

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**TAX APPEAL NO. E022 OF 2022**

**BETWEEN**

**GOLDEN ACRE  
LIMITED.....APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC  
TAXES.....RESPONDENT**

**RULING**

**INTRODUCTION AND BACKGROUND**

1. By its application dated 18<sup>th</sup> October 2024, the Appellant seeks leave of the Court to appeal against the Court’s judgment delivered on 19<sup>th</sup> September 2024. The Appellant relies on grounds set out on the supporting affidavit of Samson Kirika, sworn on 18<sup>th</sup> October 2024. The Respondent (Commissioner) responds to the application through the Grounds of Opposition dated 13<sup>th</sup> January 2025(erroneously dated 13<sup>th</sup> January 2024). The parties have also filed written submissions to supplement their arguments and I have

considered the same and I will be making relevant references in my analysis and determination below.

### **ANALYSIS AND DETERMINATION**

2. After careful consideration of the pleadings and the parties' rival submissions, I note that the issue for the Court's determination is whether the Appellant should be granted leave to appeal the Court's decision to the Court of Appeal. I note that the Commissioner technically assails the application by contending that the same is incompetent because there is no valid appeal currently before the Court to which the request for leave can be attached. It argues that the Appellant has not exhausted the correct legal pathway, which for a further appeal should be directed to the Court of Appeal, not back to the High Court.
3. The Commissioner submits that the proper procedure for appealing to the Court of Appeal begins with filing a Notice of Appeal but that since this has not been done, the current application has nothing to peg itself on and is therefore defective. It asserts that the Court delivered its final judgment on 19<sup>th</sup> September 2024 and it is now *functus officio* and the Commissioner characterizes the application as an abuse of the Court process and "forum shopping," implying

the Appellant is improperly trying to get a second hearing from a Court that has already ruled.

4. In response, the Appellant submits that the Respondent's contention that the Court lacks jurisdiction because it is *functus officio* is erroneous as the doctrine applies to the finality of the judgment's substantive merits, not to ancillary procedural matters such as granting leave to appeal. It states that this application for leave is filed in compliance with the Court's express directive, which told the Appellant to "make a formal application for leave to appeal" after perusing the judgment.
5. The Appellant refutes the claim that it has not exhausted external remedies, that is, appealing directly to the Court of Appeal and that the High Court is the statutorily designated first appellate forum for appeals arising from the Tax Tribunal's decision, as per **section 53** of the ***Tax Procedures Act*** and that leave should be sought from the Court that rendered the impugned decision. It denies non-compliance, such as the absence of a Notice of Appeal and asserts the Court's directive to first apply for leave which supersedes general procedural requirements. The Appellant states that it acted in strict adherence to these specific instructions and that a Notice of Appeal is described as a subsequent formality that will be promptly filed once leave is granted. The Appellant submits that

technical objections should not override substantive justice and that the intended appeal meets the threshold of being arguable.

6. I am in agreement with the Appellant that indeed, the doctrine of *functus officio* applies to a situation where the Court has pronounced itself on merits, however, it does not command that the moment the Court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes (see **Mombasa Bricks & Tiles Limited & 5 others v Arvind Shah & 7 others [2018] KEHC 5216 (KLR)**). In the premises, I find that this Court is not *functus officio* in respect of the application for leave to appeal.
7. I am also in agreement with the Appellant that it is to seek leave before this Court in the first instance and if the same is refused, then the same can be sought from the Court of Appeal (see **Boit v Kumin; Boit & another (Interested Parties) [2025] KECA 568 (KLR)**). However, I am in agreement with the Commissioner on the Notice of Appeal that the same ought to be filed outright whether or not the subject matter under appeal is that which requires leave or not as this notice is a jurisdictional pre-requisite (see the Supreme Court in **Salat v Independent Electoral and Boundaries Commission & 7 others**

**[2014] KESC 12 (KLR)].** This Court (the late Majanja J., ) in **Mercantile Life and General Assurance Company Limited & another v Dilip M. Shah & 3 others [2021] KEHC 12611 (KLR)**

further explained the aforementioned position as follows:

*6. It is not necessary for the party intending to appeal to seek leave in order to file the Notice of Appeal as the 4th Defendant's application implies. This issue is resolved by **Rule 74(4)** of the **Court of Appeal Rules** which states that:*

*When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.*

*7. In **Judicial Commission of Inquiry into the Goldenberg Affair and Others v Job Kilach NRB CA Civil Appl. No. NAI 77 of 2003 [2003] eKLR**, the Court of Appeal, after setting out Rule 74(4) aforesaid observed as follows:*

*This rule clearly deals with two situations, namely:*

- (i) where leave to appeal is necessary; or*
- (ii) where a certificate that a point of law of general public importance is involved.*

*In either case, it is not required that before one files a notice of appeal, one must have obtained the leave or the certificate. One can file the notice of appeal and thereafter obtain the leave or the certificate as the case may be. Mr. Nowrojee did not show us any authority from this Court or from anywhere else where it has been decided that the*

*obtaining of leave or a certificate is a condition precedent to the filing of a notice of appeal. We are not ourselves aware of any such authority and we would be surprised if there were to be one for such a decision would be clearly contrary to the plain meaning of the words in rule 74(4) of the rules. [Emphasis mine]*

8. Although the Supreme Court was speaking of its own rules in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions and 7 Others SCK Appl. No. 16 of 2014 [2014] eKLR**, the following observation is relevant to the application of the Court of Appeal Rules and to this case. It stated that, “Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional prerequisite.”

9. Without the Notice of Appeal, this Court lacks jurisdiction to grant leave to appeal against the ruling dated 15th January 2021.

8. From the above, it is clear that the filing of a Notice of Appeal is not a mere procedural formality; it is the foundational step that invokes the appellate jurisdiction of the Court of Appeal and signals an intention to challenge a decision. It is the key that unlocks the door to the appellate process. Without it, no competent appeal can be

initiated, and consequently, an application for leave to appeal, which is a subsequent step, has nothing to anchor itself upon.

9. In the present matter, the Appellant, in its quest for leave to appeal, has skipped this fundamental, jurisdictional step. The record before this Court confirms that no Notice of Appeal has been filed. The Appellant has instead presented a draft Memorandum of Appeal, which is a document that properly follows the granting of leave and the filing of a Notice of Appeal.

**CONCLUSION AND DISPOSITION**

10. The upshot of the foregoing is that the Appellant's application dated 18<sup>th</sup> October 2024 is not properly before this Court. It is incompetent and fatally defective for want of compliance with the mandatory requirement of first filing a Notice of Appeal as stipulated in the ***Salat(supra)*** decision. The application is hereby dismissed with costs assessed at Kshs.20,000.00/= . it is so ordered.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 6<sup>TH</sup> DAY of NOVEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Mr. Kirika for the Appellant/Applicant.

2. N/A for the Respondent.
3. Amos- Court Assistant

ORIGINAL