



**Commissioner of Domestic Taxes v Seven Four Eight Air Services (K) Limited (Income Tax Appeal E075 of 2023) [2025] KEHC 11686 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11686 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E075 OF 2023**

**MN MWANGI, J**

**JULY 31, 2025**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPLICANT**

**AND**

**SEVEN FOUR EIGHT AIR SERVICES (K) LIMITED ..... RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion application dated 1<sup>st</sup> August 2023 pursuant to the provisions of Rule 3 of the Vacation Rules, Section 10 of the *Judicature Act*, Sections 3A & 3B of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant prays for orders that this Court extends the time for filing and serving the Memorandum of Appeal on the respondent and/or in the alternative, the Memorandum of Appeal filed in this suit be deemed as duly filed and served.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 3<sup>rd</sup> August 2023 by Ms Jane Handa, the applicant's Process Server. She averred that the Tax Appeals Tribunal delivered Judgment on 12<sup>th</sup> May 2023 in favour of the respondent, enabling it to pursue a refund claim, but the applicant being dissatisfied with the said decision, instructed its Counsel to lodge an Appeal against it and a Notice of Appeal was filed and served on 26<sup>th</sup> May 2023, within the statutory timelines. Ms Handa averred that due to an inadvertent omission on her part, the Memorandum and Record of Appeal were not filed on time, despite having received instructions on 23<sup>rd</sup> June 2023.
3. Ms Handa deposed that the aforesaid delay was unintentional, regrettable, and not the applicant's fault, but it was a bona fide mistake. She stated that the application to regularize the filing of the Memorandum and Record of Appeal was made promptly and within a reasonable time and stated



that granting the orders being sought herein would not prejudice the respondent. She contended that the intended Appeal is arguable, has high chances of success and is of public importance. In addition, she averred that failure to hear the applicant's Appeal could result in the Government losing KShs.37,471,051.00. She also averred that it is in the interest of justice to grant the orders being sought as the instant application was made in good faith and without undue delay.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 21<sup>st</sup> August 2023 by Mr. Moses Mwangi, the respondent's Managing Director. He contended that in the instant application, the applicant is not seeking leave to file a fresh Appeal but is instead seeking to validate the Appeal herein filed on 27<sup>th</sup> July 2023 vide a Memorandum of Appeal dated 22<sup>nd</sup> June 2023. He asserted that this Court cannot regularize a document already filed incompetently without formal leave and justification, thus the Memorandum of Appeal dated 22<sup>nd</sup> June 2023 and this Appeal by extension is incompetent as filed.
5. He averred that there is no basis for extending time to file and serve a Memorandum of Appeal, as the applicant neither produced a certificate of delay nor alleged that the Judgment of the Tax Appeals Tribunal was unavailable. Mr. Mwangi stated that there is no evidence proving that the deponent of the applicant's supporting affidavit is a licensed Process Server. He asserted that filing of pleadings is an Advocate's responsibility and not that of a Process Server. Additionally, he contended that the annexed emails as proof of communication are inadmissible under Section 106B of the *Evidence Act*, as no certificate of electronic evidence has been provided.
6. In a rejoinder, the applicant filed a supplementary affidavit sworn on 26<sup>th</sup> November 2024 by Ms Jane Handa, the applicant's Process Server. She stated that this Court has the discretion to allow the filing of a supplementary record of Appeal once satisfied with the reasons for delay. She explained that the delay in filing the Memorandum of Appeal was due to an inadvertent failure to upload it, not negligence. Ms Handa produced a copy of her Process Server's License and reiterated that she is indeed a licensed Process Server, thus competent to file Court documents. She also produced a certificate of electronic evidence in support of the emails produced as proof of communication.
7. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by Ms Lilian Nyaringita Advocate on 27<sup>th</sup> November 2024, while the respondent's submissions were filed on 11<sup>th</sup> December 2024 by the law firm of Mwamuye Mzungu Solomon Advocate LLP.
8. Ms Nyaringita, learned Counsel for the applicant cited Rules 3 & 4 of the Tax Appeals Tribunal [Appeals to the High Court] Rules, 2015 and the Supreme Court case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, in support of the application for extension of time and asserted that the applicant ought to have filed a Memorandum of Appeal against the Judgment of the Tax Appeal's Tribunal on or before 26<sup>th</sup> June 2023, but it was filed on 27<sup>th</sup> July 2023, and thereafter, the applicant filed the instant application on 1<sup>st</sup> August 2023. Counsel relied on the Court of Appeal case of Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014] eKLR, and contended that the delay in filing the application herein was neither inordinate nor unreasonable.
9. It was submitted by Ms Nyaringita that having instructed Ms Handa to file the Memorandum and Record of Appeal but having inadvertently failed to file the said pleadings as instructed, amounts to a mistake on the part of Counsel, which is highly regretted. She cited the case of Rupa Savings & Credit Cooperative Society v Violet Shidogo [2022] eKLR, and asserted that such a mistake by Counsel should not be visited upon the applicant. Counsel stated that the applicant has an arguable Appeal since one of its grounds of Appeal is that the Tribunal erred in treating unsupported journal entries not subject to the *Income Tax Act* as balance sheet transactions. Ms Nyaringita relied on the case of



Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR, and urged this Court to exercise its discretion and deem the Memorandum of Appeal herein as properly filed.

10. Mr. Odeny, learned Counsel for the respondent submitted that in deciding whether to allow the filing of an Appeal out of time, Courts must consider factors such as the length and reason for the delay, the degree of prejudice to the respondent, the arguability of the Appeal, and the overall conduct of the parties. He relied on the case of Githau Kagiri & another [Civil Appeal 314 of 2023] [2024] [KLR], and argued that the delay in this case was attributed to an oversight by Ms Handa, a Process Server who was not responsible for filing such documents, making the reason for delay unsubstantial. Counsel contended that allowing the application herein would erode public trust in the Judiciary and set a precedent encouraging procedural non-compliance.
11. Counsel referred to the case of Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR, and submitted that the applicant's Memorandum of Appeal is incompetent as it was filed without the Tribunal's Judgment. He asserted that allowing the instant application would improperly regularize a defective pleading and compromise the proper administration of justice.

### **ANALYSIS AND DETERMINATION.**

12. Having considered the instant application, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the parties, the issue that arises for determination is whether the applicant should be granted leave to file its Memorandum of Appeal out of time.

#### **If the instant application is merited.**

13. Appeals from the Tax Appeals Tribunal to the High Court are provided for under Section 32 of the *Tax Appeals Tribunal Act*. Section 32 [1] states that –

“A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, Appeal to the High Court, and the party so Appealing shall serve a copy of the notice of Appeal on the other party.”
14. In this case, the Tribunal delivered its Judgment on 12<sup>th</sup> May 2023. Dissatisfied with the said Judgment, the applicant in compliance with the provisions of Section 32 [1] of the *Tax Appeals Tribunal Act* filed a Notice of Appeal dated 22<sup>nd</sup> May 2023 on 26<sup>th</sup> May 2023. Rule 3 of the Tax Appeals Tribunal [Appeals to the High Court] Rules provides that -

“The applicant shall, within thirty days, after the date of service of a notice of Appeal under section 32[1], file a Memorandum of Appeal with the Registrar and serve a copy on the respondent.”
15. It is not in contest that the applicant did not file a Memorandum of Appeal within the prescribed timelines, it as such seeks this Court's leave for compliance with the above provisions. Under the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010, this Court has the discretion to enlarge time within which the applicant herein can comply with the provisions of Rule 3 of the Tax



Appeals Tribunal [Appeals to the High Court] Rules. Order 50 Rule 6 of the Civil Procedure Rules, 2010, provides that –

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms [if any] as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.”

16. Further, Rule 4 of the Tax Appeals Tribunal [Appeals to the High Court] Rules grants this Court the power to extend time for filing a Memorandum of Appeal, it states that –

“The Court may extend the time specified in rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the applicant was unable to file the Memorandum of Appeal within that period and that there has been no unreasonable delay on the part of the applicant.”

17. The guiding principles when it comes to extension of time were laid down by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, as follows –

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court ;
2. a party who seeks...extension of time has the burden of laying a basis to the satisfaction of the Court ;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court ;
5. whether there will be any prejudice suffered by the respondents if the extension is granted;
6. whether the application has been brought without undue delay; and,
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

18. The applicant averred that the delay in filing the Memorandum Appeal was as a result of an inadvertent omission by Ms Handa its licensed Process Server, who failed to file the said document despite having received instructions to do so on 23<sup>rd</sup> June 2023. This allegation was corroborated by Ms Handa, the deponent of the applicant’s affidavit in support of the instant application. She acknowledged that on 23<sup>rd</sup> June 2023, she received instructions from the applicant’s Counsel to file the Memorandum of



Appeal dated 22<sup>nd</sup> June 2023, but she inadvertently failed to comply with the said instructions and was only able to file the said documents on 27<sup>th</sup> July 2023. In support of this averment, Ms Handa produced a copy of an email extract, showing communication between her and the applicant's Counsel on 23<sup>rd</sup> June 2023. From the email extract, it is evident that final copies of the Memorandum of Appeal and Record of Appeal were forwarded to Ms Handa with instructions to file them and avail filed copies of the said documents to the applicant's Counsel for their records.

19. The applicant argued that the aforesaid inadvertence by Ms Handa constitutes a mistake by Counsel and urged this Court not to penalize the applicant for the said mistake. The Court of Appeal in the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, gave guidance in regard to mistakes and or omissions of Counsel as hereunder –

“...From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of Counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of Counsel should not be visited on a client, it should be remembered that Counsel's duty is not limited to his client; he has a corresponding duty to the Court in which he practices and even to the other side. [See. Halsbury's Laws of England, 4<sup>th</sup> Edn, Vol 44 at p 100-101] and also *Re Jones* [1870], 6 Ch. App 497 in which Lord Hatherley communicated the Court's expectations this way:

Under this duty, Counsel is unequivocally obliged to exercise condor and not aid a litigant in subversion of justice. Even though the determination of whether or not Counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the Court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of Counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant Court's favour?”

20. From the depositions made by the applicant herein, it is noteworthy that Counsel not only issued Ms Handa with instructions to file the Memorandum of Appeal and Record of Appeal, but Ms Handa also acknowledged to having inadvertently failed to comply with the said instructions. As correctly submitted by the respondent, filing of pleadings is the responsibility of an Advocate and not that of a Process Server. I however do agree with the applicant's Counsel that Ms Handa having inadvertently failed to file the said pleadings as instructed, amounts to a mistake on the part of Counsel for the applicant, which she takes ownership of. I say so because she delegated the work of filing to Ms Handa, who failed to follow the instructions given by Counsel for the applicant.
21. From the CTS, it is evident that the applicant attempted to file the aforesaid Memorandum of Appeal and Record of Appeal on 27<sup>th</sup> July 2023 and served them on the respondent on 28<sup>th</sup> July 2023. Subsequently, the applicant filed the instant application on 3<sup>rd</sup> August 2023, approximately seven [7] days later. In the circumstances, I am of the considered view that the application herein was filed timeously.
22. The Supreme Court in the case of *Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others* [2018] eKLR, held that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. Bound by the aforesaid Supreme Court decision, in determining whether or not to grant the orders being



sought, I have to balance the competing interests of the parties herein, the applicant's constitutionally underpinned right of Appeal, and the respondent's right to enjoy the fruits of its Judgment.

23. In this case, the applicant duly invoked this Court's appellate jurisdiction by filing a Notice of Appeal in compliance with the provisions of Section 32 [1] of the *Tax Appeals Tribunal Act*. Further, I am persuaded that the delay in filing the Memorandum of Appeal was an inadvertent error on the part of the applicant's Counsel, who immediately sought to rectify the position once she realized that she had run of time within which to file the said Memorandum of Appeal. This coupled with the fact that the application herein was filed timeously, I am persuaded that this is one of the instances where mistakes and/or omissions of Counsel are excusable. For this reason, it is my finding that the applicant has made out a case to warrant being granted an order for extension of time within which to comply with the provisions of Rule 3 of the Tax Appeals Tribunal [Appeals to the High Court] Rules.
24. It is my finding that the application herein is merited. It is allowed in the following terms –
- i. I hereby extend the time for the applicant to file and serve its Memorandum of Appeal and Record of Appeal;
  - ii. The said Memorandum of Appeal and Record of Appeal shall be filed and served within fourteen [14] days from the date of this Ruling; and
  - iii. Costs of this application shall abide the outcome of the Appeal.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Ms Nyaringita for the applicant

Ms Ngereso holding brief for Mr. Odeny for the respondent

Ms B. Wokabi – Court Assistant.

