



Commissioner of Domestic Taxes v Kenya Breweries Limited (Income Tax Appeal E205 of 2023) [2024] KEHC 14685 (KLR) (Commercial and Tax) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E205 OF 2023
FG MUGAMBI, J
NOVEMBER 15, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

KENYA BREWERIES LIMITED RESPONDENT

(An appeal against the decision of the Tax Appeal Tribunal in Tax Appeal No. 668 of 2022 delivered at Nairobi on 6th October 2023)

RULING

Background and introduction

1. The appellant filed a Memorandum of Appeal on 5th December 2023 challenging the decision of the Tax Appeals Tribunal (the Tribunal). Upon filing the said Memorandum, the respondent filed an application dated 9th April 2024 in which it sought to have the appeal struck out for failure to file a Notice of Appeal as required under section 32(1) of the *Tax Appeals Tribunal Act*.
2. The application is opposed by way of a replying affidavit sworn by George Ochieng, counsel for the appellant. The gist of the response is that the Notice of Appeal was filed on time, that is on 6th November 2023, but that it was inadvertently filed in respect of Appeal No 669 instead of Appeal No 668 which is what was before the Tribunal.
3. Counsel averred that the appellant had since moved this Court to amend the said inadvertent error which according to him is not fatal.
4. Indeed, by an application dated 3rd July 2024, the appellant herein sought leave to correct the typographical error on the Notice of Appeal dated 6th November 2023 to read 668 of 2022 instead of 669 of 2022.



5. The application is opposed through a replying affidavit sworn by Karen Mate Gitonga on 18th July 2024. In addition to restating its case as contained in their application, the respondent argues that there is no provision of the law that allows a Notice of Appeal to be amended and that such would lead to prejudice and injustice to the respondent. The respondent avers that the Notice of Appeal is a jurisdictional prerequisite which the appellants have failed to comply with.
6. The respondents further argue that allowing the said amendment will be tantamount to allowing the filing of a Notice of Appeal to be filed out of time, without leave, which is unprocedural. The respondent confirms that the judgment in Appeal No. 669/2022 involved different parties and that judgment was delivered by the Tribunal on 29th June 2023. The respondents note that the application to amend the Notice of Appeal was filed more than 7 months after the Notice of Appeal was filed and no reason has been given.

Analysis and Determination

7. I have carefully considered the pleadings, submissions, authorities and evidence filed by both parties in support of their respective positions. The cardinal issue for determination is whether this court should strike out the appeal herein or allow the amendment of the typographical error. I have laid out the divergent cases by both cases.
8. Fortunately, this issue is not novel and there are numerous judicial pronouncements on how courts have addressed similar situations. The starting point in these determinations is the Constitutional dictate in Article 159 of the *Constitution*. Post-2010 jurisprudence strongly reflects the principle outlined in Article 159(2)(d), which mandates that justice shall be administered without undue regard to procedural technicalities.
9. Jurisprudence overwhelmingly supports the need to prioritize substantive justice over procedural technicalities. In *Trust Bank Limited v Amalo Company Limited*, [2002] 2 KLR 627 [2003] 1 EA 350, the Court of Appeal, citing its decision in *Central Bank of Kenya v Uburu Highway Development Ltd & Others*, CA No. 75 of 1998 stated thus:

“The principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit and errors should not necessarily deter a litigant from the pursuits of his right.”
10. The respondent has equally cited from the Court of Appeal’s decision in *Commissioner of Police, Commissioner of Lands & Attorney General v Joseph Mburu Gitau, Felisita Wariapa Nduku, Keziah Wanja Njuguna, Cecilia Wanjiru Gichuru, Geoffrey Minahanji Anaimbo, Flacia Njoki Muiruri, Christian Munjanji Ajambo, Mary Wambui Karari, Isaac Mburu Njuguna & 633 others* [2019] KECA 654 (KLR).
11. In that case, the Learned Judge while dealing with a case in which there was a typographical error on the Notice of Appeal, as is the case before me, held as follows:

“I have also not lost sight of the fact that the Notice of Appeal that was included in the record had a typographical error citing the wrong Judge. I am conscious that the Notice of Appeal is the foundation of every appeal. For those reasons, I have asked myself whether a typographical error on the Notice of Appeal can cost the applicants a right to a hearing which is guaranteed in the *Constitution*. To answer that, I have looked at the prejudice that will be suffered by the respondents. In my view the respondents have suffered delay from executing the judgment and the inconvenience of attending court to defend this application.



To me the former, is an imponderable cost of pursuing justice while the latter can be compensated with costs. Both are far outweighed by the bigger picture of administering substantive justice that brings a dispute over suit land to a finality after all the parties are given a hearing.

For the foresaid reasons, I am persuaded the seriousness of the issues raised in the appeal far more outweigh the prejudice which can also be compensated with an award of costs of this application which I award to the 1st, 3rd and 5th respondents who opposed this application.”

12. Also cited was the Court of Appeal decision in *SK Macharia & Royal Credit Media V Standard Chartered Bank Limited*, [2012] KECA 233 (KLR) in which again, the Court of Appeal dealt with an application where there was an error relating to one of the parties in the Notice of Appeal. In allowing the application, the Learned Judge held that;

“sections 3A and 3B of the *Appellate Jurisdiction Act* confers on this Court similar discretion to apply the overriding objectives of the *Act* and the rules made there under to facilitate ‘the just, expeditious, proportionate and affordable resolution of Appeals governed by the *Act* and the aims which the Court should strive to achieve in matters before it in furthering the overriding objectives, like the just determination of proceedings’.”

13. In my view, the Court of Appeal decisions referenced above bear strong relevance to the matter before me. A typographical error is a typographical error, whether it inadvertently introduces a stranger to the appeal, misidentifies a judge, or references an unfamiliar case number.
14. The primary considerations, as outlined in the decisions, include whether there is any prejudice to be suffered by the respondent. I have reviewed the evidence before me and I do note that indeed the letter written by the appellant to the Tribunal requesting for the proceedings had captured the correct case number and it is only when the Notice of Appeal was filed that the error in the case number was picked up.
15. Despite the error in the case number, the essence of the appeal remains intact and is well understood by both parties. As such, I do not find that the respondent would suffer any prejudice by the application being allowed. Given the public interest issues at stake, including matters of tax litigation and the significant sums in dispute, I find that the need to administer substantive justice and afford the appellant an opportunity to be heard far outweighs any potential harm to the respondent, if any.

Disposition

16. Accordingly, the application dated 9th April 2024 seeking to strike out the appeal is dismissed. The application of 3rd July 2024 seeking leave to amend the typographical error is allowed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF NOVEMBER 2024.**

F. MUGAMBI

JUDGE

