

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Njoki & Ouko SCJJ)*

**APPLICATION NO. 12 (E021) OF 2021**

**- BETWEEN -**

**THE KENYA REVENUE**

**AUTHORITY.....1<sup>ST</sup> APPLICANT**

**THE COMMISSIONER GENERAL**

**OF KENYA REVENUE AUTHORITY.....2<sup>ND</sup> APPLICANT**

**THE COMMISSIONER OF CUSTOMS & EXCISE..... 3<sup>RD</sup> APPLICANT**

**-AND-**

**MOUNT KENYA BOTTLERS.....1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY BOTTLERS.....2<sup>ND</sup> RESPONDENT**

**NAIROBI BOTTLERS.....3<sup>RD</sup> RESPONDENT**

**KISII BOTTLERS.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

*(Being an application for leave to file a notice of appeal and an appeal out of time from the judgment of the Court of Appeal dated 19<sup>th</sup> July 2019 (W. Karanja, J. Otieno Odek and S. Ole Kantai, JJ.A.)*

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**RULING OF THE COURT**

**A. Introduction and Background**

**[1] BEING** alive to the fact that on 22<sup>nd</sup> of September 2021, the Applicants’ Appeal, *S. C. Petition No 41 of 2019 (Kenya Revenue Authority & 2 Others vs Mount Kenya Bottlers Limited & 4 Others)* was struck out for want of

form; the Court noted that the Appeal did not contain any prayer for any specific relief; further, the appellant had failed to include in the Record of Appeal, substantial and essential parts of the Petition in the High Court contrary to Rule 9 (1) (d) of the Supreme Court Rules of 2012 (repealed), which requires that a Petition must contain the relief sought.

BEING satisfied that failure to comply with Rule 33 (4) of the repealed 2012 Rules, that requires certain documents to form part of the Record of Appeal, for the purpose of an appeal from the Court of Appeal was fatal and that the Court having expressed disapproval at the lack of candour on the part of counsel for the applicant in failing to disclose the state of the record of appeal, though fully aware of its deficiency, and instead was prepared, to proceed with the hearing of the appeal as if all was well; and

**[2] FOR THE AFORESAID** reasons the Appeal was struck out, prompting the applicant to take out the instant Notice of Motion dated 29<sup>th</sup> September 2021 for leave to extend time to file a fresh Notice of Appeal; or in the alternative, that time to file an appeal out of time be extended; and

**[3] UPON** carefully perusing the Motion, expressed to be brought pursuant to Articles 159(2) (d) and 163 (4) (a) of the Constitution, Sections 3, 21 (2) and 24 (1) of the Supreme Court Act (No. 7 of 2011), Rules 3(5), 15(2), 32, 36(1) and 38(1) of the Supreme Court Rules 2020; and

**[4] UPON** considering the affidavit in support of that Motion and a further affidavit sworn by Philip Munyao, who is described simply as an officer of the applicant as well as the Replying Affidavit sworn on the 15<sup>th</sup> of October 2021 by Xavier Alcoverro Selga, the Managing Director of the 3<sup>rd</sup> respondent on behalf of the rest of the respondents; and

**[5] UPON** considering the written submissions on behalf of the applicants, to the effect that the order striking out the Appeal did not bar them from filing a fresh

competent Appeal; that they are, however, in a dilemma as to whether the striking out of the Appeal equally struck out the Notice of Appeal on record, hence the need to first seek leave to file a fresh Notice of Appeal out of time if that is the route, or whether the Notice of Appeal was not affected so that all they need to seek is time to file the fresh Appeal out of time; that this dilemma has been caused by the conflicting jurisprudence emanating from the Court of Appeal on the implication on the Notice of Appeal where an Appeal has been struck out; that the applicants are still desirous of having the matters in controversy resolved on merit, being matters of great public interest touching on the Constitutional Interpretation of Parliament's mandate and power to legislate on taxation; that they have met the conditions set out in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others***, Sup Ct. Application 16 of 2014 [2014] eKLR; that they have satisfactorily explained the reasons for bringing the application; and that no prejudice will be occasioned to the respondents; and

[6] UPON perusing the two decisions of the Court of Appeal cited by the applicant as being contradictory on the effect of striking out the Appeal on the Notice of Appeal, namely, ***Jedida Alumasa & 3 others vs S. S. Kositany*** [1997] eKLR and ***Gabriel Kigi & 6 Others vs Kimotho Mwaura & another*** [1997] eKLR; and;

[7] HAVING considered too the respondent's submissions in opposition to the application to the effect that, contrary to the submission by the applicants, the intended appeal is not concerned with the general interpretation of tax statutes but limited to the interpretation only of Section 127 C of the Customs and Excise Act following the amendment introduced by Section 13 of the Finance Act, 2004 which neither raises a matter of public interest nor of general public importance as enunciated by this Court in ***Hermanus Phillipus Steyn vs Giovanni***

**Gnecchi – Ruscone**, [2013] eKLR; that the applicants failed to seek any specific reliefs in the Appeal; failed to amend or to apply for leave to amend it out of time, even after they were granted leave to file a supplementary Record of Appeal; that they cannot now plead that a mistake of their counsel should not be visited upon them; that they will be greatly prejudiced if the process was to start all over again; that the respondents have endured considerable costs and expense in defending the Appeal, while the applicants who are represented by an in-house counsel are not incurring any legal costs; and finally, that this litigation must come to an end.

### **B. Analysis and Determination**

**[8] RECALLING** that on the 22<sup>nd</sup> of September 2021, when the appeal came up for hearing before the Court, by an *ex tempore* order, it was struck out for two reasons as explained above, that there were no specific reliefs sought in it, and secondly, that the Record of Appeal did not include essential portions of the Petition that was the subject matter in the two courts below. In the reasons rendered on 26<sup>th</sup> November 2021, the Court explained that the applicant having had sufficient time to comply with Rule 33 (4) of the Supreme Court Rules 2012, which was applicable at the time, even after time to do so was availed, it was improper for its Counsel to still be willing to continue with the matter even when he was fully aware that the record was incompetent; and

**[9] NOTING** that indeed the respondents had in their affidavit warned the applicants that by merely asking this Court to make pronouncements on certain principles of taxation “**with a view to build the jurisprudence in taxation**”, their Appeal did not meet the threshold of Article 163(4)(a) of the Constitution; and

**[10] NOTING FURTHER** that the Appeal did not even pray for the setting aside of the judgment of the Court of Appeal, not to mention that the matter was

mentioned several times before the Deputy Registrar, with the issue of incompleteness of the record coming up on the 25<sup>th</sup> of August 2020. An adjournment was granted specifically to allow the applicant to file a supplementary Record of Appeal. This was duly done on 19<sup>th</sup> October 2020. However, only the Order and notes of the Judges of the Court of Appeal were introduced in the supplementary record, omitting the High Court Petition and part of the affidavit in support of the Appeal; and

**[11] CONSIDERING** that extension of time is an equitable remedy, the grant of which involves the exercise of judicial discretion, and that equity aids the vigilant and not the indolent, it is quite apparent to us, from the numerous infractions and omissions identified above, that the appellants have not taken the processes of this Court and their own Appeal with the seriousness deserved, even after the applicants urged us to note that the matters in issue raise “**matters of grave taxation implications**”.

**[12] NOTING further** that by Rule 15 of the Supreme Court Rules, time will only be extended;

“... for any action under these Rules.....in accordance with—

(a) any timeline provided for under the Constitution;

(b) section 57 of the Interpretations and General Provisions Act

(c) any directions of the Court.

**(2) The Court may extend the time limited by these Rules or by any decision of the Court**” (Our emphasis).

**[13] THEREFORE**, the circumstances of the present application are not contemplated by the Rules of this Court, as readily admitted by the applicants in their arguments to the effect that the fate of the Notice of Appeal was not clear after the Appeal was struck out. The extension of time for purposes of appeal to this

Court contemplated by Rule 15 are those arising from Rules 36, 37 and 38. This Court does not in its Rules have the equivalent of Rules 56,64,68 and 84 of the Court of Appeal Rules, which provide, respectively for the restoration of a dismissed appeal where a memorandum of appeal is not lodged within the prescribed time or for non-appearance by the applicant or the appellant on the date of the hearing or where the appeal has been struck out on the ground that no appeal lies or that some essential step in the proceedings has not been taken or taken within the prescribed time. The two rulings cited to show inconsistencies in the decisions of the Court of Appeal Court, as indeed all the provisions of the Constitution, the Supreme Court Act and the Supreme Court Rules relied on are of no help in the circumstances of this matter, and the inherent power of the Court to make such orders for the ends of justice to be met or to prevent abuse of the due process of the Court, is not exercised in a vacuum; and

**[14] HAVING** considered this Court’s decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the Court, for the first time considered and outlined the guiding principles in applications for extension of time in this Court, as follows:

- “i) 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;**
- ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
- iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- v) Whether there will be any prejudice suffered by the respondents if the extension is granted;**

**vi) Whether the application has been brought without undue delay; and**

**vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time”; and**

**[15] RECALLING** the history of this dispute, as well as the principles laid down by the Court in *Daniel Kimani Njihia v Francis Mwangi Kimani & Another*, [2015] eKLR, that the only regime of law that govern proceedings before it are, the Constitution, Supreme Court Act, the Supreme Court Rules and any Practice Directions; that the Appellate Jurisdiction Act and the Civil Procedure Rules are not applicable when moving this Court; and that the Court has to be moved under the correct provisions of the law, failing which the cause will be struck out.

**[16] WE NOTE** that the dispute commenced in the High Court in October 2012, ten (10) years ago, then moved to the Court of Appeal, over nine years ago in July 2013. To start the case all over again, for no fault of the respondents, is not only unconscionable but also insensitive and cruel.

**[17] FOR THESE** reasons we unanimously conclude that the applicants have not only been injudicious but also brazen in flouting the directions of the Registrar, and therefore undeserving of this Court’s exercise of discretion.

We find no merit in the application and accordingly reject it. As costs follow the event, the applicants shall bear the costs of the Application.

### **C. Orders**

**[18]** Consequently, we make the following Orders:

***i. The Notice of Motion dated 29<sup>th</sup> September 2021, filed on 1<sup>st</sup> October 2021 is disallowed.***

***ii. The Applicant shall bear the costs of this application.***

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of February, 2022**

.....  
**M. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**M.K IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy  
of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**

