



Packtech Solutions Limited v Commissioner of Customs & Border Control (Customs Tax Appeal E012 of 2022) [2023] KEHC 26172 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26172 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E012 OF 2022
FG MUGAMBI, J
NOVEMBER 24, 2023

BETWEEN

PACKTECH SOLUTIONS LIMITED APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL RESPONDENT

RULING

1. The appellant filed an application dated 29th November 2022 seeking amongst others, stay of execution of the ruling of the Tax Appeals Tribunal of 11th November 2020 and for leave to file its appeal out of time. The other prayers are substantive prayers which therefore requires that I deal with the prayer for leave to appeal out of time before I can deal with the substance of the appeal. The application is supported by an affidavit sworn by Githinji Muteru, the Managing Director of Packtech Solutions Ltd on 29th November 2022. The applicant also filed written submissions dated 24th May 2023.
2. The respondent opposed the application by way of a replying affidavit sworn by Timothy Momanyi, an officer working in the Debt Enforcement Division of the respondent, on 19th December 2022. The respondent also filed a Notice of Preliminary Objection dated 8th March 2023 and took issue with the fact that the appellant had failed to file a Memorandum of Appeal as contemplated under Rule 3 and Rule 5 of the *Tax Appeals Tribunal (Appeals to the High Court) Rules. (hereinafter the Rules)*.
3. The applicant responded to this submission by denying the allegation and instead stated that it had filed a Memorandum of Appeal. From my perusal of the pleadings and the court record herein, it is not true as submitted by the appellant that there is already a Memorandum of Appeal filed. My understanding is that the appellant admits that the time for filing its appeal has lapsed and thus seeks the court's intervention to grant it leave to file the appeal out of time by extending the time within



which it can file the said Memorandum of Appeal. All that the appellant has filed is a Notice of Appeal dated 25th November 2022.

4. It is for this reason that the Preliminary Objection fails because it puts the cart before the horse. The applicant is seeking leave to file the draft Memorandum of Appeal which is part of the supporting documents accompanying the application of 29th November 2022, outside the permitted time. It is a right that the appellant has by law as I will demonstrate, and for this reason I hold that the appellant is not required to have filed the Memorandum of Appeal. I will now turn my focus on the prayer for leave to file the appeal out of time.
5. The timelines and procedure of filing appeals from the Tribunal is governed by section 32(1) of the [Tax Appeals Tribunal Act \(TATA\)](#). The said provision vests jurisdiction to the court to extend time within which an appellant may file a Notice of Appeal and a Memorandum of Appeal. It provides as follows:

“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.”
6. Further, rule 3 of the [Rules](#) requires that the Memorandum of Appeal should be filed within thirty days, after the date of service of a Notice of Appeal under section 32(1). Rule 4 grants the court discretion to extend the time specified in Rule 3 in respect of the Memorandum of Appeal as follows:

“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 appellant was unable to file the memorandum of appeal within the period and that there has been no unreasonable delay on the part of the appellant.”
7. This Court has pronounced itself in the case of [Commissioner of Domestic Taxes V Kiambu Club Limited & Another](#), ML HC ITA No. E043 of 2020 [2020] eKLR, that the court may grant extension of time prospectively or retrospectively. In [Commissioner of Domestic Taxes V Mayfair Insurance Company Ltd](#), ML HC ITA No. 31 of 2017 [2017] eKLR it further held that the court’s powers and discretion to extend time is unlimited but must be exercised judiciously.
8. Further, the Supreme Court set additional parameters for the courts when faced with an application for extension of time in [Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others](#), [2014] eKLR. The following underlying principles are also applicable:
 - 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.”
9. The record shows that the applicant filed an application dated 23rd September 2022 before the Tribunal, seeking leave to file its appeal out of time, against the decision of the Commissioner of 24th September 2021. In declining to allow leave the Tribunal in its ruling delivered on 11th November 2022 noted that:
- “The applicant has not at the very least provided a single reason for the inordinate delay of more than one (1) year contrary to the express conditions of section 13(4) of the TATA and rule 10(2) and 10(3) of the Tax Appeals Procedure Rules, 2015, as to invoke the discretion of the Tribunal to grant the orders sought.”
10. The applicant now seeks to appeal that ruling of the Tribunal and interestingly, despite the Tribunal pointing out that the delay in filing the appeal was inordinate and inexcusable, the applicant has again failed to give any good reason for the delay in filing its appeal against the decision of the Commissioner. The appellants only states that the same was not intentional.
11. A relief such as the one that the applicant seeks is a discretionary relief. It therefore falls on a party to provide sufficient evidence to convince the court that they are deserving of the orders sought. Extension of time is not a tool to aid the indolent upon sudden wake up from slumber and I decline to use it as such. Not a single reason has been provided to this court to beseech it to allow the appeal against the Commissioner. In the absence of any such good reason, I have no choice but to decline the prayer sought.

Determination and final orders

12. For the reasons that I have stated, the application for expansion of time to file a Memorandum of Appeal fails and as such, this Court has no jurisdiction to determine the other prayers in the application as there is no appeal properly before the Court. The application of 29th November 2022 has no merits and is dismissed albeit with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 24TH DAY OF NOVEMBER 2023.

F. MUGAMBI

JUDGE

