



Commissioner of Customs & Border Control v Phillips Therapeutics Ltd (Customs Tax Appeal E227 of 2024) [2025] KEHC 11871 (KLR) (Commercial and Tax) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E227 OF 2024**

CM KARIUKI, J

JULY 3, 2025

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL APPELLANT

AND

PHILLIPS THERAPEUTICS LTD RESPONDENT

(Being an Appeal from the Judgement of the Tax Appeals Tribunal at Nairobi was delivered on June 13, 2024, in Nairobi, TAT No. E481of 2023)

RULING

Introduction

1. The Court is moved via Appellant's Notice of Motion Application dated September 2, 2024, which seeks an extension of time for the filing of the Notice of Appeal and the Appeal against the Judgement of the Tax Appeals Tribunal in (TAT No. E481 of 2023 and further sought orders in Appeal that this Honourable Court set aside the decision of the Tax Appeals Tribunal dated June 14, 2024 ('The Tribunal Judgement'). The Appellant has also filed a Record of Appeal, a comprehensive document outlining the grounds for the Appeal, and a Memorandum of Appeal, a concise summary of the Appeal, both dated September 2, 2024 ('The Record of Appeal' and 'The Memorandum of Appeal'). The basis of the Application is that: -
2. The Tax Appeals Tribunal delivered its Judgement in Tax Appeals Tribunal Number E483 of 2024 on June 14, 2024, allowing the Appeal. The Applicant filed a Notice of Appeal on August 21, 2024, and served it upon the Respondent on the same date.
3. The delay in lodging the Appeal herein was an inadvertent mistake of the Respondent's Counsel in computing timelines. The 38-day lateness in lodging the Notice of Appeal herein is not inordinate and



inexcusable. The lateness is due to illness. However, it is important to note that the Appellant has since filed the Memorandum of Appeal and Record of Appeal on August 21, 2024, within the timelines, demonstrating their diligence and commitment to the case.

4. The intended Appeal is not only timely but also arguable with high chances of success. This Application has been filed without inordinate delay after lapse of the statutory timelines to lodge the Appeal. The Respondent will suffer no prejudice if time is enlarged. The Respondent opposes the Appellant's Application through Grounds of Opposition dated October 5, 2024, contesting the timeousness of the Application and contending that this Court has no jurisdiction to entertain the intended Appeal. The Respondent has also filed its intended Statement of Facts dated October 5, 2024.

Directions

5. The Court directed parties to canvass the Application via submissions. The parties filed and exchanged the submissions.

The Appellant's Submissions

6. The Appellant submits on two issues for determination in the instant Application, namely: -Has there been an inordinate delay by the Appellant in filing the Memorandum of Appeal? Is the Appeal arguable with chances of success? Has there been an inordinate delay by the Appellant in filing the Memorandum of Appeal?
7. The Appellant submits that the Appellant ought to have filed its Memorandum of Appeal by July 14, 2024. However, this was due to the Counsel on record falling ill, and proof of the same is attached to the Application to file the Appeal out of time. Subsequently, and in line with Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, the Applicant filed a Memorandum of Appeal and Record on August 23, 2024.
8. The delay in filing the Memorandum of Appeal was therefore 38 days outside of the statutory timelines, which the Appellant submits does not amount to inordinate delay. As enumerated in the Application, the delay in filing the Memorandum of Appeal was occasioned by illness. The Appellant has been proactive and zealous in prosecuting its Appeal, and a delay of 38 days in filing its Appeal is not inexcusable, in the circumstances.
9. Further, from the Memorandum of Appeal filed, the Appellant, being dissatisfied with the judgment of the Tribunal, seeks justice from this Honourable Court. This quest should not be cut short because of a 38-day delay in filing the Memorandum and Record of Appeal. Reliance is made in the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another* [2014] eKLR, the Court held:

“Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay, and so on. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, excusable.”

10. What is or is not an inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs. That this inordinate delay is inexcusable, until a credible excuse is made out, the natural inference is that it is inexcusable.



11. The defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between themselves and the plaintiff, or between each other, or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of prejudice at trial." Reliance made on *Allan V Sir Alfred MC Alphine and sons Ltd* [1968] 1 ALL ER 543, *George Kagima Kariuki & 2 others v George M. Gichimu & 2 others* [2014] eKLR, *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR, and provisions of Article 159(2) (d) of *the Constitution*, 2010.
12. The Appellant submits that the substantive issues before this Court need to be deliberated upon with pronouncements made on the merits of the Appeal and not dwell on technicalities. Reliance is made on the Court of Appeal case of *Phillip Chemwolo & Another v Augustine Kubende* [1986] eKLR, *Republic vs. District Land Registrar, Uasin-Gishu & Anor* (2014) eKLR.
13. The Appellant therefore urges this Honourable Court to find that there has been no inordinate delay in filing the Appeal and proceeds to deem the Memorandum and Record of Appeal dated August 23, 2024, annexed to this Application as duly and properly filed.

Is the Appeal arguable with chances of success?

14. On this issue, the Appellant submits that the Appeal as filed is arguable with high chances of success. It is the Appellant's case that the Honourable Tribunal erred by finding that the Appellant erred in re-classifying Andolex® - C AB Mouthwash under tariff code 3306.99.00 instead of the appropriate tariff code of 3004.90.00. Furthermore, the Appellant is dissatisfied with the Honourable Tribunal's decision, which failed to consider the Appellant's basis for classifying the tariff code applied.
15. The above grounds of Appeal are arguable, as the taxes raised by the Applicant are much-needed Government revenue. That an arguable appeal must not necessarily succeed, but one which ought to be argued fully before the Court, and one which is not frivolous. Cited cases are *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR and *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR.

Respondent Submissions

16. The Respondent submitted the following issues. Should the Court entertain the out-of-time Notice of Appeal? Should the Applicant be granted an extension of time to file the Appeal? And Costs.

Should the Court entertain the out-of-time Notice of Appeal?

17. The statutory timeline for the institution of Appeals from the Tax Appeals Tribunal to the Court of Appeal Rules filing of a Notice of Appeal is set out as thirty (30) days from the rendering of the impugned decision, per section 53 of the *Tax Procedures Act*, and of the *Tax Appeals Tribunal Act* as read with of the Tax Appeals Tribunal (Appeals to the High Court) Rules.
18. The Respondent contends that the filing of the Notice of Appeal on August 21, 2024, which was 2 months 1 week (68 days) after the date of delivery of the Tribunal Judgement, was a mere afterthought, inordinate, and inexcusable. The Notice of Appeal is a simple procedural requirement which merely expresses a party's discontent with a particular decision and its intention to appeal the same; as such, filing of the Notice outside statutory timelines deprives the appellate Court of jurisdiction and betrays the fact that the Appellant did not evince a desire to appeal the impugned decision. Reliance made in case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR).



19. A Notice of Appeal is a primary document that must be filed outright, regardless of whether the subject matter of the Appeal requires leave or not. It is a jurisdictional prerequisite as ruled in the California Supreme Court while reversing the Court of Appeal decision that had dismissed the Appellant's Notice of Appeal as having been filed out of time. See *Silver brand v County of Los Angeles* [2009] 46 Cal. 4th 106, 113.
20. The Respondent further contends that the reason for sickness advanced by Counsel for the Applicant for filing the Notice of Appeal late is not credible. Reason being, whereas by Counsel's averment she was indisposed between June 12, 2024, and June 27, 2024, she still had ample time of 17 days to file the Notice of Appeal thereafter, before time ran out. Instead, Counsel filed the Notice of Appeal 68 days late. Additionally, the Notice of Appeal is signed off by two Counsels. The alternate Counsel could easily have stepped in to file the Notice of Appeal.
21. Further, it is contended that a mistake on the part of Counsel in computing timelines does not amount to a reasonable cause to explain away the delay in filing the Notice of Appeal. The timelines for lodging appeals to this Court from the Tax Appeals Tribunal are matters which should be the competence of the Appellant's Counsel, and such excuses should not be condoned as held by the Court of Appeal's in *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] KECA 242 (KLR), that: "If the advocate was simply guilty of inaction, that is not an excusable mistake which the Court may consider with some sympathy.
22. Should the Applicant be granted an extension of time to file the out-of-time Appeal?
23. The Respondent avers that the guidelines for the exercise of discretion by the Courts in the enlargement of time under Rule 4 were enunciated by the Supreme Court in *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) as follows: Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court. A party that seeks the extension of time has the burden of laying a basis for the satisfaction of the Court. Whether the Court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court. Whether the respondents will suffer any prejudice if the extension is granted. Whether the Application has been brought without undue delay; vii Whether, in some instances, like an election petition, public interest ought to be a consideration for extending time. (available on the page of these submissions).
24. The Respondent submits that the Application fails to adduce cogent and compelling reasons for the exercise of the Court's discretion in the Appellant's favour. In particular, the Appellant's Counsel does not aver that they were out of the country. The Appellant's excuse of sickness as the reason for the delayed filing of the Appeal is untenable, as the Medical Certificate adduced only ran up to June 27, 2024. After this time, they were expected to lodge the Notice of Appeal and Memorandum of Appeal expeditiously, not two months later.
25. In addition, the Court should note that two Advocates of the Appellant signed the Notice of Appeal. In contrast, the Medical Certificate is in respect of only one, which discredits all excuses of sickness, as there was at all times an alternate Counsel for the Appellant capable and duly authorised to file the Notice of Appeal. A mistake on the part of Counsel in computing timelines does not amount to a reasonable cause to explain away the delay in filing the Notice of Appeal. The timelines for lodging appeals to this Court from the Tax Appeals Tribunal are matters that should be the special competence of the Appellant's Counsel, and this Court should not condone such excuses.



26. Further, the Respondent submits that it would be inequitable and highly prejudicial for this Court to grant the prayers sought by the Appellant. Specifically, the Respondent will be highly prejudiced if the Application is allowed, as it considered the matter as settled and entered into business arrangements on that assumption, including the sale and disposal of the products; therefore, allowing the Application would render uncertain the outcome of already concluded business transactions and introduce financial strain on the Respondent.
27. Moreover, the importance of timelines in this type of litigation need not be gainsaid; this Court is aware that a protraction of these types of matters affects the bottom line of the litigants significantly and introduces risks in their business operations. As such, it is in the public interest that the Court rigidly enforce the applicable timelines to give finality and clarity, and to this type of litigation. It is also a fundamental principle that litigation must come to an end. See Registered Trustee of Micro Enterprises Support Program Trust (MESPT) v Kyome Fresh Co., LTD.
28. The Respondent contends that granting the extension would occasion significant prejudice and harm, and it is in the public interest that this Court enforce the applicable timelines to provide clarity, finality, and predictability in this type of litigation. See Republic v Commissioner of Income Tax & another; Equatorial Commercial Bank Ltd (now known as Spire Bank Ltd) (Ex parte) [2022] KEHC 10203 (KLR),
29. Thus, in sum, the Respondent concludes that the Notice of Appeal was filed out of time, and the intended Appeal is improperly instituted, disregarding clear statutory timelines. As such, this Court has no jurisdiction to entertain the Application and intended Appeal. The Appellant has not proffered any cogent or convincing reasons for the delay in filing the Notice of Appeal, and the same is an excusable and mere afterthought, and only reveals that the Application and Appeal are worthy of striking out; and granting the Application would be inequitable and highly prejudicial to the Respondent, which had relied on the existing state of affairs to enter into various business arrangements and would suffer financial harm upon their reversal; and It is in the public interest that the Intended Appeal be struck out, on the basis that tax matters should be litigated in a timely and diligent manner.

Issues, Analysis, And Determination

30. After reviewing the pleadings, proceedings, record, and filed submissions, the issues are as follows.
 - i. Has there been an inordinate delay by the Appellant in filing the Memorandum of Appeal?
 - ii. Whether the Applicant has provided sufficient cause to warrant extension of time to appeal under Section 79G of the *Civil Procedure Act*.
 - iii. Is the Appeal arguable with chances of success?

Leave to Appeal Out of Time

31. Under Section 79G of the *Civil Procedure Act*, an appeal from a subordinate court to the High Court must be filed within 30 days. The exact section allows for extension of time where sufficient cause is shown. IN TAT appeal to the High Court, Lodging a notice of Appeal: Section 52 (1) of the TPA provides that a person who is dissatisfied with an appealable decision may appeal to the TAT by the *Tax Appeals Tribunal Act* (TAT Act) Submitting Supporting Documents: Within 14 days of filing the Notice, the taxpayer must provide a Memorandum of Appeal, a Statement of Facts, and any supporting evidence.



32. According to the provisions of section 56 of the TPA, Section 32 of the [Tax Appeals Tribunal Act](#), and Section 53 of the TPA, Rule 3 of The Tax Appeals Tribunal (Appeals to The High Court) Rules. Rule 5 of The Tax Appeals Tribunal (Appeals to The High Court) Rules, if a party in a TAT matter is aggrieved with the decision of the Tribunal, they appeal to the High Court on a question of law only, by lodging a Notice of Appeal before the Tribunal. The Appellant shall serve a copy of the Notice on the other party within 2 days of lodging a Notice of Appeal vide section 32(1A) of the [Tax Appeals Tribunal Act](#). Within 14 days of filing the Notice, the taxpayer must provide a Memorandum of Appeal, a Statement of Facts, and any supporting evidence.
33. Then, he files a Memorandum of Appeal in the High Court and serves a copy on the Respondent within 30 days of the Tribunal's decision, i.e., within 30 days of the date of service of a Notice of Appeal.
34. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231, the Court set out the principles applicable when considering extension of time: the length of delay, the reason for delay, whether the Appeal is arguable, and prejudice to the other party.
35. Issues I and II are determined together, i.e., has there been an inordinate delay by the Appellant in filing the Memorandum of Appeal? Moreover, whether the Applicant has provided sufficient cause to warrant extension of time to appeal under Section 79G of the [Civil Procedure Act](#).
36. The Applicant argues that the Appellant ought to have filed its Memorandum of Appeal by July 14, 2024. However, this was due to the Counsel on record falling ill, and proof of the same is attached to the Application to file the Appeal out of time. Subsequently, and in line with Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, the Applicant filed a Memorandum of Appeal and Record on August 23, 2024.
37. Thus, the delay in filing the Memorandum of Appeal was 38 days outside of the statutory timelines, which the Appellant submits does not amount to inordinate delay. As enumerated in the Application, the delay in filing the Memorandum of Appeal was occasioned by illness. The Appellant has been proactive and zealous in prosecuting its Appeal, and a delay of 38 days in filing its Appeal is not inexcusable, in the circumstances.
38. In rejoinder the Respondent argues that The statutory timeline for the institution of Appeals from the Tax Appeals Tribunal to the High Court of Kenya through filing of a Notice of Appeal is set out as thirty (30) days from the rendering of the impugned decision, per section 53 of the [Tax Procedures Act](#), and Section 32(1) of the [Tax Appeals Tribunal Act](#) as read with of the Tax Appeals Tribunal (Appeals to the High Court) Rules.
39. The Respondent contends that the filing of the Notice of Appeal on August 21, 2024, which was 2 months 1 week (68 days) after the date of delivery of the Tribunal Judgement, was a mere afterthought, inordinate, and inexcusable.
40. The classic case on exercise of discretion in granting leave to file a memorandum of Appeal out of time is the Supreme Court case in *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) as follows:
41. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court. A party that seeks the extension of time has the burden of laying a basis for the satisfaction of the Court. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case-by-case basis, considering whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court. Whether the respondents will suffer any prejudice if the extension is granted. Whether the Application has been brought without



undue delay; vii Whether, in some instances, like an election petition, public interest ought to be a consideration for extending time.

42. *Salat Supra* held that a Notice of Appeal is a primary document to be filed outright, regardless of whether the subject matter of the Appeal requires leave or not. It is a jurisdictional prerequisite. The Appellant therefore urges this Honourable Court to find that there has been no inordinate delay in filing the Appeal and proceeds to deem the Memorandum and Record of Appeal dated August 23, 2024, annexed to this Application as duly and properly filed.
43. However, the Respondent's rejoinder, with which this Court agrees, is that. In contrast, according to the Appellant's Counsel's averment, she was indisposed between June 12, 2024, and June 27, 2024; she still had ample time of 17 days to file the Notice of Appeal thereafter, before the time ran out. Instead, Counsel filed the Notice of Appeal 68 days late. Additionally, the Notice of Appeal is signed off by two Counsels. The alternate Counsel could easily have stepped in to file the Notice of Appeal.
44. The mistake on the part of Counsel in computing timelines does not amount to a reasonable cause to explain away the delay in filing the Notice of Appeal. The timelines for lodging appeals to this Court from the Tax Appeals Tribunal are matters that should be a matter of due diligence and competence on the part of the Appellant's Counsel. The Court will not condone such excuses. See the case of *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] KECA 242 (KLR). The Appellant has not proffered any cogent or convincing reasons for the delay in filing the Notice of Appeal and the Appeal. Thus, the Court finds that there has been an inordinate delay by the Appellant in filing the Memorandum of Appeal.

Whether the Appeal is arguable with chances of success?

45. On this issue, the Appellant submits that the Appeal as filed is arguable with high chances of success. It is the Appellant's case that the Honourable Tribunal erred by finding that the Appellant erred in re-classifying Andolex® - C AB Mouthwash under tariff code 3306.99.00 instead of the appropriate tariff code of 3004.90.00. Further, the Appellant is dissatisfied with the Honourable Tribunal's decision, which failed to consider the Appellant's basis for the classification tariff code applied.
46. The above grounds of Appeal are arguable as the taxes raised by the Applicant are much-needed Government revenue. In response the Respondent argue that the Respondent will be highly prejudiced if the Application is allowed as it considered the matter as settled and entered into business arrangements on that assumption, including the sale and disposal of the products, therefore, allowing the Application would render uncertain the outcome of already concluded business transactions and introduce financial strain on the Respondent; and the importance of timelines in this type of litigation need not be gainsaid, this Court is aware that a protraction of these types of matters affects the bottom line of the litigants significantly and introduces risks in their business operations. As such, it is in the public interest that the Court rigidly enforce the applicable timelines to give finality and clarity to this type of litigation.
47. It is a fundamental principle that litigation must come to an end. The Court agrees with the Respondent that the circumstances of this case, which would occasion significant prejudice and harm if the extension were granted, and it is in the public interest that this Court enforces the applicable timelines to give clarity, finality, and predictability in this type of litigation.
48. In sum, the Court makes a finding that the Notice of Appeal was filed out of time and the intended Appeal is improperly instituted, disregarding clear statutory timelines, and as such, this Court has no jurisdiction to entertain the Application and intended Appeal.



- 49. The Appellant has not proffered any cogent or convincing reasons for the delay in filing the Notice of Appeal, and the same is inordinate and in excusable and mere after thought, and only reveals that the Application and Appeal are a and worthy of striking out; and granting the Application would be inequitable and highly prejudicial to the Respondent, which had relied on the existing state of affairs to enter into various business arrangements and would suffer financial harm upon their reversal; and
- 50. It is in the public interest that the Intended Appeal be struck out, on the basis that tax matters should be litigated in a timely and diligent manner.
- 51. Thus, the Court makes the orders.
 - i. The Application has no merit; therefore, it has been dismissed, with the parties bearing their costs.
 - ii. The Notice of Appeal, the Memorandum of Appeal, and the entire record of Appeal are struck out.

DATED AND DELIVERED IN NAROK VIA MICROSOFT TEAMS ON 30TH JULY 2025

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CHARLES KARIUKI
JUDGE

