



Aval Trading Limited v Commissioner of Customs & Boarder Control (Customs Tax Appeal E003 of 2022) [2023] KEHC 21324 (KLR) (Commercial and Tax) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E003 OF 2022**

FG MUGAMBI, J

JULY 21, 2023

BETWEEN

AVAL TRADING LIMITED APPELLANT

AND

COMMISSIONER OF CUSTOMS & BOARDER CONTROL RESPONDENT

((Being an appeal from the Tax Appeals Tribunal in Tax Appeals Case No. TAT 444 of 2020 delivered on 15th December 2021))

JUDGMENT

Brief Facts

1. The appellant is engaged in the business of import and sale of processed food items from India and is based in Machakos County. The respondent is an officer of the Kenya Revenue Authority, which is established under section 3 of the [Kenya Revenue Authority Act](#), cap 469 Laws of Kenya and is charged with the mandate of assessment, collection and accounting of government revenue.
2. The appellant lodged the present appeal on January 14, 2022 from the Tax Appeals Tribunal (TAT). Briefly, the dispute arises from the importation of a consignment by the appellant, for which duty amounting to Kshs.977,140/= was paid. The respondent issued a further tax demand dated 22nd June 2019, over the consignment, amounting to Kshs.975,403/= whereupon the appellant lodged its Notice of Objection dated June 24, 2019. The respondent confirmed the demand vide a letter dated July 3, 2019 prompting the appeal at the TAT against the respondent's additional assessments.
3. When the appeal came up for hearing, the respondent raised a preliminary objection that the appeal was out of time. The TAT considered the objection and in the interest of justice allowed the appellant 7 days within which to file its appeal. For a second time the appellant allegedly filed its appeal out of



time without any reason, prompting the TAT to strike out the appeal and confirm the respondent's assessments dated June 21, 2019. Dissatisfied with the decision of the TAT, the appellant filed the present appeal vide a Memorandum of Appeal dated January 14, 2022, based on 3 main grounds as highlighted at paragraph 12 of its submissions as follows:

- i. Whether the appeal was filed within 7 days and within time as ordered by the TAT and if the contrary position taken by the TAT and the respondent was wrong;
- ii. Whether the delay was inordinate to warrant the striking out of the appeal
- iii. What prejudice will the respondent suffer?

Analysis

4. I have carefully considered the pleadings and the rival submissions filed by the parties herein. It is clear from the record that when the TAT expanded time for the appellant to file its appeal, the appellant had up to July 16, 2020 to file the same.
5. The appellant denies having filed its appeal out of time and states that the said appeal was filed electronically on July 6, 2020 and not September 29, 2020 when the hard copies were physically delivered to the registry. The appellant faults the TAT registry for acknowledging receipt of the documents relating to the appeal on September 22, 2020, almost 2 months later. In its defence, the appellant states that online service became an accepted mode of service during the COVID pandemic and still is an accepted mode of service.
6. The appellant goes on to state that even if there was a delay in filing the appeal, the same was not inordinate and finally that there will be no prejudice suffered by the respondent if this appeal is allowed.
7. The criteria for extension of time was set by the Supreme court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, (2014) eKLR in the following terms:
 - a. 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.
 - b. A party who seeks for extension of time has the burden of laying the basis to the satisfaction of the court.
 - c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.
 - d. Whether there is a reasonable reason for delay, the delay should be made to the satisfaction of the court.
 - e. Whether there will be prejudice suffered by the Respondent if the extension is granted.
 - f. Whether the application for extension has been brought without undue delay.



8. The power to expand time for filing an Appeal is donated by section 13(3) of the [Tax Appeals Tribunal Act](#) which provides that:

“The Tribunal may, upon application in writing, extend the time for filing the Notice of Appeal and for submitting the documents referred to in subsection (2).”

9. Having set out the law as it relates to the discretion to expand time, I shall now proceed to deal with the issues before me in this appeal. More specifically, the question is whether the appellant is deserving of the prayers that are sought. The thread of emails that the appellant relies on shows that an email was sent out to the email address LegalServices@kra.go.ke by Counsel for the appellant on July 16, 2020 at 11:46am, attaching the appeal documents. It is on this basis that Counsel holds the view that the appeal was filed on July 16, 2020.

10. There is no evidence that the requisite filing fees had been paid at the registry. I find it disconcerting that even without following any other procedure of filing of documents in the Tribunal's registry, other than sending an email, Counsel persists that the appeal had been rightly filed.

11. None of the parties make any mention about the email to which the documents were sent although there is in the thread of emails an email written on September 22, 2020 from taxtribunalcbc@gmail.com to Counsel requesting that he carries the hard copy documents relating to the appeal. A second email was sent through the same address at 12:17pm from the TAT acknowledging receipt of the documents. That the email address to which the documents were sent on July 16, 2020 is different from the email through which Counsel communicated with the TAT on September 22, 2020, is clear. No other evidence of filing of the appeal has been presented to this court.

12. The appellant steers clear of these details and has opted not to own up to its mistake. Instead it picks to blame the TAT for acknowledging the documents in September and insists that it filed the documents on time. Secondly, it is not enough for the appellant to state that the delay was not inordinate without explaining the reason for the delay. No justification has been given for the delay in filing its documents even after being granted an extension of time.

13. The same situation was apparent at the hearing before the TAT as stated in its judgment at paragraph 18 that:

“The appellant has made no submission in respect of its late appeal neither has it responded to the respondent's preliminary objection. As such the Tribunal will proceed to access the merit of the preliminary objection.”

14. I do not fault the decision of the TAT in doing so. The TAT had granted the appellants a second opportunity. The casualness with which the appellant handled this issue is perplexing. The appellant comes to this court asking yet again for another extension without disclosing the details of its omission and without explaining the delay. Such a state of affairs cannot be allowed to go on and is a waste of judicial resources and judicial time.

Determination and orders

15. In conclusion therefore, I find no reason to interfere with the finding of the TAT. The appeal is dismissed. There shall be no orders to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 21st DAY OF JULY, 2023.



F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

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