

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAT MISC. NO. 55 OF 2020

BATAVIA INTERNATIONAL LIMITED.....APPLICANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Applicant is a limited liability company incorporated in Kenya under the Companies Act. Its principal activity is importation of solar water heaters.
2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act for purposes of collection and accounting of government revenue and related purposes.
3. The Applicant filed a Notice of Motion dated 26th August 2020 seeking the following orders:
 - 1) **THAT** the application be certified urgent and be heard ex-parte in the first instance.
 - 2) **THAT** the Honourable Tribunal be pleased to extend the time allowed for the Applicant to file the Memorandum of Appeal, Statement of Facts and all other accompanying documents.

- 3) **THAT** upon grant of prayer (2) above, the Applicant be granted leave to serve the Respondent with the Memorandum of Appeal, Statement of Facts, and all other accompanying documents.
- 4) **THAT** costs of this application be in the suit.

Grounds for the Application

4. The application, which is supported by the affidavit of Edward Specht sworn on the 26th day of August, 2020, is based on the following grounds:
 - i. **THAT** the Respondent advised the Applicant that the late objection has been rejected but reasons for rejection or for the decision were not given to the Applicant despite several personal visits to North of Nairobi station and by email on 4th May 2020
 - ii. **THAT** the Applicant filed an application to the Tax Appeals Tribunal and made payment of Kshs. 20,000.00 on 19th May 2020.
 - iii. **THAT** the Applicant has not been able to file an appeal at the Tax Appeals Tribunal in the absence of Confirmed Assessments Notices and in absence of a Tax Objection Decision being communicated to the Applicant.
 - iv. **THAT** the Applicant decided to organize a meeting with the Deputy Commissioner of North of Nairobi. During the meeting, the Respondent's officer expounded further on the decision and

confirmed the assessment. During the meeting of 28th July 2020, the Deputy Commissioner advised the director of the Applicant Company to file an appeal to The Tax Appeals Tribunal.

- v. THAT the Applicant filed an online Notice of Appeal dated 28th July 2020 on the same day with the assistance of the Respondent's officers in the absence of a Confirmed Assessment Notice and Objection Decision.
- vi. THAT the Applicant was unable to file the Memorandum of Appeal, Statement of Facts, and accompanying documents within the statutory timelines when the initial application was made on 19th May 2020.
- vii. THAT the Applicant filed an appeal at the Tribunal immediately after following with the Respondent on its Objection Decision.
- viii. That the Applicant was keen to file the appeal papers on time as evidenced by the fact that it lodged its Notice of Appeal within 15 days of receiving email from the department that the objection was rejected. No confirmed Notice of Assessments has been issued or Objection Decision has been communicated.
- ix. THAT the Applicant experienced immense challenges putting together the appeal papers due to complications in staff logistics as a

result of the Government-imposed directives for the control of COVID-19.

- x. THAT the Applicant had issued a notice to their staff requiring them to work from home, which meant that normal and regular tasks such as retrieval of documents became a challenge.
- xi. THAT the Applicant is desirous of having the Appeal determined upon its merits and upon canvassing of substantive issues.
- xii. THAT the Applicant has, in the attached application, given reasons as to why the appeal documents were not filed on time.
- xiii. THAT the objects of the Appeal would be defeated if this application is not allowed.
- xiv. THAT the Applicant had issued a notice to their managerial staff requiring them to work from home, which meant that normal and regular tasks such as retrieval of documents became a challenge.
- xv. THAT further, the directors of the Applicant were locked down in Nairobi and could not travel to the company offices to facilitate the Appeal process.
- xvi. THAT the Appeal by the Applicant is meritorious and has a high chance of success if this application is granted.
- xvii. THAT there will be no prejudice occasioned to the Respondent in granting the orders sought by the Applicant.

- xviii. THAT undoubtedly, this Honourable Tribunal has the powers to extend the time of filing the pleadings as granted by Section 13(3) and (4) of the Tax Appeals Tribunal Act 2013 and Rule 10 of the Tax Appeals Tribunal Rules 2015.
- xix. THAT in the premises, it is only fair and in the interest of justice that the orders sought herein be granted.

RESPONDENT'S GROUNDS OF OPPOSITION

5. In its Grounds of Opposition dated the 2nd day of September, 2020 in opposition to the Applicant's application the Respondent offered the following grounds in opposition:-
- a. THAT the application by the Applicant offends/flaunts the statutory provisions of Section 13 of the Tax Appeals Tribunal Act. The Act grants a party 30 days upon the decision of the Commissioner to lodge a Notice of Appeal as against the Objection Decision.
 - b. THAT the Applicant has not satisfied the criteria for grant of an extension of time and does not therefore warrant an extension under Section 10(3) of the Tribunal (procedure) Rules 2015.
 - c. THAT the Applicant has not demonstrated that it will suffer irreparable /irremediable harm if the application is not granted.
 - d. No reasonable circumstances have been demonstrated to warrant an order for the enlargement of time.

ANALYSIS AND FINDINGS

6. The Applicant submitted that the delay in filing its Notice of Appeal was occasioned by circumstances that were beyond its control. In particular, the Applicant averred that it did not receive the confirmed assessment and the Tax Objection Decision from the Respondent. The Applicant claimed that its bank accounts were frozen and that is when they rushed to the Respondent's offices to inquire the reasons for the Agency Notices and that is where they were informed of the VAT assessments and given the letter erroneously dated 30th January 2018 instead of 30th January 2019.
7. The Respondent argues that the application offends /flaunts the statutory provisions of Section 13 of the Tax Appeals Tribunal Act 2015 which grants the party 30 days upon the decision of the Commissioner to lodge a Notice of Appeal as against the Objection Decision.
8. Section 13 of the Tax Appeals Tribunal Act in granting the Tribunal discretion to extend time provides that:-

“(3) The Tribunal may, upon application in writing, extend the time for submitting the documents referred to in subsection (2).

(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from giving notice of appeal within the specified period.”

9. Consequently, the Tribunal is required to determine the length and reason for the delay when determining the extension of time to appeal out of time. It is noted that the power to extend time is discretionary and unfettered but the same must be exercised judiciously.
10. In determining whether to expand time, courts have in the past considered several factors. The court discussed these factors in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997** where the judge held that:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

11. The court in **Wasike V Swala [1984] KLR 591** supplied the hierarchy of the factors to consider when it stated that:-

“an applicant must now show, in descending scale of importance, the following factors: - a) That there is merit in his appeal. b) That the extension of time to institute and/or file the appeal will not cause

undue prejudice to the respondent; and c) That the delay has not been inordinate.”

12. In ***Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR*** the Court held that:-

“As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors.”

13. The Tribunal, guided by the principles set out in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997, Wasike V Swala [1984] KLR** ***Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR*** and **Section 13 of the Tax Appeals Tribunal Act 2013** used the following criteria to consider the application:-

- a. The merits of the complained action.
- b. Whether there will be prejudice suffered by the Respondent if the extension is granted?

- c. Whether the application for extension was filed without undue delay?
- d. Whether there is a reasonable cause for the delay?

a. The merits of the complained action

- 14. The Tribunal considered whether the matter under dispute was frivolous to the extent that it would be a waste of the Tribunal's time or it was material to the extent that it deserved its day in the Tribunal.
- 15. The test is not whether the case is likely to succeed. Rather, it is whether the case is arguable. This was the finding in **TRUST BANK LIMITED & Another v INVESTECH BANK LTD & 3 Others [2000] eKLR** where the court held that:-

“it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous...”
- 16. The issue at hand relates to an assessment on imports amounting to **Kshs 36,037,071.22**, inclusive of interest which the Applicant disputes. In the view of the Tribunal, the subject matter of the intended Appeal is a matter that would ordinarily merit a day at the Tribunal. The Tribunal therefore finds that the dispute is not frivolous and should be heard on its merits.

b. Whether the Respondent will suffer prejudice if the extension is granted?

17. The courts have held that in considering whether to extend time, due regard must be given to whether the extension will prejudice the opponent. In determining this, the Judge in **Patrick Maina Mwangi v Waweru Peter [2015] eKLR** quoted the finding in **United Arab Emirates V Abdel Ghafar & Others 1995 IR LR 243** where it was held that:-

“.....a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate.....”

The approach indicated in these two principles is modified to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice, to the other party, justice will usually favour the action proceeding to a full trial on the merits.”

The test, therefore, as set out in the case above is whether the Respondent will suffer irreparable prejudice if the application is granted.

18. It is the view of the Tribunal that the Applicant's recourse to justice lies in an appeal to the Tribunal. Thus, the Applicant would suffer prejudice if it is not granted leave to file its appeal. The Tribunal finds that refusing the Applicant to Appeal out time would leave the same without any way of remedying its cause. On the other hand, the Respondent did not show how it would suffer prejudice if an extension of time were granted to the Applicant to file its Appeal before the Tribunal. The Tribunal therefore finds that the Respondent will not suffer undue prejudice if the extension is granted.

c. Whether the Application for extension was filed without undue delay?

19. The Applicant avers that it found out about the confirmed assessment after their accounts were frozen and had to visit the Respondent's offices. It then engaged with the Respondent on the assessment and made the first application on 19th May 2020. However, the Applicant avers that due to Covid-19 it experienced immense challenges in putting together the appeal papers as a result of the government-imposed directives as it had already issued notice to its staff to work from home.

20. The Tribunal notes that the application at hand was filed on 26th August 2020 after the first application of 19th May 2020 and the Notice of Appeal dated 28th July 2020. The Tribunal further notes from the Applicant's submissions that there were meetings/correspondence within the period

between the Applicant and the Respondent besides the challenges associated with Covid-19 pandemic.

21. Considering the circumstances, the Tribunal found that the application for extension had been brought without undue delay.

d. Whether there is reasonable cause for the delay

22. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] Eklr** held that:

“It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court...”

23. The Applicant argued that the delay was caused by circumstances that were beyond its control. According to the Applicant, it did not receive the Objection Decision from the Respondent. The Applicant further claimed that it could not file the Appeal in the absence of Confirmed Assessment Notices and in absence of the Objection Decision.
24. The Respondent on the other hand argued that the Applicant has not satisfied the criteria for grant of an extension of time and does not therefore

warrant an extension under Section 10(3) of the Tribunal (procedure) Rules 2015.

25. The Tribunal notes that the assertion by the Applicant to the effect that it did not receive the communication from the Respondent has not been challenged. The Tribunal therefore finds that the Applicant has demonstrated grounds for the delay.

ORDERS

26. Accordingly, the Tribunal makes the following Orders:-

- i. That leave be and is hereby granted for the Applicant to file its Memorandum of Appeal and Statement of Facts out of time.
- ii. The Memorandum of Appeal and Statement of Facts filed before the Tribunal on the 26th day of August 2020 are deemed as duly filed.
- iii. The Respondent to file its response within 30 days of the date of this Ruling.
- iv. Each party to bear its own cost.

DATED and DELIVERED at NAIROBI this 11th day of September, 2020

**ERIC N. WAFULA
CHAIRMAN**

**NGINA MUTAVA
MEMBER**

**WILFRED N. GICHUKI
MEMBER**

**ABRAHAM K. KIPROTICH
MEMBER**

**GABRIEL M. KITENGA
MEMBER**