



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 72 OF 2010

MAT INTERNATIONAL LIMITED.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

R U L I N G

1. The application before the court for determination is the Notice of Motion dated 11.10.2019 brought under Order 17 Rules 2(3) of the Civil Procedure Rule seeking the following orders;

(a) That the Notice of Motion application dated 14.6.2010 be dismissed for want of prosecution.

(b) That this Honourable Court be pleased to grant the present application (Kenya Revenue Authority) costs of this suit.

2. The Application is premised on the grounds contained in the affidavit sworn on the 11.10.2019 by **Mr. Marigi John**, who is the Respondent's advocate. Other grounds are on the face of the application.

3. The Applicant averred that the Ex-parte applicant was granted leave to operate as stay of income tax assessment of the 14.10.2009 pending hearing and determination of application for judicial review orders. The respondent filed a replying affidavit to the substantive application on the 14.12.2010.

4. The Applicant further averred that the last known status of the file was on the 3.3.2015 before Hon. Emukule J (as he then was) when the judicial review application came up for direction. This is before the court file went missing from the registry and it is only through the industry of the Respondent that the file was reconstructed after the order of this court dated 26.9.2019.

5. It is also averred that Kenya Revenue Authority is a public body given the mandate of collection of taxes on behalf of people of Kenya under Article 201(b)(i) and Article 210 of the Constitution together with section 18 of the Kenya Revenue Authority Act, Section 31 and 37(3) of the Tax Procedure Act.

6. It is averred that the delay of prosecuting this matter for a period of nine (9) years is inordinate, unreasonable, inexcusable and highly prejudicial to the Republic and it is in the interest of justice that this case be dismissed with costs.

7. The Applicant/Respondents opposed the Application via its Replying Affidavit sworn on the 15.11.2019 by **Mansur Muathe Issa** who is the Ex-parte Applicant's advocate.

8. The deponent averred that the ex-parte Applicant has not failed to prosecute its judicial review application as it was last in court on the 12.10.2016, when it came up for directions. There had been negotiations with the Respondent in an attempt to settle the tax dispute out of court and the ex-parte applicant is keen on having its application for judicial review orders heard. The ex-parte Applicant has even supported the Respondent's application dated 31.5.2019 seeking reconstruction of the court file.

9. It is further averred that it is only three weeks after the court file was reconstructed. Therefore, it is unreasonable and irrational for the Respondent to allege that the ex-parte Applicant is not interested in prosecuting the judicial review Application. Therefore, this court should allow the Applicant to prosecute its application for judicial review orders.

10. The deponent further avers that various attempts have been made to fix the judicial review application for hearing. However, all the attempts were frustrated by the absence of the Court file at the registry.

The Determination

11. I have considered this application, the submissions of Counsel, and have also perused the documents filed herein. The issue for determination here is whether there is inordinate delay to warrant the dismissal of suit for want of prosecution.

12. It is apparent from the record that it took the initiative of the Applicant/Respondent to file an application for the reconstruction of a new court file when the original file went missing in October 2016. The Applicant/Respondent successfully obtained orders to have this file reconstructed on 24.9.2019 vide the motion dated 31.5.2019.

13. The ex-parte applicant's advocate has deponed in its Replying Affidavit that there had been ongoing negotiations in an attempt to settle the dispute out of court and thereafter, his firm made numerous attempts to have the summons issued but that was not done because the court file went missing.

14. The law on dismissal of suits for want of prosecution is well settled. The applicable law is Order 17 Rule 2(1) which provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

15. Further Order 17 Rule 2(3) provides as follows:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

16. It is evidently in exercise of the power conferred by Order 17 Rule 2(3) that the Applicant/Respondent has brought this application to have this suit dismissed for want of prosecution. The principles governing applications for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendants are likely to be prejudiced by such delay.

Whether the delay is intentional and therefore inexcusable

17. I have looked at the letters referred by Counsel for the ex-parte applicant as the “ongoing negotiation” between the parties. It is my view that its last letter to the Respondent was way back in August 2012 which is exactly seven (7) years ago. Therefore, I find that the letters annexed by the ex-parte applicants barely demonstrate that there was negotiation between the parties post August 2012 that led to a delay in fixing the judicial review application for hearing.

18. Secondly, I have considered the ex-parte Applicant's claims that he was unable to trace the Court file from the registry. It is worth noting that the ex-parte Applicant has not offered any evidence to prove that it was keen to follow up and have the disappearance of the file resolved. For instance, it did not provide any letter that was written to the Deputy Registrar informing him/her of the missing file and no application for reconstruction of the file was ever done by it.

19. Be that as it may, this court allowed the reconstruction of this file paving way for the hearing of the matter on its merits. It would not make much sense to re-construct a file and then dismiss suit, where the apparently negligent party is still willing to prosecute the matter.

20. In the exercise of the discretion of this court the application herein is dismissed. However, the Ex parte Applicant shall pay the costs of the said application. This suit must be finalized within ninety (90) days from to date.

Dated, Signed and Delivered at Mombasa this 23rd day of January, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Ng'ang'a for Applicant/KRA

Ms. Nduku holding brief Issa for Respondent

Mr. Kaunda Court Assistant