



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO.69 OF 2011

**IN THE MATTER OF: AN APPLICATION BY PAUL KAMAU NJOROGE FOR LEAVE TO
 APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND
 PROHIBITION**

AND

**IN THE MATTER OF: SECTION 186(1) (2) & (5) OF THE COMPANIES ACT, CAP 486 LAWS
 OF KENYA, THE DECISION OF THE BOARD MEETING OF NJUNU TEA FACTORY
 COMPANY LTD HELD ON 14TH DECEMBER , 2011**

**PAUL KAMAU NJOROGE.....EXPARTE
 APPLICANT/RESPONDENT**

VERSUS

**THE BOARD OF DIRECTORS NJUNU TEA FACTORY LIMITED....1ST
 RESPONDENT/APPLICANT**

**SOLOMON GICHINA MWANGI.....2ND
 RESPONDENT/APPLICANT**

RULING

1. The application is premised under the provisions of Article 159 of the Constitution of Kenya, Section 1A and 3A of the Civil Procedure Act and order 53 and Order 51 Rule 1 of the Civil Procedure Rules and all other Enabling provisions of the Law; the Applicant is seeking the following orders;

- (I) The dismissal of the *Ex-parte* Applicant’s/Respondent
- (II) The costs be borne by the *ex-parte* Applicant/Respondent

2. The application is supported by the grounds on the face of the application and on the Supporting Affidavit made by Paul Ngigi which is dated the 14th June, 2018 wherein he deponed to the fact that he is an advocate seized of the matter and fully conversant with the facts of the case;

APPLICANT’S CASE

3. The Applicant stated that the *ex-parte* Applicant brought the Judicial Review application dated the

20/12/2011 under a certificate of urgency; that their firm came on record on the 5/5/01/2012 and filed a Notice of preliminary Objection against the Judicial Review application:

4. A subsequent application dated 8/05/2012 was filed by the advocates for the *ex-parte* Applicant seeking to set aside a Consent dated the 9/01/2012 whereby the firm of M/s Mukunya and Co. Advocates had misrepresented to the court the *ex-parte* Applicant's intent to withdraw the suit, yet the said firm was improperly on record as they were not properly on record.

5. This application was heard and the ruling was delivered on the 15/10/2014 which set aside the consent order; that ever since that time and over a span of four (4) years the *ex-parte* Applicant's has taken no steps to prosecute the matter; the delay has been prolonged, inordinate and inexcusable; and the *ex-parte* Applicant has not offered any reason or explanation for his failure to prosecute the application.

6. This conduct runs contrary to the overriding objectives of the court which is to ensure the fair and expeditious determination of matters; that the Applicant herein continues to suffer grave prejudice from the pendency of the suit; threat it is only fair and reasonable that litigation must come to an end; the Applicant prayed that the suit be dismissed for want of prosecution.

ISSUES FOR DETERMINATION

7. After taking into consideration the submissions of the Applicant this court finds only one issue for determination;

- (i) Whether the suit is ready for dismissal;

ANALYSIS

8. It is this court's considered view that the appropriate section of the law would have been Order 17(2) of the Civil Procedure Code as it deals with dismissal for want of prosecution; but the instant application premised under the provisions of Article 159 of the Constitution 2010 and Order 51 of the Civil Procedure Rules is nevertheless competent as the provisions provide that it is the court duty to do justice without undue regard to procedural technicalities;

9. Upon perusal of the court record this court notes that the Respondent was duly served with the application and the hearing Notice; this is supported with the Affidavit of Service; at the hearing hereof the Respondent and his counsel were both absent despite being duly served; the record also reflects that there is not response filed to the instant application offering any explanation as to the failure or delay to prosecute the suit; in the absence of any response it therefore follows that the application is unopposed and uncontroverted;

10. The record indeed shows that the last action was the application dated 8/05/2012 which was filed by the advocates for the *ex-parte* applicant seeking to set aside a Consent dated the 9/01/2012 whereby the firm of M/s Mukunya & Co. Advocates had misrepresented to the court the *ex-parte* Applicant's intent to withdraw the suit, yet the said firm was improperly on record as they were not properly seized of the matter; this application was heard and culminated in the ruling that was delivered on the 15/10/2014; thereafter from that date to date the record reflects that no steps were taken by the *ex-parte* applicant to have the matter listed for disposal;

11. The Applicant herein has established that the delay complained is for over four(4) years and is indeed inordinate and inexcusable; and a rebuttable presumption arises that the Applicant herein has been greatly prejudiced by the delay and continues so to be;

12. The overriding objectives for the rules of the court is that for justice to be done all litigation must be prosecuted with diligence and expeditiously; in this instance this court is satisfied that the applicant has established that there has been inordinate and inexcusable delay in prosecuting this matter; litigation must also come to an end and this court finds that this suit is ripe for dismissal for want of prosecution;

FINDINGS AND DETERMINATION

13. In the light of the forgoing this court makes the following findings and determination;

- (i) The application is found to have merit and it is hereby allowed.
- (ii) The suit is hereby dismissed with costs to the Applicant herein

It is so ordered

Dated, signed and Delivered at Nyeri this 20th day of June, 2019

HON. A. MSHILA

JUDGE