**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**INCOME TAX APPEAL NO. 136 OF 2010**

**BANTU UTAMADUNI LODGE LTD…….APP./RESPONDENT**

**VRESUS**

**COMMISSIONER OF INCOME TAX…….RES./APPLICANT**

**RULING**

The appellant/respondent filed an appeal against the decision of the respondent's **Income Tax Local Committee** under **section 86(2)** of the **Income Tax Act, Cap. 470** dismissing the appellant's appeal against the assessment of tax payable by the appellant for the years 2003 and 2004. The appeal to this Court was vide a memorandum of appeal dated 5th August, 2010 and filed in court on 6th August, 2010. The respondent filed his response to the appeal on 3rd September, 2010 and no action seems to have been taken on the appeal since then.

By a motion dated 5th March, 2015 the respondent has sought to have the appeal dismissed for want of prosecution on the grounds that the appellant has not set down the appeal for hearing since the 6th August, 2010 when it filed it and that the delay of over 4 years in taking any action to have the appeal heard is inordinate, inexcusable and unreasonable.

The motion is stated to be brought under **order 17 rule 2** and **order 51 rule 1** of the **Civil Procedure Rules, 2010.** It is supported by the affidavit of Mr Timothy Koome, the applicant's audit officer at its office in Nyeri. In that affidavit Mr Koome has deposed that the matter has remained dormant in court without any action on the part of the appellant for over four years and seven months.

According to Mr Koome, the delay in the prosecution of the appellant's appeal is a clear demonstration that the appellant is not interested in the conclusion of its appeal yet its existence denies the applicant the sum of Kshs 6,854,737/= in revenue.

The appellant/respondent's counsel, Mr Duncan Waweru Macharia, swore a replying affidavit opposing the applicant's motion. As far as I can gather, apart from the contention that due to a heavy backlog of cases in this Court, it has been difficult securing hearing dates, the rest of the counsel's depositions in that affidavit are matters of law to which he need not have deponed.

When the motion came up for hearing parties agreed that their submissions in this application be adopted in **High Court Income Tax 137 of 2010** where a similar application has been filed by the respondent against the appellant; this ruling will therefore apply and be adopted in that appeal as requested by counsel for both parties.

The major bone of contention in this application is whether **order 17 rule (2) of the Civil Procedure**

**Rules, 2010** is applicable to appeals filed in this Court pursuant to **section 86(2)** of the **Income Tax Act** and the **Income Tax (Appeals to the High Court) Rules** and in particular **rule 20** thereof which prescribes the extent to which the Civil Procedure Rules are applicable to such appeals. That rule provides as follows:-

> ***20. The rules determining procedure in civil suits before the Court in so far as those rules relate to recognised agents and advocates, to service, to consolidation, to admissions, to the production, impounding and return of documents, to summoning and attendance of witnesses, to adjournments, to the examination of witnesses, to affidavits, to judgment and decree, to the death, bankruptcy and marriage of parties, to withdrawal, discontinuance and adjustment, to security of costs, to commissions, to corporations, to trustees, executors and administrators, and to the enlargement of time shall, to the extent to which those rules are not inconsistent with the Act or these rules, apply to an appeal as if it were a civil suit but, save as provided in these rules, the procedure relating to civil suits before the court shall not apply to an appeal.***

The rule only gives different scenarios when Civil Procedure Rules can apply leaving it to whoever is seeking to invoke them to identify the appropriate rule applicable in any particular scenario. It is not like rule 63 in the probate and administration rules in the Law of Succession Act, Cap. 160 which is specific as to the Civil Procedure Rules applicable in succession causes.

My understanding of the given circumstances in which Civil Procedure Rules would apply is that the following rules apply to any appeal to this Court under the **Income Tax (Appeals to the High Court) Rules**: **order 5** (issue and service of summons), **order 9**(recognised agents and advocates), **order 11**(consolidation of suits) **order 13**(admissions), **order 14** (production, impounding and return of documents), **order 16** (summoning and attendance of witnesses) and **order 17**(prosecution of suits); others are **order 18**(hearing of suit and examination of witnesses), **order 19** (Affidavits), **order 21**(judgment and decree), **order 24** (death and bankruptcy of parties), **order 25**(withdrawal discontinuance and adjustment of suits), **order 26**(security for costs), **order 28** (Commission and references) **order 31**(suits by or against trustees, executors and administrators) and **order 50** (time).

It must remembered that the Income Tax Rules were made against the back-drop of the old Civil Procure Rules which preceded the current Civil Procedure Rules, 2010; the assumption is the specific circumstances to which the old Civil Procedure Rules would apply and which the drafter of rule 20 had in mind have been taken on board in the new Civil Procedure Rules, 2010; if there is any specific area in rule 20 that has not been covered in the new Civil Procedure Rules, or it has been addressed in the new rules in a manner that had not been contemplated under rule 20, then it behoves the appropriate authority or authorities to amend rule 20 to align itself with the current Civil Procedure Rules.

For instance, when that rule says that the Civil Procedure Rules shall apply in matters of consolidation, it must have been referring to Order 11 of the old which specifically provided for the consolidation of suits and the procedure to be adopted whenever such consolidation was necessary.

**Order 11** under the current rules deals with pre-trial directions and conferences; consolidation of suits is only one of the issues that the Court may consider in a case conference convened under **order 11 rule 3(1);** thus, though consolidation of suits is not expressly provided for under the current rules, any party may apply or the court may on its own motion consolidate suits in a case conference. Appeals instituted under **section 86(2)** of the **Income Tax Act** can only be consolidated under these circumstances because, unlike in the old rules, there is now no other provision that expressly provides for consolidation of suits.

Except for a few changes such as the one I have just highlighted in the current Civil Procedure Rules, there is no material or a fundamental departure from the previous rules; they remain intact and the current rules largely mirror them.

If we narrow this discussion to the issue at hand, we come back to the question whether **Order 17** of the current Civil Procedure Rules under which the application to dismiss the appellant's appeal for want of prosecution is applicable. The applicant's counsel contended that it is applicable because, in her view,

rule 20 of the Income Tax Rules provides that one of the situations under which the Civil Procedure Rules may apply to appeals filed under the Tax Rules is the discontinuance of suits. I understood her to be referring to order 25 of the Civil Procedure Rules which deals with this question. The learned counsel also relied on the High Court decision in **Income Tax Appeal No. 4 of 2007, Commissioner of Income Tax versus Phoenix East Africa Assurance Company Ltd** where Kimondo, J. held that a tax appeal such as the one filed by the appellant herein is a 'suit' as defined under **section 2** of the **Civil Procedure Act**, **Cap. 21**. The learned judge held that the Income Tax Rules were meant to be self-contained and the Civil Procedure Rules would only apply only so far as they are not inconsistent with the provisions of the Income Tax Act. Since this latter Act or the rules made thereunder did not contain any corresponding rule relating to dismissal of suits for want of prosecution, the learned judge reasoned that the application of **Order 17 rule 2 (1)** and **(2)** to appeals instituted under the Income Tax Act could not be said to be inconsistent with the provisions of that Act; he concluded that though this rule of the Civil Procedure Rules was not expressly provided for in rule 20 of the Income Tax Rules, it was applicable to the proceedings taken under that Act.

Counsel for the respondent was of the contrary view; his argument was that the dismissal of suits for want of prosecution is not amongst the several scenarios that have been set forth by rule 20 of the Income Tax Rules and to which the Civil Procedure Rules apply; accordingly **order 17** of the **Civil Procedure Rules**, is by implication ruled out. Counsel urged that I should not follow the decision in **Commissioner of Income Tax versus Phoenix East Africa Assurance Company Ltd** (supra) first because it is a decision from court of co-ordinate jurisdiction and secondly, the decision was made *per incuriam* in so far as it imported the provisions of the Civil Procedure Rules that have not been expressly provided for. Counsel urged that the duty to fix the appeal for hearing was upon the deputy registrar and not the appellant and even if the Civil Procedure Rules were to apply then the appeal ought to be admitted and directions given before the applicant can apply to have it dismissed.

To resolve these competing contentions, I have to go back to **rule 20 of the Income Tax (Appeals to the High Court) Rules.** As has been noted, this rule expressly provides the situations to which the Civil Procedure Rules apply; one of these situations that I think is relevant to the issue in contention is the 'adjournments' of suits. As noted earlier, unlike rule 63 in the Probate and Administration Rules which specify the particular rules of the civil procedure that apply in succession causes, rule 20 of the Income Tax Rules leaves it to whoever seeks to invoke the civil procedure rules to pick out the rule that would be applicable to a particular situation. The question that then follows is, when rule 20 speaks of 'adjournments' as one of those circumstances to which the rules of civil procedure apply, where, in those rules is the question of 'adjournments' addressed? The answer, in my humble view, is **order 17** of the current **Civil Procedure Rules**; this rule provides as follows:-

**PROSECUTION OF SUITS**

> ***1. (1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.***
>
> ***(2) When the court grants an adjournment it shall give a date for further hearing or directions.***
>
> ***2. (1) 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.***
>
> ***(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.***
>
> ***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.***
>
> ***(4) The court may dismiss the suit for non-compliance with any direction given under this Order.***

***3. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit.***

***4.Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.***

I have not found any provision in the Civil Procedure Rules that deals with the issue of adjournments other than **order 17** thereof; this provision was initially **order XVI** under old rules and its head note was expressly stated to be *"prosecution of suits and adjournments"*. In the head note to the current rules the words "*and adjournments"* have been omitted but the issue of adjournment is still covered in the substantive rule just like in the previous rule in **order XVI**. Now, if rule 20 invoked the rules of civil procedure relating to adjournments, then there is no doubt that it thereby embraced the then **order XVI** of the old Civil Procedure Rules which is now numbered as **order 17** of the new Civil Procedure Rules. It is for this reason that I hold the application of **order 17** of the **Civil Procedure Rules**, 2010 to appeals filed to this Court under the Income Tax Rules is expressly provided for.

If **order 17** of the rules is applicable, has the applicant made out a case for dismissal of the appellant's appeal for want of prosecution? Counsel for the appellant argued that even if the Civil Procedure Rules applied, the appeal has not been admitted and directions given and therefore it would be premature at this stage to apply to have the appeal dismissed for want of prosecution. In any event the burden of fixing the appeal for hearing lies on the deputy registrar and not the appellant, so he argued. With due respect to the learned counsel, the appeal filed under the Income Tax (Appeals to the High Court) Rules is not the same as an appeal contemplated in **sections 65** and **79 G** of the **Civil Procedure Act** which ordinarily is subject to the process of admission and the giving of directions before it is heard. An appeal filed under the Income Tax Rules is not subject to such procedural requirements before it is heard; its hearing is governed by **rule 9** of the **Income Tax Rules** which states as follows:-

***9. Unless the parties otherwise agree, the Registrar shall give fifteen days' notice in writing to the parties of the date and place fixed for the hearing of the appeal.***

The hearing date is given after the respondent has filed his response to the appeal in accordance with rule 8 if he intends to contest the appeal and nowhere in the rules is it provided that the court has to admit the appeal or give directions before it is set down for hearing.

**Rule 9** also answers the counsel's contention that it is the registrar or deputy registrar, for that matter, who should fix the appeal for hearing. The rule is clear that parties are at liberty to take the initiative and agree on when the appeal can be heard; this is what I understand the opening words of that rule, "*unless the parties otherwise agree…"* to mean. The point is, the appellant cannot have been sitting for the past 4years and seven months without setting its appeal down for hearing on the pretext that it is the deputy registrar's obligation. Such argument is, in my view, misconceived and without any legal backing.

The learned counsel for the appellant also submitted that the hearing dates have not been available because of the backlog of cases in this Court; however, counsel did not demonstrate that the appellant has ever made any efforts, for the past four and a half years to seek for a hearing date for its appeal.

I am not convinced that the appellant has given any reason to my satisfaction as to why its appeal should not be dismissed for want of prosecution and I am inclined to agree with the submissions by the learned counsel for the applicant that the appellant fell into lethargy the moment it filed its appeal. It took no further action for almost five years after it filed its appeal. The logical conclusion that one can make in these circumstances is that it has not been keen to prosecute its appeal. I hereby allow the applicant's application dated 5th March, 2015 with costs; accordingly the appellant's appeal is dismissed with costs to the respondent.

**Signed, dated and delivered in open court this 29th July, 2016**

Ngaah Jairus

**JUDGE**