



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. APPLICATION NO. 85 OF 2012 (JR)

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE VALUE ADDED TAX (CAP 476 – LAWS OF KENYA)

AND

IN THE MATTER OF: AN APPLICATION BY CORRUGATED SHEETS LIMITED TO APPLY
FOR ORDERS OF JUDICIAL REVIEW AGAINST THE DECISION BY THE KENYA REVENUE
AUTHORITY DEMANDING PAYMENT OF ALLEGED ARREARS OF VAT TAX

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

AND

CORRUGATED SHEETS LTD.....EXPARTE APPLICANT

RULING

1. The Judicial Review application by way of a Notice of Motion was dated and filed on 17th October, 2012, pursuant to leave granted on 5th October, 2012 to commence Judicial Review proceedings for orders of certiorari to quash the decision of Kenya Revenue Authority (KRA) to collect Shs. 50,500,743.00 from the ex parte applicant. The court ordered that the leave so granted would operate as a stay.

2. Armed with the stay order, preventing KRA from taking any further action, until its application was heard and determined, the Applicant Corrugated Sheets Limited, went into hibernation until the court on

its own motion on 22nd July, 2015 had the Notice of Motion of 17th October, 2012 dismissed for want of prosecution, and thus dissolved or vacated the order of stay.

3. Set at liberty, the Respondent, KRA, issued Agency Notices dated 3rd September, 2015, to Standard Chartered Bank Limited and Cooperative Bank of Kenya Limited to demand and to collect from each of the said Agency Banks, on account, of the Applicant the sum of Kshs. 50,500,743.00, making a cumulative total amount of Kshs. 101,001,486.00.

4. Alarmed with the Agency Notices, the ex Applicant rushed back to court, and obtained orders on 8th September, 2015 staying the Agency Orders and sought orders whether the original Notice of Motion of 17th October, 2012 should be reinstated or not. The Applicant's counsel, Mr. Khagram argued all the grounds why the Notice of Motion should be reinstated. The Applicant had filed promptly, the application for reinstatement, the Respondent had itself written to the court on 20th July, 2015 seeking an early hearing date, the Applicant was therefore not stealing a march on the Respondent, KRA, that the Notice to dismiss the Applicant's Notice of Motion was made by the court and not the Respondent. The Respondent had an option to either ask for a hearing date or dismissal of the application. They had not done so.

5. Counsel submitted that where a party to an action evinces an intention to proceed with a matter, that party has a protected interest to be heard. Counsel relied on the Court of Appeal decision in **FRAN INVESTMENT LIMITED VS. G4S SECURITY SERVICE LIMITED [2015]eKLR** that

“the right to hearing has always been a well protected right in our constitution and is also a cornerstone of the rule of law.” as also used in RICHARD NCHACPIN VS. LEIYAGU VS. INDEPENDENT ELECTROAL AND BOUNDARIES COMMISSION & 2 OTHERS (Nyeri (CA) Appeal No. 18 of 2013)

6. Counsel consequently urged the court to allow the application.

THE RESPONSE BY KRA

7. The Application for the reinstatement of the motion was however strongly opposed by the Respondent's counsel Ado Moses, through the Respondent's Replying Affidavit sworn on 14th September, 2015 and filed on 15th September, 2015 Mr. Ado denied the Applicant's counsel's claims that the Respondent was stifling the Applicant's right to be heard. On the contrary, the Respondent admits that right. The Respondent's agency Notices was for collection of taxes which he Applicant owes to the Respondent. The Applicant's right to be heard, must however be balanced with the Respondent's demands, and sought an undertaking from the Applicant, to deposit the said sum with the Respondent, and if the Applicant were to be successful in its application any such sum so deposited would be applied in future tax demands.

DETERMINATION

8. I have considered the rival arguments. The court has wide discretion to set aside ex parte orders or judgments, on terms that are fair and that power does not cease to apply because a decree has been extracted – **MAINA VS. MUMBI [1984] KLR 405**.

9. The case of **SHAH VS. MBOGO & ANOTHER [1967] 46**, established the reasons for setting aside an ex parte order or judgment –

“The principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, and not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”

10The test for reinstating a dismissed suit was set in the case of **IVITU VS. KYUMBU [1984] KLR 441**. The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and excusable, and if so, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and justice can well be done to the parties, the action shall not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.

11. Though the Notices were issued to the Applicant under Order 17 rule 2(1) and (4) and Order 42, rule 35(2) of the Civil Procedure Rules to Show Cause Why the Judicial Review application should not be dismissed for want of prosecution, the power to dismiss a Judicial Review application for want of prosecution is at the discretion of the court, and not under either the provisions of either Order 17 rules 2(1) and (4) or Order 42 rule 35(2). I submit this because under sections 8 and 9 of the Law Reform Act, (Cap 26 Laws of Kenya), a Judicial Review court exercises neither civil nor criminal jurisdiction in its judicial review jurisdiction. However, in exercise of its inherent jurisdiction whether or not a judicial review application should be dismissed or reinstated, the principles of law developed in ordinary civil litigation, I respectfully submit, would apply.

12.The Judicial Review application herein was dismissed on 22nd July, 2015. The application for reinstatement was filed on 5th August, 2015 but was not served upon the Respondent until the 7th September, 2015, that is, one month after filing, and obtaining the stay orders. In addition, it was not served upon the Respondent until after it had commenced recovery of taxes on 3rd September, 2015. I agree with the submission by Mr. Ado, counsel for the Respondent, that the entire judicial Review application is intended to delay and frustrate the collection of taxes which have been due since 2012 when the Judicial Review application was filed.

13. In this regard I do not accept the argument or the claim regarding lack of Judges. There have been Judges in this Station throughout the material period. Besides, Judicial Review matters like all interlocutory applications, must, by their nature be determined on priority. The reasons are clear, Judicial Review applications are a challenge against exercise of some statutory power or public policy decisions. They must consequently be determined with the least delay. Any delay compromises the provision of services to the citizenry.

14. The situation is worse where such applications lead to delays in the collection of taxes due to the State. There is therefore need to ensure such applications are prosecuted with the urgency in which they were first initiated and with candour.

15. Though the right to hearing is protected under Articles 10 and 47 of the Constitution, these rights to fair administrative action, and to the rule of law, carry with them a corresponding duty upon the citizenry that the rights shall be enjoyed and exercised subject to the same laws.

16. In this case the ex parte applicant has sought the exercise of the court's discretion to allow it to prosecute its application contesting the Respondent's claim for taxes in the sum of Ksh. 101,001,486/= for the years 2008-2011. The discretion is however subject to terms to balance the rights to hearing the Applicant, and the duty to pay Caesar what is due to Caesar. I therefore make the following orders –

(1) Set aside the orders of dismissal of 22nd July, 2015, and reinstate the application of 17th October, 2012 for hearing.

(2) The Applicant shall issue a bank guarantee in the sum of Kshs. 101,001,486/= within 14 days of the date hereof.

(3) Direct that the application dated 17th October, 2012 be heard within thirty (30) days, and in default the application aforesaid shall stand dismissed after the expiration of that period.

17. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 21st day of October, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Egessa holding brief for Mr. Khagram for Applicant

Mr. Ado Moses for the Respondent

Mr. Kaunda Court Assistant