REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 232 of 2008

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY ROMAGECO KENYA LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE COMMISSIONER GENERAL AND COMMISSIONER OF CUSTOMS AND SERVICES OF KENYA REVENUE AUTHORITY

AND

IN THE MATTER OF: SEMI FINISHED SHEETS SQUARES AND OTHERS IMPORTED BY ROMAGECO KENYA LIMITED

AND

IN THE MATTER OF: CUSTOMS AND EXCISE DUTY ACT CAP 472 OF TH LAWS OF KENYA

BETWEEN

ROMABECO KENYA LIMITED……..……APPLICANT

VERSUS

THE COMMISSIONER GENERAL

THE COMMISSIONER CUSTOMS & SERVICES DEPARTMENT

KENYA REVENUE AUTHORITY……..……RESPONDENT

RULING

For my determination is the application dated 13th April 2012 which seeks that:

a) The orders of this Honourable Court issued on 9th March 2012 be and are hereby set aside and/or varied

b)That this suit be and is hereby reinstated and the case to proceed for hearing *inter partes* on a

date to be fixed by the parties in the registry of the High Court.

Briefly stated, the application is based on the grounds that:

a) The dismissal of the suit is unprocedural and/or irregular as none of the parties to the suit herein and/or their advocates were served with a notice of dismissal as required by law and the applicant was therefore not accorded a chance and/or the opportunity to show cause why the suit should not be dismissed.

b) Unless the orders made by this court on 9th March 2012 are set aside and or varied, and the suit herein reinstated, the Applicant's right to prosecute its claim against the Respondent will have been unfairly extinguished thus causing substantial loss to the Applicant;

c) The Applicant's advocates made several attempts to have the matter mentioned for directions but the registry did not fix the suit for mention on any of those dates. The matter therefore ought not to have been dismissed for want of prosecution;

d) The Applicant assumed that the Respondent had waived the taxes since it had ceased demanding them until after the dismissal of the suit. The Applicant's advocates were therefore in the process of getting instructions in view of the Respondent's conduct so as to ascertain the proper manner in which to dispose of the matter herein.

e) There will be no prejudice occasioned to the Respondent in the event that the suit is reinstated and determined on merit

f) That it is in the interests of justice that the prayers sought herein be granted.

The Respondent opposed the application through the replying affidavit of William Otieno Odhiambo. It takes the view that the Applicant has been indolent in prosecuting this application, and that it should not be reinstated.

The Respondent objects to the Applicant's allegation that there was a waiver. It states that there can be no assumption of waiver of taxes because taxes are due and payable according to statutory provisions.

The Respondent further states that the burden of prosecuting a claim or objection lies on the objector who files the suit. It states that the Applicant's indolence has been prejudicial to as the collection of revenue has been held up.

The parties filed submissions to advance their respective positions. In its submissions, the Applicant takes the view that the suit presents has a genuine grievance which should be ventilated. It also submits that it was not served with any notice to show cause why the suit should not be dismissed, which by law should have happened before the dismissal of its case. In opposition, the Respondent submits that the Applicant has been guilty of inordinate delay, and has not given any reasonable explanation for the delay.

This suit was instituted through the application dated 8th May 2008. It last came into court on 22nd September 2008. On 9th March 2012, it came up for dismissal. Ms Lavuna, counsel for the Respondent, was present and she did not oppose the dismissal of the matter. The application dated 8th May 2008 was therefore dismissed with no order to costs.

It is undisputed that the last time the Applicant took any steps towards the prosecution of this matter was in the year 2010 when its Advocate wrote 3 separate letters to the Deputy Registrar, each requesting that the matter be listed before the presiding judge with a view to taking directions. Before the letters of 2010, it is apparent from the record that the matter was last in court on 22nd September 2008.

The Applicant argues that Order 17 rule 2, makes it mandatory for all parties to a suit to be served with a

notice to show cause where the court contemplates dismissing a suit.

Order 17 rule 2 reads as follows:

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.

My considered view is that this rule does not make it mandatory for parties to be given an opportunity to show cause why matters should be dismissed. The rule provides for a situation where parties are given an opportunity to show sufficient cause to the court why a matter should not be dismissed. Even where the parties are called upon to show cause, the court may still choose to dismiss that matter if sufficient cause is not shown. I am of the view that where there has been no action whatsoever for over one year in any suit, the court may choose to dismiss it on its own motion.

There has been a delay of about two (2) years since there was any action on this matter. The Applicant's advocate has stated that the reason for this is that they were in the process of getting instructions from their client. I find that this is not a reasonable or satisfactory explanation as to the delay in prosecution of the matter. It is incumbent upon the Applicant or the advocate to satisfy this court as to the reason for the delay.

The Applicant has also submitted that one of the reasons that the suit was not set down the suit for hearing is that it had assumed that the Respondent had corrected its action and waived the taxes that had been demanded, and as such there was no need to hear the matter. For this contention to be true or legitimate, the applicant was required to get proof or evidence from the Respondent that the taxes had been waived. There must also be an inference or assumption that the action or omission was done by the Respondent to enable the Applicant to conclude that its claim or cause of action had been settled or satisfied.

The Applicant also contends that it was incumbent on both parties to set down the application for hearing. This assertion may be true but the primary responsibility of prosecuting the application or matter was upon the shoulders of the Applicant. It is the Applicant who was aggrieved by the Respondent's decision to levy extra taxes, and it is the one who instigated the matter and obtained orders against them. I agree with the Respondent's submission that since it was the Applicant who took issue with its decision, it ought to have prosecuted the application without delay. After all, an application for judicial review is supposed to be heard and determined expeditiously. See the decision in ***Nakumatt Holdings Limited v Commissioner of Value Added Tax [2011] eKLR (Civil Appeal 200 of 2003)*** wherein the Court of Appeal sitting at Nairobi stated:

"An application for an order of judicial review is intended to be a quick and inexpensive procedure to aid a party who, in a way, is in distress."

Having addressed my mind to the issues, I am satisfied that the Applicant is guilty of delay in the prosecution of this matter. The delay has not been satisfactorily explained. Consequently, it is in the interests of justice not to reinstate the suit. For these reasons, the Application dated 13th April 2012 is dismissed with no order to costs.

DATED, SIGNED and DELIVERED this 29th day of November 2012

M. WARSAME

JUDGE