



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS J.R. NO. 294 OF 2010

IN THE MATTER OF: LAW REFORM ACT AND THE CIVIL PROCEDURE ACT

AND

**IN THE MATTER OF: AN APPLICATION BY KENTON COLLEGE
TRUST APPLYING FOR ORDERS OF MANDAMUS & CERTIORARI**

AND

IN THE MATTER OF: INCOME TAX CAP 470 LAWS OF KENYA

**AND THE DECISION DATED 19TH MARCH 2010, BY THE COMMISSIONER OF DOMESTIC
TAXES PURSUANT**

**TO LEAVE GRANTED HEREIN BY THE HONOURABLE WENDOH J. DATED 17TH
SEPTEMBER 2010**

REPUBLICAPPLICANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

KENTON COLLEGE TRUST.....EX PARTE APPLICANT

RULING

The 1st respondent's application dated 3rd February, 2011 was brought under **Article 159(2)** of the **Constitution of Kenya, Section 1A, 1B, 3A & Orders 50, 51 rules 1 and 53** of the Civil Procedure Rules and seeks the following prayers:

“1. That the order of leave be granted to allow the 1st respondent file its replying affidavit and written submissions out of time within one day of the order.

2. That the costs of the application be provided for.”

The brief facts that gave rise to the application are explained in a supporting affidavit sworn by Mr. David O. Ontweka, the 1st respondent's advocate.

On 29th November 2010 a consent order was recorded to the effect that the 1st and 2nd respondents do file their replies and submissions within 28 days. Mr. Ontweka prepared the affidavit and submissions in time but the person who was to sign the affidavit was not available for various reasons as shown in his affidavit. The replying affidavit was not filed until 27th January, 2011 and the submissions on 28th January, 2011.

On 31st January, 2011 the ex parte applicant's advocate urged the court to expunge the said documents for having been filed out of time without leave. On that day Mr. Ontweka was unable to articulate all the facts that caused the delay, having been taken by surprise by the said oral application. There being no satisfactory reason for the delay the replying affidavit and submissions were ordered struck out.

Mr. Ontweka now pleads with the court to allow the 1st respondent's application so that this matter can be determined on its merits. The application was opposed by the ex parte applicant.

Mr. Jasminder Singh Walia, the Financial Controller of the ex parte applicant, stated that the application had been brought under the wrong provisions of the law. He further stated that the delay was for over one month and that the reasons for the delay were not satisfactory. He urged the court to reject the application.

I have considered the issues raised by both parties. In my view, the approach to be taken in an application of this nature is that which was adopted by the Court of Appeal in **TRUST BANK LTD v. AMALO LTD, [2003] 1 E.A. 350** at page 352 that:

“The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

This principle is now embodied in our Constitution and Civil Procedure Act. **Article 159 (2) (d)** of the constitution requires the court to dispense substantial justice without undue regard to procedural technicalities. That does not, however, mean that rules of procedure, time lines and orders given during proceedings can be given casual treatment. They are important but the overriding objective of the court as spelt out in **Sections 1A and 1B** of the **Civil Procedure Act** ought to be borne in mind whenever a court is considering an application of this nature.

Having carefully considered the explanation given for the late filing of the 1st respondent’s replying affidavit and submissions, I find the explanation satisfactory. Consequently, in the interest of justice, I grant leave to the 1st respondent to file its replying affidavit and submissions out of time as sought in its application. The 1st respondent shall however bear the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Ontweka for the respondent

No appearance for the applicant