REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 1158 OF 1998

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE

JACK & JILL SUPERMARKET LIMITED

RULING

1. By a Notice of Motion dated 21st October,1998, the ex parte applicant herein sought leave to apply for orders of certiorari and prohibition. It also sought an order that the grant of leave operate as a stay of the decision in question.

2. The said application was based on the following grounds:

> **1) The Kenya Revenue Authority's Decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made in gross misinterpretation of the Value Added Tax and its Schedules.**
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> **2) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made in gross misinterpretation and misunderstanding of the empirical data and gross sales and purchases of the Applicant business.**
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> **3) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failing to take into account that 80 per cent of the Applicant's retail products are non-designated and zero rated for purposes of Value Added Tax.**
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> **4) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failing to appreciate the mark up value for the Applicant's products is not 14 and/or 15 per cent.**
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> **5) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failing to consider and take into account that the mark up for the Applicant's business was 7.25 per cent in 1995, 7.65 per cent in 1996, 12.25 per cent in 1997 and 12.3 per cent in 1998.**
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> **6) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made arbitrarily without due regard to the contents of the records and books of account kept by the applicant and seized, examined and analysed by the Revenue Authority.**

7) That the Revenue Authority considered irrelevant material in arriving at its decision made on 31st August 198. The irrelevant materials considered are the Sale Agreement of Extravaganza Limited and Income Tax returns.

8) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by using a wrong formula and direct VAT allowable. The formula used also ignores the 80 per cent ratio of the applicant's non designated, exempt and zero rated products.

9) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failing to comprehend the distinction between average rate of return on stock and gross profit as well as the distinction between gross margin, make up and gross ratio.

10) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failure to consider and take into account the following factors: the Applicant's opening stock, closing stock and type of clientele served, which factors determine the mark up rate of the Applicant business.

11) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failure to consider the record and entries in the Applicant's books of account and purchases ledgers which were in possession of the Revenue Authority for over three months.

12) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= or any part thereof from the Applicant has been made by failing to take into account that the Applicant does not import any goods and neither does it stock electrical equipment and machinery.

13) The Kenya Revenue Authority's decision made via letter dated 31st August 1998 to demand the sum of Kshs. 134,984,205/= from the Applicant was made by failing to take into account the gross profit ration reflected in the Applicant's audited accounts.

14) That the Applicant will suffer irreparable loss and damage if called upon to pay the sum of Kshs. 134,984,205/= or any part thereof. Specifically, the irreparable loss of the Applicant can be itemised as follows:

i. the applicant's bank accounts have been frozen since mid-September 1998 and the applicant cannot transact business;

ii. the applicant cannot make any new orders for stock since it has no running cheque book or bank account;

iii. the applicant's suppliers have not been paid and are losing confidence in the commercial viability of the applicant's business;

iv. the business goodwill and clientele of the applicant is waning as the creditworthiness and stock of the applicant continues to dwindle.

v. the applicant's employees stand to permanently lose their jobs if the situation is no relief is granted by this honourable court;

vi. a foreign investor who was interest in vesting in the applicant's business has pulled out due to the Kenya Revenue Authority demands for tax

15) That no product is vatable unless is it classified.

16) That the demand by the authority for Kshs 134,984,205/= from the Applicant is ultra vires since the demand is arbitrary and based on irrelevant considerations.

17) That the Decision of the Kenya Revenue Authority to demand the sum of Kshs 134,984,205/= from the applicant is arbitrary and is partly based on refusal of the applicant to bribe officers of the Authority.

18) That in June on 1998, Mr. J.N. Njagi from the Kenya Revenue Authority visited the business premises of the applicant and demand Kshs 5,000,000/= from the applicant as an inducement/bribe to prevent the applicant from paying Value Added Tax.

19) That the demand referred to in paragraph 37 above was specifically made to the chairman of the Applicant Company Mr. Schon Noorani

20) That the Applicant through its Chairman refused to succumb to the bribe demands of Mr. Njagi.

21) That during the same month of June 1998, Mr. J.G. Ndegwa of the Kenya Revenue Authority telephoned Mr. Schon Noorani demanding the monies asked for by Mr. Njagi and expressly stated that failure to pay the same will result into excessive assessment and imposition of penalties and liability on the applicant's tax liability to the Revenue Authority.

22) That during the same month of June 1998, Messrs Ndegwa and Njagi visited the Applicant's business premises wherein they met Mr. Noorani showed Noorani a draft assessment with penalties totalling Kshs 127,235,560/=. The officers from the Revenue Authority intimated to Mr. Noorani that unless the sum of Kshs 5,000,000/= is paid, the Applicant shall be fully and squarely responsible for all the consequences.

23) That the decisions of the Kenya Revenue Authority to demand the sum of Kshs 134,984,205/= from the Applicant is not supported by the quantity and volume of sales of the Applicant Company during the period in question.

24) The Kenya Revenue Authority has failed to give the Applicant credit for payments made and remitted to the Commissioner of Tax through the Central Bank of Kenya

3. On 21st July, 27th October, 2016, this Court granted leave to the applicant to commence judicial review proceedings and proceeded to direct that to avoid the implementation of the challenged report during the pendency of these proceedings, the said leave would operate as a stay of the Respondent' decision to investigate the Applicant, to publish the investigation report and/or issue the same to the relevant authorities within seven (7) days from 25th October, 2016 or at all pending the hearing and determination of the substantive Notice of Motion.

4. On 22nd October, 998, **Mbogholi, J** granted the applicant leave as sought and directed that the said leave would operate as a stay. On 21st July, 200 **Aluoch, J** (as she then was) discharged the said order of say. On 25th July, 2007, the matter was once again before **Aluoch, J** and it is recorded that **Kamau Kuria** informed the Court that the parties had discussed the matter and agreed that the application seeking reinstatement of the stay be marked as settled as the Respondent had undertaken not to take any steps in respect of the disputed amount until the suit is head. Mrs Onyango for the Respondent then confirmed that the Respondent had given an undertaking in the manner proposed and that the respondent was granted leave to file a replying affidavit within 21 days while the applicant would respond within 10 days and the Motion would be heard on 1st and 2nd November, 2000. There however was no order endorsing what the counsel had informed the Court. I will however say no more on that issue.

5. Suffice it to say that the matter did not proceed on the scheduled date and was subsequently taken out of the hearing lists a number of times. On 23rd September, 2002, when the matter came up before **Kuloba, J**, the same was adjourned indefinitely. No step seems to have been taken in the matter till 21st June, 2018 when a representative from the office of the Attorney General on behalf of the Respondent fixed the matter for mention on 23rd July, 2018 on which day **Nyamweya, J** directed that the 1st Respondent's application dated 13th June, 2018 be heard together with the substantive motion dated 4th November, 1998 on 11th September, 2018. The application dated 13th June, 2018 is seeking that the leave granted herein be set aside and the Motion be struck out for being defective and for want of prosecution.

6. However on 5th September, 2018, the ex parte applicant appointed the firm of Maingi Musyimi & Associates to act for them in the matter. It is however not clear whether the said firm was replacing the firm which was on record or whether it was instructed to act alongside the said firm. On the same date, the firm of Maingi Musyimi & Associates filed a Notice of intention to apply for amendment of both the Statutory Statement and the Motion dated 4th November, 1998. Together with the said notice, the said firm filed an application dated 4th September, 2018, putting into motion the said intention. It is this application that is the subject of this ruling.

7. According to the applicant, since the filing of the substantive motion, it has become exigent and important that the said pleadings be amended in order to articulate the change of circumstances. The said changes it was deposed included the fact that the applicant's premises were on 23rd May, 2013 destroyed thereby leading to the closure of operations which was ultimately the precursor to the collapsing of the applicant's business. It was further averred that despite the order of stay issued on 23rd October, 1998, the Respondent has brazenly flouted the same by issuing an agency notice dated 21st may, 2018.

8. The applicant however deposed that the proposed amendments will allow it to articulate fundamental issues in respect of the dispute before the Court. In its view the said amendments will not occasion any prejudice to the Respondent if allowed since the Respondent would be accorded an opportunity to respond to them.

9. The applicant averred that even with the existence of the suit against the Respondent, they had continued to meet their tax obligations.

10. The applicants also annexed the intended amended pleadings. In the proposed amended statement, it is clear that what is intended to be introduced in the grounds are the illegality, irrationality and unreasonableness of a demand letter dated 31st August, 1998; the cancellation of the arbitrary Notice of Assessment dated 24th June, 1998 and the issuance of a fresh notice dated 6th November 1998; the issuance of a Notice on 21st may, 2018 claiming the earlier cancelled Notice of Assessment dated 24th June, 1998; that the Respondent flouted the procedures laid down in the Act and thwarted the applicant's legitimate expectation. The applicant further contended that due to the inordinate passage of time, the applicant's ability to adduce and challenge evidence in this case is irredeemably hampered due to institutional memory loss as its former employee and book keepers/auditors are unavailable and/or untraceable and further that the applicant has since ceased to be in operation following the destruction of its supermarket on 23rd May, 2013 leading to loss of records. The applicant therefore contended that as a result of the foregoing it is nolonger able to competently adduce or challenge the evidence with respect to the VAT demanded by the Respondent hence the assessment should be quashed.

11. It was further disclosed that after the applicant fled its returns of the 2013 financial year, the Respondent generated and issued to the applicant a statement indicating credit balance of Kshs 1,907,463.35 hence the amount demanded is legally and factually unsupported.

12. In rejoinder to the matters deposed to by the Respondent in reply particularly the issue of delay, the applicant relied on the contents of its affidavit in response to the Respondent's application seeking to set aside the leave. In that affidavit, it was deposed that the failure to proceed was occasioned in part by the Respondent's failure to appear when the matter was fixed for hearing leading to the matter being stood over severally. After the matter was stood over generally in 2002, the ex parte applicant continued to engage the Respondent in a bid to resolve any and all tax issues and that the applicant continued to meet its tax obligations leading to the Respondent confirming that the applicant was meeting its tax obligations. It was therefore the applicant's case that the Respondent has by its conduct abandoned the claim or demand of Kshs 134,984,205.00 that forms the subject matter of this suit. It was therefore the applicant's case that the Respondent by its conduct created a legitimate expectation on the part of the Applicant that the Respondent had abandoned the VAT demand. Therefore to revive the VAT demand/Assessment almost two decades after it had been stood over generally by consent would be inimical to the interest of justice and would run afoul of the principles of fair administrative action.

13. In his oral address, **Mr Arua** who appeared with **Mr Maingi** for the applicant submitted that the application is meant to bring before the Court facts between November, 1998 todate which may have a bearing on the order sought. While admitting that the delay in bringing the application was inordinate, Learned Counsel submitted that the delay was caused by the two advocates who were involved in the matter on behalf of both the parties. It was further submitted that the applicant was under the impression that the matter was being settled as show by the numerous correspondence hence the litigation had been abandoned.

14. It was further submitted that the delay has no bearing on the Court's exercise of discretion to allow an amendment since the only issue is whether the amendment will have any value in the pursuit of justice. To Learned Counsel, it was in the interest of all parties to allow the amendment since several events have taken place which make it necessary to allow the same so that a complete picture may be brought forward based on the correct state of facts.

15. In his view the said amendment does not amount to an introduction of a new cause of action since it does not affect the nature of the relief sought.

16. It was submitted that the mere fact that the substantive motion has been fixed for hearing does not bar the Court from allowing an amendment which can be done even at the hearing pursuant to Order 53 rule 4(2) of the ***Civil Procedure Rules***. It was his view that the only issue is whether the intended amendment has direct bearing on the reliefs sought and whether the Respondent can be compensated in costs. It was his view that it is not asking much to pray that the events that have taken place since the application was filed be taken into consideration in determining the application. In his view the mistake of counsel ought no to be visited on the client.

17. In support of his submissions, **Mr Arua** referred to the constitutional right of access to justice. It was submitted that the right of access to justice and the right to fair trial would be futile unless the application is allowed. Further the provisions of the Civil Procedure Act cannot defeat the constitutional provisions. In this respect Learned Counsel referred to **Republic vs. Public Procurement Administrative Review Board Ex Parte Transcend Media Group Limited JR Application No. 540 of 2017** and **Republic vs. Ministry of Planning and National Development [2006] eKLR** and submitted that the Court has wide and undeterred discretion to allow amendments in judicial review matters even in cases where there is an introduction of a new cause of action which in his view is however not the position in the instant case.

18. In response to the application the Respondent set out the history of the suit and averred that after the Respondent tried to follow up on the status of the case, it decided to instruct its in-house lawyer to take over the matter from the Attorney general but both the AG's file and the Court file were missing. The Ag eventually filed the application seeking to set aside the orders granted by this Court.

19. It was the Respondent's case that the applicant has been indolent in prosecuting its case. It was therefore contended that the amendment of the pleadings herein is belated and hopelessly misplaced considering that leave was granted almost twenty years ago. Further the matters being introduced are a new cause of action independent of the decisions that were stayed by the Court.

20. The Respondent averred that the proceedings of this nature ought to be conducted within the confines of the pleadings that initiated the application for leave. In this case the ex parte applicant has been awoken from the slumber by the application dated 13th June, 2018 and the Court's own motion in fixing the matter for hearing during the Court's Service Week.

21. It was contended that the applicant had failed to demonstrate why it had taken all these years to address the tax dispute with a view to bringing it to a close. The Respondent was therefore of the view that the substantive motion ought to be heard and disposed of and prayed that the instant application be dismissed.

22. In his submissions, **Mr Ontweka**, Learned Counsel for the Respondent submitted that the application ought not to be allowed as the main application is already fixed for hearing. Considering the fact that the matter has been in Court for nearly 2 years, it was submitted that the applicant is guilty of inordinate delay. It was further Learned Counsel's view that the said amendments propose to introduce new matters which fall within the definition of a new cause of action.

23. As regards the allegations of negotiations, it was submitted that the letters referred to were in respect of a period not covered by this application hence has no relevance to the decision the subject of these proceedings. It was his position that the alleged new matters are matters which arose after the 1998 decision hence have nothing to do with the cause action.

24. While appreciating that the Court has discretion to allow amendments of pleadings, it was submitted that the same should be exercised within the frame of the decision being sought to be quashed since the actions which purportedly occurred in 2013 were not available at the time the decision sought to be quashed was made.

25. **Mr Odhiambo** who appeared with **Mr Ontweka** added that to allow the application would prejudice the Respondents' right to fair trial.

Determination

26. I have considered the application, the affidavits in support of and in opposition to the application and he submissions made by Counsel.

27. Order 53 rule 4(2) if the Civil Procedure Rules provides that:

> ***The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.***

28. The general principles guiding the grant of application to amend pleadings in civil proceedings have been stated as follows:

> **(i). The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See Tidelsay vs. Harpic [1878] 10 CH.D. 393 at 396.**
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> **(ii). The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle. See Eastern Bakery vs. Castellino [1958] EA 461.**
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> **(iii). The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See British India General Insurance Co. Ltd vs. G.M. Parmar [1966] EA 172.**
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> **(iv). The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice caused if the other side can be compensated by costs. See British India General Insurance Case (SUPRA).**

29. As stated above, these are the general principles but when considering judicial review applications, the said principles must be considered in the context of such proceedings which strictly speaking are not civil proceedings. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**

30. Judicial review proceedings, it was in **Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116**, are required to be made promptly since the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage. Judicial review therefore acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. Similarly, in **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that:

> **"Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes…Legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders."**

31. In this case the delay is admittedly inordinate. The reason for this delay is blamed on the advocates who were then acting for the parties herein. However it is not every case that a mistake committed by an advocate would be a ground for exercising discretion in favour of a litigant. In **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

> **"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor**

by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".

32. As was held by **Kneller, JA** in In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584:**

"If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates."

33. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J** expressed himself as follows:

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

34. In this case there is no evidence that the applicant itself took any steps to expedite the determination of its case after the parties had agreed to maintain the status quo. It is not enough for a party to simply blame the advocates but must show tangible steps taken by him in following up his matter. The decision whether or not to allow amendment of pleadings being an exercise of discretion may be declined where there is undoubted inordinate delay which is not satisfactorily explained since an exercise of judicial discretion must be based upon reason, not like and dislike, caprice or spite. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

35. Apart from the purported mistake of the advocates, it was the applicant's case that due to the negotiations being carried out between the parties, the applicant was under the impression that the matter had been abandoned. Firstly, it was the applicant who instituted these proceedings. If the same were to be abandoned it was the applicant who ought to have done so. It cannot purport that it was under the impression that the matter was abandoned when it had not taken the necessary steps to have the matter declared so. By stating that it was under the impression that the matter was abandoned, the applicant is in effect saying that it was nolonger keen in prosecuting its case.

36. As regards the negotiations, the applicant has exhibited letters dated 24th January, 2011, 1st March, 2011 and 3rd June, 2011, all of which emanated from the Respondent. However, there is no indication that these letters gave an impression that the litigation had been abandoned.

37. According to the applicant the necessity of amending the pleadings and the filing of a further affidavit has been occasioned by facts which have arisen as a result of the delay of finalising this matter. According to it as a result of the said delay, which in my view is partly to be blamed on itself, it is nolonger capable of mounting a formidable case hence the need to adduce further evidence.

38. Order 53 rule 1(1) and (2) of the ***Civil Procedure Rules*** provides:

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

39. It is therefore clear that an applicant is required at the time of seeking leave to set out in the verifying affidavits the facts he intends to rely on. The only avenue available for the applicant to adduce further evidence is by coming under Order 53 rule 4(2) where it is shown that the issues to be adduced deal with new matter arising out of the affidavits of any other party to the application. In this case it is not alleged that the issues sought to be introduced arise out of the affidavits of any other party to the suit. Rather, the said issues arise as a result of the long period taken without this matter being prosecuted. In my view that is not what is contemplated under the rules. I therefore associate myself with the view adopted by **Wendoh, J** in where she expressed herself as hereunder:

"Order 53 Rule 4 (2) of the Civil Procedure Rules only provides for amendment of the Statutory Statement and the filing of further Affidavits with the leave of this court… Order 53 therefore specifically provides for amendment of the Statement and filing of further Affidavits but does not provide for amendment of the Notice of Motion. In the Statement in support of the Notice to amend the Applicant's Counsel has sworn an Affidavit and at paragraph 5 thereof, introduces some documents in support of the fresh prayers that are now introduced in the Notice of Motion and the Statement. Order 53 Rule 4 (2) is clear, that further Affidavits that may be allowed on application by the Applicant are those that will be replying to new matters

raised in the Affidavits of. the opposing parties. The documents exhibited at paragraph 5 of the Counsel's Affidavit are not a response to new matters raised in the Respondent's Affidavits. They introduce new evidence which the Counsel depones had been inadvertently left out. Whereas I do not agree with Mr. Wekesa's submission that this matter is partly heard because arguments had been filed, introducing fresh evidence by the Applicant at this stage would mean that the case be reopened afresh so that the Respondents can reply to the new facts that have been introduced at paragraphs 4 & 5 of Mr. Kihara's affidavit. Order 53 Rule 4(2) Civil Procedure Rules intention is the amendment of the statement or filing of further Affidavits to be done at the very last minute that is, at the hearing of the Notice of Motion when the case is ready for hearing. It cannot have been intended for tendering of new evidence because that would be prejudicial to the parties. The filing of further Affidavits in response to the Affidavits by opposing parties is supposed to clarify the issues and to enable the court reach a fair decision in the matter but not so that one party has an advantage over the others by introducing documents/facts that should have been introduced at the filing of the Chamber Summons when the statement and Affidavits to support the Notice of Motion were filed."

40. I however disagree that the discretion to amend the pleadings may even be exercised to introduce a fresh cause of action or prayer for which no leave was granted. That would, in my view, render the requirement of leave in purely judicial review applications superfluous. In this respect I disagree with the sentiments expressed by **Nyamu, J** (as he then was in **Republic vs. Permanent Secretary Ministry of Planning and National Development Ex-parte Mwangi S. Kimenyi [2006] eKLR.** It is clear that the provision dealing with amendments expressly allows the amendment of the statement and the filing of further affidavits but only where they deal with new matters arising out of affidavits of any other party to the application. It is important to note that the provision deals with proceedings "on the hearing of the motion" which is a clear indication that the drafters of the rules were clear in their mind that at that time the Motion is already part of the record. Yet they did not deem it fit to expressly provide for the amendment of the Motion as well. In my view if it was intended that the Motion could be amended at that stage, nothing would have been easier than for the rules to provide for the same.

41. To my mind, the omission to expressly provide for the amendment of the Motion was intentional and was intended to avoid the introduction of other reliefs at the stage of the hearing of the motion for which leave was neither sought nor granted. In my view issues which arise after the decision sought to be challenged and which may not support the application as originally presented cannot be subsequently introduced in order to give the application a different character from that which was in the contemplation of the parties when the challenge was initially taken and the matter commenced. In this case, it is clear that had the matter proceeded immediately it was filed there would have been no necessity to amend the pleadings and file further affidavits. This step has only been necessitated by the inordinate delay in prosecuting the application. In other words the effect of the amendment and the filing of further affidavit would be to change the nature of the applicant's grievances. That cannot be permitted in proceedings of this nature.

42. The applicant contended that the application ought to be allowed in light of the constitutional right to access justice and fair hearing. I am however aware that One of the cardinal principles for constitutional interpretation was restated the Supreme Court in Advisory Opinion No. 2 of 2013 - **The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR,** in which the Honourable Chief Justice at paragraph 184 quoted the Ugandan Case of **Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3)** where it was held that:

> "**the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."**

43. While Article 48 of the Constitution provides to the right of access to justice, under Article 159(2)(b) of the Constitution one of the constitutional principles that guide this Court in the exercise of its judicial authority is that justice shall not be delayed. To my mind the right to fair hearing also encompasses the right to have litigation expeditiously determined so that the same is not left hanging over one's head for unnecessarily too long like in this case where the litigation has been pending for nearly two decades.

44. Having considered the application I find that the inordinate delay in making this application has not been satisfactorily explained Secondly, the amendments intended to be introduced have the effect of mutating the application into a cause of action that never existed and was not in the contemplation of the parties when these proceedings were initiated. To allow the instant application would in my respectful view, turn these proceedings into a circus and render them a theatre of the absurd. It is my view that the applicant cannot by way of panel beating his pleadings seek through the backdoor reliefs for which leave was never sought and granted.

45. In the premises I decline to exercise my discretion in favour of the applicant herein. Consequently, the application dated 4th September, 2018 fails and is dismissed with costs to the Respondent.

46. It is so ordered.

G. V. ODUNGA

JUDGE

Dated and delivered at Nairobi this 18th day of September, 2018

P. NYAMWEYA

JUDGE

Delivered in the presence of: