



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL PETITION NO 258 OF 2012**

**MASTERMIND TOBACCO (K) LTD.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF DOMESTIC TAXES .....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF CUSTOMS & EXCISE.....3<sup>RD</sup> RESPONDENT**

**THE KENYA REVENUE AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The petitioner first approached this court by way of an application brought under a certificate of urgency on 19<sup>th</sup> June 2012. The basis of the application was that the Finance Act 2012 had introduced a retrospective provision in the Customs and Excise Act on the basis of which the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had issued Agency Notices to the petitioner's bankers calling for the immediate payment of Kshs90,830.154.
2. The petitioners sought and were granted conservatory orders restraining the respondents from demanding payment of the disputed amount of Kshs 90,875,154 from the petitioner or its bankers pending hearing of the application inter parties on the 9<sup>th</sup> of July 2012. The court also directed that the matter be heard together with Judicial Review Application No 82 of 2012, which was between the same parties and raised similar issues.
3. Thereafter, the parties were given directions with regard to the filing of responses and submissions, and the conservatory orders were extended. On 3<sup>rd</sup> October, 2012, the court directed that the matter be mentioned on 28<sup>th</sup> November 2012 with a view to taking a date for highlighting of the parties' submissions.
4. From the court record, it appears that no further steps were taken in the matter thereafter. The matter next came up before the court on 8<sup>th</sup> July 2014 when it was dismissed for want of prosecution, with liberty to the petitioner to apply. The orders were made in the presence of counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents but in the absence of the petitioner's Counsel.

5. The petitioner then filed the present application dated 12<sup>th</sup> August 2014 brought by way of certificate of urgency seeking the following orders:

1. *That the matter be certified urgent and be heard on priority basis during the current court vacation.*
2. *That the Honorable Court be pleased to issue an interim order of stay of the orders made on 8<sup>th</sup> July 2014 dismissing the applicant's petition dated 18<sup>th</sup> June 2012 with costs pending the interparty hearing of the petition.*
3. *That this Honourable Court be pleased to reinstate the applicant's aforesaid petition dated 18<sup>th</sup> June 2012.*
4. *That this Honourable Court be pleased to reinstate the Conservatory Orders issued by this Honourable Court on 19<sup>th</sup> June 2012.*
5. *That his Honorable Court do issue any other order in the interest on justice.*
6. *That cost of this application be on cause.*

6. The application is supported by an affidavit sworn by the petitioner's Counsel, **Mr. Tom Maina Macharia**, and is based on the grounds that:

- i. *The parties to this suit opted to pursue an out court settlement which had reached an advanced stage.*
- ii. *The applicant was never served with a notice for the intended dismissal and was therefore never accorded an opportunity to explain its reasons for the delay in prosecuting the matter*
- iii. *There was no deliberate failure to prosecute the matter by the petitioner*
- iv. *No prejudice shall be suffered by the respondents that cannot be compensated by costs.*

7. Mr. Macharia submits and avers in his affidavit that he was personally dealing with the petition on behalf of the petitioner, but was out of the country at the time the matter was dismissed for want of prosecution. He further avers that the petitioner was never served with the notice to show cause. He draws the court's attention to the said notice which indicates that it was served only on the respondents, and does not bear the petitioner's Advocates' stamp. He argues therefore that the petitioner was not accorded an opportunity to show cause why there was a delay in prosecuting the matter.

8. The petitioner submits that the parties to this matter had opted to pursue an out of Court settlement, and the negotiations in that regard were at an advanced stage. A bundle of documents is attached to Mr. Macharia's affidavit to illustrate the ongoing negotiations between the parties.

9. The petitioner states that following the dismissal of the petition on 8<sup>th</sup> July 2014, the 2<sup>nd</sup> respondent sent a letter dated 15<sup>th</sup> July 2014, received by the applicant's bankers on 31<sup>st</sup> July 2014, recalling a bond between the applicant and its bankers for alleged nonpayment of excise duty. It was upon the said letter being forwarded to his firm that the petitioner's counsel perused the court file and learnt the petition dated 18<sup>th</sup> June 2012 had been dismissed, and that the letter was premised on the said dismissal.

10. He avers that there was no deliberate failure to prosecute the matter as pursuit of an out of court settlement which the parties were engaged in is also part of the legal process recognized by the court.

11. The respondents oppose the application and have filed an affidavit sworn by their Counsel, Ms. Rosalie W. Ngugi, on 17<sup>th</sup> September 2014. Ms. Ngugi deposes that the petitioner, which had been granted conservatory orders in June 2012, was directed to file submissions on 26<sup>th</sup> September 2013 after the respondents had filed their responses to the petition, but did not; had not moved with the prosecution of the matter but had continued to enjoy conservatory orders while holding much needed government revenue of Ksh 90,875,154.00.
12. It was her submission that the petitioner had been moved to act by the dismissal of the petition; that Article 159(2)(b) of the Constitution requires that matters be dispensed with without delay; and that by delaying the prosecution of the petition, the petitioner was committing an injustice against the respondents. Ms. Ngugi denied that there were any out of court negotiations in the matter, but that there had been negotiations between the petitioner and the respondents in other cases.
13. Having read the application and the affidavit in support, as well as the affidavit in opposition to the application, and having heard the parties' respective counsel, I take the following view.
14. First, I observe from the copy of the notice to show cause in the court file that while it was served on the respondents, it was not served on the petitioner. It is a cardinal tenet of natural justice that a party ought to be given a hearing before adverse action is taken against it. The right to a hearing is enshrined in our Constitution at Article 50. Thus, in so far as the petitioner was not served with the notice to show cause why the petition should not be dismissed, it has a basis for seeking the exercise of the court's discretion in its favour.
15. I have also considered the reasons given for the failure to proceed with the petition. I note the exchange of correspondence between the parties. In particular, I have noted the letters dated 20<sup>th</sup> July 2014 which appears to be in response to a letter from the respondents, which alludes to matters under discussion between the parties, and reminds the Relationship Manager, Top 25 Taxpayers Sector of the Kenya Revenue Authority, that he has omitted the present petition and the matter with which it was consolidated, JR 82 of 2012. I have also noted the exchange of correspondence between the parties' Advocates dating back to 2013.
16. The picture that emerges is of parties engaged in some negotiations over court matters. While it is quite conceivable that the matters under discussion did not include the present petition, it is more probable that the parties were negotiating all matters in dispute.
17. At any rate, given the fact of non-service of the notice to show cause coupled with the correspondence presented before the court, it is my view that the interests of justice demand that the present petition be reinstated.
18. In the circumstances, I allow the application dated 12<sup>th</sup> August 2014 and issue the following orders:
  - i. ***That the petition dated 18th June 2012 is hereby reinstated;***
  - ii. ***That the conservatory orders issued by this Honourable Court on 19th June 2012 is also hereby reinstated;***
  - iii. ***That the parties shall negotiate a settlement of the issues raised in the present petition and Judicial Review Application No. 82 of 2012 or proceed with the prosecution of the consolidated matter within the next sixty(60) days from the date hereof failing which the petition shall stand dismissed.***
19. It is so ordered.

**Dated, Delivered and Signed at Nairobi this 14<sup>th</sup> day of October 2014**

**MUMBI NGUGI**

**JUDGE**

**Mr. Macharia instructed by the firm of Mbugwa Atudo Macharia & Co. Advocates for the applicant**

**Mrs Ngugi instructed by the Kenya Revenue Authority for 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

**Ms Makori Litigation Counsel instructed by the State Law Office**