



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 432 OF 2008

JOHN MURUARU MAINA.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

LUCY WANGARI IRUNGU.....2ND DEFENDANT/RESPONDENT

RULING

1. This is an old matter, filed on 4th August 2008. It has not been heard on merit.
2. Five (5) years after it had been filed a Notice of Motion dated 16th May 2013 was presented by the Plaintiff for the following orders:-
 1. That leave be granted to the firm of Koceyo & Company Advocates to come on record for the Plaintiff in the place of Mangerere & Company Advocates.
 2. That Court set aside the Ruling and order made on 18th November 2011 dismissing this suit for want of prosecution and reinstating the suit for hearing.
 3. That leave be granted to the Plaintiffs/Applicants to amend their Plaintiff in terms and to the extent of the annexed Draft Amended Plaintiff.
 4. That cost be in the cause.
 5. That the draft amended Plaintiff be considered duly filed upon payment of the requisite Court fees.
3. That Application came up for hearing almost a year later on 7th May 2014. The record of that day shows that the matter was before Gikonyo J but the applicant's Counsel was not present to prosecute the application. Upon request by Counsel Mulama acting for the 1st Defendant, the Judge dismissed the application of 16th May 2013.
4. Just a day after, the current application was filed and seeks the reinstatement of the dismissed application and implores that it be heard on merit. In a short affidavit, Counsel Timothy James Ilako explains his absence from Court at the time the matter was called up. He avers:-

[2] That the matter was present in Court on the 7th May, 2014 when the application dated 16th May 2013 came up for hearing but I was held up in another matter only to come back and find that the matter had been called and dismissed for non-attendance.

[3] That the matter INDUSTRIAL CAUSE NO. 29(N) OF 2010 ALICE NJOKI MIRINGU –VS- BARCLAYS BANK LIMITED by which I was held up was coming up at 9am but the Judge came in later than expected. (Attached is a copy of the cause list and diary for 17th May, 2014 marked "TII").

5. The application was filed promptly, a day after the dismissal. The promptness is a plus for the Applicant.

6. As for the reason for his absence, Counsel has attached the cause list of Judge Nzioki Wa Makau of 7th May 2014 showing that he had an application in 29(N)/2010 Alice Njoki –vs- Barclays Bank of Kenya before the Judge. I do not have evidence to the contrary and I believe him.

7. Yet to this explanation the 1st Defendants Counsel retorts:-

“Whereas this might be the case, we can’t help but point out that the Plaintiff himself was not present in Court on the said date at least to inform the Court that his advocate was held up in another matter.

Given the high stakes in the matter, a keen litigant would ordinarily be present to ensure an application like the one dated 16th May 2013 is prosecuted and not dismissed for non-attendance”.

8. Human is to error and as there is no evidence that the indiligence was systemic, this Court will excuse it.

9. This Court is then told that it has taken over 5 years to prosecute the instant application but there is nothing to demonstrate that the Applicant is to blame for the delay.

10. This Court is inclined to allow the application of 6th May 2014 and I hereby do so with costs to the Applicant.

Dated, Signed and Delivered in Court at Nairobi this 13th Day of March 2020

F. TUIYOTT

JUDGE

PRESENT:

Ms Mirichi for Plaintiff/Applicant

No appearance for Defendant

Court assistant: Nixon