



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 434 OF 2012**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**- V E R S U S -**

**RONALD N. OKERO.....RESPONDENT**

*(Being an appeal from the ruling of the Hon. Mr. Charles Obulutsa SPM in Milimani CMCC no. 1006 of 2005 delivered on 19<sup>th</sup> July 2012)*

**JUDGEMENT**

1. Cooperative Bank of Kenya Ltd, the appellant herein, filed a suit before the Chief Magistrate's Court, Milimani against Ronald N. Okero, the respondent herein, claiming to be paid ksh.117,481.77 plus costs and interest. The claim is said to have arisen out of the respondent's use of the appellants credit card no. 4407820000004285. The respondent filed a defence to deny the appellant's action. The appellant thereafter applied for the respondent's defence to be struck out. The application dated 11.1.2006 was strenuously opposed by the respondent. The main ground raised and argued was that there was a receiving order in respect of the estate of the respondent made in 2004 vide Bankruptcy Petition no. 84 of 2004 which the respondent failed to disclose its existence. The aforesaid petition was eventually dismissed on 10.6.2011 for want of attendance by the respondent for public examination. The consequence of the dismissal order is that the receiving order was lifted thus opening the way for the appellant to prosecute the application for summary judgment. The appellant avers that it could not prosecute the aforesaid application because the court file could not be traced thus occasioning a delay. The appellant was prompted to visit the court registry to peruse the court file, when Ms Kenya Shield Auctioneers visited the premises to execute a warrant of attachment on 8.12.2012. Upon perusal, the appellant discovered that the suit before the subordinate court had been dismissed for want of prosecution *suo-moto* on 16.10.2010 pursuant to the provisions of Order XVI rule 6 of the Civil procedure Rules. The appellant thereafter filed an application dated 13.2.2012 in which it sought for inter alia the orders and decree made on 7.9.2011 and on 16.4.2010 to be reviewed and set aside. It also sought for an order to reinstate the appellant's suit for hearing on its merits and for an order seeking for a refund of the money paid as costs and auctioneer charges. The aforesaid application was dismissed on 19.7.2012. The appellant being aggrieved preferred this appeal.

2. On appeal, the appellant put forward the following grounds:

***1. The learned trial magistrate erred in law and in fact in failing to find that the appellant had on a balance proved that there were sufficient reasons to warrant a review and setting aside the decree and orders of the court dated 7<sup>th</sup> September 2011.***

***2. The learned trial magistrate erred in law and in fact in failing to find and hold that there was***

*an error apparent on the face of the record warranting the review and setting aside of the decree and orders of lower court dated 7<sup>th</sup> September 2011.*

*3. The learned trial magistrate erred in law and fact in failing to find that the respondent was wholly responsible for the delay in prosecuting the suit by obtaining a receiving order against himself and thereafter failing to appear for public examination.*

*4. The learned trial magistrate erred in law and in fact in holding that the respondent was entitled to apply for costs without any notice to the appellant long after the dismissal of the suit by the court on its own motion.*

*5. The learned trial magistrate erred in law and in fact in failing to find and hold that the order for costs was made without jurisdiction and the subsequent execution proceedings were null and void abinitio and ought to have been set aside as a matter of justice and equity.*

*6. The learned trial magistrate erred in law and fact that the appellant was guilty of laches.*

*7. The learned trial magistrate erred in law and fact in dismissing the appellant's application for review which decision was wholly against the weight of the evidence.*

3. When the appeal came up for hearing, learned counsels, recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments presented before the trial court. I have further considered the written submissions. Though the appellant has put forward a total of seven (7) grounds of appeal, I am of the considered view that the appeal may actually be determined by a singular point answering the question as to whether or not there were sufficient grounds before the trial court to enable the court to review and set aside the order dismissing the suit issued on 16.4.2010. It is the submission of the appellant that there were sufficient reasons to warrant the subordinate court to issue an order for review. The appellant submitted that the respondent brought to the attention of the appellant and the court of the existence of the receiving order vide his replying affidavit sworn on 6<sup>th</sup> February 2006 and served upon the appellant on 18.4.2006, the day when the appellant's application seeking for the defence to be struck out and for entry of summary judgment. The appellant further argued that it is on account of replying affidavit that the application dated 11.1.2006 was adjourned generally on 18.6.2006. It is the submission of the appellant that no proceedings against the respondent could continue when the receiving order was in force hence its failure to prosecute the suit was beyond the appellant's control.

4. The respondent on the other hand is of the view that the subordinate court was right and well within the law to dismiss the suit for want of prosecution. The appellant further argued that the appellant had the option of filing a fresh suit in terms of Order XVI rule 6 of the Civil Procedure Rules (now repealed).

5. After a careful consideration of the rival submissions it is clear in my mind that there exist certain facts which appear undisputed. First, that at the time of dismissing the suit for want of prosecution, the receiving orders was still in force. In his ruling, the trial court acknowledged that the suit was actually dismissed *suo moto* at the time when the receiving order was in place. This fact was brought to the attention of the subordinate court when the application for review came up for hearing but the trial magistrate instead concluded that the appellant/applicant did not demonstrate that the prejudice he would suffer if the order sought was denied. After a careful re-evaluation of the material placed before the trial court, I have come to the conclusion that the learned Principal Magistrate did not properly exercise his discretion when he dismissed the application for review. The appellant had ably explained the reasons why there was delay in prosecuting the suit. It was clear that a receiving order was in existence forcing the hearing of pending application and the suit to be adjourned. Basically there was an explanation that the delay to prosecute the suit was occasioned by the parallel bankruptcy proceedings relating to the lifting of the receiving order. This court had the occasion to determine a near similar matter, in **National Bank of Kenya Ltd =vs= Japheth Magut (2014) eKLR** in which the High Court reviewed and set aside an order for dismissal which had been issued during the existence of a receiving order.

6. In the end, I am convinced that the trial court committed an error in dismissing the application for

review. There was clear evidence that the delay in prosecuting the suit was due to the existence of the receiving order obtained by the respondent. I find this appeal to be meritorious on this ground.

7. Consequently, the order dismissing the application is set aside and is substituted with an order allowing the motion dated 13<sup>th</sup> February 2012. The decree or order issued by the trial court on 7.9.2011 is set aside and the appellant's suit is reinstated to be heard on its merits on priority basis by another magistrate of competent jurisdiction other than Hon. Obulutsa. The appellant is awarded costs of the appeal.

Dated, Signed and Delivered in open court this 27<sup>th</sup> day of January, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent