

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT 46 OF 1998

NATIONAL BANK OF KENYA PLAINTIFF

VERSUS

PAUL KIPTIGIN SITIENEI DEFENDANT

RULING

The suit by National Bank of Kenya Limited (“the bank”) against Paul Kiptigin Sitienei was dismissed on 14/1/2004 under Order IXB rule 4 (1) of the Civil Procedure Rules (‘CPR’), which stipulates that “*if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.*”

The bank is now back in court in an application which was filed on 13/6/2006 and in which it seeks an order to set aside the aforementioned order of dismissal and orders consequential thereto. It also prays that if the above prayer is granted, then a sum of K.Shs. 75,000/- which it had deposited as security in this court for a grant of stay of execution, be released to it.

It bases its application on the grounds that it was not aware that the suit had been fixed for hearing on the said date and it attributes the blame to its counsel who failed to advise it, or even to attend court on the appointed day, and it contends that mistakes of its counsel should not be visited upon it.

Mr. Mitei, who appeared for the bank urged the court to find that the delay in preferring this application has been only for one year, but that it had been explained by the fact that his client only became aware of the dismissal of its suit in November 2004, after which it instructed his firm of advocates on 17/1/2005. Though he refers to an order of 4.1.2004, I will assume that it was a typographical error as the contentious order was actually made on 14.1.2004.

Miss Wambua, who appeared for Sitienei urged the court to dismiss the application as the suit was dismissed for want of prosecution, on a day which had been fixed by its counsel, who had served her firm with hearing notices. In her view, a delay of two and a half years is inordinate and the bank had not advanced any good reasons, for the said delay, to warrant the granting the orders which it seeks.

She urged the court to find that her client stands to be prejudiced if the orders which they seek were to be granted.

In an application of this nature, the duty to explain the delay and to persuade the court that it had good reasons for failing to attend court on the date when the suit was listed for hearing, and secondly for the delay in preferring an application to set aside the order of dismissal lies on the applicant. Indeed this is the gist of Order IXB rule 8 of the CPR, which stipulates that “*where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such term are just.*”

The banks pleadings reveal that despite having learnt of the dismissal of its suit in November 2004, it did not take any action until after the expiration of three months, when it decided to instruct the firm of Yano & Company to act on its behalf. But even then, and assuming that the matter was being treated with the seriousness that it deserved, no further action was taken until 16/6/2006. even assuming that the initial delay of nine months could have been explained by the fact that the counsel who had originally acted for

it had chosen to remain mum and not to inform it of what had transpired in court on 14/1/2004, in my humble opinion the reasons which the bank advances now are not convincing, for it has not shown at all why it took a further seven months to move this court. True enough, the mistakes of counsel should not be visited upon his client but justice demands that both parties be treated fairly, and that the court exercises its discretion judicially.

In my view, the respondent who has assumed that this matter ended in his favour over 30 months ago, stands to be prejudiced if I were to grant the orders which the bank seeks, for it is trite that litigation has to come to an end. In any event, I hold the view that a litigant who finds himself in the position, in which the bank is in, has a right to demand that its counsel indemnifies it for his negligence. It would not be for the respondent to take the brunt of that negligence.

I do in the circumstances find that this application is devoid of merit and I do dismiss it with costs.

Dated and delivered at Eldoret this 31st day of October 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Miss Wambua for the defendant/respondent

Mr. Maina for the plaintiff/applicant