



REPUBLIC OF KENYA



KENYA LAW
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**Kiplangat v Family Bank Limited; Ray Stores Limited (Interested Party)
(Civil Case 5 of 2017) [2024] KEHC 2459 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE 5 OF 2017
JK SERGON, J
MARCH 12, 2024**

BETWEEN

PETER KIPLANGAT PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

AND

RAY STORES LIMITED INTERESTED PARTY

RULING

1. The application coming up for determination is a notice of motion dated 21st July, 2021 seeking the following orders;
 - (i) Spent
 - (ii) That pending inter partes hearing of this application the orders issued on 16th July, 2021 be reinstated.
 - (iii) That the firm of F.C Bor & Company Advocates, Kion-eei Plaza P.O. Box 142-20200 Kericho be granted leave to come on record in place of the firm of M/s Mitey & Associates, Centenary House 4th Floor, Ring Road off Waiyaki Way P.O Box 13731-00800 Nairobi.
 - (iv) That the order made on 20th June, 2023 dismissing the suit herein be set aside, reviewed and/or varied.
 - (v) That costs be in the cause.
2. The application is supported by grounds on the face of it and the supporting affidavit of the plaintiff/applicant herein.



3. The applicant deponed that he instructed the then advocates on record, the firm of M/s Mitey & Tonui Advocates to institute and prosecute the instant suit, upon filing the suit he was assured that the matter was being prosecuted accordingly.
4. The applicant deponed that he was surprised to learn that the suit was dismissed on 20th July, 2023 and he was not informed by the advocate on record at the time.
5. The applicant deponed that he was duly informed that the mistakes of an advocate should not be visited on a client and he therefore urged the court to reinstate the suit as it revolves a land parcel and considering the emotive nature of land disputes, he maintained that he should be allowed to ventilate his claim thereby bringing the dispute between him and the respondent to an end.
6. The respondent filed a replying affidavit which was sworn by Sylvia Wambani an Advocate employed by Family Bank Limited, the Defendant/Respondent herein.
7. The respondent set out a brief factual background and chronology of events in the instant suit which is as follows; the instant suit was filed by the applicant sometime in 2017 concerning a facility in arrears that continues to accrue interest to the detriment of the respondent herein and further to this the applicant had obtained interim orders which occasioned further loss to the respondent. The matter was set down for hearing on 20th June, 2023 and a hearing notice physically served upon the applicant's advocates and an affidavit of service filed. When the matter came up for hearing of the main suit, the matter did not proceed as the Plaintiff and his Counsel were not present in court, the court therefore proceeded to dismiss the suit with costs to the defendant and interested parties.
8. The respondent contended that the failure to attend court for hearing of the main suit was contemptuous on the part of the applicant and shows disregard for the court's time and resources and therefore the applicant ought not to be granted leniency for his indolence.
9. The respondent reiterated that the facility in issue is in arrears and continues to accrue interest at the default interest rate to the detriment of the respondent and its depositors, further to this the applicant continues to derive benefit from interim orders further prejudicing the respondent.
10. The respondent was adamant that the instant suit has been pending for six (6) years which is unconscionable. The respondent maintained that this court ought to uphold the sanctity of commercial transactions that are proper in both form and substance.
11. The respondent deponed that the applicant's delay in prosecuting his claim was causing apprehension and that as a banking institution it is conscious of its regulatory obligations and the need to safeguard the interests of its depositors.
12. The respondent deponed that if this court were so inclined to indulge the applicant then, it was just and fair that punitive thrown away costs be awarded to themselves taking into account the time spent in litigation, inconvenience and the negative impact on its operations.
13. The respondent therefore urged the court to dismiss the instant application with costs on account of the inequitable conduct of the applicant.
14. The interested party filed a replying affidavit sworn by Amrishbai Patel the Managing Director of Ray Stores Limited, the interested party herein.
15. The interested party deponed that his advocates on record received a hearing notice that this suit was fixed for hearing on 20th June, 2023. He further deponed that he was reliably informed by his advocates



- that the applicant's advocate was served with the same hearing notice and an affidavit of service filed on record.
16. The interested party deponed that there is no plausible explanation advanced for the failure by the applicant or his advocate to attend court. The interested party further deponed that there was no material on record to show that the failure to attend court was due to mistake of counsel and further that without an affidavit from the advocate explaining the circumstances and the reasons that made him fail to attend Court, the allegation was hollow.
 17. The interested party deponed that there was no evidence on record by the applicant categorically stating the steps he took as a litigant in this case to ensure that he was always kept abreast of the developments in this case.
 18. The interested party deponed that pursuant to the dismissal of the suit on 20th June, 2023 the suit property Land Parcel No. Kericho/Municipality Block 1/335 was transferred in the interested party's name.
 19. The interested party deponed that the firm of M/s F.C Bor & Company Advocates cannot be heard on the prayer to set aside the orders made on 20th June, 2023 dismissing the suit as they are not yet on record and that the only viable prayer that could be entertained by this court is the prayer seeking leave to be allowed to come on record to represent the applicant.
 20. The court directed the parties to file written submissions. The respondent complied and filed written submissions which I have considered.
 21. The respondent contended that the duration the applicant had taken to prosecute their claim was excessively protracted. The inordinate delay in prosecution of the suit considering the complexity of the matter which involved financial obligations, was detrimental to the respondent. Furthermore, the application for reinstatement was filed after a significant period following the dismissal of the suit. The respondent cited the case of *Mwangi S. Kimanyi v Attorney General & Another (2014)* eKLR where the court addressed itself as to what constitutes inordinate delay, the court observed as follows; "There is no measure of what amounts to inordinate delay, inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given of the delay; and so on and so forth. "
 22. The respondent contended that the explanation for the delay was not sufficient, the respondent faulted the applicant for failing to provide record of meetings, correspondence and any other form of engagement with their previous advocate to support his case. Furthermore, the mere assertion of personal circumstances without tangible evidence of corroboration did not alleviate the applicant's responsibility to actively participate in the proceedings of his case. The respondent relied on the case of *Cherutich v Mburu & 5 Others (2013)* eKLR whereby the court stated that a case belongs to a client and not a lawyer.
 23. The respondent faulted the applicant for abusing the court as an institution and its processes, the respondent reiterated that the applicant after successfully obtaining interim orders from this court rested on his laurels and attempted at defeating the hearing date set for the main suit by ignoring and/or refusing to attend court, which was tantamount to abuse of court process.
 24. The respondent reiterated that should the court be inclined to allow the application for reinstatement, the applicant should bear the consequent costs arising from non compliance, the respondent proposed an award for throw away costs amounting Kshs. 50,000/= payable within seven (7) days which would serve as a palpable reminder of the need for litigants to prosecute their cases with the seriousness and alacrity they demand. The respondent relied on the case of *Millicent Wamaita Njogu v Pauline*



- Nyambura Waweru (2022)* eKLR where the Learned Judge held that throw-away costs are not merely symbolic but are intended to serve as substantial indemnity costs and that these costs are awarded to compensate for wasted time and the resultant resources that will be duplicated upon rescheduling of the trial.
25. I have considered the pleadings and the submissions by the parties and the main issues for determination by this court is whether to set aside the orders issued by this court on 20th June, 2023 and reinstate the substantive suit for hearing and whether to allow the Firm of M/s. F.C Bor & Company Advocates to come on record on behalf of the applicant.
 26. On the issue of delay, On one hand, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and 1B, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant in this respect. On the other hand, section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. The reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another & another [2018]* eKLR by Mulwa J., where the court stated as follows on the matter of discretion; “ The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
 27. In this matter, I am not entirely convinced by the arguments put forward by the applicant to explain non-attendance in court as and when required, and generally the failure to have the matter prosecuted since 2017 when it was filed. I wish to highlight the fact that the applicant did not furnish this court with credible evidence to demonstrate that the failure to attend court was due to mistake of counsel. He also failed to present evidence of the steps he took as a litigant in this case to ensure that he was always kept abreast of the developments in the instant suit.
 28. I have taken note of the averments by the interested party in their replying affidavit, they stated that as a result of the order dismissing the instant suit for want of prosecution on 20th June, 2023, the suit property Land Parcel No. Kericho/Municipality Block 1/335 was subsequently transferred in the interested party’s name. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another [2004]* eKLR the court observed as follows: “ I must say that the Courts are under a lot of pressure from backlog and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”
 29. On the issue as to whether the firm of Firm of M/s. F.C Bor & Company Advocates is to be granted leave to come on record, the answer is in the affirmative, a litigant is entitled to the legal representation of choice. In *Miriam Mbeke Nyamasyo & others v Dishon Odhiambo & others [2022]* eKLR the Learned Judge observed as follows; “I agree with the principle that a litigant is entitled to representation of his choice. The litigant has a right to choice of counsel, which includes the right to appoint counsel in the first instance, and also the right to change that counsel.”
 30. Consequently, the notice of motion dated 21st July, 2021 partially succeeds to the extent that the Firm of M/s. F.C Bor & Company Advocates is hereby granted leave to come on record on behalf of the



applicant in place of M/s Mitey & Associates. The prayer seeking to set aside the order dismissing the suit made on 20th June, 2023 is refused, thus the suit remains dismissed.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 12TH DAY OF MARCH, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Ngui for Defendant

No appearance for the Plaintiff

