



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Commercial Bank Limited v Orapa & another (Civil Suit 569 of 2014)  
[2023] KEHC 29 (KLR) (Commercial and Tax) (13 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 29 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 569 OF 2014  
A MABEYA, J  
JANUARY 13, 2023**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**AND**

**JOHN MOSES ORAPA ..... 1<sup>ST</sup> DEFENDANT**

**SALOME SAFO MWAURA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. There are two applications by the plaintiff before court for consideration. The first one is dated 4/3/2022 and seeks the setting aside of a dismissal order made on November 11, 2021 while the second one is dated 17/3/2022 and seeks a stay of execution.
2. The first application was brought pursuant to sections 1A, 1B & 3A of the *Civil Procedure Act*. In it, the plaintiff sought that the order made on November 11, 2021 dismissing the suit for want of prosecution be set aside and the suit be reinstated for hearing.
3. The application was premised on the grounds that the plaintiff instituted this suit against the defendants *vide* a plaint dated 5/12/2014 for Kshs 13,023,170.44 and costs of the suit. That the court dismissed this suit for want of prosecution on November 11, 2021.
4. The plaintiff contended that neither itself nor its advocates was served with a notice to show cause. That the advocate who was in charge of this matter left the law firm of the plaintiff's advocates and did not handover therefore the matter was not prosecuted expeditiously. That it only discovered that the suit had been dismissed on 24/2/2022 while in the process of filing an amended plaint.
5. *Vide* a replying affidavit sworn on 22/3/22 by their advocates on record, the defendants opposed the two applications.



6. It was averred that this suit was filed in 2014. That there were no steps taken to prosecute the same since June 2018. That the plaintiff was duly served with the defendants' application to dismiss the suit for want of prosecution which clearly indicated the date of the hearing as November 11, 2021.
7. That on November 11, 2021, the date of the hearing, the plaintiff's advocate failed to appear despite the fact that they were duly served. That the bill of costs, notice of taxation and ruling date on the taxation were all duly served on the plaintiff *vide* its advocate's email address but they also failed to appear in court.
8. The court has considered the parties' contestations. Order 17, rule 2(1) of the [Civil Procedure Rules](#) provides: -
 

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”
9. *Vide* a ruling dated on November 11, 2021, the court dismissed this suit for want of prosecution. Before that ruling, the court noted that there was on record an affidavit of service for the application dated 2/8/2021 which indicated that the plaintiff was properly served on 1/11/2021. As the application was unopposed, the court proceeded to allow the same and dismissed the suit.
10. In an application to set aside an *ex-parte* order, the principles applicable are; the reason for failure to attend court and whether the application has been made timeously. Further, in an application to reinstate a dismissed suit for want of prosecution, made *ex-parte*, the court has also to consider if any cause is shown.
11. In the present case, the reason given for non-attendance is that, neither the plaintiff nor its advocates was served with notice to show cause. Further, that the advocate who was in charge of this matter left the plaintiff's advocates law firm and did not handover leaving the matter to be unprosecuted.
12. On their part, the defendants argue that the plaintiff's advocates were duly served with the application to dismiss the suit, the bill of costs and the notice of taxation but the plaintiff was a no show.
13. The court has seen annexure “JOW1” attached to the defendants' replying affidavit. It is the application for dismissal of suit for want of prosecution. It is stamped with a received stamp by the plaintiff's advocates on 1/11/2021. The application indicated that the dismissal hearing would be on November 11, 2021. The record shows that, on that date, the said did not appear in court.
14. Further, there is an affidavit of service sworn on 5/11/2021 indicating that the plaintiff's advocates were duly served with the dismissal application on 1/11/2021.
15. The notice of taxation and bill of costs were served via email to the plaintiff's advocates through the email address [kenyalaw@robsonharris.com](mailto:kenyalaw@robsonharris.com). This is the same email address indicated on the firm's letter dated 18/3/2022 marked as “JOW5” in the defendants' replying affidavit.
16. In view of the foregoing, it is incorrect to state that neither the plaintiff nor its advocates were served with either the application or the hearing date thereof. I find that the plaintiff's advocates were aware of the proceedings but chose not to attend court. Accordingly, there is no good reason advanced as to the failure to attend court on the date of the hearing of the dismissal application.
17. Regarding the delay in coming to court, there has been no explanation. Since all these proceedings were being properly served upon the plaintiff's advocates, there was no good reason why it took the plaintiff



close to 4 months before coming to court for re-instatement. There was in-ordinate delay in applying to set aside the order of November 11, 2021.

18. As regards showing cause, the reason advanced for non-prosecution of the suit was that the advocate in charge of the matter had left the firm without handing over the file. That in my view is no good reason. If an advocate deals with a matter negligently, there is a way to deal with it and not necessarily to upset proceedings that have been conducted in accordance with the law. The plaintiff should seek redress as against its advocate and not to seek to unseat the defendants from their judgment.
19. Equity aids the vigilant and not the indolent. There has been no cause shown to the satisfaction of this court as to why the suit should be reinstated. There was no explanation given as to non-prosecution of the matter.
20. Conversely, the defendants would be prejudiced if this suit is reinstated 8 years after it was filed. They are likely to have challenges in having their witnesses as well as the likelihood of memory loss.
21. In the premises, the application lacks merit and is dismissed with costs to the defendants.
22. The second application dated 17/3/2022 sought a stay of execution of the ruling and/or order made on November 11, 2021. Having found that the first application lacks merit, it goes without say that the second application is spent. The same is also dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JANUARY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

