



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 104 OF 2010

JOSEPHAT NYINGI PETER.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT

RULING

1. The Notice of Motion of 25th January 2021 is for the following prayers:-

1.

2. *That this Honourable Court be pleased to allow the firm of Messrs. Anthony Gikaria & Company Advocates to take over the conduct of this matter on behalf of the Plaintiff/Applicant in place of the firm of Messrs. Mutisya Kiamba & Co. Advocates.*

3. *THAT this Honourable Court be pleased to stay execution of the decree issued on the 10th September 2019 and any other consequential orders issued against the Plaintiff/Applicant, pending the hearing and determination of the application.*

4. *THAT this Honourable Court be pleased to extend time and grant leave to the Plaintiff/Applicant to lodge his Notice of Appeal together with his intended Appeal out of time against the judgment of Honourable Mr. Justice F. Tuiyott delivered on the 19th day of July 2019.*

5. *THAT the costs of this Application be provided for.*

2. The explanation given by the Applicant for the delay in filing the Notice of Appeal is that it was not until 10th January 2021 when his former advocates M/s Mutisya Kiamba & Co. Advocates informed him of the judgment.

3. The Respondent Bank notes that the judgment was delivered on 19th July 2019 and the delay is in excess of one and a half years. The Respondent takes a view that the Applicant is expected to have followed up on the update of his case having testified in Court.

4. The Court agrees with the Respondent that it is the responsibility of a litigant to diligently check on the progress of his/her suit. A responsible litigant does not simply sit back and wait for an update from his advocate. The Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR observed:-

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

5. In the matter at hand the Plaintiff was in Court on 9th July 2018 when he testified in support of his case. On that day, the Plaintiff's case closed and the Defence case set for 13th November 2018. The Defence case proceeded and closed on the scheduled day of 13th November 2018.

6. After Court had given timelines for filing of submissions, the Defendant's Counsel, on 29th March 2019, confirmed to Court that both sides had filed submissions. Judgment was then reserved for 24th May 2019. Judgment was ready on that day but was not delivered because

of the absence of counsel for the Plaintiff.

7. Delivery of Judgment was rescheduled to 23rd July 2019 but the Court was not satisfied with the supposed service of notice on the Plaintiff's counsel. Judgment was eventually delivered on 19th July 2019 in the presence of Mr. Bwire holding brief for Mr. Mega for the Plaintiff.

8. The Plaintiff now states that it was not until 10th January 2021 when he was summoned by his former advocates and informed of the judgment. It does seem irresponsible of the Plaintiff not to inquire of the progress of this suit after testifying on 9th July 2018. He was content to sit back for about one and a half years without making a follow up of his own suit.

9. And even when he says that his visit to his lawyers' offices on 10th January 2021 was prompted by a summons by them, he does not elaborate how he was summoned nor does he provide proof thereof.

10. The manner in which the Plaintiff has conducted himself does not portray him as a diligent litigant. The delay of one and a half years is long and inordinate and the explanation given is not reasonable. The Court is unable to excuse it. To allow the Application for extension puts the Defendant to a risk of further delay in the satisfaction of judgement it holds. This is prejudice to the Defendant.

11. The only prayer that the Court grants in the Notice of Motion of 25th January 2021 is that of prayer 2 allowing the change of advocates, otherwise the other prayers of the Motion are dismissed. Costs to the Defendant.

DATED AND SIGNED THIS 5TH DAY OF JULY 2021

F. TUIYOTT

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2021

D. S. MAJANJA

JUDGE