



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.424 OF 2009

ELIAS MWORORO KAMAU.....PLAINTIFF/APPLICANT

VERSUS

CO-OPERATIVE BANK OF

KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **21st February 2018** by which the Plaintiff/Applicant seeks for orders that:-

“1. The Honourable court be pleased to set aside the orders made on the 17th of February 2014 dismissing the Plaintiff’s suit herein for want of prosecution and be further pleased to reinstate the suit herein on such conditions as it shall deem just.

2. The cost of this Application be in the cause.

The application was grounded upon Sections **1A, 1B, 3A, and 80 of the Civil Procedure Act and Order 12 Rule 7, Order 45, Order 51, Rule 1 of the Civil Procedure Rules 2010** and all enabling provisions of the law and was supported by the Affidavit of **ELIAS MWORORO KAMAU** (The Plaintiff herein) dated **21st February 2018**.

(2) **CO-OPERATIVE BANK OF KENYA**, the Defendant/ Respondent opposed the application by way of a Replying Affidavit dated **21st May 2018** sworn by **LAWRENCE KARANJA**, the Legal officer of said Bank. The court directed that the application be disposed of by way of written submissions. The Applicant filed their written submissions on **18th September 2018** while the Respondents filed theirs on **12th October 2018**.

BACKGROUND

(3) The brief facts of this matter are as follows. On or about **5th May 2009**, the Plaintiff/Applicant purchased from the Respondent Bank, a Bankers cheque in the sum of **Kshs.8,050,000/=**. The cheque was made out in favour of one **JANE NJERI MWAURA**. However despite an equivalent sum having been debited from the Applicants account, when the payee presented said banker cheque for payment the same was dishonoured. The Respondents later explained that they had received a complaint from **Imperial Bank** regarding that cheque and that they had been served with a Court Order dated **11th May 2009** directing the Bank to freeze the cheque.

(4) The Plaintiff then filed this suit on **15th June 2009**, seeking orders that the Bank honour the cheque or in the alternative credit the Plaintiff’s account with the sum of **Kshs.8,050,000/=**. Meanwhile the Plaintiff was arrested in 2009 and was charged with the offence of stealing contrary to **Section 275** of the Penal Code vide **Nairobi CMCC No.1189 of 2009**, which case is still ongoing.

(5) The Plaintiff avers that in **January 2015** he went to the firm of **Wanjau and Wanjau Advocates**, who at the time were acting for him to enquire about the progress of his civil suit. The Plaintiff was informed that the Advocate who had been handling his case had left the firm but a different lawyer had been assigned to proceed with the suit. The Plaintiff says he made several enquiries about her case and was continually assured that his matter was receiving attention from the firm.

(6) In **October 2015** the Plaintiff decided to personally visit the Court Registry to find out for himself why his suit had never been listed for hearing. Initially he was informed that the file could not be traced. Even finally in **December 2017** the Plaintiff was informed that his suit had been dismissed for want of prosecution on **17th February 2014**. The Plaintiff was shocked by this turn of events and decided to instruct

a different lawyer to pursue his claim hence the present application. The Plaintiff avers that his suit was dismissed without his knowledge or involvement and contends that this amounts to a gross violation of his rights as he was condemned unheard.

(7) On its part the Respondent Bank states that after being served with the Plaint and summons in the instant suit they filed a Defence on **13th July 2009**. The Defendant/Respondent then filed an application seeking to have the suit struck out. That application was dismissed vide the Ruling delivered by **Justice J.M. Mutava** on **15th March 2012**. The Judge went on to direct both parties to comply with Order 11 within 60 days.

(8) It was averred for the Respondent that the Plaintiff took no further steps to prosecute the suit so the Respondent filed an application seeking to have the suit dismissed for want of prosecution. This application was allowed on **17th February 2014** and the suit was accordingly dismissed. The Respondent opposes reinstatement of the suit on the grounds that no justifiable cause has been advanced for such reinstatement. The Respondent also states that due to the passage of time they have closed their books on this matter.

ANALYSIS AND DETERMINATION

(9) I have perused and considered the submissions filed in this matter as well as the cited case and the relevant law. The main issues to be determined are:-

1. Is this application properly before the Court?
2. Should the suit be reinstated?

Is the Application competent

(10) The Respondents have submitted that the present application is fatally defective as it has been filed under the wrong provisions of law. The applicants moved the court under **Section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules, 2010. The Respondent contends that the above provisions relate to review of an order as opposed to the **settling aside** of an order which is what the Applicant is seeking. On this ground the Respondents submit that the application is fatally defective and ought to be struck out.

(11) Notwithstanding the fact that the present application may have been premised on the wrong provisions of law, the court has a duty to administer substantive justice in any matter which comes before them **Article 159 (2)(d)** of the Constitution of Kenya, 2010 provides that:-

“(d) Justice shall be administered without undue regard to procedural technicalities.”

The justice of the matter requires that the court determine the application on its merits and not strike the same out on the basis of a technicality.

Should the suit be reinstated?

(12) The Plaintiff/Applicant filed this suit on **15th June 2009**. After that the Applicant was arrested on related criminal charges. The Applicant implies that due to his battling the criminal charge he did not follow up on the suit he had filed. He apparently left it to his advocate to follow up on the matter. As it transpired no steps were taken to set down the suit for hearing. On **14th October 2011** the Defendant filed an application to have the suit struck out for want of prosecution. This application was dismissed vide the Ruling delivered by **Justice J.M. Mutava** on **15th March 2012**. **Justice Mutava** directed both parties to comply with Order 11 within 60 days. Still no steps were taken to have the suit set down for hearing. It was not until almost a full year after the suit had been dismissed for to want of prosecution that the Applicant came to court seeking to have his suit reinstated.

(13) I find that the Applicant has been exceedingly indolent in the pursuant of his claim. The fact that he was facing criminal charges was not a bar to his pursuit of his suit. There is no allegation that the Plaintiff was in custody and therefore due to physical confinement was unable to follow up on his suit. It is apparent that after the suit was filed the Applicant went to sleep and failed to take any action to advance the case. In **RAJESH RUGHANI –VS- FIFTY INVESTMENTS LIMITED & ANOTHER 2016 eKLR** The Court held as follows:-

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

The Court went on to conclude thus:-

“Our re-evaluation of the record leads us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay.”

(14) Similarly in **SAVINGS & LOAN LIMITED –VS- SUSAN WANJIRU MURITU Nairobi Milimani HCCC 397 of 2002**, Hon. **Justice Kimaru** held that:-

“A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole

ground of a mistake by counsel of the litigant on account of such Advocates failure to attend court. It is the duty of the litigant to constantly check with her [or his] advocate the progress of her case.”

(15) The Applicant herein filed his case in **June 2009** and then took no further action. He simply sat back, and waited for his advocates to pursue the suit yet the claim was his. It was he and not his advocate who had a claim against the Defendant. The fact that the Applicant was facing criminal proceedings is not in my view a valid enough excuse for his inaction and indolence. It is only in **January 2015** a full six (6) years **after** filing the suit that the Applicant woke up and decided to start making enquiries from his advocate about the case.

(16) Inasmuch as the Applicant claims to have made several enquiries to his advocate then on record, he has not annexed even a single letter to prove that indeed he made these enquiries. Further the Applicant appears only to have started enquiring about his case in **January 2015** a full six (6) years **after** the suit had been filed. What steps did the Applicant take from **2009** to **2015**. Apparently none. As I have stated earlier the fact that the Applicant was facing criminal charges did not bar him from acting to progress the civil suit.

(17) From the evidence available it is clear that the Applicant took no real steps to prosecute this plaint until **January 2015**. The reasons he had advanced for the failure to pursue his claim are not persuasive at all. They amount to mere excuses. The suit was dismissed in **February 2014**. It was not until one year later that the Applicant apparently woke up from his slumber and decided to investigate the status of his claim. He has not annexed any letters as proof of enquiries that he made to the Court Registry.

(18) The decision of a court on whether or not to reinstate a suit is purely a matter of discretion. The court must in reaching its decision take into account all relevant and pertinent factors. Whereas the **Constitution of Kenya 2010** accords to every citizen the right to be heard, the onus is upon that citizen to pursue that right. In this case the Applicant took no real steps to realize this right. He has now come to court far too late in the day. The bank has indicated that following the dismissal of the suit in **February 2014** they closed their file on this matter and plead that it may not be possible to retrieve the relevant records. Obviously the bank could not have been expected to keep their file active on the off chance that the Applicant would wake up and eventually decide to pursue his claim. I find no compelling reasons to warrant the reinstatement of this suit. Accordingly, I dismiss the Notice of Motion dated **21st February 2018** with no orders on costs.

Dated at Nairobi this14thday of December 2018

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Justice Maureen A. Odera