

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILLIMANI COMMERCIAL COURT
CIVIL APPEAL NO. E099 OF 2024

CO-OPERATIVE BANK OF KENYA LIMITED.....
.....APPELLANT

VERSUS

COAST RAHA LIMITED.....
RESPONDENT

(Being an appeal from the Ruling and Order of the
Magistrates court at Nairobi, Milimanl Commercial Courts (
the Honourable Principal Magistrate B.M Cheloti (PM)
delivered on 23rd October,2023 in Civil Suit No 2214 of
2017)

ARISING FROM

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT OF KENYA AT NAIROBI
CIVIL SUIT, NO 2214 OF 2017

COAST RAHA LIMITED.....
.....PLAINTIFF/RESPONDENT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....
DEFENDANT

JUDGEMENT

A. Introduction

1. This Appeal arises from the ruling of **Honourable B.M Cheloti (PM)** dated 23rd October, 2023, where she dismissed the appellant's Notice of motion Application dated 7th March 2023, where they had sought to dismiss the respondent's suit for want of prosecution/operation of the law as provided for under **Order 17 Rule 2(3),(4) and (5), Order 51 Rule 1 of the Civil Procedure Rules as read with Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 laws of Kenya**. It was their contention therein that, ever since the suit was filed on 30th March 2017, the respondent had not been keen in prosecuting the same and thus had file the first application dated 2nd July, 2019 seeking to have the said suit dismissed.
2. Initially, vide a ruling dated 30th April, 2020 the learned trial Magistrate had refused to grant the dismissal orders and directed the respondent to ensure that they list the said suit for hearing within 90 days. Unfortunately, the respondent had failed to do so, for a period of over two years and nine

months, which delay was inordinate and inexcusable. It was clear that the respondent had lost interest in the suit and therefore it would have been just to relieve the applicant of the burden of this litigation.

3. In response, the respondent filed their grounds of objection dated 13th July 2023, where they held out that striking out the suit was a drastic action of the last resort and they ought to be given a chance to ventilate their case. Secondly, the delay in listing the suit down for hearing within 90 days had been caused by Covid 19 lockdown, which shut down court business. They also pointed out that the appellant too, had a duty to list the matter for hearing but had failed to do so. The motion therefore lacked merit, had been filed in bad faith and constitutes an abuse of the process of the court. They therefore prayed that the said motion be dismissed.
4. The trial court did consider the application, the response filed and held that it is true that Covid 19 pandemic did slow down court operations and that the appellant too, had a duty to set down the suit for hearing instead of relying on the respondent to do so. She therefore found that the Notice of motion application dated 7th March 2023 lacked merit and proceeded to dismiss the same.

5. Being wholly dissatisfied as against the said Ruling/Order the appellant did file this appeal and raised the following grounds of appeal;

a. That the learned Magistrate erred in law in misconstruing the issue for determination in the Appellants Application dated 7th March 2023 that the Appellant was seeking to have the suit dismissed for want of prosecution.

b. That the learned Magistrate erred in law in determining an issue that was not placed before the court for determination that the Appellants Application dated 7th March 2023 was seeking to have the suit dismissed for want of prosecution.

c. That the learned Magistrate erred in law in failing to determine the issue that was placed before the court that the respondent's suit stands dismissed by operation of law.

d. That the learned Magistrate erred in law in misconstruing the principle set out in Nilani Vs Patel (1969) EA 341 enunciating the Appellants duty in the suit to either apply for dismissal or set the suit down for hearing as is convenient.

e. That the learned Magistrate erred in law in finding that the Appellants Notice of Motion Application dated 7th March 2023 was opposed vide grounds of opposition.

f. That the learned trial Magistrate erred in law in setting down the matter for hearing with dates being taken out by both parties in court

6. The Appellant thus prayed that the said ruling be set aside and be substituted with an order allowing the application dated 7th March 2023 with costs to the Appellant.

B. ANALYSIS & DETERMINATION

7. The court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. It is trite law, that the appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in **Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA** held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

8. The only issue for determination in this appeal is whether the trial magistrate exercised her discretion in the proper manner in refusing to dismiss the suit based on the parameters set out

under **Order 17, Rule 2(3),(4) and (5) of the Civil Procedure Act**. The said provision provides that;

Notice to show cause why suit should not be dismissed

(Order 17, Rule 2).

1) 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.

2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

3) Any party to the suit may apply for its dismissal as provided in Sub rule 1.

4) The court may dismiss the suit for non-compliance with any direction given under this Order.

5) A suit stands dismissed after two years where no step has been undertaken.

6) A party may apply to court after dismissal of a suit under this Order.

9. It is clear beyond any peradventure that the respondent despite being granted a second bite to the cherry, when directed to list down the suit for hearing within 90 days failed to do so. Granted that in 2020 the operations of the court were slowed by Covid 19 pandemic shut down, but that only lasted

for a few months. No satisfactory explanation was put forth by the respondent, to explain why they did not set down the suit for hearing for a period of two years and nine months, which period is inordinate and therefore the courts discretion ought not to have been exercised in their favour.

10. The learned trial Magistrate circumvented this issue and failed to make any determination on the same and that was a misdirection that has to be corrected.

C. DISPOSITION

11. The upshot is that this Appeal has merit. The ruling/Order of Hon. B.M Cheloti, Principal Magistrate dated 23rd October, 2023 and delivered in **MILLIMANI COMM CMCC E2214 OF 2023** is hereby set-aside and the Appellants Notice of motion Application dated 7th March 2023 is hereby allowed in terms of prayers (1) and (2).

12. The Appellant will also have costs of this Appeal which is assessed at **Kshs.120,000/=** all inclusive.

13. It is so ordered.

Judgement written, dated and signed at Marsabit this 17th day of MARCH 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of MARCH, 2026.

In the presence of;

N/Afor Appellant

N/Afor Respondent

Mr. JarsoCourt Assistant

ORIGINAL