

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 333 OF 2013**

**ST. ELIZABETH ACADEMY KAREN.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**NATIONAL BANK OF KENYA.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling concerns the Plaintiff/Applicant's Notice of Motion dated 28<sup>th</sup> March 2023. It was filed under Order 45 Rule 1, Order 51 Rule 1, Order 12 Rules 3 and 7 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A, and 63(e) of the Civil Procedure Act, and Article 159(2)(d) of the Constitution.
2. The Applicant seeks leave for M/s Micere Advocates to come on record, stay of execution of the judgment and decree, setting aside of the orders made on 27<sup>th</sup> April 2022 dismissing the suit for want of prosecution, reinstatement of the suit for hearing on the merits, leave to amend the plaint, and costs in the cause.
3. Anne Wado's affidavit supports the application. She states that the suit was filed in 2013 and was scheduled for hearing on 27<sup>th</sup> April 2022. She claims she was not aware of the hearing date because her previous advocates did not update her. She only found out about the dismissal by looking at the court file on 13<sup>th</sup> February 2023. She argues that her failure to attend court was not deliberate. She believes that if the orders are not set aside,

the Plaintiff will face harm and be denied a chance to be heard on the merits.

4. The application is challenged. The Defendant submitted a Replying Affidavit sworn by Christopher N. Maithya, a Legal Officer of the Bank. The Defendant claims that the Plaintiff obtained loan facilities secured by various properties, defaulted, and the Defendant legally used its power of sale. It is stated that the Plaintiff filed many interlocutory applications, which were dismissed, and even attempted an unsuccessful appeal. The Defendant further argues that the Plaintiff repeatedly failed to pursue the case despite being given chances by the Court. This led to the dismissal for lack of prosecution on 27<sup>th</sup> April 2022. The current application is said to be excessive, unfounded, and an abuse of the court process.
5. The application was canvassed by way of written submissions.

### **Analysis and determination**

6. The issues that arise for determination are:
  - i. Whether the Applicant has met the threshold for review,*
  - ii. Whether there is sufficient cause has been shown to warrant setting aside the dismissal, and*
  - iii. Whether the other reliefs sought are warranted.*
7. Order 45 Rule 1 permits review on the grounds of discovery of new and important matter or evidence, error apparent on the face of the record, or any other sufficient reason, provided the application is made without unreasonable delay.
8. The rules governing review were clearly outlined in **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR**. The Court

of Appeal stated that review is not a way for a party to rehearse its case or correct legal errors. It focuses on fixing clear mistakes or considering new evidence that could not have been produced earlier with due diligence.

9. The Applicant has not shown any new and significant evidence or pointed out any obvious mistake on the record. The complaint is mainly that she was not aware of the hearing date because her previous advocates did not inform her. This does not meet the strict criteria of Order 45.
10. Therefore, the request for review under Order 45 is not justified.
11. Order 12 Rule 7 gives the Court the power to set aside or change a judgment or order made in default under fair terms. This discretion aims to enable the Court to deliver justice to the parties.
12. The discretion is unrestricted but must be exercised responsibly. In **Shah v Mbogo & Another [1967] EA 116**, the Court noted that the discretion aims to avoid injustice or hardship from accidents, mistakes, or inadvertence, and not to aid someone who has deliberately tried to obstruct justice.
13. In **Ivita v Kyumbu [1984] KLR 441** the Court indicated that in cases regarding dismissal for lack of prosecution, the test is whether there is enough reason for the delay and if justice can still be served despite the delay.
14. The record shows that this suit was started in 2013 and has been the focus of many interlocutory applications and an appeal. The Defendant's testimony, which remains unchallenged,

indicates that the Plaintiff was given multiple opportunities to pursue the case but did not.

15. The court record confirms that the Plaintiff was granted leniency on several occasions despite a lack of attendance and effort. The dismissal order was made on 27<sup>th</sup> April 2022 because the Court found that the Plaintiff had failed to pursue the case and that no valid reason had been provided for additional delays. The current application was filed on 28<sup>th</sup> March 2023, nearly eleven months later. The provided explanation is that the Applicant only reviewed the court file in February 2023 and faced communication issues with prior counsel
16. While a mistake by counsel may sometimes be a valid reason, it does not apply universally. A litigant should actively pursue their case and cannot fully delegate responsibility to their attorney.
17. Litigation belongs to the parties. A party that files a suit must be diligent. The Applicant has not shown what steps, if any, were taken between April 2022 and February 2023 to follow up on the matter. The delay remains largely unexplained.
18. In **CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No 329 of 2001 [2004] eKLR** the Court of Appeal held that the discretion to set aside is meant to ensure that a litigant does not suffer injustice as a result of an excusable mistake. However, that discretion must not be exercised in favour of a litigant who has failed to demonstrate such a mistake or who has been indolent.

19. The Defendant also claims that the securities have been realized. The Court must consider the potential harm. Reinstating the case after a long wait, especially when securities have reportedly been realized, would significantly harm the Defendant.
20. The overriding objective under Sections 1A and 1B of the Civil Procedure Act obliges the Court to facilitate expeditious and proportionate resolution of disputes. Article 159(2)(d) of the Constitution does not oust procedural requirements nor does it aid indolent litigants.
21. Given all circumstances, I am not convinced that valid reasons have been provided to justify the use of this Court's discretion in favor of the Applicant.
22. On other prayers in respect of the request for a stay of execution, leave to amend the plaint, and leave to prosecute the suit are consequential upon reinstatement. Since reinstatement is not justified, those prayers must also fail.
23. Regarding the change of advocates, permission is typically granted. However, this request is moot due to the dismissal of the substantive reliefs.
24. Accordingly, the Notice of Motion dated 28<sup>th</sup> March 2023 is devoid of merit and is hereby dismissed with costs to the Defendant.

It is so ordered.

**RULING** delivered virtually, dated and signed at **NAIROBI**

This **12<sup>th</sup>** day of **March** 2026.

**P.M. MULWA**  
**JUDGE**

**In the presence of:**

*Mr. Wati* for Plaintiff/Applicant

*Ms. Musau* for Defendant/Respondent

Court Assistant: *Carlos*