



**National Bank of Kenya Limited & another v Foursome Developers Limited & another; Dove Court Limited & 3 others (Proposed Interested Parties) (Civil Case 478 of 1998) [2025] KEHC 9385 (KLR) (Commercial and Tax) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 478 OF 1998**

**AA VISRAM, J**

**JUNE 26, 2025**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**GITHIGIU FARMERS CO. LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FOURSOME DEVELOPERS LIMITED ..... DEFENDANT**

**AND**

**DAVID KIHARA GITONGA AND SIMON PETER KIHARA (SUING AS THE PERSONAL REPRESENTATIVES OF JOHN KIHARA GITONGA - DECEASED) ..... INTENDED DEFENDANT**

**AND**

**DOVE COURT LIMITED ..... PROPOSED INTERESTED PARTY**

**SHABA INVESTMENTS LIMITED ..... PROPOSED INTERESTED PARTY**

**KAMUTHI HOUSING CO-OPERATIVE SOCIETY LIMITED .... PROPOSED INTERESTED PARTY**

**K-REP BANK LIMITED ..... PROPOSED INTERESTED PARTY**



## RULING

### Introduction and Background

1. This suit was dismissed by the court (Mwita J.) on 20<sup>th</sup> July, 2022, for non-attendance when the matter came up for mention for directions. The Plaintiff has now filed a Notice of Motion dated 26<sup>th</sup> July, 2022, seeking to reinstate the suit and to set aside the dismissal order.
2. The Application is supported by the grounds stated on its face and by the affidavits of Obadiah Obed Otuoma, an Advocate having conduct of this matter on behalf of the Plaintiff, sworn on 26<sup>th</sup> July, 2022, and 13<sup>th</sup> November, 2024.
3. The intended 2<sup>nd</sup> Defendant's support the Application through the Replying Affidavit of Simon Peter Kihara sworn on 13<sup>th</sup> December, 2022. The proposed 1<sup>st</sup> Interested Party opposes the Application through Grounds of Opposition dated 22<sup>nd</sup> November, 2022, and 4<sup>th</sup> December, 2023. The Application was canvassed by way of written submissions which are on record.

### Analysis and Determination

2. The principal issue for determination is whether the suit should be reinstated. As submitted by the Plaintiff, such an Application invokes the discretion of the Court, which must be exercised judiciously and in a just manner. In *Shah v Mbogo & Another* (1967) EA 116, Harris J. observed that:-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

2. In applications for reinstatement, the court must weigh whether reasonable grounds have been advanced to justify reinstatement against any prejudice that may be occasioned to the opposing party if such reinstatement were to be granted. It must also bear in mind that dismissal is a draconian remedy that removes a party from the seat of justice, and should therefore be applied sparingly. (See *Ngugi v Thogo* [2021] KECA 88 (KLR), per Nambuye JA.)
4. The guiding principles applicable to applications for reinstatement have been enunciated in numerous authorities. The Court of Appeal in *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] KECA 979 (KLR), reaffirmed the test laid down by Chesoni J. (as he then was) in *Ivita v Kyumbu* [1984] KLR 441, where it was held that: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task where documents or witnesses may be missing and evidence is weakened due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the



plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

5. It is not in dispute that there has been delay in the prosecution of this suit. The issue, however, is whether the Plaintiff has furnished sufficient and justifiable reasons to excuse both the delay and the failure to attend court on the material date. The Plaintiff explains that the non-attendance arose from a mistake in Counsel's diary, as Counsel believed that the matter was scheduled for mention on 26<sup>th</sup> July, 2022, rather than on 20<sup>th</sup> July, 2022. The Plaintiff submitted that this was an honest and inadvertent mistake on the part of Counsel, and that the Plaintiff should not be made to suffer the harsh consequence of dismissal of the suit for what was a genuine error.
6. The proposed 1<sup>st</sup> Interested Party, on its part, opposed the Application on grounds that this Court is functus officio, in light of the consent judgment entered on 7<sup>th</sup> May, 2003, the ruling of Ogola J. dated 29<sup>th</sup> September, 2015, and the subsequent Court of Appeal decision in *Gitonga & another (Suing as the Legal Representatives of John Gitonga Kihara) v National Bank of Kenya Limited & 5 others* [2023] KECA 370 (KLR).
7. Upon reviewing the record, I find that although the Plaintiff has offered a plausible explanation for Counsel's failure to attend court; based on the record before me, I am persuaded that reinstating this suit would serve no useful purpose. This is because the consent judgment of 7<sup>th</sup> May, 2003, effectively compromised the suit. Further, the Court of Appeal in *Gitonga & another (supra)* affirmed this Court's ruling of 29<sup>th</sup> September, 2015, and held that the competing claims as pleaded between the Plaintiff and Defendant had been fully and finally determined by the consent and decree, leaving no live dispute for adjudication. Finally, the appellate court concluded that this Court is functus officio, and that no further issues remain for determination.
8. Moreover, the record shows that while the intended 2<sup>nd</sup> Defendants attempted to impeach the legality and propriety of the consent, the Court of Appeal was not persuaded that the consent was tainted by any illegality, mistake, or misrepresentation. The appellate court held that the intended 2<sup>nd</sup> Defendants lacked locus standi to challenge the consent, and had failed to demonstrate any fraud or illegality warranting its setting aside. Consequently, I do not think that they may re-open a matter before this court that the Court of Appeal has already pronounced itself authoritatively on. The appellate court further noted that the delay by the intended 2<sup>nd</sup> Defendants and proposed interested parties in seeking joinder was inordinate, and their application for joinder was rightly declined by this Court.
9. In light of these circumstances, in my view, the Plaintiff's present Application has been overtaken by events. Reinstating this suit would serve no practical purpose, and would only prejudice the parties given the considerable lapse of time. It is also relevant to note that this matter was filed over 25 years ago and in any event, pursuant to the terms of the consent judgment dated 7<sup>th</sup> May, 2003, this Court is functus officio, and there is no suit properly before the Court for determination.
10. Based on the reasons set out above, I am not persuaded that the Applicant has satisfied the applicable test for reinstatement.

### **Conclusion and Disposition**

11. In the result, the Plaintiff's Application dated 26<sup>th</sup> July, 2022, is hereby dismissed with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> { ^ } DAY OF JUNE, 2025**

**ALEEM VISRAM, FCI Arb**



**JUDGE**

In the presence of;

Court Assistant: Sakina

- .....for 1<sup>st</sup> Plaintiff/Applicant
- ..... for 2<sup>nd</sup> Plaintiff/Respondent
- .....for 1<sup>st</sup> Defendant/Respondent
- .....for Intended 2<sup>nd</sup> Defendant/Respondent
- .....for Proposed 1<sup>st</sup> Interested Party
- ..... for 2<sup>nd</sup> Interested Party
- .....for Proposed 3<sup>rd</sup> Interested Party
- .....for Proposed 4<sup>th</sup> Interested Party

