



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 30 of 2007**

**DAQARE TRANSPORTERS LIMITED.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

The Defendant in this suit has by chamber summons dated 4<sup>th</sup> November, 2007 expressed to be brought under Sub-Sections 3A and 6 of Civil Procedure Act sought the following orders:

1. THAT this honourable court be pleased to strike out the plaintiff's plaint dated 18<sup>th</sup> January, 2007 consequently order the suit to be dismissed in its entirety.
2. THAT the cost of this application be provided for.
3. THAT costs of this application be provided for.

The grounds of the application are those appearing on the face of the application as follows:

- a) THAT the plaintiff's suit is incurably defective, bad in law and offends the mandatory provisions of Section 6 of the Civil Procedure Act cap 21 of the Laws of Kenya as there is a pending suit to wit, High Court Civil Suit No. 541 of 2005 and the plaintiff's said Account No.7175184 is the subject matter in issue in the said suit is substantially the same as that in the present suit.
- b) THAT the Plaintiff's suit is scandalous, frivolous and vexatious.
- c) THAT this amounts to multiplicity of suits between the same parties over the same subject matter.
- d) THAT the Plaintiff's suit is otherwise an abuse of the process of the Court.

The application is supported further by an affidavit sworn by Kennedy O. Ochieng. The application is opposed. A director of the Plaintiff, Abdi Abshur Warsame, has sworn a replying affidavit dated 21<sup>st</sup> January, 2008.

The gist of the application is that the suit as filed offended Section 6 of the Civil Procedure Act in that there was a pending suit, to wit HCCC No. 541 of 2005, in which the account No.7175184 was the subject matter in issue and the issues in both suits were substantially the same. The application annexed the pleadings filed in the previous suit and the orders made by various judges dating as far back as

September, 2005. It also annexed an application made by the 2<sup>nd</sup> defendant therein, who is one of the directors of the Plaintiff company in the instant suit, in which injunctive orders relating to the same account number were sought.

The Respondent has in response deposed at paragraph 4 as follows:

*“4. That the said suit terminated with orders to the effect that I pay the sum of USD 39,000.00, an injunction on accounts numbers 7174242 and 7175184 inter alia, as shown on defendant’s annexure “KO 2(b)”*

There is no reply to that clear averment made that the previous suit has since terminated.

Section 6 of the Civil Procedure Act provides:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

I did call for Milimani HCCC No. 541 of 2005. I found that it was a very huge file with numerous applications filed. There was also a consent order entered between the Plaintiff’s Advocate and the Defendant’s Advocate on 12<sup>th</sup> October, 2005 in which judgment was entered for the plaintiff in terms of prayer 1 of the Plaint. An attempt to have the order set aside was rejected by the court. The effect of the consent order is that the suit has been settled between the Plaintiff and the 1<sup>st</sup> Defendant who is not a party to this suit. In the circumstances the Plaintiff’s averment herein, that the suit was compromised by the parties and concluded, seems to find support in the record of the proceedings. The objective of Section 6 of the Civil Procedure Act is, inter-alia, to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties or parties claiming through them, whose subject matter is directly or substantially the same. It has been argued that the subject matter in both suits is the same and that therefore this suit ought to be dismissed. Section 6 of Civil Procedure Act does not provide for the striking off of a later suit or of its dismissal, if found to be directly or substantially similar as a previously instituted suit. In that regard, the decision of **Ouko J in BERNARD BAYA MWARO VS ORNATO ORARO & ANOTHER MALINDI HCCC NO. 28 OF 2005** was decided per incurium.

I have stated that the previous suit appears to have been compromised. It is true the subject matter in that suit included the account number in issue in this suit. The orders sought in this suit is a Mandatory Injunction while in the previous suit a Mareva Injunction is sought against the Plaintiff herein who is the 2<sup>nd</sup> Defendant in the previous suit, and a party not a party to this suit. The Plaintiff also seeks judgment for a specified sum with interests and costs. I did consider whether the Plaintiff should have anticipated its claim and therefore ought to have amended its pleading to counter claim for what is sought in this suit. In my view, all these considerations are not important, as it does appear that the previous suit was compromised and concluded. Even if it has not been concluded, the most this court can do is to order stay of this proceedings until such time as the court may direct. Since the Applicant has not established any ground to justify the court to invoke section 6 of Civil Procedure Act, the application is dismissed with costs.

**Dated at Nairobi this 12<sup>th</sup> day of March, 2008.**

**LESIIT J**

**JUDGE**

Read, signed and delivered in the presence of:

Mrs. Karani for Applicant

Mr. Mau for Respondent

**LESIIT J**

**JUDGE**