



National Industrial Credit Bank Limited v Barclays Bank of Kenya Limited & another (Civil Case 293 of 2001) [2025] KEHC 1319 (KLR) (Commercial and Tax) (3 March 2025) (Ruling)

Neutral citation: [2025] KEHC 1319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 293 OF 2001
JWW MONG'ARE, J
MARCH 3, 2025**

BETWEEN

NATIONAL INDUSTRIAL CREDIT BANK LIMITED PLAINTIFF

AND

BARCLAYS BANK OF KENYA LIMITED 1ST DEFENDANT

NANCY WAIRIMU MURIITHI 2ND DEFENDANT

RULING

1. This ruling determines the Plaintiff's application dated 16/4/2024. The application is brought pursuant to Sections 1A, 1B, 3A and 27 of the [Civil Procedure Act](#), Order 17 Rule 2(5) & (6) and Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. The orders sought in the application are as follows:-
 - a. By operation of the law and pursuant to order 17 rule 2(5) of the Civil Procedure rules 2010, the 2nd Defendant's counterclaim stood dismissed as of the year 2022.
 - b. The costs of the application be provided for and
 - c. Any such or further reliefs as this Honourable Court may deem fit to grant in the interest of justice.
3. In support of the application the Applicant relied on the grounds on the face of the motion and the supporting affidavit sworn by Gabriel Mwangi of even date. It was the Applicant's position that vide a judgment dated 16/3/2018 the Plaintiff's suit was dismissed by the Court of Appeal and directions were given instructing the 2nd Defendants counterclaim to proceed for hearing before any Judge of the



High Court. That the 2nd Defendant had been inactive since then until recently on 4/3/2024 when she fixed the matter for a mention.

4. According to the Applicant, there had been an inordinate delay which is inexcusable, and pursuant to Order 17 Rule 2(5) of the Civil Procedure Rules 2010, the 2nd Defendants suit stood dismissed since, and two years had lapsed without any action being taken towards its prosecution. Additionally, it was stated that the delay defeated the overriding objective under section 1A and 1B of the Civil Procedure Act CAP 21 Laws of Kenya that the Applicant seeks to invoke.
5. The 2nd Defendant opposed this application via a replying affidavit sworn on 5/7/2024 by Simon Theuri Wanjohi the Advocate in conduct of the matter. He confirmed that the judgment of the court of appeal delivered on 16/3/2018 had dismissed the Plaintiffs claim and ordered the 2nd Defendants counterclaim to be set down for hearing. He stated that the appeal had been active before the Court of Appeal for a period of close to 13 years and during that time there was no action on the counterclaim. Further, he observed that the file could not be traced for them to take the appropriate action. He further attributed the delay to the Covid-19 pandemic which paralyzed the courts operations and that the Advocate had difficulties in mapping the case on CTS. Based on the foregoing, he refuted the claim that the firm slept on the matter rather, he observed that there had been steps taken to prosecute the matter. He therefore averred that the 2nd Defendants counterclaim did not stand dismissed as at the year 2022 as claimed by the Applicant.
6. Parties canvassed the application by way of written submissions which I have duly considered. The Applicant's submissions are dated 22/7/2024 whereas the Respondent's submissions are dated 5/10/2024.
7. The Applicant submitted that under Order 17 Rule 2(5) the dismissal was by operation of the law and therefore judicial discretion was not applicable. Counsel submitted that the Respondent's explanation on the delay was not tenable since the matter had been dismissed by operation of the law. It was submitted that directions had been given with respect to how matter would proceed during the Covid-19 pandemic which had undoubtedly started two years after the pandemic. It was the Applicant's submissions that there was no evidence of any follow up with the Registry and the Respondent ought to have ensured she's diligent in ensuring the claim is not challenged by Order 17 Rule 2(6).
8. The Respondent submitted that the provision relied upon by the Applicant Order 17 Rule 2(5) of the Civil Procedure Rules was brought in as an amendment to Order 17 vide the Civil Procedure (Amendment) Rules 2020. Counsel submitted that the amendment therefore came into operation in 2020 and did not have a retrospective effect. It was submitted that the Covid-19 Pandemic paralyzed court movement and as such practice directions were given. Counsel averred that there were difficulties in tracing the file due to physical restrictions to the court.

Analysis And Determination

9. I have carefully considered the parties' arguments as presented in their pleadings and submissions. The key issue for determination is whether the 2nd Defendant's counterclaim stands dismissed by operation of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010, which states:

“A suit stands dismissed after two years where no step has been undertaken.”

10. In this case, it is undisputed that the Court of Appeal dismissed the Plaintiff's suit and directed on 16/3/2018 that the 2nd Defendant's counterclaim proceeds to hearing. However, the 2nd Defendant



attributes the delay in prosecuting the matter to difficulties in accessing the court file, challenges in case mapping on the CTS system, and disruptions caused by the COVID-19 pandemic.

11. The courts have previously addressed the interpretation of Order 17 Rule 2(5). In *Surya Holdings Limited & 4 others v ICICI Bank Limited & another* (Commercial Case 68 of 2015) [2023] KEHC 22173 (KLR), the court held:-

“From the above provision, I agree with the Defendants that the suit stood dismissed when no steps were taken to prosecute for a period of two years from the last step taken. The last step having been taken on June 15, 2018, the suit stood dismissed on or about June 15, 2020. The proper step the Plaintiffs were required to take was to apply for setting aside of the dismissal order and for reinstatement of the suit.”

12. Similarly, in *Lutta & 2 others v Co-operative Bank of Kenya* (Civil Suit 23 of 2018) [2023] KEHC 19568 (KLR), the court emphasized that:-

“Under sub-rule 5, the suit automatically stands dismissed if it remains dormant for two years. Dismissal under this rule does not require an application, as it takes effect automatically.”

13. Applying these principles to the present case, it is clear that once two years lapse without any prosecutorial steps, the suit is deemed dismissed. The last recorded step in this matter was before the Court of Appeal on 16/3/2018. Under Order 17 Rule 2(5), the counterclaim would have lapsed by March 2020. However, the 2nd Defendant argued that this provision came into effect on 26/2/2020, meaning the earliest the counterclaim could have been dismissed was 26/2/2022.

14. Even considering the 2nd Defendant’s argument, the court notes that more than two years passed after the Legal Notice came into effect, yet no meaningful steps were taken to prosecute the case. The first documented correspondence to the court is dated 28/3/2022, by which time two years had already lapsed since the Legal Notice took effect. Additionally, the affidavit sworn by process server Samuel Karoki, attached to the 2nd Defendant’s replying affidavit, fails to provide sufficient proof of the alleged difficulties in accessing the court file or linking the 2nd Defendant’s counsel to the CTS system.

15. In light of the above, the court is not convinced that the 2nd Defendant made genuine efforts to prosecute its counterclaim before the lapse of two years.

16. Accordingly, the 2nd Defendant’s counterclaim stands dismissed by operation of law under Order 17 Rule 2(5). The application is therefore found to be merited and the same is hereby allowed as prayed. Costs are awarded to the Plaintiff. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MARCH 2025

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Ms. Kaunda holding brief for Mr. Mwangi for the Plaintiff/Applicant.

Mr. Wanjohi for the 2nd Defendant/Counterclaimant.

Amos - Court Assistant

