



**Daqare Transporters Limited v Barclays Bank of Kenya (Civil Case 30 of 2007)
[2021] KEHC 160 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 30 OF 2007
F TUIYOTT, J
OCTOBER 14, 2021**

BETWEEN

DAQARE TRANSPORTERS LIMITED PLAINTIFF

AND

BARCLAYS BANK OF KENYA DEFENDANT

RULING

1. The Application dated 5th September 2020 is brought by the Defendant and seeks the dismissal of this suit for want of prosecution.
2. The Application is anchored on the provisions of order 17 rules (2) and (3) of the *Civil Procedure Rules* which read:-

“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.

Procedure if parties fail to appear on day fixed [Order 17, rule 3.]

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit.”

3. Prior to the filing of the application, this matter was last in Court on 13th July 2018, which would be more than a year before the bringing of the application. The one year threshold of the rule is therefore achieved.
4. The applicant contends that although this matter is more than 13 years old, the suit has never been certified ready for hearing and the plaintiff has not shown any interest in prosecuting it. The defendant thinks the plaintiff to be an indolent litigant. In an affidavit sworn by Dennis Joseck Mare on 5th September 2020 it is deponed that:-

“...The pendency of this suit is detrimental to the Defendant/Applicant as the Defendant/Applicant in view of being indebted to the Plaintiff and that the Defendant/Applicant has deliberately refused to pay the Plaintiff.”

5. In Court, counsel sought to add two more grounds. That the defendant’s witnesses have left employment and that the defendant has over time undergone transformation. The Court will not consider these two additional grounds because they are matters of evidence which cannot be raised from the bar.
6. In a replying affidavit sworn by Suleiman Bashir Warsame, a director of the plaintiff Company, he seeks to explain the inaction that this matter has suffered. In the main, it is that a co-director, one Abdi Abshir Warsame who was personally seized of the matter on behalf of the company, died on 27th January 2018 and for that reason the advocates could not reach him. That after the death of Abdi, he took up the running of the company but was still not aware of this matter until 9th March 2021 when served with a hearing notice to the current application .
7. He pleads with the Court not to grant the orders as the defendant is still keen to prosecute this matter which had certified ready for hearing on 29th June 2016.
8. The delay in the prosecution of this matter is inordinate when one considers that it was filed about over 13 years ago. Whilst the matter was certified ready for hearing on 29th June 2016, the record shows the three attempts at hearing were unfruitful due to reasons attributable to the plaintiff. See Court proceedings of 18/05/2017, 31/10/2017 and 10/4/2018.
9. The only reason given for the current delay is that the director who was seized of this matter passed on 27th January 2018 and Mr. Suleiman Bashir Warsame who is now in charge of the matter was not aware of it. Further, that the advocate was unable to reach them. In considering the merit of those reasons, the Court must give regard to the material already on the record.
10. On 10th April 2018, Mr. Busiega holding brief for the plaintiff’s advocates informed Court that the plaintiff’s case could not proceed because one of its witness Abdi Abshir Warsame had passed on. This was on information they had received the previous day. This is the person who, the court is told, was the director seized of this matter. The source and how the information of the death of the director was given was not disclosed.



11. After a lapse of about 20 months, the Advocates for the plaintiff applied to cease acting through an application of 5th February 2020. In the affidavit in support by George Kithi, the managing partner of the firm of Kithi & Co. Advocates, no mention of that death is made. He deposes:-

“ [5] That subsequent to receiving the Plaintiff’s instructions, efforts by the firm to reach the Plaintiff for further instructions have proved futile since the Plaintiff has never responded to our numerous correspondence regarding the matter herein.

[6] That further, the Plaintiff’s representatives has never made any efforts to visit the firm to check on the progress of his matter.”

12. That firm was granted leave to cease acting on 25th February 2021 but came back on record through a Notice of appointment of 17th March 2021.

13. The Plaintiff in this matter is a limited liability company and not the deceased director. A party to a suit ought to be interested in the progress of his/her action. In this case it is the plaintiff company, not just one director, who ought to have been following up on the prosecution of the suit. It will be a derelict of duty on the part of the current director not to have an interest in this litigation. And I very much doubt that Mr. Sulieman would not be aware that this suit had been filed when the core objective of the suit is to compel the defendant bank to accept him (Sulieman) as a signatory of an account held by the company at the bank. Paragraph 15 of his own affidavit filed in response to the current application is testimony that he could not possibly not have been aware of these proceedings. He depones;

“ 15. The continued delay by the Defendant to effect the requisite changes regarding the signatories has greatly inconvenienced the Plaintiff in its running of its day-today business since the Plaintiff is unable to use and peacefully enjoy the purpose of its account opened at the Defendant for fear of serious financial losses that might be occasioned by the Defendant’s inaction.”

14. Mr. Sulieman was at the very heart of the controversy that is the subject of these proceedings. He confesses that failure to make changes regarding the signatories has caused great hardship to the daily affairs of the company. Is it believable that he would then not be aware of litigation whose objective was to relieve the company of that hardship?

15. The Court does not accept the explanation proffered by the plaintiff and in view of the prolonged and inordinate delay in prosecuting this matter must accede to the request by the defendant. The application dated 5th September 2020 is allowed as prayed. Costs of the application and the suit to the defendant.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

