



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE 66 OF 2005**

**ELEGANT FREIGHTRES LTD..... PLAINTIFF
VERSUS**

ORIENTAL COMMERCIAL BANK LTD

**(FORMERLY THE DELPHIS BANK LTD).....1ST DEFENDANT
NATIONAL INDUSTRIAL CREDIT BANK LTD.....2ND DEFENDANT
INSTORE ROMOTIONS EAST AFRICA LTD.....3RD DEFENDANT**

**BY WAY OF ORIGINAL CLAIM
AND**

ORIENTAL COMMERCIAL BANK LTD

**(FORMERLY THE DELPHIS BANK LTD).....PLAINTIFF
VERSUS**

**ELEGANT FREIGHTERS LTD.....1ST DEFENDANT
KULTAR SINGH HANSPAL.....2ND DEFENDANT
DAVINDER SINGH HANSPAL.....3RD DEFENDANT**

RULING

The 2nd defendant in the counterclaim filed a defence to the counterclaim on 5th June 2009. On 3rd November 2009, the said defendant moved this court by notice of motion purportedly under the provisions of **Order XVI Rules 6** of the **Civil Procedure Rules** seeking the dismissal of the plaintiff's counterclaim on the ground that the plaintiff had failed to take any steps to prosecute its suit for a period of over three (3) years. The said defendant contends that the failure by the plaintiff to prosecute the suit had prejudiced the 2nd defendant and has resulted in the 2nd defendant suffering irreparable damage on account of non-release of the title that is the subject of this suit. The said defendant was of the view that the plaintiff's counterclaim was therefore an abuse of the process of the court and should be dismissed with costs. The application is supported by the annexed affidavit of Alka Roshanal Hanspal, who holds the power of attorney of Kultar Singh Hanspal. The application is opposed. Wilfred Machini, the credit manager of the plaintiff swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Mr. Maobe for the 2nd defendant and by Miss Thuo for the plaintiff in the counterclaim. I have read the pleadings filed by the parties to this application in support of their respective opposing positions. I have also considered the submissions made in court by counsel for the said parties. The issue for determination by the court is whether the 2nd defendant established a case for this court to dismiss the plaintiff's suit for want of prosecution. Having evaluated the facts of this application, it was clear that the 2nd defendant's assertion that the suit has not been prosecuted in the past three years is false. The 2nd defendant filed his defence about five months ago. How can he claim that the suit has not been prosecuted for the past three years yet he was not a party to the suit until about five months ago? I have perused the record of this court. It is evident that the file has been active in the past three years. The 2nd defendant has not concluded discovery. Neither has he filed his list of agreed issues. Under the principles laid down in the case of **Ivita vs Kyumbu [1984] KLR 441**, this is not one of the cases that can be dismissed for want of prosecution as anticipated under **Order XVI Rule 5 & 6** of the **Civil Procedure Rules**.

The application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009.

L. KIMARU
JUDGE