

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

Civil Case 629 of 2002

ALCON HOLDINGS LTD.PLAINTIFF

VERSUS

DELPHIS BANK LIMITED1ST DEFENDANT

FELICITY NYAGA T/A PALAMINO AGENCIES2ND DEFENDANT

RULING

By its application of the 26.5.2005 the Applicant seeks to have the suit herein dismissed for want of prosecution.

The reasons given are that the Plaintiff has failed to take any steps for a period of seven months to prosecute the suit and the subject matter of the suit has been disposed of.

Grounds of opposition have been filed by the Plaintiff/Respondent. It states there is a pending application to consolidate this suit with another and alleged that the affidavit in support of the application by Ravi Patnain is defective as he is an officer of the Oriental Commercial Bank Ltd, which is not a party to the suit. There is also a replying affidavit sworn by the Managing Director of the Plaintiff Company.

The application is brought pursuant to the provisions of Order 16 Rule 5(a), which requires the Plaintiff to set the suit down for hearing within three months after the close of pleadings.

The Applicant is at liberty to make this application as no steps in this suit had been taken for a period of seven months prior to the making of this application. The remedy is, however, discretionary. A court will generally only dismiss a suit if the delay in taking steps to set the suit down for hearing has been so inordinate that the Plaintiff is deemed to have abandoned the suit or the Plaintiff has by its conduct demonstrated that it has no interest in proceeding with the matter.

So far as the objection are concerned the fact that an application has been made subsequent to this application for consolidation of suits is not a sufficient answer to the Plaintiff's failure to set the suit down for hearing. Also the complaint in respect of the supporting affidavit is not merited as the deponent states that his bank is the successor to the 1st Defendant bank.

However, I am not persuaded that the failure to set the suit down for hearing is so inordinate as to make a dismissal order or that the Plaintiff has evinced an intention to abandon the suit.

I order that the Plaintiff do set this suit down for hearing within 14 days from today failing which the suit will stand dismissed.

The applicant will have the costs.

Dated and delivered at Nairobi this 25th day of May, 2006.

P. J. RANSLEY

JUDGE