

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 664 of 2002**

ALFA MOTORS LTD.....PLAINTIFF

VERSUS

TOYOTA EAST AFRICA LTD.....DEFENDANT

R U L I N G

This is an application (by notice of motion dated 17th February, 2005) by the Defendant for dismissal of the Plaintiff's suit for want of prosecution under Order 16, Rule 5(c) of the Civil Procedure Rules(the Rules). Under that paragraph if within three months after the removal of the suit from the hearing list the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal. The Defendant herein has elected the latter option, as it was entitled to do. A supporting affidavit sworn by one **MAHMOOD OMAR**, the general manager, finance and administration, of the Defendant, sets out the history of the suit since its filing to the bringing of the present application.,

The Plaintiff opposes the application upon the various grounds argued in the replying affidavit sworn by the Plaintiff's present counsel **MR. AZIM TAIBJEE**. It is not apparent from the replying affidavit why the same was not sworn by an officer of the Plaintiff especially when it is noted that many of the matters Mr. Taibjee has deponed to occurred before he was appointed to act for the Plaintiff. Except in cases of necessity, an advocate acting in a matter should not swear an affidavit which ought, properly, to be sworn by his client. This is now an established principle in our jurisdiction. It is deponed in the replying affidavit that at some point communication between the Plaintiff and its former advocates broke down and that the Plaintiff quickly appointed the present counsel. It is further deponed that it took some time to retrieve necessary documents from the previous advocates who were unco-operative in the matter. Other reasons for delay are also given in the replying affidavit.

I have read both the supporting and replying affidavits. I have also perused the court record. Finally, I have given due consideration to the submissions of the learned counsels appearing. The suit last came up for hearing on 5th March, 2003. Both learned counsels then present for the parties informed the judge (Nyamu, J.) that the matter was not ready for trial as discovery had not been completed. The suit was in effect removed from the hearing list and stood over generally. The suit has since not been fixed for hearing. The present application was filed on 17th February, 2005.

For nearly two years the Plaintiff did not set down the suit for hearing. The explanations given in the replying affidavit for this long period of apparent inactivity are not entirely satisfactory. But there is a strong plea made that the Plaintiff is desirous of prosecuting the suit. A court of justice will always be reluctant to shut out a litigant from the judgment seat and will endeavor to fully and finally determine the issues between the parties in a proper trial of the action. It is in this spirit that I will refuse the Defendant's application. But this will not be without some penalty to the Plaintiff. That penalty will be two-fold. One, the Plaintiff must pay to the Defendant its costs of this application, hereby assessed at Kshs.25,000/00, within fourteen days from the date of delivery of this ruling. In default the Defendant shall be at liberty to execute for the same forthwith. Secondly, the Plaintiff must within thirty(30) days of delivery of this ruling take concrete steps towards setting the suit down for hearing. In the absence of such steps the suit shall be dismissed. The case shall be mentioned on theday of.....,2005 for this purpose. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2005.

H.P.G. WAWERU

JUDGE