

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

Civil Case 579 of 2002

MECHANICAL ASEMBLY SYSTEMS (K) LTD.....PLAINTIFF

VERSUS

EVEREADY BATTERIES (K) LIMITED.....DEFENDANT

R U L I N G

There has been considerable delay in the preparation of this short ruling. It was occasioned by an oversight in that the file was misplaced and escaped my attention. The delay is regretted.

The Defendant seeks dismissal of the Plaintiff's suit for want of prosecution by notice of motion dated 9th June, 2005. The application is said to be brought under Order 16, rule 5 of the Civil Procedure Rules, but no particular paragraph under that rule has been cited. There are three paragraphs under that rule which set out various circumstances under which a suit may be dismissed for want of prosecution. Different and distinct principles apply to each of them. It is incumbent upon a defendant applying under rule 5 of Order 6 for dismissal of a plaintiff's suit to cite the particular paragraph of rule 5 under which he applies.

Some five grounds for the application are given on the face thereof. Ground (b) is that pleadings were closed on the 8th July, 2002. Under paragraph (a) of rule 5, if within three months after the close of pleadings 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 down the suit for hearing or apply for its dismissal. It has not been stated that the plaintiff failed to set down the suit for hearing within three months of close of pleadings. There is no affidavit filed in support of the application.

Ground (e) states that the Plaintiff has taken no steps for over 25 months to have the suit heard and determined. However, it has not been stated from what event the 25 months run. It is to be noted that if within three months after the removal of the suit from the hearing list (paragraph (c) of rule 5) or adjournment of the suit generally (paragraph (d)) 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's application is defective upon all the parameters set forth above. The fact that there is no affidavit sworn and filed in support of the application has not helped matters. The application being defective, is hereby struck out with no orders to costs as the Plaintiff never filed any papers in response thereto. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 5TH DAY OF MAY, 2006.