



REPUBLIC OF KENYA

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

Civil Case 579 of 2002

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

VERSUS

EVERREADY BATTERIES (K) LTD.DEFENDANT

RULING

The Defendant has brought a Notice of Motion dated 9th May, 2006 which application is brought under Order XVI Rule 5(a) of the Civil Procedure Rules. The Defendant seeks the dismissal of the Plaintiff's case for want of prosecution. The affidavit in support of that application is sworn by the Defendant's counsel. He deponed that the Plaintiff filed this suit on 14th May, 2002. That the claim by the Plaintiff related to the alleged breach of trade mark. The summons in this matter were served on the defendant 27th May, 2002. That on 30th May, 2002 the Plaintiff under certificate of urgency filed an application for temporary injunction in terms of the prayers in the Plaint. That on 21st June, 2002 the Plaintiff filed an amended Plaint. The Plaintiff's application for injunction was finally heard and a ruling was delivered on 31st July, 2002 when the Plaintiff's said application was dismissed. On 26th May, 2003 the Plaintiff filed a list of documents. On 10th June, 2005 the Defendant filed an application under Order XVI Rule 5 of the Civil Procedure Rules. When that application came up for hearing the Honourable Justice Waweru struck it out for being defective on 5th May, 2006. The Defendant's advocate deponed that since the 5th May, 2006 when that ruling was delivered, the Plaintiff had taken no action to set the suit for hearing. That it was now three years since the closure of pleadings and since then the Plaintiff has not taken active role to fix the matter for hearing. The Defendant's counsel in submissions stated that the principles which ought to guide the court are:- (i) the Defendant needs to show delay and (ii) the court needs to consider if that delay is inexcusable. (iii) that the Defendant needs to explain the delay and if he fails the court should dismiss the suit for want of prosecution.

The defendant relied on the case **Ivita v Kyumbu [1984] KLR 441** where the court held:

“The three months limitation period in the Civil Procedure Rules order XVI rule 5 does not apply to a defendant's application to dismiss the suit and the defendant may take out a notice of motion to dismiss the suit for want of prosecution at any time after the three months limitation. A failure to take out such notice early does not prejudice the success of the defendant's application.”

The defendant further relied on the case **Harbinder Singh Sethi v The Standard Limited and another HCCC 314 of 2002 (unreported)** and quoted the following passage:-

“I would have looked favourable to the Plaintiff if an explanation for the failure to fix the suit for hearing had been given, and such explanation should in any event have been satisfactory. The

grounds of opposition filed merely go to technicalities and not the fact of delay.”

Defence counsel submitted that the Defendant had failed to give explanation for the delay in setting down this suit for hearing and that accordingly the suit should be dismissed. He said that the record clearly shows that the plaintiff has no interest in prosecuting this suit and that it does seem that their main interest was in obtaining an injunction which was dismissed. The application was opposed by the Plaintiff's counsel who relied on grounds of opposition that have been filed. The grounds were that;

- 1. The Plaintiff has intention of prosecuting this matter to its conclusion.**
- 2. The defendant had filed a similar application before this Honourable Court which was struck out.**
- 3. That the application is incompetent and fatally defective.**
- 4. The matter has already been adjudicated on and this court is now *functus officio*.**

The Plaintiff's counsel in his submission stated that the Defendant had failed to show what prejudice would be suffered if this suit is not dismissed. He stated that the dismissal of a suit is a drastic action which the court should not entertain because it would deny the Plaintiff an opportunity to be heard. In that regard he relied on the case **Njuki Gachugu v Githi KLR [1977]**.

I have considered the submissions by counsels and the affidavit and grounds of objection. In deed the Defendant had previously filed an application seeking the dismissal of the Plaintiff's suit on the basis that the plaintiff had failed to set the suit down for hearing but that application was struck out by the Honourable Justice Waweru for being defective. The fact that the application was struck out was not a bar to the Defendant to file a fresh application. There would have been a bar if the application had been dismissed. The Defendant's application clearly shows that the Plaintiff has no interest in this suit for indeed for three years the Plaintiff has not set down the suit for hearing. Surprisingly even after the striking out the Defendant's application the Plaintiff was not awoken from its slumber. I am of the view that this application falls squarely within Order XVI Rule 5(a) of the civil Procedure rules and that the suit of the Plaintiff ought to be dismissed for want of prosecution. I therefore grant the following orders:-

- 1. That the Plaintiff's suit is hereby dismissed for want of prosecution with costs of this suit being awarded to the Defendant.**
- 2. That the costs of the application dated 9th May, 2006 are awarded to the Defendant.**

MARY KASANGO

JUDGE

Dated and delivered this 17th October, 2006.

MARY KASANGO

JUDGE