



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 229 OF 2007

ROYNEX CHUMBA.....RESPONDENT/APPELLANT

VERSUS

SUNNY AUTOPARTS (K) LIMITED.....APPLICANT/RESPONDENT

RULING

This appeal was filed on 10/12/2007. To-date, it has not been prosecuted. The Respondent/Applicant filed the application dated 8/12/2010 seeking to have the appeal dismissed for want of prosecution because since, the appeal was adjourned generally on 27/1/2009, it has never been listed for hearing. The application is supported by the affidavit of **Dilipsinh Prabhatsinh Mahida**, counsel who has conduct of this matter on behalf of the Respondent/Applicant, dated 8/12/2010 and a supplementary affidavit dated 30/3/2011. Counsel avers that there are no valid reasons advanced by the Appellant for inaction in this matter and that the appellant never took a hearing date on 15/3/2010 as alleged; that the court diary cannot have been closed by March, 2010; the attempt to fix a hearing date during the pendency of this application was rejected by the Applicant and the appellant has failed to prosecute the appeal.

In opposing the application, **Roynex Chumba**, the Appellant/Respondent, swore a replying affidavit dated 9/3/2011 and a supplementary affidavit was sworn by his advocate, Mr. Gekonga. Both of them deponed that after the case was adjourned, the counsel's clerk informed counsel that the appeal was fixed for hearing on 15/3/2010. It is not until the matter came up on 14/3/2011 that counsel realized that it was not fixed for hearing. Thereafter, he instructed his clerk to take another date but the court diary was already full and on 16/3/2011, the Respondent's/Applicant's counsel refused to attend court to take a hearing date for the appeal. The appellant claims to be ready to have the appeal heard but the Applicant has declined to co-operate.

Contrary to what the Respondent avers, there is no evidence that this appeal was ever fixed for hearing after it was adjourned on 27/1/2009. Counsel has not shown the court any dairy where the hearing date of 15/3/2010 was indicated or if indeed he was informed by his clerk that it was for hearing on 15/3/2010, but counsel did not attend court on that date or take note that no

hearing date had been taken after all and ask the court to fix another date. It is not until the Respondent filed this application. It was about two years since the appeal had been adjourned. So far, there is really

no good explanation for the inaction.

The record of appeal is already filed and this appeal is ready for hearing. I do agree with the observation of *Justice Waki* in **Bi-Mach Engineers Limited Vs James Kahoro Mwangi (Civil Application No. 15 of 2011)**, where the Judge said that an applicant has a duty to pursue his advocates to find out the position of the litigation. In this case, there is no evidence that the appellant did. Both counsel and the Appellant sat back after the appeal was adjourned on 27/1/2009 till they were propelled into action by this applicant. However, in view of the fact that the record of appeal is filed and the appellant has come to oppose this application, thus showing some revived interest in the matter, the court will decline to grant the order of dismissal of the appeal and order that the Appellant do ensure that this appeal is fixed for hearing and heard during the next 6 months. I allow 6 months because the appeal is yet to be admitted and the diary may be full for the year. In default, the appeal should be dismissed. The Appellant will bear the costs of this application.

DATED and **DELIVERED** this 7th day of October, 2011.

R. P. V. WENDOH
JUDGE

PRESENT

Mr. Tengekyon holding brief for Mr. Mahida for Respondent

Kennedy Oguma – Court Clerk