



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Appeal 50 of 2003

RAIPLYWOODS (K) LIMITED APPELLANT

VERSUS

HENRY TONGOLA OTIPA RESPONDENT

RULING

When both counsels appeared before me on 28/2/2006, on a date when the appeal was listed for hearing though Mr. Kutwa for the respondent was ready to proceed, Mrs. Cheptinga, the appellant's counsel was however not ready. She prayed for an adjournment as she had not filed her list of authorities, Though Mr. Kutwa opposed that application for adjournment as they should have filed their list by then, I decided to allow the application and stood the matter over to 7/3/2006 with an order that the appellant do pay the adjournment fee.

Mr. Kutwa appeared before me on 7/3/2006. The appellant was not represented, and as it had not complied with my order of 28/2/2006, Mr. Kutwa who had taken it upon himself to pay the adjournment fees, applied successfully for the dismissal of the appeal as in his opinion the appellant no longer appeared to be interested in the appeal.

Rai Plywoods (K) Limited is now back in Court, seeking the reinstatement of its appeal as it was not cause listed on the day when it was dismissed for want of prosecution.

As is expected, the application is opposed mainly on the basis of the grounds that the applicant is not genuine, as not only was the hearing date given in court, but that it had not even deemed it fit to comply with orders of court on payment of the adjournment fee.

I have taken the submissions of both counsel into account and it is clear that when the matter was stood over to 7/3/2006, both counsel were present. The fact that the matter was not listed for hearing on that day cannot in my view form the basis for the excuse of non-attendance by counsel, who knew only too well that matter could not be listed if she had not paid the adjournment fee as ordered. No explanation for non compliance with that order has been offered, which in my mind shows that the appellant may have not been interested in having the matter proceed on that particular day.

It is also interesting to note that though the list of authorities was filed on 1/3/2006, there is no reason why the adjournment fee was not paid then, and even then, why the list was not served until 6/3/2006, which was just a day before the hearing, and further that though the applicant's counsel claims to have paid the adjournment fee on 10/3/2006, there is no evidence on record to that effect.

I form the opinion that this applicant appears not to be serious in prosecuting this appeal which was filed on 5/5/2003. This is a court of justice, which must be balanced fairly for all parties. A party who expects the leniency of the court must come with clean hands.

I do in the circumstances find that the application is devoid of merit and I do dismiss it with costs.

Dated and delivered at Eldoret this 26th day of April 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mrs. Cheptinga for the applicant

Mr. Kutwa for the respondent