**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 129 OF 2006**

**EASTERN PRODUCE (K) LIMITED…….....…...APPELLANT**

**VERSUS**

**PATRICK JUMA MAINA.…….....RESPONDENT**

**RULING**

1. This appeal was dismissed on 6th July 2015 during an initiative of the Judiciary styled *justice@last*. The order was made under Order 42 Rule 35(2) of the Civil Procedure Rules 2010. The appellant is aggrieved by the order. The appellant has filed a notice of motion dated 11th August 2015. The motion is expressed to be brought under sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act; Order 42 Rule 8B, and, Orders 45 and 51 of the Civil Procedure Rules 2010.

2. The pith of the motion is that the appellant is keen to prosecute the appeal but was handicapped by factors beyond its control. The appellant claims that no formal notice to show cause or any other notice for dismissal was issued; that accordingly, there is a mistake on the face of the record; that the appeal has never been admitted due partly to imperfect records of the lower court; and, that it is only fair and just that the appeal be reinstated for hearing on merit. Those matters are buttressed in a deposition sworn by the appellant's counsel on 11th August 2015.

3. The application was vigorously contested by the respondent. There is a replying affidavit sworn by counsel for the respondent on 25th August 2015. The respondent contends that there has been laches; that the notice issued by the Deputy Registrar of the court under Order 42 Rule 35 (2) did not require personal service; that this appeal has been stagnant for nearly nine years; that typed proceedings have never been obtained; that the application offends Order 45 Rule 2; and, it is fatally defective.

4. The appellant filed submissions on 23rd October 2015. On 27th October 2015 I heard counsels for the appellant and respondent. I have considered the notice of motion, the depositions and rival submissions.

5. Order 42 Rule 35 (2) allows the court to dismiss dormant appeals. The rule provides as follows-

> *"If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal"*

6. The rule does not speak of personal service of the notice: but there *must* be some form of notice to the parties. By employing the word *shall* it is clear the requirement of notice is *mandatory*. The respondent never moved the court for dismissal. The dismissal was *initiated* by the Deputy Registrar of the court. But there can be no circumventing the requirement of notice.

7. The matter was listed on the daily cause list for dismissals for 6th July 2015. However, there is *no* evidence of any prior notice to the parties. An electronic notice would have been sufficient. True, there was a general public notice or advertisement in the newspapers asking parties whose cases were up for dismissals to visit relevant court registries countrywide. There would have been no contest if the advertisement referred the parties to a list of those cases on a website of the Judiciary or the Eldoret Court. Such notice would have sufficed for purposes of Order 42 Rule 35 (2). There is also no evidence that the cause list of 6th July 2015 was posted on the Eldoret High Court's website.

8. It is not contested that the appeal has not been set down for hearing for years since the service of the memorandum of appeal. To be precise, the memorandum of appeal was served on 6th December 2006 upon the respondent. That is about *nine* years ago. The appeal is dormant. The reasons advanced for delay are a scapegoat. The truth is that the complete transcript of the lower court's proceedings has never been obtained. Directions have never been taken. If the appellant has encountered challenges in obtaining the lower court's records, its counsel has not approached this court for assistance; or, for directions on how to proceed. This is a classic case of a disinterested appellant; one who has fallen into deep slumber. The respondent is obviously prejudiced by the lethargy of the appellant.

9. When delay is established, unless it is well explained, it is deemed to be inexcusable. See *Allen v Mc Alpine & Sons Ltd* [1968] 1 All ER 543, *Ivita v Kyumbu* [1984] KLR 441. However, in the absence of some form of notice for dismissal, I am minded to review the order of 6th July 2015. The dictates of justice demand that the appeal be reinstated. I say so because the court is enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

10. However, justice is a two way street. Justice in this case will only be served if the appeal is reinstated on strict conditions and terms. That will perhaps assuage the respondent; and, keep the appellant wide awake.

11. The upshot is that the order dismissing the appeal made on 6th July 2015 is hereby set aside *but* upon the appellant meeting two *conditions*. The appellant shall pay the respondent *thrown away* costs of Kshs 10,000 within the next *thirty* days. The appellant shall also ensure that the appeal is *admitted* and set down for *directions* within *sixty days* of today's date. If the appellant fails to meet *any* of the two conditions within the set *time*, the appeal shall automatically stand *dismissed*.

It is so ordered.

**DATED** and **DELIVERED** at **ELDORET** this 21st day of January 2016

**GEORGE KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of-***

Ms. Tigoi for Mrs. Khayo for the appellant.

No appearance for the respondent.

Mr. Lesinge, Court Clerk.