



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO.123 OF 2003

EZEKIEL AMUKONGO PLAINTIFF/APPELLANT

V E R S U S

**RAMESH PATEL
T/A LUBAO JAGGERY LIMITED DEFENDANT/RESPONDENT**

R U L I N G

1. This Appeal was filed on 16.9.2003. On 28.9.2004, G.B.M. Kariuki admitted it to hearing and on 2.6.2004, a Notice of Motion for directions was filed and directions given on 24.9.2004.
2. On 26.8.2006, a Notice of Motion was filed seeking enlargement of time to institute the Appeal and in it, it was admitted that the Appeal was filed out of time. That Application was withdrawn on 13.3.200.
3. The Appeal was then fixed for hearing on 23.4.2008 but it was not heard and thereafter no action was taken until 28.9.2010 when the Respondent filed an Application premised on the provisions of Order XVI Rule 5 of the Civil Procedure Rules seeking Orders that the suit be dismissed for want of prosecution. The grounds in support and which are duplicated in the Supporting Affidavit sworn on 27.9.2010 by Simiyu Makokha, Advocate are that;
 1. *“That the plaintiff has failed neglected and or refused to set down this suit for hearing.*
 2. *That it is now over 2 years since the case was last in court.*
 3. *That the plaintiff’s failure to fix this suit for hearing clearly indicates that he is not willing and or interested in prosecuting this matter for hearing any further.*
 4. *That for the plaintiff to let this suit lie in the court unprosecuted for over 2 years is a clear abuse of the due process.*
 5. *That it is in the interest of justice that this suit should be dismissed for want of prosecution in order to bring the same to an end.”*
4. In his Replying Affidavit sworn on 8.2.2011, Michael Kiveu, Advocate deponed that whereas the delay was admitted, the reason why the Appeal was not prosecuted was because his office file got misplaced and it was only traced in December 2010. Further, that the court file had been misplaced and when it was traced, the present Application had already been filed.

5. In any event, that the mistake on his part should not be visited on his client.
6. I will accede to the Application because the reasons given for delay are not in the circumstances, reasonable. When did the file disappear and why would it take the filing of the Application to spur the Appellant's Advocate to take action? Where is evidence that the court file had disappeared when no letter of complaint exists?
7. In any event, it is admitted that the Appeal was filed out of time so that, in fact, no proper Appeal is before the court and whatever is before court has been pending unheard for 8 years.
8. This is a fit case for dismissal of the Appeal for want of prosecution as prayed. Costs thereof to the Respondent.
9. Orders accordingly.

Delivered, dated and signed at Kakamega this 14th day of April, 2011

ISAAC LENAOLA
J U D G E