



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**Civil Appeal 22(A) of 2005**

**JOHN KIPTOO KIPTUM.....APPELLANT**  
**VERSUS**  
**MARTIN GATURA.....RESPONDENT**

**RULING**

By an application by way of chamber summons dated 4<sup>th</sup> August 2009, pursuant to the provisions of order XL1 Rule 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the application seeks orders:

- (a) That the appeal herein filed on 6<sup>th</sup> February, 2003 by the Appellant/respondent herein John Kiptoo Kiptum be and is hereby dismissed for want of prosecution.
- (b) That costs of this application be provided for.

The application is based on the grounds on the face of the application.

The application is predicated upon the annexed affidavit of Linah Jepkosgei Kigen Advocate sworn on the 4<sup>th</sup> day of August, 2009.

On behalf of the respondent, it was argued the appeal herein was lodged and/or filed in the honourable court on 6<sup>th</sup> February, 2003.

Since then the appellant has not taken any steps to list the appeal down for hearing. The appeal was lastly fixed for hearing on 12<sup>th</sup> November, 2008 but it was stood over generally.

From the aforesaid date the appellant has not taken any steps to list the appeal for hearing. This, counsel confirmed, is a clear indication that the appellant is not interested in prosecuting the appeal hence this application. In any event the same was an afterthought. It is aimed at frustrating the respondent by increasing costs.

The respondent filed a replying affidavit through Jones Nyachiro advocates sworn on 18<sup>th</sup> January 2010.

On behalf of the respondent it was argued that the appeal came up for hearing on 12<sup>th</sup> November 2008. Mr Ingosi had instructions to hold Mr Nyachiro's brief and argue the appeal. However, Mr Ingosi misplaced the file and requested for time to trace the same. The appeal was therefore adjourned generally.

By the time the file was eventually traced the applicant had filed this application for dismissal. That it is not true that the appellant is not interested in prosecuting the appeal. That the mistake was that of counsel which should not be visited on the client.

Order XL1 Rule 31(2) of the Civil Procedure Rules provides:

**“ 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”.**

From 12<sup>th</sup> November, 2008 to 10<sup>th</sup> August 2009 when the application was filed is about eight months. The respondent's only excuse was that counsel he had instructed misplaced the file. If counsel misplaced the file nothing would have been easier than to make an application to re-instruct the file. As it were counsel went to sleep.

In the disclosed circumstances of the case there is no good reason shown to me why the appeal should not be dismissed.

In addition thereto counsel contends that mistake of his should not be visited on his client. This is no longer good law. The law as it was yesterday ought to be changed to be in conformity with other jurisdictions. The law has been changed in England. As was said in **Ketterman V. Hansel Properties Ltd. (1988) 1 ALL ER 38** at page 62:-

**“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequence of the negligence of the lawyers to fall on their heads rather than allowing an amendment at a very late stage of the proceedings.”**

I subscribe to those views.

The up-shot is that the appeal is dismissed with no orders as to costs.

Dated and delivered at Kitale this 19<sup>th</sup> day of January 2010.

**N.R.O OMBIJA**  
**JUDGE**