



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 753 of 2005**

**CELINICO FLOWERS.....APPELLANT**

**VERSUS**

**ISAAC IRUNGU MAINA.....RESPONDENT**

**R U L I N G**

On the 5<sup>th</sup> June, 2008, this court delivered a ruling dismissing the appeal filed by Celinico Flowers on the grounds that the continued delay of the prosecution of the appeal was prejudicial to the respondent and an abuse of the process of the court.

The appellant has now moved the court under Section 3A, & 63(e) of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules for orders that the proceedings and hearing of the application dated 21<sup>st</sup> May, 2008 including the ruling of 5<sup>th</sup> June, 2008 be set aside *ex debito justitiae* and the matter be refiled for hearing. The application is supported by two affidavits, one sworn by James Kironji Mwenja an advocate, and the second one sworn by Jacob Okwemba Malanda a court clerk, in the firm of the appellant's advocate.

It is deponed that the failure of the advocate to attend court for the hearing of the application, was due to the court clerk's oversight in failing to enter the date of the hearing of the application in the advocate's diary. The failure to prosecute the appeal on the other hand is attributed to the lower court's failure to avail the typed copies of the proceedings. In support of the application, the following cases were relied upon: -

- (1) ***Girado v Alam & Sons (U.) Ltd. [1971] EA 448***, where although the court found that no sufficient cause for non-appearance at the hearing had been shown, the court nonetheless, set aside the judgment to avoid injustice to the applicant.
- (2) ***High Court Misc. Civil Application No.46 of 2002 (Msa), Republic vs Registrar of Titles & 2 Others***, in which the court exercised its inherent powers to set aside orders earlier issued, because the respondents were not served with the motion subject of the orders.

The respondent objected to the application through an affidavit sworn by the respondent's advocate contending that the application lacks merit and has no sound basis. It was contended that notwithstanding the alleged error in failing to record the date in the diary, there was no replying affidavit or grounds of opposition filed. It was further contended that the proceedings of the lower court were typed way back in the year 2005 and that the lower court file was forwarded to the Registrar of the High Court on 24<sup>th</sup>

November, 2005.

I have carefully considered the application, the affidavits in support and in reply and the submissions of counsels. It is evident that the appellants were properly served with the chamber summons dated 3<sup>rd</sup> April, 2008 on the 6<sup>th</sup> May, 2008, showing that the same was coming up for hearing on the 21<sup>st</sup> May, 2008. As has been pointed out by the respondent's advocate, although it is contended that the date of hearing was not diarized, there is no explanation as to why no grounds of opposition or replying affidavit was filed in opposition to the application.

Secondly, the explanation given for the failure to prosecute the appeal cannot hold. The record of the lower court was forwarded to this court together with certified copies of the typed proceedings and judgment on 24<sup>th</sup> November, 2005. The typed proceedings have all along been available and the appellant could easily have obtained the same if it was serious in pursuing the appeal. Moreover, the Deputy Registrar, High Court did write two letters to the appellant's advocate requesting the appellant to prepare and file the record of appeal. None of these letters elicited any response.

I am satisfied that the appellant was given an opportunity to respond to the application dated 3<sup>rd</sup> April, 2008 but failed to do so, and that the appellant has not offered any reasonable explanation for his failure to prosecute the appeal. Accordingly I find no good reason to set aside the proceedings of 21<sup>st</sup> May, 2008 or the ruling of 5<sup>th</sup> June, 2008, and dismiss the motion dated 5<sup>th</sup> June, 2008. I award costs to the respondent.

Those shall be the orders of this court.

**Dated and delivered this 28<sup>th</sup> day of July, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant absent

Mwanyale H/B for Mrs. Muhuhu for the respondent