

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 150 OF 2010

SIMION ODUKE MSUMBA APPELLANT

VERSUS

UNITED ARYAN EPZ LIMITEDRESPONDENT

RULING

This appeal was dismissed on 6th June, 2016 for want of prosecution under Order 42 Rule 35 (2) of the Civil Procedure Rules. The application dated 28th June, 2016 seeks to set aside the said dismissal order. The reasons set out on the face of the application are that the appellant is desirous of prosecuting the appeal having already filed the record of appeal. The failure to have it prosecuted was for reasons that the appeal had not been admitted and the lower court record had not been availed. Counsel for the appellant has filed a supporting affidavit.

The respondent on the other hand filed grounds of opposition accusing the appellant of laches, and that no sufficient reason has been given for the delay in prosecuting the appeal. Notices dated 23rd May, 2016 were generally published by the deputy registrar giving notice to parties of the intended action. There is no proof however, that other than the publication in the Judiciary website that the appellant was served or that he was aware of the said notice.

More importantly however, even at the time of writing this ruling, no directions had been given and the lower court record is not part of this file. Additionally, no prejudice has been alleged shall befall the respondent if the order sought is granted.

I am inclined to allow the application which I hereby do. The order made on 6th June, 2016 is hereby set aside and the appeal reinstated. The deputy registrar shall facilitate the availability of the lower court file and place the appeal before a Judge in chambers for directions within 30 days from today.

The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 6th Day of April, 2017.

A. MBOGHOLI MSAGHA

JUDGE