



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL APPEAL CASE NO. 132 OF 2010**

**PETER KEN KIBOI..... PLAINTIFF**

**VERSUS**

**TERENCE NAIBEI LUBUSI.....DEFENDANT**

**RULING**

[1].By a Notice of Motion dated 1<sup>st</sup> August, 2016, the applicant prayed that this court be pleased to vary, review and set aside the order of dismissal of the suit issue on 26.3.2014 and that the suit be set down for hearing. The reasons upon which the appeal was grounded was that the notice was served on the applicant/appellants with no identification of the hearing date and that the applicant and his advocate were not served with a hearing notice of the application dated 11.2.14 and finally that failure of the applicant and his counsel was inadvertent.

[2]. The respondent filed a replying affidavit on 21.3.17 and it was argued that the application lacks merit and should be dismissed and that it was brought with inordinate delay since the appeal was dismissed. That the applicants advocates were served with a hearing notice dated 20.2.2014 which was annexed to the affidavit, and finally that this case has been pending since 1989 and it ought to be brought to an end.

During the hearing of the application, Mr. Situma advocate argued that a delay of 2 years 5 months was inordinate and that the thresholds set up under Order 45 of the Civil Procedure Rules was not met and finally that litigation must come to an end and that an appeal filed in 1991 in Kakamega High Court a period of over 20 years must come to an end. He argued that once a suit is dismissed by court for want of prosecution the court is functus officio and that the only recourse is to appeal.

The court finds itself in agreement with the sentiments of Mr. Situma advocate. No valid reason has been given to warrant the court to set aside its own orders. The delay herein is inordinate. Dismissal by court on its own motion is definitive. It becomes a final judgment and the court becomes functus officio. The only avenue is only to file an appeal in the Court of Appeal.

This application has no merit the same is dismissed with costs.

DATED at **BUNGOMA** this **11<sup>th</sup>** day of **May** 2017.

**S. MUKUNYA**

**JUDGE**