



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 138 OF 2014**

**EVANS ANYWA NYANGWESO.....PLAINTIFF/APPLICANT**

**VERSUS**

**LEONIDA A. ORIKI**

**RICHARD OWINO YAYA**

**NGESA YAYA.....DEFENDANTS/RESPONDENTS**

**RULING**

The application is dated 9<sup>th</sup> December 2009 and is brought under 17 Rule 2 (1) & (2) of Civil Procedure Rules seeking for orders that:-

1. That this application be certified urgent and heard exparte in the first instance.
2. That this honourable court be pleased to set aside and review orders issued on 9/11/2017 dismissing the suit for want of prosecution and all consequential orders.
3. That the costs of this application be provided for in the cause.

It is premised on the following grounds that on 9<sup>th</sup> November 2017 when the matter came up the plaintiff and his advocate was absent having not been served with any exparte notice and their failure to attend was not in any way deliberate to defeat the ends of justice being met. That by the time the suit was being dismissed the case was in a state of limbo because orders were issued directing the Land Registrar Kakamega County and the surveyor to perform site visit on LP Butso/Esimeyia/240 and consents were filed. That when the said survey was eventually done, the land registrar was to file a report within a period of 30 days which never happened to date, and to date none has been filed that the applicant is aware of. That the applicant is willing and able to comply with any conditions placed on him by court as a pre-condition to granting the orders herein being that it's a land matter and needs to be determined on merit rather than by dismissal. That the respondents will not be prejudiced in any way that cannot be remedied by payment of costs. That it only in the interest of justice that orders sought herein be granted.

The defendants opposed the application dated 9<sup>th</sup> December, 2019 on the following grounds that the suit herein was dismissed on 9<sup>th</sup> November, 2017 and the plaintiff failed to take the necessary steps to reinstate the suit for hearing. That the application lacks merit and it is an abuse of court process for the reason that it has taken the plaintiff two years to file an application for reinstatement of the suit. That the plaintiff/applicant has shown no sufficient cause to warrant or sustain the reinstatement of the suit herein. That the application has been brought with inordinate delay as it is the duty of the plaintiff to take steps to progress his case, but he was never interested. That there is no evidence to show that the Surveyor and the Land Registrar visited the suit parcel despite the fact that the defendants facilitated the costs of the survey. That the application is brought in bad faith and it is prejudicial to the defendants herein.

This court has considered the application and the submissions therein. The applicant submitted that on 9<sup>th</sup> November 2017 when the matter came up the plaintiff and his advocate was absent having not been served with any exparte notice and their failure to attend was not in any way deliberate to defeat the ends of justice being met. I have perused the court file and find that the applicant's advocate was indeed served on the 18<sup>th</sup> October 2017 with the notice for dismissal for want of prosecution. I have perused the court file and find that this suit was dismissed on 9<sup>th</sup> November, 2017 for non-attendance. It was not until 9<sup>th</sup> December, 2019 when this application was filed. This is an old matter of 2014. Reasons advanced why this application should be granted are unacceptable.

In the case of Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF JUNE 2020**

**N.A. MATHEKA**

**JUDGE**