



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 282 OF 2013**

**ONEYA OMUCHENI.....PLAINTIFF/APPLICANT**

**VERSUS**

**ERICK ODHIAMBO OKETCH**

**JACINTER AKOTH OYIENGO**

**MICHAEL OPONDO WAMWAYI**

**PATRICK OWINO HANDA**

**MORRIS ONGAYA**

**REGISTRAR OF LANDS, KAKAMEGA.....DEFENDANTS/RESPONDENTS**

**RULING**

The application is dated 31<sup>st</sup> October 2017 and is brought under sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, order 12 rule 7, order 24 rule 3 (1) and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

- (a) That application be certified as urgent and heard ex-parte in the first instance.
- (b) That this honourable court be pleased to set aside and or vary the order issued on the 9<sup>th</sup> October, 2018 dismissing the suit herein for want of prosecution and all consequential orders and proceedings thereto.
- (c) That this honourable court be pleased to re-instate the suit herein so that it can be heard and determined on merit.
- (d) That upon grant of prayers (b) and (c) above, this honourable court be pleased to substitute the name of the plaintiff (deceased) herein with that of the legal representative, Fredrick Odhiambo alias Fredrick Ngode Oneya.
- (e) That the costs of this application be provide for.

It is based on the grounds that this matter was dismissed for want of prosecution on the 19<sup>th</sup> October, 2017 on the grounds that the last action was taken in the file on the 28<sup>th</sup> April, 2015. That the notice to show cause dated 26<sup>th</sup> May, 2017 was never served on the deceased plaintiff's advocates' offices and therefore they were not aware of the said notice. That the deceased plaintiff's advocates only became aware of the dismissal in this suit when they presented an application for substitution of the deceased plaintiff in September, 2018 and the file could not be traced at the registry, only to learn on 19<sup>th</sup> September, 2018 that the suit had been dismissed for want of prosecution. That although it is true that the last action was taken on 24<sup>th</sup> April, 2015, the failure to prosecute the matter was not in any way attributable to the deceased plaintiff but to reasons beyond him since Kakamega Land Court did not have a substantive judge between the year 2015 and 2016 until advocates held demonstrations. That the plaintiff died on the 7<sup>th</sup> March, 2017 and it was thus imperative that letters of administration be obtained prior to any action being taken in this matter. That one Fredrick Ngode Oneya has since obtained letters of administration ad litem and intends to continue with the suit on his own behalf and on behalf of the estate of the plaintiff who is now deceased. That the 5<sup>th</sup> Defendant has since passed on and the proposed plaintiff intends to withdraw the suit against him. That the proposed administrator and the estate of the deceased plaintiff stands to suffer irreparable loss and damage, if the suit is not re-instated. That the proposed plaintiff is ready and willing to abide by any such orders that this honourable court may deem fit as a condition for the grant of the orders sought.

The 4<sup>th</sup> defendant submitted that, on 27/2/2019 they were served with Notice of Motion dated 31/10/2018 and filed on 5/11/2018 seeking orders inter alia setting aside and or varying the order issued on 9/10/2017 dismissing the suit herein for want of prosecution. That this is a

court of record and this honourable court be pleased to note that this matter was last acted upon on 24/4/2015 and that is more than 3 years now since the order dismissing the suit was made by this honourable court. That further, the applicant has merely stated that the plaintiff passed away on the 8/3/2017 but despite noting the need for letter of administration, the applicant has not demonstrated why this honourable court was not made aware of the said predicament at the earliest opportune moment. Is it right that the applicant had to wait until 11/3/2019 to inform the court of the same? That the applicant's claim that the Estate of the deceased will suffer irreparable harm must be subjected to the test as to whether the said could have taken place in the past 3 years from the date in which the suit was dismissed. The applicant has not demonstrated any such harm that existed or was imminent in the past 3 years to enable this court grant orders sought. That the legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits is founded in Article 159 (2) (b) of the Constitution of Kenya that justice shall not be delayed. Further, section 3A of the Civil Procedure Act gives the courts unlimited power to make such orders as may be necessary for the ends of justice and/or to prevent abuse of the process of court. That subject to section 63 (e) of the Civil Procedure Act, which is the statutory basis for all interlocutory applications, courts are assigned the unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient. That a party that seeks to have the orders of this honourable court set aside must provide sufficient reasons in support of their case. The applicant is consequently bound by Article 159 of the Constitution and Order 17 Rule 2 (3) which gives the court the discretion to dismiss the suit where no action has been taken for one year. That in dismissing the suit for want of prosecution, this honourable court exercised its judicial discretion in the interest of justice as the party that instituted the suit acted in manner that can only be to have demonstrated loss of interest in it, and/or the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendants on account of that delay. That the grounds upon which the applicant basis the application are insufficient to say the least. The applicant has not sufficiently demonstrated to this honourable court as to why the matter was not acted upon for a long time and he has not provided for the date in which he obtained Letters of Administration ad litem so as to enable this court determine the application. That the substance of the plaintiff's claim as against the 4<sup>th</sup> defendant have been compromised as he is no longer interested in the suit property and his money for the purchase price had been refunded by 1<sup>st</sup> and 2<sup>nd</sup> defendants. Consequently, there is no suit to reinstate against the 4<sup>th</sup> defendant. That therefore, this application as filed cannot be maintained against the 4<sup>th</sup> defendant. That it is in the interest of justice that the application be dismissed.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 9<sup>th</sup> October 2017. It is was not until the 5<sup>th</sup> November 2018 that the present application was filed. I find that there is inordinate delay in filing this application and the same is an afterthought. Reasons advance for the delay are not convincing. The applicant has been indolent and is guilty of inordinate delay.

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 IN OPEN COURT THIS 2<sup>ND</sup> JULY 2019.**

**N.A. MATHEKA**

**JUDGE**