

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 66 OF 2017

SAKINA ABDALLA M.....APPELLANT/APPLICANT

VERSUS

ALICE K. MULUPI.....RESPONDENT

RULING

The application is dated 30th October 2018 and is brought under rules 4 and 102 (1), (3) of the Court Appeal Rules, Section 3 of the Civil Procedure Act seeking the following orders:-

- a. That the orders for dismissal of this appeal for non-attendance on 6/2/2018 be set aside and orders issued be reviewed.
- b. That this suit be reinstated for hearing of the appeal.
- c. That costs of this application be provided for in the cause.

It is based on the following main grounds that on the material day of the dismissal there was an inadvertent mistake on Counsel's part which should not be visited on the appellant because it was not in any way deliberate to defeat justice. That the appellant has a prima facie case with a high probability of success and should be accorded an opportunity to bring out his case in court. That the appellant is ready to fully prosecute the case to its final conclusion and it is only fair that the appellant is accorded an opportunity to bring out his case. That it is only in the interest of justice that the order sought herein is granted and this court has unfettered inherent powers to discretely grant the same. That the appellant is willing to abide by any conditions placed on his in fulfilment of the same.

The appellant/applicant has filed the present application dated 30/10/2018 seeking for review of the orders of dismissal made on 6/2/2018 and the appeal herein be reinstated. That the applicant herein is on a fishing expedition and a delay tactic to prevent the respondent from enjoying the fruits of the trial court judgment in her favour. The Deputy Registrar of this honourable court duly issued notices for the material date when the appeal herein was dismissed and it was the duty of the counsel to diarise and inform his client of the same date. The orders sought to be reviewed against were made way back on 6th February, 2018, the appellant/applicant has taken nine (9) months down the line to bring the present application. In fact they have intentionally not mentioned the date they realized the appeal herein was dismissed so as to circumvent giving the reasons for the delay. The applicant has not been keen in prosecuting this appeal and a keen perusal at the appeal itself, it has no merit in the first instance.

This court has considered the application and the submissions therein. The applicant submitted that on the material day of the dismissal there was an inadvertent mistake on counsel's part which should not be visited on the appellant because it was not in any way deliberate to defeat justice. I have perused the court file and find that this suit was dismissed on 8th May 2018. The date was taken in court by consent and was the final adjournment as this matter was filed in court way back in 2014. It was not until the 2nd 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 2ND JULY 2019.

N.A. MATHEKA

JUDGE