REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 10 OF 2018

SAMWEL ODHIAMBO.....APPELLANT/APPLICANT

VERSUS

AMOS SHIKOMERA NDAKWA

LUKA A. SACHIZA

CHAIRMAN WESTERN PROVINCE

LAND DISPUTE APPEALS COMMITTEE.....RESPONDENTS

RULING

The application is dated 9th July 2018 and is brought under order 17 rule 2, order 45 rule1-6, order 51 rule 1 of the Civil Procedure Rules 2010 and sections 3 & 3A of the Civil Procedure Act Cap 21 seeking the following orders:-

1. That the court be pleased to review and reinstate the appeal herein and fix the same for judgment.

2. That the cost of this application be provided for.

It is based on the principal grounds that the appeal herein was dismissed pending judgment. That at the time of dismissal the original court file could not be traced. That the applicant did not receive notice of the intended dismissal. That prior to the said dismissal the applicant herein had requested for judgment by way of notice. That the applicant is desirous to have this appeal concluded logically. That the application herein is made in good faith and without undue delay.

The respondent submitted that the appellant has never been keen to prosecute the appeal. That court record and it clearly shows that the memorandum of appeal is dated 11th April, 2008 and it was not filed until 27th August, 2009. That no explanation was given as to why it took the appellant long to lodge the appeal in court. That it is within his knowledge that this matter came up in court on 30/7/2012 when the court directed parties to file written submissions. That to the best of my knowledge the appellant did not file his written submissions since none was served upon them. That the last time the matter came up for mention was on 15/11/2012 when the matter was fixed for further mention on 30/12/2012. That from 15/11/2012 to 20/4/2015 when the appeal was dismissed for want of prosecution the appellant took no step to have the appeal prosecuted. That the appellant not taking any steps between 15/11/2012 and 20/4/2015 has not been explained nor has the appellant offered any explanation as to why he took no steps from 20/4/2015 until 9/7/2018 to make any application regarding the appeal. That for an appeal which was lodged in 2008 and a party coming to court to revive it ten years later is an abuse of the due process of the court. That the decision which the appellant sought to set aside was delivered on 11/2/2008 as per the Memorandum of Appeal. That appeals against decisions of Provincial Appeals Committees could only be lodged to the High Court within 60 days from the date when such decisions were made in accordance with the Land Disputes Tribunal Act. That the filing of the appeal herein in 2009 was out of time thereby rendering this appeal incompetent. That a decree arising from the adoption of the Western Provincial Appeals Committees verdict had been issued and fully executed.

This court has considered the application and the submissions therein. The applicant submitted that the applicant did not receive notice of the intended dismissal. That prior to the said dismissal the applicant herein had requested for judgment by way of notice. I have perused the court file and find that this suit was dismissed on 20th April 2015. It is was not until the 9th July 2018 that the present application was filed. Prior to the dismissal the appellant had taken no steps to prosecute the matter since 2012. I find that there is inordinate delay in filing this application and the same is an afterthought. Reasons advanced 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 3RD JULY 2019.

N.A. MATHEKA

JUDGE