

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 470 OF 2014

WILSON NYIKURI SHIRO

GEOFFREY LIANDA LUSENAK..... PLAINTIFFS/APPLICANT

VERSUS

PHILIMON AKUFA

MESHACK SHALO J. MAKABILA....DEFENDANTS/RESPONDENTS

RULING

The application is dated 15th November 2018 and is brought under sections 3 & 3A and 80 of the Civil Procedure Rules seeking the following orders;

(a) This suit be reinstated for hearing and final disposal.

(b) Costs of this application be provided for.

It is supported by the grounds that the applicant's advocates did not receive the letter from court dated 27th May, 2018. Suit is over land and the applicant's case has been dismissed without a chance of being heard.

The 2nd respondent submitted that the applicant has not been keen in prosecuting this matter. The applicant has not produced any evidence that the postal address used in the notice does not belong to him. He never also asked to cross examine the process server.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 17th October 2018. It is was on the 15th November 2018 that the present application was filed. I find that there is no inordinate delay in filing this application. Reasons advance for non attendance are acceptable.

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 merit and I grant it on condition the applicant obtains a hearing date within the next 30days. Costs of this application to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 2ND JULY 2019.

N.A. MATHEKA

JUDGE