

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 346 OF 2013

FRANCIS MUSLIO CHELOTI.....PLAINTIFF/APPLICANT

VERSUS

MAIGWE KIARIE

JANE MAIGWE KIARIE.....DEFENDANT/RESPONDENTS

RULING

The application is dated 25th July 2019 and is brought under Order 12 Rule 7 Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act seeking the following orders;

1. That the orders of this court dismissing this suit be and are hereby set aside.
2. That costs hereof be in the cause.

It is grounded on the annexed affidavit of Francis Cheloti and the grounds that this suit was dismissed by this court on 2nd day of July, 2019 for non attendance. That he was not aware that this matter was coming for hearing on the day it was dismissed. That failure to attend court was not deliberate hence excusable. That the applicant is keen on prosecuting this matter. That the present application has been brought without delay.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 2nd July 2019 when the plaintiff and his counsel failed to attend. On the 17th December 2018 the plaintiff's counsel was in court and sought an adjournment and the date of 2nd July 2019 was taken by consent. On the date for hearing the defendants were in court and the plaintiff was not. I find that the reason that he did not know about the hearing date is not true. This is a matter which was filed way back in 2013. Reasons advanced for non attendance are not 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 no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE