



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 328 OF 2017**

**JOHNSTONE HUNTER AMBALE.....PLAINTIFF/APPLICANT**

**VERSUS**

**VERONICA LUNANI MATEKWA.....DEFENDANT/RESPONDENT**

**RULING**

This application is dated 16<sup>th</sup> November 2019 and is brought under section 3 & 3A of the Civil Procedure Act and order 12 rule 7 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That the orders for closure and/or dismissal of the above suit for want of prosecution on the 4<sup>th</sup> November, 2019 be set aside and the suit be reinstated for full hearing and determination.
2. That the costs of this application be in the cause.

It is based on the annexed affidavit of Timothy Omwando Mbaka Advocate and on the following grounds that applicant's counsel has been attending the court consistently without delay. That the matter herein is extremely emotive in that it involves the issue of land and in which the plaintiff had testified way back in March, 2010 before he passed on 15<sup>th</sup> June, 2016. That on the material day the family members of the deceased plaintiff were present in court but they were not given a chance to be heard. That on the material day the counsel for the plaintiff Mr. Mbaka was held up before the Kakamega High Court No. 1 in Succession Cause No. 814 of 2009. That when the said counsel rushed to the court at around 9.15 a.m. the court was already through with its call over. That the busy schedule of a counsel should not be visited upon an innocent litigant. That the plaintiff has a good case with high chances of success.

This court has considered the application and the submissions therein. The applicant's counsel submitted that he was held up before the Kakamega High Court No. 1 in Succession Cause No. 814 of 2009 on the material day and could not attend court on time. I have perused the court file and find that this suit was dismissed on 4<sup>th</sup> November 2019 after being given the final adjournment on 16<sup>th</sup> July 2019. The applicant was in court when the date was given in his presence and he was given the final adjournment. The plaintiff passed on in 2016 and was never substituted. This is an old matter filed way back in 2006. Reasons advanced for the non-attendance are unacceptable.

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 19<sup>TH</sup> FEBRUARY 2020.**

**N.A. MATHEKA**

**JUDGE**