

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 500 OF 2017

JOSEPH BULINGA KEYA.....PLAINTIFF/APPLICANT

VERSUS

PHILIP OWINO

ALICE AUMA.....DEFENDANT/RESPONDENT

RULING

This application is dated 24th July 2019 and is brought under Section 5 (1) of the Judicature Act Cap 8 of the Laws of Kenya, Civil Procedure (amendment No. 2) Rule 2012 Part 8 order 51, Civil Procedure Rule and Sections 3A, 1A & B Civil Procedure Act seeking the following orders;

1. That the order of dismissal of this case issued on the 25th June, 2019 for non-attendance be set aside and the case reinstated for full hearing and disposal on merit.
2. Costs be in the cause.

It is based on the grounds that this case was not due for dismissal. That a cursory perusal of court record showed that notice was to be issued to the parties herein to appear before the honourable court for mention for directions on the matter. That no notice was issued to the advocates on record for the plaintiff before the dismissal order was issued which in essence did deny the plaintiff a chance to explain the status of the case and to take directions. It is necessary and in the interest of justice that the case be reinstated for full hearing and disposal. No prejudice will be suffered by the defendants if the prayers sought are granted for they will have a chance to defend the suit and present their case and in any event an award of cost can suffice upon determination of the suit.

The 2nd respondent submitted that vide plaint alongside notice of motion dated 6/12/2017 and filed on the 7/12/2017 the plaintiff sued her claiming the orders outlined therein. That the notice of motion was argued by way of submission and the same was disallowed on 30/5/2018. That the plaintiff slept on his right for approximately 5 months her advocate invited vide their letter dated 26/10/2018 served upon the plaintiff's counsel on 31/10/2018 attend court on 16/11/2018 to fix a mutual convenient date they failed to attend court (exhibit marked AA1). That the court issued notice pursuant to order 17 rule 2 of the Civil Procedure Rules 2010.

This court has considered the application and the submissions therein. The applicant's counsel submitted that notice was issued to the parties herein to appear before the honourable court for mention for directions on the matter. That no notice was issued to the advocates on record for the plaintiff before the dismissal order was issued which in essence did deny the plaintiff a chance to explain the status of the case and to take directions. I have perused the court file and find that this suit was dismissed on 25th June 2019 for non-attendance. After the last ruling of this court on the 30th May 2019 the plaintiff took no steps to prosecute this matter and the court served them to attend court on the 25th June 2019 which they did not. This is an old matter of 2017. Reasons advanced why this application should be granted 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 19TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE