

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 202 OF 2014

SYLVESTER LIBONDO alias PEPELE.....PLAINTIFF/APPLICANT

VERSUS

FERDINAND ESESE MUTSAMI alias ESESE....1ST DEFENDANT/RESPONDENT

MACHISEMULA MUSINZI MUSONYE.....2ND DEFENDANT/RESPONDENT

RULING

The application is dated 16th December 2019 and is brought under Section 19, 1b, 3, 39 & 63 e of the Civil Procedure Act, order 10 rule 11 and order 12 rule 7 of the Civil Procedure Rules seeking the following orders:-

1. That the judgment and orders made against the plaintiff/applicant on the 5th December, 2019 dismissing the plaintiff's suit for want of prosecution and not attendance of his counsel on record be set aside or be reviewed and this suit be reinstated and set down for interparties hearing.
2. That costs of this application be in the cause.

It is based on the grounds that the plaintiff/applicant's suit for recovery of his land comprised in land reference number Isukha/Shitochi/1971 was dismissed on the 5th December, 2019 for want of prosecution and non attendance of his counsel on record. The applicant who is suing under a power of attorney on behalf of Silvester Libondo who is terminally ill and who was present in court during the dismissal is desirous to prosecute this matter on merit. That the applicant's counsel was bereaved and could not attend court as she was attending the funeral of her sister in law the late Margaret Mulunda in South Wanga Mumias Sub County. That equally the respondents did not attend court. That the applicant has a good and prima facie case as against the defendants. That this application has been brought without unreasonable delay and in good faith.

The defendants/respondents opposed the Notice of Motion dated 16th December, 2019 based on the following grounds that the application herein is an afterthought intended to re-open the case after it was lawfully dismissed for want of prosecution. The applicant has never been keen in prosecuting this suit and nothing has been produced to show that the original plaintiff is terminally ill. The 1st defendant is the lawful registered proprietor of the suit land parcel. The application is incompetent and an abuse of the court process and should be dismissed with costs.

This court has considered the application and the submissions therein. The applicant submitted that he is suing under a power of attorney on behalf of Silvester Libondo who is terminally ill and was present in court during the dismissal is desirous to prosecute this matter on merit. That the applicant's counsel was bereaved and could not attend court as she was attending the funeral of her sister in law the late Margaret Mulunda in South Wanga Mumias Sub County. That equally the respondents did not attend court. I have perused the court file and find that this suit was dismissed on 5th December 2019 for non attendance. This application was filed on the 16th December 2019. Reasons advanced why this application should be granted 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 the same on condition the applicant obtains a hearing date within the next 30 days from today's date. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 16TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE