

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 9 OF 2014

JAPHETH M. CHITERI.....APPELLANT/APPLICANT

VERSUS

BROOKWAY NYONJERESPONDENT

RULING

The application is dated 25th May 2018 seeking the following orders;

1. That this matter be certified as urgent and that service be dispensed with in the instance.
2. That Hon court be pleased to set aside, lift and or quash the orders of 14th May, 2018 that dismissed this matter and that this matter be reinstated and be listed for hearing.
3. That the Butere Senior Resident Magistrate's civil case No 184 of 2001 be transferred back to Butere court for hearing and disposal.
4. That costs be provided for.

The applicant submitted that, on or about 14th May 2018 his appeal was dismissed without his knowledge and in his absence. That the Respondent has already served him with a notice of intended eviction requiring him to vacate his premises within 21 days failure to which he will demolish his houses against his will. That he is now requesting the court for an order of reinstatement of this matter and the Butere 184 of 2001 be transferred to Butere Law Courts for hearing and determination.

This court has considered the application and the submissions herein. The Application is based on the grounds that, that he was never aware that his case was coming up for hearing and as such never attended court. This court has carefully perused the court record and it is clear the applicant's advocates were properly served and they acknowledge service. I find the reasons given inexcusable. The applicant has been indolent.

In the case of **Utalii Transport Company Ltd & 3 Others v 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 10TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE