

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 74 OF 2017

PIUS POSITA MUKOKHO.....PLAINTIFF/APPLICANT

VERSUS

MOSES MUYOMA LIHEMO.....DEFENDANT/RESPONDENT

RULING

The application was filed in court on the 23rd January 2020 and is brought under Section 3A of the Civil Procedure Act Cap 21 seeking the following orders:-

1. That this honourable court be pleased to set aside the orders made on 13th March, 2019 dismissing this case for want of prosecution.
2. That in the alternative this honourable court's orders made on 13th March, 2019 dismissing this suit for want of prosecution be set aside and the suit be reinstated.
3. That the costs of this application be provided for.

It is based on the following principal grounds that the plaintiff attended court but was in a different court. That at time the suit was dismissed the plaintiff was in the Land and Environmental Court which court was handling this matter. That both parties had complied. That the defendant will suffer no undue prejudice if the suit is reinstated.

The respondent submitted that on the 13th March, 2019 when matter came up for hearing, he was ready in court with three defence witnesses when the matter was called out and placed aside to proceed at 10.45 a.m. That when the matter was called out the plaintiff and his advocate were absent and even when it came out after 10.45 a.m. they were also absent. That prior to that date the plaintiff and his counsel have not been keen to prosecute this matter. That from the conduct of the plaintiff, it appears he lost interest in this matter and hence the suit was rightly dismissed for want of prosecution. That the plaintiff/applicant's contention that he attends a different court is an afterthought designed to mislead this honourable court. That the applicant's allegations that his counsel was involved in other court cases has not in any way been explained and supported by the said counsel. That in any event the applicant's counsel ought to have made arrangements to get another counsel to hold his brief and say so. That the applicant's failure to attend court with his counsel was therefore deliberate and lack of interest in prosecuting the matter.

This court has considered the application and the submissions therein. The applicant submitted that on 13th March, 2019 when the matter came up the plaintiff and his advocate was absent because plaintiff attended court but was in a different court.

I have looked at the court record and find that indeed on the material date the matter was called out at 9am and again at 10am and the plaintiff and his advocate were nowhere to be found. Indeed the said hearing dated has been taken by consent. I have perused the court file and find that this suit was dismissed on 13th March, 2019 for non-attendance. It was not until the 23rd January 2020 when this application was filed. 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 THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE