



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 259 OF 2016**

**THE CHAIRMAN B.O.M OF VIKUTSA**

**PRIMARY SCHOOL.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOSES ABWOBA**

**SABETI MUDEKU**

**DAVID AMUHANDA**

**LUKA MUDEGU**

**DANIEL LUVA MUDEKU**

**BENSON TIGU MUDEKU.....DEFENDANTS/RESPONDENTS**

**RULING**

The application is dated 22<sup>nd</sup> January 2020 and is brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 12 Rule 7 of the Civil Procedure Rules and Article 50 of the Constitution seeking the following orders;

1. That the application herein be certified as extremely urgent and be heard ex-parte in the first instance and service be dispensed with.
2. That the order of dismissal of the plaintiff suit against the defendants made on 9<sup>th</sup> December, 2019 be set aside and the suit be reinstated for hearing.
3. That there be a stay of execution of judgment against the plaintiff pending hearing and determination of this application.
4. That costs of the application be provided for.

It is supported by the supporting affidavit of Andrew Kasomba and on the following grounds that the suit was dismissed on the 9<sup>th</sup> December, 2019 by this honourable court because of failure of the plaintiff witness to attend court for hearing. That the applicant/plaintiff are aggrieved by the dismissal orders made on 9<sup>th</sup> December, 2019. That failure of the plaintiff witness to attend court was not deliberate but was occasion by matters beyond their control since the witness were unwell. That the plaintiff/applicant has always been willing to prosecute the case and it is in the interest of justice and fairness that the court exercises its discretion and reinstate the suit for hearing. That the plaintiff was ready to proceed for hearing on 2<sup>nd</sup> June, 2019 when the matter last came to court but the same was adjourned at instance of the defendant's counsel who was unwell. That the plaintiff/applicant have a reasonable cause of action against the defendants and urge that they be heard on merit. That the plaintiff had already complied with the Civil Procedure Rules and the suit was ready for hearing save that their witness were not available on the particular date of the hearing. That the plaintiff is a public primary school and it is in the interest of justice that they should not suffer the penalty of not having his case heard on merit. That the suit property is the only parcel of land that the school sits on and has been in possession since the year 1974. That the defendants are in the process of executing the judgment pursuant to the dismissal orders of 9<sup>th</sup> December, 2019 and will result in the eviction of the applicants which is a public primary school. That since the Attorney General came on record they have only sought an adjournment once that is on 13<sup>th</sup> November, 2018. That the application for reinstatement will be rendered nugatory should stay of execution not granted. That no prejudice will be suffered by the respondents should the application be allowed and orders for reinstatement granted. That the application is made in the interest of justice and fairness.

The respondents opposed the application and submitted that the order for dismissal was just as the plaintiff has been guilty of inexcusable delay in prosecuting the suit since 2016. There are no acceptable reasons explained for nonattendance of the plaintiff's witnesses on the date of hearing when the suit was dismissed. The defendants are the registered proprietors of the suit land and have a right to enjoy their property.

This court has considered the application and the submissions therein. The applicant submitted that on 13<sup>th</sup> 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 the suit was dismissed on the 9<sup>th</sup> December, 2019 by this honourable court because of failure of the plaintiff witness to attend court for hearing. The applicant submitted that failure of the plaintiff witness to attend court was not deliberate but was occasion by matters beyond their control since the witness were unwell. I have perused the court file and find that this suit was dismissed on 9<sup>th</sup> December, 2019 for non-attendance. This application was filed on the 22<sup>nd</sup> January 2020 and 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 is merited and I grant the same and costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JULY 2020.**

**N.A. MATHEKA**

**JUDGE**