



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 37 OF 2018

ERNEST MAKOKHA OSUNDWA.....PLAINTIFF

VERSUS

PETER WAKASIKA

THE NATIONAL LAND COMMITTEE

THE DIRECTOR OF SURVEY.....DEFENDANTS

RULING

The first application is dated 10th January 2020 seeking the following orders;

1. This application be certified as urgent and its service be dispensed with.
2. That the respondent be ordered to restore/reinstate the public water way that runs between the parcel Kakamega/Moi's Bridge Settlement Scheme/11/179 and parcel Kakamega/Moi's Bridge Settlement Scheme/11/178.
3. The OCS Matunda and the area Chief to oversee and provide security.
4. Costs.

It is based on the grounds that the respondent filed a suit against the applicant. The suit was dismissed. That there is a public water way that runs through the two suit parcels of land. That the respondent has fenced off the water way.

The second application is dated 19th February 2020 and is brought under Article 50 (1) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 12, Rule 7, Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That this application be certified urgent and be heard ex-parte in the first instance.
2. That this application be heard inter-partes as a matter of urgency on such date and at such time as this honourable court may direct.
3. That the order of the honourable Justice Nelly A. Matheka made on the 19th December, 2019 dismissing the suit herein together with all other consequential orders be reviewed, varied and/or set aside.
4. That the suit herein be reinstated, heard and decided on its merits.
5. That the defendant's application dated 10th January, 2020 be set down for hearing inter parties.
6. That the costs of this application be in the cause.

It is made on the grounds that on 19th December, 2019, the honourable court made an order for dismissal of the plaintiff's suit for want of prosecution. The plaintiff, the only witness in the matter, is aged 77 years and sickly. Consequently, he was unable to attend court on 19th December, 2019 as he had been taken ill and was under the doctor's instruction to be on bed rest. The said order was made through no fault or wrongdoing on the part of the plaintiff/applicant but due to the illness and therefore non-availability of the plaintiff. The plaintiff is keen

on prosecuting his suit, which raises a substantial claim with triable issues which should be heard and determined on its merits. The delay occasioned herein is not so inordinate or so great as to be considered inexcusable. The plaintiff is desirous of prosecuting the claim and the defendant will suffer no prejudice if the dismissal is set aside and the suit herein is determined on its merits. It is in the interest of justice and the overriding objective of the court that the said order ought to be reviewed and the suit be reinstated for hearing and determination.

This court has carefully considered the application and the submissions therein. On the first application the defendant filed the same on the 10th January 2020 seeking substantive orders that the plaintiff opens the water way. It is not disputed that the entire suit stands dismissed from the 19th December 2019, there is no suit and the said orders cannot be issued. I find this application is not merited and I dismiss the same with no orders as to costs.

On the second application it is based on the grounds that on 19th December, 2019, the honourable court made an order for dismissal of the plaintiff's suit for want of prosecution. The plaintiff, the only witness in the matter, is aged 77 years and sickly. Consequently, he was unable to attend court on 19th December, 2019 as he had been taken ill. I find that 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 is merited and I grant it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE