

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 16 OF 2020

DAVID LILUNGU AMBEYIAPPELLANT/APPLICANT

VERSUS

JAMES MAJENGO MURUNGA..... RESPONDENT

RULING

The application is dated 2nd July 2020 and is brought under order 12 rule 7 of the Civil Procedure Rules and sections 3 and 3A of the Civil procedure Act seeking the following orders;

1. That the application herein be heard on priority basis.
2. That the dismissal order made on 9th July, 2015 dismissing the appellant/applicant's appeal for want of prosecution be set aside.
3. That the appellant's appeal be reinstated for hearing and determination on merit.
4. That the costs of this application be in the cause.

It is based on the affidavit of David Lilungu Ambeyi and grounds that the appeal was dismissed on 9th July, 2015 for warrant of prosecution. The notice for dismissal of the appeal was not served on the appellant or his advocates on record to show cause why the appeal should not be dismissed. The notice for dismissal of the appeal was erroneously addressed to the respondent in person yet he had an advocate on record. The appellant has been condemned unheard when the appeal was ready for hearing. The appellant is still the registered owner of the suit land which is the subject matter in the appeal. Unless the appeal is heard and determined on merit, the appellant shall suffer irreparable loss and damages. The dispute between the parties will remain unresolved and may likely escalate in unending disputes. It is in the interest of justice that the orders sought be granted.

The respondents opposed the application stating that the delay in filing the application is inordinate. That nothing barred the applicant from prosecuting the appeal and he cannot blame his advocate.

This court has considered the application and the submissions therein. The applicant submitted that the notice for dismissal of the appeal was not served on the appellant or his advocates on record to show cause why the appeal should not be dismissed. I have looked at the court record and find that this suit was dismissed on 9th July 2015. It was not until the 2nd July 2020 when this application was filed. This is an old matter of 2011. 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 27TH OCTOBER 2020.

N.A. MATHEKA

JUDGE