

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 18 OF 2020

SHEM NALIANYA SIPITALI (*suing through*

Next friend and uncle Patrick Wafula Kaburu).....**APPLICANT**

VERSUS

MUSIKITI KUSIMA MAKHOKHA.....**RESPONDENT**

RULING

This application dated 11th March 2020 and is brought under order 51 Rule 3, 15, order 12 rule 7 of the Civil Procedure Rules 2010 seeking the following orders: -

1. That for reason to be recorded, this application be certified as most urgent and service thereof be dispensed with in the first instance.
2. That this honourable court orders on the 2nd day of October, 2019, be discharged, varied and or set aside in their totality on the strength of Order 51 Rule 15. The court may set aside an order made ex-parte.
3. That upon granting prayers 2 above this honourable court be pleased to fix and set full hearing of the main suit herein considering the weighty and serious questions of law that call the attention of this honourable court to arbitrate on the matters which the plaintiff herein have raised in the main suit.
4. Costs of this application be provided for.

It is supported by the affidavit of Patrick Wafula Kaburu and on grounds that the honourable court's Notice of Dismissal placed before the honourable judge on the 2nd October, 2019 for dismissal was not properly before the honourable court as it was dubbed with serious irregularities in legal procedure. That the honourable court is not a party to the case referred as Land and Environment Case No., 151 of 2014 and hijacked itself to dismiss the suit, where upon the court never served the plaintiff herein namely Patrick Wafula Kaburu with the Notice for dismissal as under order 17 Rule 2 of Civil Procedure Rules. That the plaintiff/applicant herein will not and is not admitting having failed to attend this honourable court on 2nd October, 2019 deliberately and therefore the procedural technicality on the part of the court lacks bearing to dismiss the main suit herein. That the honourable court herein and the defendant/respondent had already made an opinion to dismiss the main suit herein not considering the weighty and serious questions of law that call this honourable court to arbitrate on the matters raised in the main suit, which the plaintiff had already filed an application under certificate of urgency dated 15th day of October, 2015 seeking for directions of this honourable court for main suit to continue to full hearing. That this honourable court cannot take away the plaintiff/applicants right of being heard and defend himself and in the end be condemned unheard. That this honourable court be pleased to allow this application and or set aside orders of 2nd October, 2019 in their totality, as it will be contrary to the spirit of the rules of natural justice as enshrined under Article 22 (3) (d) of the Kenya Constitution. That this will not only be contrary to the rules of natural justice but will be allowing and giving due regard to procedural technicalities which has no place in law as is evidenced by Article 159 (2) (d) of the Kenya Constitution. It is in the interest of justice that the order sought herein be granted.

The respondent opposed the application and submitted that the application dated 11th March, 2020 is incompetent for failure to explain the inordinate delay in prosecution of the suit. That the application runs counter to the provisions of Order 17 rule 2 of the Civil Procedure Rules. That the application runs counter to the provisions of Article 50 (2) (e) of the Constitution of Kenya. That the application dated 11th March, 2020 is frivolous, vexatious and is generally an abuse of the due process of this honourable court.

This court has considered the application and the submissions therein. The applicant submitted that on 2nd October, 2019 when the matter came up the he was absent because he was never served with the notice for dismissal. I have looked at the court record and find that indeed on the material dated the matter came up for dismissal before Justice B. Olao sitting in Bungoma and the applicant was not present in court. It is on record that dismissal notices were issued to both the parties on the 19th June 2019. I further have perused the court file and find that this suit was dismissed on 2nd October, 2019 for want of prosecution. It was not until the 11th March 2020 when this application was filed. This is an old matter of 2014. 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 24TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE