

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 20 OF 2020

SHEM NALIANYA SIPITALI (*suing through*

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

VERSUS

MUSIKITI KUSIMA MAKHOKHA

ATTORNEY GENERAL (*suing on behalf of*

LANDS REGISTRAR BUNGOMA COUNTY).....**RESPONDENTS**

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 24th day of May, 2018, allowing the 1st defendant's application dated 26th day of February, 2018 and terminating the plaint suit herein, 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 premised on the grounds that the plaintiff/applicants failure to attend court was not deliberate but a calculated move by the 1st defendant herein one Musikiti Makokha Kusimba who planned with the OCS Kimilili police station to arrest the plaintiff/applicant herein and put the plaintiff herein in Kimilili Police cells on 18th May, 2018. That the plaintiff/applicant herein will not and is not admitting having failed to attend this honourable court on 24th May, 2018 deliberately and therefore the procedural technicality on the part of the court lacks bearing to allow the 1st defendants application of 26th February, 2018 to dismiss the main suit herein. That the honourable court herein and the 1st defendant had already made an opinion to allow the applicant of 26th February, 2018 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 24th May, 2018 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.

The 1st 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.

This court has considered the application and the submissions therein. The applicant submitted that his failure to attend court was not deliberate but a calculated move by the 1st respondent herein one Musikiti Makokha Kusimba who planned with the OCS Kimilili police station to arrest the plaintiff/applicant herein and put the plaintiff herein in Kimilili Police cells on 18th May, 2018. He has annexed a charge sheet dated the 21st May 2019. There is no evidence of confinement on the 24th May 2019. Be that as it may, I have carefully perused the court record and find that indeed on the material date the matter came up for the application for dismissal before Justice B. Olao sitting in Bungoma on the 24th May 2019 and the applicant was not present in court. The application was not opposed and the orders dismissing the suit were granted. I further have perused the court file and find that this suit was dismissed on 24th May 2019. It was not until the 4th March 2020 when this application was filed. This is an old matter of 2012. 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