

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 24 OF 2019

JAMES KARINGA ALUVANZE.....APPELLANT

VERSUS

KENNEDY ALUVANZE

BEN ICHAMINY.....RESPONDENTS

RULING

The application is dated 19th August 2020 and is brought under Sections 1A, 1B & 3A of the Civil Procedure Act and Order 10 & Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this honourable court be pleased to reinstate the appeal herein by varying, reviewing and setting aside the orders made on 23rd June, 2020 dismissing the appeal herein for non-attendance.
2. That costs of this application be provided for.

It is based on the affidavit of James Karinga Aluvanze and grounds that the appellant/applicant was represented by the late Betty Rashid Advocate of Betty Rashid & Co. Advocate who died on 28th June, 2020. That the said advocate died on 28th June, 2020 just after four days, after the appeal herein was dismissed on 23rd June, 2020 while undergoing treatment. That the appellant/applicant was not aware the appeal was coming up for hearing on 26th June, 2020. That the appellant/applicant was not aware that this matter had been given a last adjournment on 23rd March, 2020 when it came up for mention in the absence of the parties herein. That the appellant/applicant did not receive any communication from her then counsel on record the late Betty Rashid who was ailing then and was in fact in India for some time then later transferred to Nairobi Hospital for treatment till her demise. That the appellant/applicant came to know of the appeal herein having been dismissed on 23rd June, 2020 on 14th August, 2020 when he instructed his new counsel on record Osango & Co. Adv. who perused the court file and indeed established that the same had been dismissed for non-attendance of both parties herein. That there are remarks on the mention notice in the court file indicating that the counsel on record for both parties were served vide WhatsApp and there could be a possibility that the said notice could not have come across the mind of the late Betty Rashid who was ailing and undergoing treatment. That the said late Betty Rashid during her lifetime in the lower court never failed to attend court and or instruct a counsel to hold her brief when the matter came up for hearings and mentions. That the appellant/applicant was condemned unheard. That the respondents will suffer no prejudice if the orders sought are granted since they will have an opportunity to defend the suit on merit rather than technicalities. That the application herein is made in good faith and timelessly. That it is in the interest of justice that the prayers sought be granted.

This court has considered the application and the submissions therein. The application was not opposed. The applicant submitted that failure to attend court by his Counsel Betty Rashid and or the appellant/applicant in person was not deliberate but on account of sickness of the said advocate who died on 28th June, 2020. That the appellant/applicant works in Nairobi and could not travel to Kakamega since there was a lockdown due to the effects of Corona Virus (Covid 19) pandemic which restricted movements within the County and out of the County. That there were directions of scaling down the operations of court by the Chief Justice which denied most of the litigant's chance to access the court premises and parties were advised that fresh dates will be given on notice. 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 vs 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 merit and I grant the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 25TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE