



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 327 OF 2014**

**RINA SHEM MBAYE..... PLAINTIFF/APPLICANT**

**VERSUS**

**FREDRICK L. NAMUSENDE**

**SIMON AKALA KAITANO**

**LAND REGISTRAR, KAKAMEGA.....DEFENDANTS/RESPONDENTS**

**RULING**

The application is dated 17<sup>th</sup> October 2018 and is brought under Section 3A of the Civil Procedure Act, Order 12 rule 7 of the Civil Procedure Rules, 2010 for orders:-

1. That the honourable court be pleased to set aside and/or vary the order made on the 6<sup>th</sup> day of December, 2017 dismissing the suit herein for want of 1. prosecution.
2. That in the result, the honourable court be pleased to reinstate the plaintiff/applicant's suit.
3. That the plaintiff/applicant's be at liberty to apply for such further and/or other orders or directions as this honourable court may deem fit to grant.
4. That the costs of this application be in the cause.

It is supported by the annexed affidavit of Julius Kiboen Maruja and is based on the following general grounds that on the 6<sup>th</sup> day of December, 2017, this honourable court issued an order dismissing the suit herein for want of prosecution. That since the institution of this suit the plaintiff has been nothing but vigilant, persistent and consistent in pursuing its determination. That even though this matter has been in court for a long time now, had actually been slated for hearing and on the material day, the plaintiff/applicant was never informed of the said hearing date by her erstwhile advocates, which is highly regretted. That following dismissal persistent remedial efforts by the applicant, including engaging new advocates on record have been brought to the fore so that the suit to finally be listed for directions forthwith before the honourable court notwithstanding the delay. That the plaintiff had filed all the requisite documents prior to fixing a hearing date, which efforts were frustrated by the above mentioned occurrence. That there was no inordinate delay between the time when the matter was in court last and the time when it was dismissed or if there was, the same was not occasioned by the plaintiff/applicant herein. That the plaintiff/applicant is at the risk of losing the piece she is claiming from the defendants/respondents in light of the dismissal. That in the application herein the plaintiff/applicant is seeking reinstatement of the suit to allow the parties to reach a final conclusion. That it is in the interest of justice and fair determination of this suit that this application be certified as urgent and be dispensed with forthwith. That in the application herein the plaintiff/applicant is seeking reinstatement of the suit to allow the parties to reach a final conclusion. That it is in the interest of justice and fair determination of this suit that this application be certified as urgent and be dispensed with forthwith.

The 1<sup>st</sup> defendant/respondent opposed the plaintiff/applicant's application dated 17<sup>th</sup> October, 2018 on the following grounds inter alia that the plaintiff/applicant is guilty of inordinate delay. That the applicant has not explained why it has taken her almost one year before bringing up this application. That the applicant is thus guilty of laches. That the supporting affidavit has been sworn by an advocate who cannot explain the issues surrounding the dispute and or parties in this case. That the affidavit sworn by the counsel should thus be struck out. That upon striking out counsel's affidavit, the application will be left unsupported and it would consequently be dismissed.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 6<sup>th</sup> December 2017. It is was not until the 17<sup>th</sup> October 2018 that the present application was filed. I find that there is inordinate delay in filing this application and the same is an afterthought.

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 IN OPEN COURT THIS 28<sup>TH</sup> DAY OF FEBRUARY 2019.**

**N.A. MATHEKA**

**JUDGE**