



**REPUBLIC OF KENYA**

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

**ELC APPEAL CASE NO. 12 OF 2018**

**ELIJAH ODARI GWINI.....APPELLANT/APPLICANT**

**VERSUS**

**LABAN KIPCHOGE**

**PRISCILLA ANDIA SOTE**

**DANIEL MBOLE.....RESPONDENTS**

**RULING**

The application is dated 22<sup>nd</sup> May 2017 and is brought under section 3 and 3A of the Civil Procedure Act and order 42 rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this honourable court be pleased to set aside the orders issued on 22/4/2015.
2. That this appeal filed vide a memorandum of appeal dated 27<sup>th</sup> day of February, 2013 be reinstated.
3. That costs be in the cause.

It is grounded upon the annexed affidavit of Elijah Odari Gwini and on the following grounds that the advocate on record did not communicate on time to the appellant/applicant that the matter was set for dismissal and that the mistake of counsel should not be visited upon the appellant. The appellant/applicant ought not be condemned unheard. The appellant/applicant has an arguable appeal with high chances of success. The appellant/applicant will suffer irreparable loss if the said orders are not granted. The appellant /applicant has acted reasonably and properly in making this application.

The application dated 22<sup>nd</sup> May, 2017 was opposed on the grounds that same is belated having been brought after two years which delay is inordinate. The reasons advanced by the applicant to back the application are insufficient as there was no effort by the applicant to seek court direction as against the deceased respondents. By the applicant's persistent habit of coming up every time to make similar applications to explain inaction on his party by blaming others in the past, the present application become vexations and gross abuse of the court's process. The law does not aid the indolent and litigation must come to an end. The applicant has a remedy against his previous counsel under Article 22 and 23 of the Constitution of Kenya 2010 if indeed he was wronged.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 22<sup>nd</sup> April 2015. It is was not until the 22<sup>nd</sup> May 2017 that the present application was filed. I find that there is inordinate delay in filing this application and the same is an afterthought. Reasons advance for the delay are not convincing. The applicant has been indolent and is guilty of inordinate delay.

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 20<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**