



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 54 OF 2018**

**RAMADHAN O. MUKONZO.....APPLICANT**

**VERSUS**

**JOHN WESONGA OLUNGA.....RESPONDENT**

**CEPHAS O. MIRIMO.....RESPONDENT**

**RULING**

The application is dated 2<sup>nd</sup> November 2018 and is brought under order 12 rules 1 and 7 of the Civil Procedure Rules, 2010 and Article 157 of the Constitution of Kenya seeking the following orders:-

1. That the learned judge be pleased to set aside the orders of 24/10/2018 dismissing the applicant's suit and reinstate it to be heard and decided on merit.
2. That costs be in the cause.

It is premised on the annexed affidavit of Rayhana Omar and grounds that the non-attendance by counsel on the applicant was not deliberate. That the applicant has a good case with a high chance of success. That the applicant is craving for justice.

That this suit was fixed for mention by the registry on 24/10/2018. That they prepared a mention notice and instructed a process server to effect service on the respondents. That on 24/10/2018 she travelled to Kakamega and went to the registry to have the return of service be filed. That unfortunately her secretary had mistyped the case number as 64 of 2018 instead of 54 of 2018 causing her a delay at the registry. (Attached and marked RO-1 a & b is a copy of the affidavit of service and its receipt.) That by the time she realized the omission, corrected the same and rushed to court, the matter had been dismissed. That she had advised her client not to attend court hence his absence. That the plaintiff's claim is water tight and has a very high chance of success. That the litigant should not be punished for omissions by counsel. That they implore the court to reinstate this suit for trial and determination on merit.

This court has considered the application and the submissions therein. The respondent was served but failed to attend court or oppose the application. I have perused the court file and find that the case was dismissed on the 24<sup>th</sup> October 2018 for nonattendance. This application was filed on 8<sup>th</sup> of November 2018. I find the reasons given for non attendance reasonable and I accept the same.

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 merit and I allow the same on condition that the applicant obtains a hearing date within thirty (30) days from the date of this ruling.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> DAY OF  
APRIL 2019.**

**N.A. MATHEKA**

**JUDGE**