



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 126 OF 2012**

**LIVINGSTONE O. OGOLA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSHUA KUSINGO.....DEFENDANT/RESPONDENT**

**RULING**

The application is dated 25<sup>th</sup> March 2019 and is brought under section 3 & 3A of the Civil Procedure Act, Order 12 rule 7 and Order 8 rule 3 (i) of the Civil Procedure Rules seeking the following orders:-

1. That the orders for dismissal of the above captioned suit on or about the 17<sup>th</sup> October, 2017 for want of prosecution be set aside and the said case be reinstated for interparty hearing.
2. That the orders for injunction issued therein vide the ruling dated 20<sup>th</sup> March, 2013 be reinstated and extended pending the hearing and determination of the main suit.
3. That this honourable court be pleased to grant the applicant leave to amend the plaint to include the acts of trespass and the same draft be deemed as duly filed upon payment of the requisite fees.
4. The costs herein be in the cause.

It is based on the affidavit of Livingstone O. Ogola and on the following general grounds, that the plaintiff never received any information regarding the dismissal of the said suit. That there was no land court and the plaintiff was never informed on when it resumed. That the plaintiff has a good case with high chances of success. That the dismissal of this case will make the applicant suffer irreparably as the matter touches on land which is a sensitive issue. That failure of the applicant to include the acts of trespass may be fatal since the nature of the developments in respect to the suit land has changed. That the delay in filing this application is excusable since the applicant was seeking legal advice and finances to facilitate the filing thereof. That it is proper and just for the plaintiff to include the acts of trespass and tilling.

The applicant submitted that he filed the suit and the same proceeded for the hearing of the application therein until the ruling was delivered on the 20<sup>th</sup> March, 2013. That due to the foregoing the District Land Registrar visited the disputed land parcel whereby they filed a report in the court file since the substantive suit was pending for hearing and determination. That there was a time when there was no land court judge at Kakamega High Court and in the due course they were instructed to be patient and wait until the time when the land court will resume. That he stayed at home without receiving any information in respect to the foregoing until he went to inquire about his case in the year 2018. That he was surprised to note that his case was dismissed on or about the 17<sup>th</sup> of October, 2017 for want of prosecution. That he was never notified of the said date when the file was taken to court.

This court has considered the application and the submissions therein. The respondent was served and failed to attend court and the application was not opposed. I have perused the court file and find that this suit was dismissed on 17<sup>th</sup> October 2017. It is not until the 25<sup>th</sup> March 2019 that the present application was filed. I find that there is inordinate delay in filing this application and the same is an afterthought. Reasons advanced 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 no orders as to costs as it was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**