

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 106 OF 2013

JOHN NANDWA ANGAYA

JOSEPH NYANGWESO CHAPIA.....PLAINTIFFS/APPLICANTS

VERSUS

PATRICK ALUKWE.....DEFENDANTS/RESPONDENT

RULING

The application is dated 12th March 2019 and is brought under order 12 rule 7 and order 51 rule 1 seeking the following orders;

1. That this honourable court be pleased to set aside its orders issued on 5/3/2019 dismissing the suit herein for want of prosecution, reinstate the same and set it down for hearing upon such conditions as may be determined.
2. That the costs of this application be provided for.

It is based on the grounds that this honourable court on 5/3/2019 dismissed the suit herein for want of prosecution. That the plaintiff's advocate was not aware that the matter had been listed for hearing on the 5/3/2019. That the office clerk who took the said date diarized the same as coming up for hearing on the 6/3/2019 instead of 5/3/2019. That the error was a bonafide and genuine mistake on the part of the plaintiff's advocate office and the said mistake should not be revisited upon an innocent litigant. That they only came to know of the said dismissal on 6/3/2019 when they came to court with their witnesses ready to proceed with the case only to be informed by the court clerk that the said matter had come up the previous day and dismissed for want of prosecution. That it is in the best interest of justice that the said orders be set aside, the suit herein reinstated and listed down for hearing to enable disposal of the same on merits. That the plaintiff/applicant shall abide, if need be, on such conditions as this honourable court may prescribe for grant of the orders sought.

The respondent submitted that the clerks of the firm of K.N. Wesutsa and the firm of M/s. Lucy Nanzushi went at the registry to fix this case for hearing on the 5/3/2019 and it was on the court file. The plaintiffs advocate should have shown the cases for 5/3/2019, to show that the clerk did not fix the same on that date. This case started off in the year 2013 and the reasons being given are not convincing.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 5th March 2019. It was on the 13th March, 2019 when the present application was filed. I find that there is no delay in filing this application. I find the reasons given for nonattendance excusable and I accept them. I find that no prejudice will be occasioned upon the defendant in the event the orders sought are granted as the application herein has been filed promptly.

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 is merited and I grant the same on condition that the applicant obtains a hearing date of the main suit within the next thirty (30) days from the date of this ruling. Costs of this application to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE