

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 74 OF 2013

ANNA INDONDE IMBOBA.....PLAINTIFF/RESPONDENT

VERSUS

VINCENT SHINGWANA INJEDE.....DEFENDANT/APPLICANT

RULING

The application is dated 3rd September 2018 and is brought under Section 3 and 3A of the Civil Procedure Act seeking the following orders;

1. This honourable court be pleased to grant the defendant/applicant leave to withdraw the services of M/s. M. Kiveu & Co. Advocates.
2. This honourable court be pleased to grant the defendant/applicant leave to appeal to Court of Appeal.
3. This honourable court be pleased to grant the defendant/applicant leave to file and serve Notice of appeal out of time to this honourable court ruling dated 27th day of September, 2017.
4. This honourable court be pleased to stay any further execution of this honourable court's judgment delivered on 17th Day of March, 2015.
5. Costs of this application be provided for.

It is brought on the grounds that, the defendant/applicant herein instructed the firm of M/s. Kalema Maina & Bundotichi & Co. Advocates who filed a memorandum of appearance, defence and counterclaim. The defendant/applicant had formidable defence and counter claim which raised weighty issues against the plaintiff/respondent's claim. The defendant/applicant's firm of M/s. Kalema, Maina & Bundotich Advocates never communicated to the defendant/applicant as to the hearing of this case scheduled for 9/12/2014. The defendant/applicant came to know of judgment when the plaintiff/applicant started bragging in the village. The defendant/applicant immediately instructed the firm of M/s. M. Kiveu & co. Advocates in the place of the previous lawyers on record who filed application dated 20/5/2015. Immediately after delivery of judgment and filing of the application dated 20/5/2015, the Environment and Land Court was suspended following the decision made at the Court of Appeal at Malindi. The defendant/applicant's application could not be heard in the absence of the Environment and Land Court. The plaintiff/respondent then filed her application dated 16/6/2017 immediately, this present court started its sittings. This honourable court never took judicial notice that failure to prosecute application dated 20/5/2015 was due to absence of the Environment and Land Court at Kakamega. The defendant/applicant has stayed and occupied the suit land since the year 1979. The defendant/applicant learned of dismissal of his application of 20/5/2015 when he was evicted from the suit land on 16th day of July, 2018 at 4.00 a.m. in the morning. The defendant/applicant was never informed of the dismissal of the application by the firm of M/s. Kiveu & Co. Advocates who were in record for him. The plaintiff/respondent has never at one time settled on this suit land and/or utilized. The defendant/applicant has suffered irreparable loss and damages. It is in the interest of justice that the defendant/applicant's application be granted to enable him exercise his rights of fair hearing.

The respondent submitted that the applicant's prayer number 1 in the said application may be granted as it is his right to choose his legal representative. That this court delivered judgment in her favour on 17/3/2015. That the applicant moved the court to stay execution of the said judgment in his application dated 20/5/2015 and he was granted interim orders on 9/9/2015 to stay the execution. That the applicant never prosecuted his application dated 20/5/2015 to set aside the said judgment. That she proceeded to make an application dated 16/6/2017 to set aside the said interim orders. That this court delivered a ruling of the application dated 16/6/2017 in her favour on the 27/9/2017 lifting the interim orders granted in favour of the applicant. That further the ruling delivered on 27/9/2017 was done in the presence of the applicants advocate on record. That it is within her knowledge that following the ruling on 27/9/2017 she proceeded to carry out execution on 16/7/2018. That the defendant/applicant is misleading this court that he learnt of the application dated 16/6/2017 on the day of eviction when the application was served upon him and he even opposed the same by filing a replying affidavit on 27/7/2017.

This court has considered the application and the submissions therein. Prayer 1 is granted by consent. I have perused the court file and find that this suit judgement was delivered on 17th of March, 2015 and the ruling on 27th day of September, 2017. It is was not until the 3rd 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. Reasons advance for the delay are not convincing. The applicant has been indolent and is guilty of inordinate delay. This court has been sitting in Kakamega from February 2017 and so it is not true that the matter could not proceed for lack of a court.

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 8TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE