



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 92 OF 2013**

**KENNEDY MISIGO OMEGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELIJAH OTHIENO OTIENO..... DEFENDANT/RESPONDENT**

**RULING**

This application is dated 20<sup>th</sup> February 2019 and is brought under Article 159 (2) of the Constitution of Kenya, Section 1A and B of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this honourable court be pleased to reinstate the suit herein.
2. That costs be in the cause.

It is based on the following general grounds that the suit herein was dismissed for want of prosecution on the 27<sup>th</sup> day of November, 2017. For quite sometime the court file could not be traced at the registry since 16<sup>th</sup> June, 2015. The dismissal notices dated 24/5/2017 and 11/11/2017 were never served upon the applicant and if indeed the applicant's advocate received the notice dated 11/11/2017, then he never notified the applicant. That the mistake of counsel should not be visited upon an innocent litigant. The applicant has a good claim and it is in the best interest of justice that the suit herein be reinstated so that the real issues in question can be determined on merits. The applicant regrets the circumstances that lead to the dismissal of the suit herein.

The applicant submitted that he secured exparte judgment through his then advocates on record but before he could proceed with execution process, the exparte judgment was by consent set aside and the defendant sought for an out of court settlement negotiations so that the matter can be settled by recording a consent. That on 12/11/2014, 15/12/2014 and 26/2/2015 when this case came in court, the court was duly informed that parties were still negotiating. That on 16/6/2015 when the case was to be mentioned in court to confirm if a settlement had been reached, which date he was duly present, his advocates informed him that the court file was not traceable and he would fix another date when it would be found. That he then instructed his advocates now on record who after inquiry at the registry informed him that the case was dismissed on 27/11/2017. That he was never served with the notice and if his former advocates on record ever received the same then they never informed him.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 27<sup>th</sup> November 2017. It was not until the 20<sup>th</sup> February 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 costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**