

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 9 OF 2016

SHADRACK MUSE ANDAIPLAINTIFF/APPLICANT

VERSUS

BENARD MULIANGO

SILAS MULIUANGO

BILHA VIHENDA.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 15th November 2018 and is brought under sections 1A, 1B, 3A, 63 & 80 of the Civil Procedure Act, Sections 13 and 19 of the Environment and Land Court Act, order 12 rules 3 and 7 and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. This application be certified urgent and service be dispensed with in the first instant.
2. The orders of this honourable court given on 26th June, 2018, dismissing the plaintiffs' suit for non-attendance and/or for want of prosecution be reviewed and/or set aside.
3. The plaintiffs' suit and the interim orders given by this honourable court on 11th February, 2016 be reinstated.
4. Costs of this application be in the cause.

It is based on the following grounds that on the 26th June, 2018, the honourable court dismissed the plaintiffs' suit for non-attendance and/or for want of prosecution. That the plaintiff could not attend court since he was in custody. That the defendants equally failed to attend court. That failure to attend court on the part of the plaintiff and his counsel was not deliberate and ought to be excused. That the plaintiff had filed the instant suit under certificate of urgency and consequently secured interim orders restraining the defendants from interfering with the suit land. That after securing the said orders, the defendants while colluding with the Divisional Criminal Investigation Officer (DCIO) Lugari division trumped up charges that led to the arrest and prosecution of the plaintiff/applicant at the Eldoret Chief Magistrate's Court. That the plaintiff/applicant was therefore handicapped and could not attend court since he was in custody. That the plaintiff/applicant was condemned unheard. That unless the dismissal order herein is set aside the plaintiff shall suffer prejudice. That the instant application is made in the interest of justice and in good faith.

The respondent submitted that, the suit herein was properly dismissed by this honourable court on 26th June, 2018. That the plaintiff's claim that this honourable court ought not to have dismissed the suit for the reason that he could not attend court due to the fact that he was in custody at the time the suit was dismissed does not warrant this honourable court to review and/or set aside its order dismissing the suit for want of prosecution. That the suit herein was ripe for dismissal as order 17 rule 2 (1) provides that in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit. That the suit has been inactive for over one year. That ever since 19th May, 2016, the plaintiff has never taken any step to list this matter down for either hearing or a mention before this honourable court. That the plaintiff's claim that he could not attend court due to the fact that he was in custody ought to be disregarded by this honourable court as he had an advocate on record who never ceased acting in the matter despite the fact that he was in custody. His advocate ought to have followed up on the matter and ensured it was active and in turn inform his client of the progress of the matter. That even prior to his arrest and prosecution the Eldoret Chief Magistrate's court, he had not taken any step to ensure that the matter is cause listed for mention or hearing. That his unwillingness to ensure that the matter is brought before court can only be interpreted as having lost interest in prosecuting the matter. That as regards the interim orders that the plaintiff claims ought to be reinstated, the same were reviewed and/or set aside by their application dated 3rd March, 2016 and as such the said orders cannot be reinstated. That the said orders were actually reviewed and/or set aside by this honourable court in view of the fact that the orders were improperly obtained by virtue of the plaintiff having misled the court. That the plaintiff herein is currently facing criminal charges for having obtained the title deed of the suit land fraudulently and or through forged documents with a view of depriving the defendant's ownership of the suit land. That in the circumstances they urge this honourable court not to allow a miscarriage of justice by the plaintiff herein.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 26th June 2018. It is was not until the 15th November, 2018 that the present application was filed. I find that there is inordinate delay in filing this application. Be that as it may, I find that the applicant was incarcerated and perhaps was not able to follow up with his advocates. I find the delay excusable and I accept it.

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. No interim orders will be reinstated. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE