

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 357 OF 2013

ENOCK LANCY SASAKA.....PLAINTIFF/APPLICANT

VERSUS

MARY ANYERA.....DEFENDANT/RESPONDENT

RULING

The application is dated 8th October 2018 and is brought under section 1A, 1B, 3A and 3B of the Civil Procedure Act and order 12 rule 12 of the Civil Procedure Rules seeking the following orders;

1. That this honourable court be pleased set aside/vary its orders made in November, 2017 dismissing the plaintiff's suit for non-attendance.
2. That the suit be reinstated and listed for hearing.
3. That the costs of this application be provided for.

It is based on the grounds that, the former advocates on record did not inform the plaintiff/applicant when the matter came up for hearing. The plaintiff/applicant is determined to prosecute the matter to its final conclusion. That it is in the interest of justice that the orders sought be granted. The case involves the plaintiff/applicant's only piece of land and if not prosecuted the plaintiff/applicant will suffer irreparably.

The applicant submitted that, the advocate became reluctant in prosecuting his matter and it was dismissed for want of prosecution in November, 2017. That upon dismissal of his case, he lacked guidance on how to represent himself in court. That the case revolves around his only piece of land and home and if the issue is not resolved he stands to suffer irreparably as he will be rendered homeless. That this case has high chances of success if it is reinstated.

The respondent submitted that, sometimes back last year, she received a call from her advocate, one Miss Rauto asking her why she was not in court in a matter where she had been sued by the applicant herein in this honourable court. That she was shocked because she was not aware of any case at the High Court Environment and Land Division. That she was far and she requested her said advocate to intervene and help her get another date so that she could come and find out more. That upon perusal of the file she discovered that the applicant filed this suit way back in 2013. That she is surprised that 6 years later, the applicant never found it necessary to serve her with the summons to enter appearance. That the applicant has disrespected this court further by lying on oath that the matter was filed in 2017 when the record is very clear. That it is the sole duty of the parties to prosecute their case and not of an advocate. That this case was never prosecuted as alleged and has never materialized for hearing. That the prayers as sought in the plaint are an abuse of the court's process and the same should never get an opportunity before this court. That no sufficient reasons have been given for review thus the application is not merited as same sought to be dismissed with costs.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 4th December 2017. It was not until the 8th 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.

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 7TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE