



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 343 OF 2013**

**THOMAS LUHYA SHITAMBAGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**ERNEST LUHYA.....DEFENDANT/RESPONDENT**

**RULING**

The application is dated 2<sup>nd</sup> November 2018 seeking the following orders;

1. That the dismissal order and or judgment made herein in this case can be set aside and same be reinstated back to normal.
2. That the hearing date to be given by this honourable court at its convenient date.
3. Costs be provided for.

The applicant submitted that, during the year 2013 he filed this case against the defendant/respondent herein. That whenever he wanted to take a hearing date, the file went missing. That the changes of the judges also affected the hearing of his case. That on 30<sup>th</sup> November, 2017, he came to the court registry and he was told on enquiry that he pays fees for a hearing date to be taken. That he paid Ksh. 50/= to be given a date and was given 22<sup>nd</sup> May, 2018. That on 22<sup>nd</sup> May, 2018, he came to ready to do the case, but only found that the file was not listed reason given by the registry is that the file was missing. That since 22<sup>nd</sup> May, 2018 he made two consecutive visits every month thereafter coming to the registry to know the position of the file, but only to be told that the file was still missing. That on 23<sup>rd</sup> October, 2018, he was surprised when he received a notice to show cause under order 42 about that dismissal of his case on 8<sup>th</sup> October, 2018. That the dismissal notice reached him late when already the case was dismissed. That the Post Office Box which the notice was dropped and/or dispatched is not his and that is why he could not avail himself in court to defend his interest in the matter. The respondent was served but failed to attend court and the matter proceeded unopposed.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 9<sup>th</sup> October 2018. It was on the 2<sup>nd</sup> November 2018 when the present application was filed. I find that there is no inordinate delay in filing this application. Reasons advanced for the delay are justifiable. The applicant has not been indolent.

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 allow it on condition the applicant takes a hearing date within the next thirty (30) days from the date of this ruling. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**