



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 50 OF 2017**

**JOHN OLUMASAI ACHEWA.....PLAINTIFF/APPLICANT**

**VERSUS**

**BEATRICE MATSA MUTAMBA**

**CHARLES MUKANGA CHECHE....DEFENDANTS/RESPONDENTS**

**RULING**

This application is dated 9<sup>th</sup> May 2019 and is brought under order 12 Rule 7, of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A and 63 e of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent and heard ex parte in the first instance and service be dispensed with as a matter of urgency.
2. That this honourable court be pleased to set aside/vary orders issued on the 17<sup>th</sup> of October, 2018 dismissing this suit and be pleased to order reinstatement of this suit as filed herein.
3. That the costs of this application be in the cause.

It is based on the following grounds that on the 17<sup>th</sup> of October, 2018 when this suit came up for hearing, the honourable court dismissed the suit and vacated interim orders of injunction dated 11<sup>th</sup> of April, 2017 and issued in favour of the plaintiff/applicant. That neither the plaintiff/applicant nor his counsel on record one Mr. Ondindo were served with the hearing notice as is required by law despite the defendants/respondents knowing his whereabouts as they are brother and sister. That the plaintiff/applicant only learnt that the suit was dismissed sometime in March, 2019 when he was served with the order dated 29<sup>th</sup> October, 2018. That in the premise failure to prosecute this suit has not been intentional neither has it in any manner been meant in any way to delay the cause of justice. That the plaintiff/applicant is desirous of prosecuting this suit to its logical conclusion. That the plaintiff/applicant has a good and meritorious case with high chances of success. That the respondents/defendants are currently wasting, damaging, alienating, selling, removing and disposing the property subject matter of this suit to the detriment of the interests of the applicant/plaintiff and other beneficiaries of the deceased's estate. That it is in the interest of justice that this application be allowed. That this honourable court has discretion to issue the orders herein as sought.

The respondent submitted that she is the owner of L.R. No. Kisa/Wambulisho/551 The case came up for hearing on the 17<sup>th</sup> October, 2018, when the case was dismissed for want of prosecution and the orders of 11<sup>th</sup> day of April, 2017 was set aside meaning that she could cultivate my land. Once they knew that the judgment had been delivered, they want to Federation of Woman Lawyers – Kenya Kisumu on the 4<sup>th</sup> March, 2019. She replied them using her lawyer Lucy Nanzushi. She filed her bill of costs dates 25<sup>th</sup> March, 2019. She has filed a case in Butere Court and served it on John Olumasai Achewa for eviction which case is still going on. They served the counsel on record i.e. Onindo Onindo & Associate who have not disputed service. The court should proceed to tax their bill including for filing an objection to notice to show cause.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on the 17<sup>th</sup> October 2018. It is was not until the 10<sup>th</sup> May 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 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 26<sup>TH</sup> JUNE 2019.**

**N.A. MATHEKA**

**JUDGE**