



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 47 OF 2017**

**JAMES JIMWEI OGOMBO.....APPELLANT/APPLICANT**

**VERSUS**

**NAOMI MUHONJA EGADWA**

**MARY ANDISI EGADWA.....RESPONDENTS**

**RULING**

The application is dated 7<sup>th</sup> may 2019 and is brought under Articles 50 (1) and 159 (2) (a) of the Constitution of Kenya 2010, Sections 1A, 1B, 3, 3A 63 (e) and 80 of the Civil Procedure Act and Order 45 and Order 51 of the Civil Procedure Rules 2010 seeking the following orders that:-

1. This application be certified urgent and service thereof be dispensed with in the first instance.
2. This honourable court be pleased to vary/set aside orders made on the 19<sup>th</sup> June, 2018.
3. The applicant's appeal herein be reinstated and set down for hearing on its merits.
4. The costs of this be in the cause.

It is supported by the grounds set out hereunder and the annexed affidavit of James Jimwei Ogombo and such further grounds that the respondent appointed M/s. Michael Muhuyi Kiveu & co. Advocates to have his appeal that had been dismissed for want of prosecution reinstated. That the said advocates took an inordinately long period of time to file the application dated 22<sup>nd</sup> May, 2017 seeking orders inter-alia that this appeal be reinstated, despite having instructions to file the same on time. That the applicant's previous advocates prior to the appointment of the same M/s. Michael Muhuyi Kiveu & Co. Advocates, M/s. Athung'a & Co. Advocates failed to prosecute this appeal and as such, the same was dismissed for want of prosecution on the 7<sup>th</sup> July, 2015. That the said M/s. Michael Muhuyi Kiveu & Co. Advocates failed to inform the applicant of the dismissal of the application for reinstatement of the appeal on the 19<sup>th</sup> June, 2018. That the applicant learnt of the position of the matter upon perusing the court file and upon trying to get the status of the same from the said advocates in vain. That as a result of the foregoing, the applicant has withdrawn his instructions from the firm of M/s. Michael Muhuyi Kiveu & C o. Advocates and has now appointed M/s. Minishi & Co. Associates Advocates to take over the conduct of this matter on his behalf. Failure by the applicant to prosecute the appeal was neither deliberate nor callous but the same was a mistake on the part of his former advocates. Unless this application is heard urgently and orders therein granted, the applicant shall suffer irreparable loss and damage as execution will ensue without him having an opportunity to prosecute his appeal on merits. The applicant is apprehensive that the respondents may interfere/waste away the suit property as they have been on various occasions together with their agents and have been seen inspecting the same. That the respondents will not be prejudiced if this application is allowed.

This court has considered the application and the submissions therein. The respondent was served but failed to attend court and the application proceeded unopposed. The respondent submitted that he appointed M/s. Michael Muhuyi Kiveu & Co. Advocates to prosecute my appeal against the decision of the Western Provincial Appeals Tribunal in respect of Land parcel number South Maragoli/Lugovo/849 of 0.43 Ha. That at the time of receiving the instructions, the substantive appeal had been dismissed for want of prosecution. That his previous advocates prior to the appointment of the same M/s. Michael Muhuyi Kiveu & Co. Advocates, M/s. Athung'a & Co. Advocates failed to prosecute this appeal and as such, the same was dismissed for want of prosecution on the 7<sup>th</sup> July, 2015. That that the said advocates inordinately took time to file the application dated 22<sup>nd</sup> May, 2017 seeking orders inter-alia that this appeal be reinstated which application was dismissed for among other reasons inordinate delay in filing the same. That the firm of M/s. Michael Muhuyi Kiveu & Co. Advocates failed to inform him of the dismissal of the application for reinstatement of the appeal on the 19<sup>th</sup> June, 2018. That he learnt of the position of the matter upon perusing the court file and upon trying to get the status of the same from the said advocates in vain. That suit property is now in real danger of being interfered with as he has credible information that the respondents plan to fence the same off in blatant disregard of his proprietary interest and in the face of this appeal failing to be heard on its merits on account of a mistake that is not of his own making.

I have perused the court file and find that this suit was dismissed on 7<sup>th</sup> July 2015. It is was on the May 2017 when the first application to set aside the dismissal was filed. I found that there is inordinate delay in filing this application. Reasons advance for the delay are not justifiable. The applicant has been indolent hence this application was dismissed on the 19<sup>th</sup> June 2018. Come the 8<sup>th</sup> May 2019 the applicant changed advocates and filed this application. I find this application is an abuse of the court process. If the applicant was dissatisfied with the ruling issued on 19<sup>th</sup> June 2018 by this court then their recourse is to appeal. This application is vexatious and a waste of the court's time.

I wish to reiterate the ruling of 19<sup>th</sup> June 2018 in this case where 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**