

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 245 OF 2015

REUBEN AMBAISI NAMBWAYO.....PLAINTIFF/APPLICANT

VERSUS

MAKOLO ATUNDO.....DEFENDANT/RESPONDENT

RULING

The application is dated 14th May 2019 and is brought under sections 1a, 1b, 63e, 3 & 3a of the Civil Procedure Act, order 51, order 10 rule 11 and order 12 rule 7 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified urgent and the same be heard on priority basis.
2. That judgment entered against and or orders made against the plaintiff on the 7th May, 2019 dismissing the plaintiff's non-attendance be set aside or be reviewed and this suit be reinstated and set down for inter parties hearing.
3. That costs of this application be in the cause.

It is grounded on the annexed affidavit of Reuben Ambaisi Nambwayo the applicant and on the grounds that, the applicant's suit was dismissed on the 7th May, 2019 for want of prosecution and for his non-attendance. That the applicant has been desirous to prosecute this matter on merit. That the applicant was at loss not to understand that his case was to be heard before this court as he strayed to the Chief Magistrate's Court number 6 where he thought the court is handling his matter. That equally the applicant's counsel did not attend court citing reasons that she was indisposed. That the applicant has a good and prima facie case as against the defendant. That this application has been brought without unreasonable delay and in good faith. That this application shall not prejudice the respondent as he may be compensated with thrown away costs. That it is in the interest of justice that the orders sought are granted.

The respondent submitted that, the suit herein was dismissed for want of prosecution on the 7th May, 2019. That the plaintiff herein had been given a last adjournment. That the case was not coming for hearing for the first time. That whenever this case comes up for hearing the applicant goes to the right court and therefore it is a lie to say that he was in the Chief Magistrate's Court No. 6. That the cause list for matters being handled for the day are conspicuously fixed on the notice board which is accessible by all litigants. That the application lacks merit and should 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 7th May 2019. It is was on the 14th May 2019 that the present application was filed. I find that there is no inordinate delay in filing this application. Reasons advance for non attendance are acceptable.

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 merit and I grant it on condition the applicant obtains a hearing date within the next 30days. Costs of this application to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH JULY 2019.

N.A. MATHEKA

JUDGE