

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC PET. CASE NO. 3 OF 2015

JACOB BUHUNGI ELAKI.....PETITIONER/APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR VIHIGA

THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENTS

RULING

This application is dated 10th June 2019 and is brought pursuant to Articles 50 (1), 159 (2) (d) of 6th Constitution, Section 1A & B, 3A and 80 of the Civil Procedure Act, Section 13 of the Environment and Land Court Act, Section 128 of the Land Act seeking the following orders;

1. The order by the honourable Judge dismissing the petitioner/applicant's case dated and or issued on 26th February, 2018 be reviewed and vacated and or set aside.
2. The order directing the parties to file written submissions be reinstated and or restored.
3. The petitioner/applicant do file and serve written submissions in person.
4. The written submissions filed by the petitioner/applicant be deemed to have been duly file and served in compliance with the orders herein.
5. The honourable judge proceeds to consider the submissions filed and deliver judgment in the final determination of the petition.
6. Costs to abide the outcome of the application.

The application is brought on the grounds that, the petitioner/applicant's case was dismissed on the 26th February, 2018. On the date the case was dismissed, the petitioner/applicant was not in court and was not aware his case was listed for hearing on that date. The case was dismissed on the grounds that the petitioner/applicant's lawyer Mr. Arwanda had not filed written submissions as directed by the court when granting the adjournment. The dismissal was occasioned by the mistake of the petitioner/applicant's advocate which should not be blamed on the petitioner/applicant. The petitioner/applicant only learnt of the dismissal from the court registry on 21st May, 2019 when he checked on the status after failing to get up date from his lawyer. The petitioner/applicant as a genuine grievance to be addressed in this petition and should be heard as his land is encumbered by the restriction filed in the year 2007 which has no time limit and no expressed indication on when the respondents will finalize the claim of compulsory acquisition. If the petitioner/applicant were in court on the date of dismissal, he would have personally intervened to save the case from dismissal. The orders sought are in the best interest of justice.

This court has considered the application and the submissions therein. The application was unopposed. The applicant submitted that on the date the case was dismissed, the petitioner/applicant was not in court and was not aware his case was listed for hearing on the date. The case was dismissed on the grounds that the petitioner/applicant's lawyer Mr. Arwanda had not filed written submissions as directed by the court when granting adjournment. I have perused the court file and find that this suit was dismissed on 26th February 2018. The date was taken in court by consent and was the final adjournment as this matter was filed in court way back on the 25th September 2017. It is was not until the 10th June 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 no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE