

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 1 OF 2014

JACOB INDAMA KISANYA.....PLAINTIFF/APPLICANT

VERSUS

ZADOCK MARK SIMWA

PATRICK SAIDI BUSHURU

JULIUS BUSHURU.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 22nd July 2019 and is brought under Section 3 & 3A of the civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules seeking the following orders;

1. That the order for closure and/or dismissal of the above suit for want of prosecution on the 10th July, 2019 be set aside and the suit be reinstated for hearing and determination.
2. That costs of this application be in the cause.

It is based on the annexed affidavit of Jacob Ndama Kisanya and J.B. Shilenje the advocate on the following general grounds that, the applicants counsel has been attending the court consistently without delay. That it is the defendant's counsel who has been always seeking for an adjournment when this matter is called up for hearing. That on the material day for dismissal the applicant was present in court together with his material witnesses ready to proceed, but he was not given a chance to be heard. That the plaintiff/applicant has a good case with high chances of success. That the counsel mistake cannot be visited upon the litigant.

The 2nd and 3rd defendants/respondents submitted that, this is an old matter having been filed in 2014 and the failure of the plaintiff/applicant to prosecute is an indication of lack of interest in the said matter. That a perusal of the application by the plaintiff/respondent shows no justifiable ground to warrant the reinstatement of this case but is rather filled with nothing but excuses. That court orders cannot be issued in vain and therefore the orders of this court issued on 10th July, 2019 should stand and for them to be disturbed there must be a very good reason. That this application is therefore frivolous, vexatious and an abuse of the court process intended to waste the court's time and should therefore be dismissed in totality.

This court has considered the application and the submissions therein. The applicant's counsel submitted that he was indisposed on the material day and could not attend court. I have perused the court file and find that this suit was dismissed on 10th July 2019. It is was on 22nd July 2019 that the present application was filed. I find that there is no inordinate delay in filing this application Reasons advanced for the 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 the same on condition a hearing date is taken within the next 30 days. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE