

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 9 OF 2018

EMILY NJOKI CHEGE alias EMERY NJOKI CHEGE.....PLAINTIFF/APPLICANT

VERSUS

GATHONI SIMON MACHARIA

MARY WANJA RUKWARO

ELIZABETH WANGARE.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 31st July 2019 and is brought under order 45 of the Civil Procedure Act seeking the following orders;

1. That the orders dismissing this suit on 23rd July, 2019 be set aside and or be reviewed.
2. That costs be provided for.

It is based on the grounds that, this matter was listed for mention for directions under order 11 of the Civil Procedure Act and that Section does not provide for dismissal of suit for any reason whatsoever. That the dismissal order was made suo moto without prompting from the defendants or anybody else. That the dismissal order was unconstitutional as it didn't follow the procedure of the court and it violated the right of the plaintiff to be heard by an impartial competent court. That a case can only be dismissed for want of prosecution under Order 12 of the Civil Procedure rules and on 23/7/2019, the matter was not before the judge pursuant to Order 12. That the plaintiff is not required to attend court during pre-trial conference if he/she has an advocate. That the mistakes of the advocate should not be visited on the party. That the court was unduly technical, at the expense of substantive justice as provided under Article 159 of the Constitution. That the court violated the plaintiff's rights by elevating technical matters to operate in the court and injustice was visited on the plaintiff as legal procedures were avoided. That the court abandoned the legal position of an Arbitor and took sides with the defendants illegally dismissing the plaintiff's case. That the court's order dated 8th July, 2019 was against the Civil Procedure rules, and was made arbitrarily and was made to with ill motifs to derail the cause of justice. The affidavit of Abel M. Momanyi Birundu and the plaintiff.

Counsel for the plaintiff submitted that, on 23rd July, 2019, he had several cases at the High Court Kakamega. That he went to mention my matter in High Court one, after which he hoped to come back to the land court and mention his matter. That at High Court One, he found out that his mention matters were scheduled to be mentioned much later and he left them to his colleague and headed to the land court to enable him mention the land court matter. That the land court matter was listed for directions which are usually done pursuant to order 11 of the Civil Procedure rules. That he arrived at the land court at 9.40 a.m. and found out that my matter had been called and dismissed. That he knew that the court had granted a last adjournment on 8/7/2019, but he interpreted that to mean that he had a last adjournment to serve the parties for the conference. That indeed on 23/7/2019, he had served the defendants and he was ready to proceed as he had sent his clerk to file returns of service.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 23rd July 2019. It is was on the 31st July 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 30 days. Costs of this application to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE