

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO 3 OF 2016

JULIUS NALENYA MUSIRAAPPELLANT/RESPONDENT

VERSUS

DAVID MULINDI LIKHODIORESPONDENT/APPLICANT

RULING

This application is dated 23rd August 2017 and brought under order 17 rule 2 of the Civil Procedure Rules 2010 seeking the following orders;

1. That the honourable court be pleased to dismiss the appeal herein for want of prosecution.
2. That costs of this application be provided for.

The applicant submitted that, on perusal of the court file by his lawyers on record show the appeal herein was admitted to hearing way back on 23.9.2011. That the directions in the said appeal were taken way back on 5.11.2013 but the Appellant's Counsel or the Appellant in person has never taken any step to move the court appropriately to have the appeal determined. That in fact the court at its own volition once placed the appeal for dismissal for want of prosecution on 9.7.2012. That he has also been informed by his lawyers on record that the Judge afforded the Appellant another golden chance by mentioning the appeal in court on 21.9.2015 to enable the Appellant bail out the appeal by taking a date for hearing but in vain. That he has been advised by his lawyers on record that the Appellant has lost interest in this Appeal and the same sands to be dismissed for want of prosecution.

The respondent submitted that, the delay to prosecute the matter was occasioned by lack of a Land and Environment court in Kakamega for sometime. That he was also taken ill from 2014 to 2015 and lost touch with his advocate on record. That he has not lost any interest in prosecuting this matter and now he is ready to proceed with it. The court had given directions on 5.10.2013 that parties file written submissions but due to his sickness he was unable to reach his advocate to give him further instructions. That he stand to suffer irreparable damage if the case is dismissed since he resides on the said suit land. That he is informed by his advocate on record that the last order in court was to file submissions which have also not been done by both parties and thus the respondent was duty bound to comply with the same and take directions. That he prays that this court do grant him one last chance to prosecute the same.

This court has carefully considered both the applicant's and the respondent's submissions. The application is based on the following grounds: That the appeal herein was admitted to hearing way back on 23.9.2011 and directions taken on 5.11.2013 but the appellant has not been keen on moving the court appropriately for determination of the same. That in fact the appeal was once placed before the court for dismissal on 9.7.2015 when the judge gave the appellant yet another chance by mentioning the appeal in court on 21.9.2015 thus affording the appellant a golden chance to move the court for hearing and determination of the same but in vain.

In the case of **Utalii Transport Company Ltd & 3 Others v 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. The applicant in the

instant case submitted that they seek to have this suit against them dismissed for want of prosecution reasons being that the plaintiff has not taken steps to have this matter dispensed with since the year 2013. The respondent's response is that, there was no Environment and Land Court in Kakamega by then and hence the respondent could not move the court which was not existing. The Environment and Land Court in Kakamega started sitting way back in February 2017 almost a year now and hence the respondent has had no excuse why he has not moved the court. Be that as it may, the plaintiff/respondent will be given the benefit of doubt and the court gives him one last chance due to the fact that he was indisposed. The application will not be allowed on condition the respondent obtains a hearing date within the next 30 days from today's date, in default this suit shall stand dismissed for want of prosecution. Costs of this application to be applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF FEBRUARY 2018.

N.A. MATHEKA

JUDGE