



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC APPEAL NO. 77 OF 2017**

**ABDALA AURA SULEIMAN.....APPELLANT**

**VERSUS**

**ELIUD WEKESA WASWA..... RESPONDENT**

**RULING**

This application is dated 25<sup>th</sup> March 2013 and brought under order 42, rule 21, order 24, rule 3 and 7 order 45, rule 1 and 2 of The Civil Procedure Rules 2010 seeking the following orders;

1. THAT the orders of this honourable court made on the 22<sup>nd</sup> day of July, 2010 be reviewed and/or set aside.
2. THAT this appeal be re-admitted and be heard.
3. THAT Eliud Waswa the deceased respondent be substituted with Robert Wanjala Wekesa .
4. THAT costs of this application be provided for.

It is grounded on the annexed affidavit of Abdalla A. Suleiman, appellant/applicant and the following grounds; that at the time the appeal was dismissed the respondent had died and there was no administrator of his estate. That failure by the appellant to attend court on 22<sup>nd</sup> July, 2010 was premised on the assumption that the appeal could not proceed since the respondent was deceased. That Robert Wanjala Wekesa is the administrator of the deceased's estate ad litem. That Robert Wanjala Wekesa has moved and obtained orders in Kakamega Chief Magistrate's Court Award No. 166 of 2006. That the orders obtained by Robert Wanjala Wekesa are in contravention of the judgment delivered in Kakamega High Court Civil Case No. 437 of 1993 and the same is res-judicata.

The respondent submitted as follows; that this application lacks merit in that there are no errors apparent on the face of the record to warrant a review. That this appeal was properly dismissed on 22<sup>nd</sup> July, 2010, when the applicant failed to come to court. That a matter will not have merit for orders of review just because a party seeking for those orders did not attend court on assumption that the appeal could not proceed since the respondent was deceased. That in fact the applicant has not even attempted an explanation as to why he did not attend court on the orders sought to be reviewed were made. That it cannot be a mere coincidence that the applicant did not attend court when the Chief Magistrate's Misc. Award No. 166 of 2006 was heard exparte, but that far from this the applicant is simply not serious with court processes, and this application should not be allowed even on this ground alone. That issues raised relating to High Court Civil Case No. 437 of 1993 are not relevant in that this is a case that was fully determined and closed well over twelve (12) years ago. That the court order made on 15<sup>th</sup> January 2013 has already been implemented and transfer effected and as a result the orders sought cannot be available, since any transfer can only come by way of a succession cause. (Annexed is a certificate marked RW1)

This court has carefully considered both the applicant's and the respondent's submissions herein. That failure by the appellant to attend court on 22<sup>nd</sup> July, 2010 was premised on the assumption that the appeal could not proceed since the respondent was deceased. That Robert Wanjala Wekesa is the administrator of the deceased's estate ad litem. That Robert Wanjala Wekesa has moved and obtained orders in Kakamega Chief Magistrate's Court Award No. 166 of 2006. That the orders obtained by Robert Wanjala Wekesa are in contravention of the judgment delivered in Kakamega High Court Civil Case No. 437 of 1993 and the same is res-judicata.

The respondent opposed the application and stated that this appeal was properly dismissed on 22<sup>nd</sup> July, 2010, when the applicant failed to come to court. That a matter will not have merit for orders of review just because a party seeking for those orders did not attend court on assumption that the appeal could not proceed since the respondent was deceased. That in fact the applicant has not even attempted an explanation as to why he did not attend court on the orders sought to be reviewed were made. I agree with the respondent.

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. Justice delayed is justice denied. The applicant does not take the court processes with the seriousness that they deserve. I find the reasons given are frivolous and I reject them. This application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8<sup>TH</sup> DAY OF MARCH 2018.**

**N.A. MATHEKA**

**JUDGE**