

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC NO. 16 OF 2018

FORMERLY HCCCNO. 96 OF 2013

VIMA ASSOCIATES & CO. LTD.....PLAINTIFF

VERSUS

COLLETA N. ODUOR.....DEFENDANT

RULING

This application is dated 19th February 2018 and brought under Order 12 Rule 7 and Order 19 Rule 3 of the Civil Procedure Rules and Section 34 and 1A of the Civil Procedure Act seeking the following orders;

1. That the exparte order made on 24th July 2017 dismissing this suit for want of prosecution be set aside.
2. That the costs of this application be provided for.

The applicant submitted that, on 12th March 2015, he attended court before Hon. Justice Chacha Mwita for the defendants application dated 30/09/14 where it was agreed by both parties that the application can be disposed of by way of written submissions. That on the same day, a mention date was given to confirm compliance of filing and serving of the written submissions and to take a ruling date. A copy of his file note is hereby attached and marked "SMK 1". That he did file his written submissions at the Kakamega High Court on 11th May 2015 and served the defendants counsel in court on 12th May 2015. That on the same day, Hon. Justice Chacha Mwita was not sitting as he and several other judges of the ELC division had not been gazette. Thus they were not heard nor given a further mention date but were informed that the ruling will be on notice. A copy of his file note is hereby attached and marked "SMK 2". That the defendants have never served him or his firm with their written submissions to date. A copy of a letter to the defendants advocates is hereby attached and marked "SMK 3". That on 24th July 2017 his firm received a Notice for dismissal for want of prosecution dated 29th March 2017 which he personally received at 10.00 a.m a copy of the same is hereby attached and marked "SMK 4". That there was not much that could be done to attend court on that day. That as in the circumstances, he was unable to attend court and give his reasons as to why suit should not be dismissed for want of prosecution.

The respondent submitted that, she is aware the plaintiff's suit was dismissed on the 24th July 2017 for want of prosecution after due notice by the court to the parties. she received copy of the notice through her lawyer on 19th day of May 2017. That even if they were to believe the plaintiff's lawyers averments that he received the notice of dismissal on 24th July 2017, there is no explanation given as to why he made no effort to contact his lawyer who is locally based on any other lawyer in Kakamega as he had done in the past to hold his brief on the subject date and save the suit. There is also no explanation as to why it took the applicant more than two months from 24th July 2017 to 27th September 2017 to draw the present application and again more than two months to 1st November 2017 to file the application. That there is nothing to be achieved by reinstating the suit for reasons that the subject title which the plaintiff/applicant is litigation being MARAGOLI/BUYONGA/235 ceased to exist when the title was closed on 18th April 2012 to create two separate titles known as South Maragoli/Buyonga/2339 and 2340 (annexture marked CNO - 1). In this regard, the plaintiff/applicant is seeking to enforce tenancy relationship and injunctive orders on a title which does not exist. The plaintiff/applicant vacated the premises in dispute on 18th May 2012 upon being served with notice by her lawyer and he has never returned to the premises. That by the order of this court dated 9th August 2014 a copy hereto annexed as CNO - 2, the plaintiff/applicant was allowed to return to the premises on condition that he paid within 45 days rent arrears due from 23rd January 2013 which (by 18th May 2013) was Kshs 16,000/= but he has never paid the rent or sought to enjoy the fruits of that order through re-occupation. That by reason of the foregoing, there is no justice to be achieved by saving the suit which will only add to costs on both parties and waste court's time.

This court has carefully considered both the applicant's and the respondent's submissions and the annexures therein. The application is made on the grounds that, the notice for dismissal for want of prosecution was indeed served but served late time at 10.00 a.m on the day the matter was coming up in court. Counsel for the plaintiff was ambushed with this notice whilst in Nairobi for a matter filed in Kakamega court which clearly would reduce and affect the chances of attendance. The above notwithstanding, counsel for the plaintiff already had other matters scheduled for the day and would have still been unable to attend.

The plaintiff's lawyer avers that he received the notice of dismissal on 24th July 2017 at 10am, there is no explanation given as to why he made no effort to contact a lawyer who is locally based in Kakamega to hold his brief on the subject date and save the suit. Secondly there is also no explanation as to why it took the applicant more than two months from 24th July 2017 to 27th September 2017 to draw the present application and again more than one month to 1st November 2017 to file this application.

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 plaintiff had taken no steps to prosecute the matter for over two years and even when the suit was dismissed he took over three months to file this application to reinstate the suit. I find the reasons given unacceptable. This application has no merit and I dismiss it with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE