

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 21 OF 2014

NOAH SAKWA INYANGALA.....PLAINTIFF/APPLICANT

VERSUS

JOHN DICK AMBOKA.....DEFENDANT/RESPONDENT

RULING

This application is dated 30th May 2018 and is brought under section 3A of the Civil Procedure Act and order 12 rule 7 and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this Honorable Court be pleased to set aside the orders dismissing the plaintiff's suit for want of prosecution.
2. The this Honorable Court be pleased to reinstate the plaintiff's suit.
3. The costs of this application be in the cause.

The applicant submitted that, he instructed the firm of M/s. Kamau Mwangi & Co. Advocates to file this suit on his behalf. That he had been in bad health in 2016/2017 and he was surprised to learn that his case had been dismissed for want of prosecution. That if at all the mistake was with his advocate on record then counsel's mistake cannot be visited on him. That he is very much interested in this suit and to have it concluded on merit as it is ancestral land. That the defendants shall not in any manner be prejudiced in the circumstance.

This court has considered the application. The respondent was served but failed to attend court and the matter proceeded exparte. The application is grounded on the affidavit of Noah Sakwa Inyangala. That the plaintiff is interested in this case and seeks to have it determined on merit. The plaintiff's advocates never informed the plaintiff of any notice for dismissal of this suit. I have perused the court file and find that this suit was dismissed on 23rd October 2017 and it is not until the 13th June 2018 that this application was filed. This is a very old matter and the plaintiff has been indolent and is guilty of laches. I do not accept his reasons given.

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. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE