

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC APPLICATION NO. 10 OF 2017

JOHN AMUKOBLE NAMALE.....PLAINTIFF/APPLICANT

VERSUS

EVANS KANGU WASUMWA.....DEFENDANT/RESPONDENT

RULING

The application is dated 10th May 2017 and is brought under sections 1A, 1B & 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 the application be and is hereby certified urgent, service thereof being dispensed with.
2. That the order of this honourable court given on the 7/7/2016 dismissing suit number 80 of 2007 for want of prosecution be and is hereby set aside.
3. That the said suit be and is hereby reinstated and allowed to proceed to hearing of application dated 28/4/2015 filed in court on 12/5/2015.
4. That the said suit file be kept under lock and key to avoid any further disappearance.
5. That a hearing date be given on priority basis to ensure expeditious disposal of the suit.
6. That the costs of this application be in the cause.

It is based on the following grounds that the notice of dismissal dated 24th June, 2016 was not sent to them and/or received by them. That the prior to the dismissal notice the suit file had disappeared since 12th May, 2015. They had on their part made several attempts to proceed with the matter and are not responsible for the delay. That the applicant will be prejudiced unless the orders made are set aside for it to be heard on merit. That the applicant is desirous of contesting this suit. That it is only fair, just and in the interest of justice that the orders sought be granted.

The defendant/respondent opposed the plaintiff's/applicant's application stating that plaintiff/applicant has since the filing of this suit on 29th October 2007 failed to move the court to have this suit heard and determined until it was dismissed on the 7th July 2015, a period of over 10 years. That the applicant is guilty of laches.

This court has considered the application and the submissions herein. The Application is based on the grounds that, the notice of dismissal dated 24th June, 2016 was not sent to them and/or received by them. That the prior to the dismissal notice the suit file had disappeared since 12th May, 2015. They had on their part made several attempts to proceed with the matter and are not responsible for the delay. I have perused that court file and find that, the court dismissed the said suit on the 7th July, 2015 for want of prosecution. This application was filed on the 10th may 2017, a period of almost two years later. This is a very old matter and the plaintiff has been indolent and is guilty of laches. I do not accept his reasons for wanting the suit reinstated.

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 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE