



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 314 OF 2014**

**PATRICK MUBATSI NAMBIRO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PETER NAMBIRO MUBATSI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**SOLOMON WATITWA MUNGONI**

**MUNICIPAL COUNCIL OF MUMIAS**

**COMMISSIONER OF LANDS**

**ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

**RULING**

This application is dated 18<sup>th</sup> April, 2018 and is brought under section 1, 3A, 63 (e) of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. That the orders dismissing the suit for want of prosecution of 17<sup>th</sup> December 2017 or any other be and are hereby set aside.
2. The suit and all interlocutory orders are reinstated.
3. The costs be provided for.

The applicant submitted that, all the parties were never served to attend court on the 17<sup>th</sup> December 2017. That they have been able to prosecute the case because this court lacked Environment and Land Court for a very long time. That they never received notice to dismiss the case for want of prosecution. That they have been sick for the better part of 2016/2017. That they are desirous of having this matter concluded on merit. That they wish to invoke the discretionary powers of this court to do justice.

The respondent submitted that, litigation must come to an end. This matter was last in court in 2014 before it was dismissed. The applicants were represented by an advocate at all times and this laxity has been exhibited before. The applicants have been indolent and are guilty of laches.

This court has considered the application and submissions therein the application is based on the grounds that the applicant was never served with the notice to dismiss this case. That Kakamega High Court lacked an Environment and Land Court for a very long time leading to stalling of land cases. I have peruse the court file and find that this matter was dismissed on the 12<sup>th</sup> December 2017. This application to set aside the dismissal order was filed in April 2018. This is a period of about 4 months, this being a land matter I will give the applicants the benefit of doubt as there is no evidence of service on record.

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. This application is merited and I will reinstate the suit on condition that the applicants obtain a hearing date within the next 30 (thirty) days of this ruling. Interim orders will not be reinstated, costs of this application to the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**