

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 352 OF 2014

FLORENCE MUKANDA ARASAPLAINTIFF/APPLICANT

VERSUS

REBECCA NAMAEMBA NYONGESA.....DEFENDANT/RESPONDENT

RULING

The application is dated 22nd February, 2018 and is brought under section 3 & 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 17 Rule 2 and order 51 Rule 4 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this Honourable court be pleased to set aside its orders of 19th December 2017 of dismissing the suit herein for want of prosecution.
2. That the Applicant's suit be reinstated and listed for defence hearing and determination on merits
3. Cost be in the course.

The Applicant's suit was on 19/12/2017 dismissed for want of prosecution. The Applicant was not aware of the notice of dismissal for want of prosecution dated 17/11/2017. The Applicant's former advocates did not communicate to her the issuance of the notice. The failure of the Applicant to attend court on 19/12/2017 was not deliberate but was due to factors beyond the control of the Applicant. The Applicant only became aware of the dismissal of the suit on 8th of February 2018 upon inquiries at the Court registry when the Applicant had attended court in respect of another related matter being Kakamega E & L Case No.84 of 2017. The applicant had already proceeded and closed her case way back on 30/7/2012. That the suit has all along been pending for defence hearing. The applicant was involved in a road traffic accident and was hospitalized for a long duration of time. That it is only necessary that proceedings of 19/12/2017 dismissing the applicant's suit for want of prosecution be set aside and the suit herein be reinstated for determination on merits.

The respondent submitted that, plaintiff/applicant's application herein dated the 22nd day of February, 2018 and is hereby opposed on the grounds that, the same is belated having been brought months later which delay is extremely inordinate. The reasons advanced by the applicant to back the application are entirely insufficient as there was no efforts by the applicant whatsoever to seek directions from the court. By the applicant's persistent habit of coming up every time to make similar applications to explain inaction on her part by blaming others in the past, the present application becomes vexatious and surmounts to a gross abuse of the court's process. The law does not aid the indolent and thus litigation must come to an end. The applicant herein has a remedy against its counsel under Article 22 and 23 of the constitution of Kenya 2010 if indeed she was wronged.

This court has considered the application and the submissions herein. The Application is based on the grounds that, the Applicant was not aware of the notice of dismissal for want of prosecution dated 17/11/2017. The Applicant's former advocates did not communicate to her the issuance of the notice. The failure of the Applicant to attend court on 19/12/2017 was not deliberate but was due to factors beyond the control of the Applicant. The Applicant only became aware of the dismissal of the suit on 8th of February 2018 upon inquiries at the Court registry when the Applicant had attended court in respect of another related matter being Kakamega E & L Case No.84 of 2017. I find the reasons given for non attendance inexcusable. The applicant has been indolent coming to court months after the matter was dismissed.

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 10TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE