



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 18 OF 2014**

**TIMOTHY LUCHELI.....APPELLANT/APPLICANT**

**VERSUS**

**PHILIP MULUPI CHETELESI....RESPONDENT/RESPONDENT**

**RULING**

The application is dated 16<sup>th</sup> May 2018 seeking the following orders;

1. That this application be certified urgent and heard on priority basis.
2. That the honourable court be pleased to review and/or set aside its orders made on the 19<sup>th</sup> February 2018 dismissing the appeal herein and substitute with orders reinstating the appeal for hearing and determination on merit.
3. That the costs of this application be in this cause.

That the appeal was dismissed due to mistake and /or in advertence on the part of his former advocate. That the court did not get a chance to look at the appeal on merit and it was dismissed on technicality rather than merit. That the issue at hand in this appeal is land boundary and if this appeal and/or matter is not determined on merit, the dispute between this parties will not have been solved. That allowing this application and granting orders sought will go a long way to solve this land issue that has been pending in court for so long and peace will prevail between the parties.

The applicant submitted that, the appeal arose out of the decision of Kakamega North District Land Disputes Tribunal which has since been abolished due to the repeal of Land Disputes Tribunal. That the matter was filed in Butali Law Courts and as at then, the said courts did not have Jurisdiction and the matter was referred from the Provincial Land Disputes appeals committee to this court. That the court granted his former lawyer leave to file a memorandum of appeal, but for unknown reasons, the same was not filed. That subsequently, the Honourable court on 19<sup>th</sup> February 2018 dismissed this matter. That the court has unfettered discretion and powers to review its own orders, set them aside and substitute them with other orders if the ends of justice will be met. That the court did not have a chance to listen to the issues involved in this matter to make a final decision, since, it appears that the dispute between him and the Respondent is only postponed. That he has discovered that it was his former lawyer Mr. Getanda advocates mistake that he inadvertently failed to file the memorandum of appeal. That the issue in controversy here is Land and Land is an emotive issue and he prays that the court do grant him one last chance to present his appeal so that a decision can be pronounced by the court and a long lasting solution will be found by the Respondent and himself.

The respondent objects to application dated 16<sup>th</sup> May, 2018 and relies on following grounds that the applicant has grossly misunderstood and misstated the issues in this appeal. That the respondent filed a land dispute in the Malava North Kabaras Tribunal and was awarded ownership of plot No. S/Kabras/Bushu/2720. That tribunal ruled on 9<sup>th</sup> August, 2009 that defendant/appellant had trespassed onto the suit land and ordered the defendant to demolish the house constructed on the suit land and allow respondent vacancy possession of plot S/Kabras/Bushu/2720. That order was filed in the Senior Resident magistrate's Court as Award No. 19 of 2011 and confirmed on 9<sup>th</sup> September, 2011 by Hon. M.L. Nabibya - RM. That the boundaries of the suit land had been confirmed by the District Surveyor Mr. Opondo. That all this was done whilst the Land disputes Tribunal was properly in place. That appellant was given 30 days to file appeal if any in the provincial land dispute appeal board. That on or about 6<sup>th</sup> September, 2011 the awarding court granted appellants application for temporary stay of execution pending hearing inter-parties on 6<sup>th</sup> October, 2011. The award courts orders of 9<sup>th</sup> September, 2011 must have been issued after that inter-parties hearing if any. That since September, 2011 no appeal has been filed before this provincial appeal board and or this Court. That on three prior occasions the appellant informed this court that he has filed the appeal and would be filing memorandum of appeal shortly which has not been done up to now. That in 2014 the applicant was given 30 days to file the alleged memorandum of appeal and appeal record which he failed to do for over 2 years. This cannot be a mere mistake on applicant's advocates. That the appellant having been granted temporary stay of execution continues to enjoy occupation of the suit land at the detriment of respondent and therefore this court rightly dismissed the suit with costs to defendant.

I have perused that court file and find that, the court granted the appellant's former lawyer leave to file a memorandum of appeal, but for unknown reasons, the same was not filed. That subsequently, the court on 19<sup>th</sup> February 2018 dismissed this matter. The record shows that, on the 4<sup>th</sup> November 2014 the court granted leave for the appellant to file a memorandum of appeal within 30 days and this was not done. When the matter came up in court on the 19<sup>th</sup> February 2018 no memorandum had been filed 4 years later. This is a very old matter and the appellant has been indolent and is guilty of laches. I do not accept his reasons as they are inexcusable.

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 11<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**