

REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 499 OF 2014

EDWARD MASINDE PLAINTIFF/APPLICANT

VERSUS

VITALIS MAKOKHA ONGWEKO DEFENDANT/RESPONDENT

RULING

The application is dated 22nd February, 2018 seeking the following orders;

1. That this honourable court be pleased to set aside the orders made on 15/2/2018 dismissing the plaintiff's suit for non attendance.
2. That in the alternative this honourable court's orders made on 15/2/2018 be set aside and the plaintiff's suit be reinstated.
3. That the costs of this application be in the cause.

It is based on the following principal grounds and on further grounds to be found in the annexed affidavit of EDWARD MASINDE and on further and other grounds to be adduced at the hearing hereof. That the plaintiff/applicant came to learn that orders had been entered against them on 21/2/2018 as he previously could not trace the file in the registry. That the plaintiff/applicant will be prejudiced unless the orders made are set aside for it to be heard on merit. That the defendant took the date without inviting the plaintiff. That the plaintiff was never served of the said date and as such could not be able to attend court. That the plaintiff is desirous of contesting this suit. That the plaintiff/applicant has been condemned unheard against the principal of natural justice. That it is only fair, just and in the interest of justice that the orders sought be granted.

The plaintiff submitted that he came to check on his file on the 21st February, 2018 to confirm its position as he never had traced it due the transfer activity to the lower court. That to his dismay the same had come up for hearing and it had been dismissed for his non-attendance. That he was never aware that his case was coming up for hearing on 15/2/2018 and as such never attended court. That as purported, he was never served with that date as all previous notices he had received he signed on them. Annexed hereto is a copy of received notices previously served on me and marked "E.M. 1". That it is therefore utter lies and forgery that he was served with the said date.

The defendant/respondent opposed the plaintiff's/applicant's application dated 22nd February, 2018 on the following grounds of law, that the plaintiff's/applicant's application is fatally defective for failure to comply with very clear and mandatory provisions of the law. That the plaintiff/applicant was properly served with the hearing notice for 15th February, 2018 but failed to attend court. That the plaintiff/applicant has since the filing of this suit failed to move the court to have this suit heard and determined. That the plaintiff's suit lacks merit as can be demonstrated by the surveyor's report of 25th February, 2014 which is on record. 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, that he was never aware that his case was coming up for hearing on 15/2/2018 and as such never attended court. That as purported, he was never served with that date as all previous notices he had received he signed on them. I have perused that court file and find that, the plaintiff/applicant was properly served with the hearing notice for 15th February, 2018 but failed to attend court. This is a very old matter and the plaintiff has been indolent and is guilty of laches. I do not accept his reasons for nonattendance.

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