

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 182 OF 2012

EDWARD MUKARI MUCHERE.....PLAINTIFF/APPLICANT

VERSUS

JUSTUS WELEMBA OMUSIKOYO

FREDRICK OMONDI OKOTH.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 7th October 2018 and seeks the following orders;

1. That the service of this application be dispensed with in the first instance.
2. That this honourable court be pleased to reinstate this case.
3. That costs of this application be provided for.

The applicant submitted that, this case was dismissed on 19th July, 2017 by Lady Justice N.A.Matheka, Judge in his absence for want of prosecution. That this was because he received a notice of dismissal late hence failing to do the necessary action. That he stays in Nairobi by virtue of his daily commitments to earn a living. That this matter involves land parcels E. WANGA/ISONGO/3110 and 3109 which have an unresolved dispute. That for justice to be done this honourable court be pleased to reinstate the case to enable them sort out their issues.

The respondent submitted that, the applicant has not presented enough material to enable this court exercise its discretion in his favour. That there is inordinate delay in bringing the said application. That the applicant does not have good grounds of not prosecuting this case that was filed way back in 2012. That the application is incompetent, frivolous, vexatious and an abuse of the due process of this court.

This court has considered the application and the submissions herein. The application is based on the grounds that, this was because he received a notice of dismissal late hence failing to do the necessary action. That he stays in Nairobi by virtue of his daily commitments to earn a living. It is not in dispute that both parties were aware of the notice sent by the court. I find the reason given inexcusable and I reject it.

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 25TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE