

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 116 OF 2017

JOHN MUIGAI.....PLAINTIFF/APPLICANT

VERSUS

TERESIAH WAMBUI.....1ST DEFENDANT/RESPONDENT

BEATRICE WANJALA.....2ND DEFENDANT/RESPONDENT

ALBERT EGENYA.....3RD DEFENDANT/RESPONDENT

RULING

This application is dated 29th May 2018 and is brought under Sections 3 A, 3B, 1A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Article 159, Article 48 of the Constitution of Kenya 2010 seeking the following orders;

- (a) That the matter be certified as most urgent and service be dispensed with in the first instance.
- (b) The orders dated 17/5/2018 be set aside, varied and/or vacated.
- (c) The suit herein be reinstated.
- (d) Costs be in the cause.

The applicant submitted that, the matter was placed before the court for mention for directions to confirm compliance and to fix a hearing date on 27/2/2018. That the matter was later placed before the court on 17/5/2018 for mention when the court dismissed the suit. That indeed as scheduled he travelled from Eldoret to Kakamega to attend court but on reaching about Kaburengu the vehicle he was travelling in broke down. That my phone similarly went off and was unable to reach fellow counsel to hold his brief due to his said predicament and place the matter aside. That he later arrived and was advised that the matter was called among other mentions and that the court had made orders dismissing the suit. That the circumstances informing his delay were not intended and were beyond his control. That part of the arrangements made during the said mention date was to file an application to have the pleadings amended so that we could take a date and fastback the matter. Those defendants encroached onto the plaintiff's land and continue to waste away his crops and as well as dispossess him of his land to the detriment of his proprietary rights. That further that the plaintiff has moved the court severally for orders restraining further dealings to protect the said rights and the suit parcel of land. That the plaintiff has not been indolent. That the substantial orders issued during the said mention date occasioned plaintiff hardship and cause injustice without him being afforded hearing a determination of the issues as intended by the court. That it is only fair and just that the suit be reinstated and the said issues be determined on merit.

This court has considered the application and the submissions herein. The respondent was served but did not oppose the application. It is based on the annexed affidavit of Juliet Adhiambo and on the grounds that the suit was dismissed on 17/5/2018. That the said date was for mention. That non attendance as at time of mention was due to circumstances beyond control. That the said delay was due to mechanical problems over matatus plying along Eldoret –Kakamega route. That the said circumstances error and mistake should not to be visited upon the innocent litigant. That the plaintiff is desirous of prosecuting his case. That the suit parcel of land registered in his name together with his properties continue to be wasted. That the plaintiff/litigant is desirous of prosecuting the matter to recover his land as initially intended while filing suit. That unless the orders sought for are granted the applicant stands to suffer irreparably with chances of losing its land. That it is only fair and just that the application be allowed. That the application is brought expeditious and in utmost good faith. I Find that this application was filed without undue delay and I accept the reasons given for non attendance.

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 merit and I grant the same. Cost of this application to the defendants/respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE