

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO 295 OF 2017

PIUS NDOMBI.....PLAINTIFF/APPLICANT

VERSUS

HARUN ONGAMO.....DEFENDANT/RESPONDENT

RULING

The application is dated 21st July 2015 and is brought under order 45 Rule 1 & 2 of the Civil Procedure Rules, Order 12 rule 7 of the Civil Procedure Rules, Cap 21 Laws of Kenya and is seeking the following orders;

1. That the orders made on the 8th day of July, 2015 dismissing the plaintiff's suit be reviewed and or set aside.
2. That the plaintiff's suit be reinstated and heard on merit.
3. That the costs of this application be provided for.

It is based and the grounds that, the plaintiff/applicant was not served Notice of Dismissal neither was his counsel served hence an error on the face of the record. That failure to prosecute the suit or take action within one (1) year was for reasons that the court file went missing after filing suit and efforts to trace it by the plaintiff's advocates turned futile. That the plaintiff has been condemned unheard and is desirous of prosecuting his suit. That no prejudice will be occasioned to the defendant if the order sought are granted.

The respondent submitted that, this suit was filed way back in 2011 and the applicant has never made efforts to enlist the same for hearing. That the fact of non-service is not substantiated at all. That it is not true that the court file herein has been missing all this time as the court record will show. That the applicant has not demonstrated what steps, he undertook to trace the missing file.

This court has carefully considered the application and the submissions therein. The applicant states that this case was dismissed for want of prosecution and yet they were not served. I have perused the court file and find that this suit was filed way back in 2011. It was dismissed on the 8th July 2015 and this application file on the 21st July 2015. Be that as it may this file was not set down for hearing until 4th December 2017. I find the delay is unreasonable and I do not accept 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 is not merited and I dismiss it. Cost of this application to the defendants/respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE