

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 183 OF 2014

JOTHAM AGGREY ANGOKO MUKHOBI.....PLAINTIFF/APPLICANT

VERSUS

JAMES AYILO MUKHOBI

HARRISON JAIRO MUKHOBI.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 26th July, 2018 and seeks the following orders:-

- (a) That this suit be reinstated.
- (b) That the cost of this application be provided for.

It is based on the annexed affidavit of George Ngala Awino and in the following grounds that failure to prosecute the suit was occasioned by late arrival of the applicant's counsel in court. That the applicant's advocate and his client failure arrive late in court was as a result of delayed transport on the way to Kakamega from Kisumu. That the delay was unforeseen and unexpected. That no prejudice shall be occasioned to the respondent if this application is allowed. The applicant submitted that, on the 24th July, 2018, this matter was called out and dismissed for non attendance. That while he was travelling to Kakamega law Court to attend to the matter, the vehicle in which he was travelling in delayed at Chavakali shopping Centre and therefore caused him to arrive 30 minutes late, only to find the suit dismissed. That the plaintiff also arrived some few minutes late due to challenges on the road. That both the plaintiff and his counsel will strive to keep time in future and both are very apologetic over what happened.

The respondent submitted that there is no evidence that the applicant ever attended court on the material date. They have been reluctant to prosecute the matter and the application should be dismissed.

This court has considered the application and the submissions therein. The applicant submitted that, failure to prosecute the suit was occasioned by late arrival of the applicant's counsel in court. That the applicant's advocate and his client failure arrive late in court was as a result of delayed transport on the way to Kakamega from Kisumu. That the delay was unforeseen and unexpected. I have perused the court file and find that this case was filed way back in 2010! On the 20th February 2018 the plaintiff was given the final adjournment. This matter is an abuse of the court process. And I do not accept the applicant's reasons 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 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 9TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE