



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC NO. 507 OF 2014**

**FRANCIS MAKUBA MUKANDA.....PLAINTIFF/APPLICANT**

**VERSUS**

**FELIX SAKWA MUTSWENJE.....DEFENDANT/RESPONDENT**

**RULING**

This application is dated 4<sup>th</sup> June 2018 and is seeking the following orders:-

1. That this honourable court be pleased to issue a temporary order of stay of proceedings in the main suit pending hearing and determination of this application.
2. That this honourable court be pleased to set aside its orders of 25<sup>th</sup> day of September, 2012 dismissing the plaintiff's suit for non attendance and do proceed to reinstate the same for hearing.
3. That the costs of the application herein be in the cause.

It is premised on the following grounds, annexed affidavit of Francis Makba Mukanda, the plaintiff herein and on such further grounds that the plaintiff's case was dismissed for non attendance of the plaintiff on 25<sup>th</sup> day of September, 2012. That the court ordered that the hearing date of the defendant's counterclaim be fixed at the registry, which is yet to be heard. That at the time of dismissal of the plaintiff's case, the plaintiff was being represented by M/s Imwene P.A. & Co. Advocates who have never communicated with the plaintiff on the progress of this case. That indeed no notice of intended dismissal was ever served on the plaintiff to show cause why dismissal orders should not be granted and the plaintiff cannot tell whether his former advocate was served. That the plaintiff herein is an innocent party who should not suffer because of the indiscretions and indolence of his former advocate in prosecution of this case. That the plaintiff invites this honourable court to exercise its unfettered discretion leniently and allow his application because his case is arguable and one that raises triable issues which should be determined on merit. That the plaintiff stands to suffer prejudice, irreparable loss and damage if this honourable court will cause him away from the seat of judgment unheard. That the application herein has been brought with reasonable speed given that hearing of the counter claim is yet to ensue. That it will be in the interest of justice if the prayers herein of stay of proceedings and reinstatement of plaintiff's case are granted, otherwise if the counterclaim is not stayed, the application herein will be rendered nugatory.

The respondent submitted that, when this case was fixed for hearing on 25<sup>th</sup> September, 2012, a hearing notice was duly served on counsel for the plaintiff then on record on 21<sup>st</sup> August, 2012. That when the case came up for hearing on 25<sup>th</sup> September, 2012 neither the plaintiff nor his counsel was in court and the court having been satisfied that the plaintiff's counsel had been served, and upon the copy of the hearing notice as the attendant affidavit of service having been filed the court proceeded with the case by dismissing the plaintiff's claim. That upon dismissing the plaintiff/applicant's claim the court made a specific order that the order dismissing the plaintiff's claim be extracted and served upon the plaintiff. That the order was extracted and served upon the plaintiff/applicant's counsel within the time specified as indicated by the annexure marked F.M.1 and F.M.2. That in dismissing the plaintiff's/applicant's case the court was also categorical that upon the plaintiff's claim/suit an affidavit of service to that effect be filed in court, and that this service was effected as exhibited by annexure marked F.M. 3. That the plaintiff/applicant did not take any step to have the case re-instated after all these steps had been taken by him. That the remainder of this suit is his counter-claim and whenever he fixed it for hearing he duly served counsel for the plaintiff/applicant as exhibited by hearing notice dated 4<sup>th</sup> February, 2013, annexure F.M.4, hearing notice dated 21<sup>st</sup> November, 2013 marked F.M.5, hearing notice dated 2<sup>nd</sup> May, 2014 marked annexure F.M.6, hearing notice dated 19<sup>th</sup> March, 2015 marked as F.M.7, hearing notice dated 17<sup>th</sup> October, 2016 marked F.M.8, hearing notice dated 19<sup>th</sup> January, 2017 marked F.M. 9 and all these show commitment on his part to have this matter heard. That this case was dismissed on a date when the matter was coming up for hearing in court and it was not necessary for the court to issue a notice of intended dismissal as suggested by the applicant. That the applicant is not honest when he swears that he learned of the dismissal of his case on 28<sup>th</sup> May, 2018, yet he had an advocate representing him and he does not even state whether he used to visit his advocate to find out on the progress of his case.

This court has considered the application and the submissions herein. The application is based on grounds that the plaintiff's case was dismissed for non attendance of the plaintiff on 25<sup>th</sup> day of September, 2012. That the court ordered that the hearing date of the defendant's counterclaim be fixed at the registry, which is yet to be heard. That at the time of dismissal of the plaintiff's case, the plaintiff was being represented by M/s Imwene P.A. & Co. Advocates who have never communicated with the plaintiff on the progress of this case.

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. Be that as it may, the plaintiff will be given one last chance to prosecute this matter on condition that he obtains a hearing date within the next 30 days. Cost of this application to the defendants/respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**