

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 264 OF 2014

EDDAH AHONO.....PLAINTIFF/APPLICANT

VERSUS

MARY KUSA INDUSWE

JOHNSTONE MURWA OMUFWOKO

HENRY OTIENO ABWAO.....DEFENDANT/RESPONDENTS

RULING

This application is dated 14th February 2018 and is brought under order 9 rules 9, 12, 6 and 10 of the Civil Procedure Rules and sections 1A, 1B, 3 and 3A and 63 (e) of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent and heard ex-parte in the first instance.
2. That this honourable court be pleased to reinstate this suit as filed herein.
3. That the costs of this application be in the cause.

It is grounded on the following that, sometime on the 10th July, 2014 the plaintiff/applicant instructed Wesutsa Advocate to act on her behalf in this matter. That on the 16th of October, 2014 when the application dated 17th July, 2014 was coming up for hearing one Amasakha Advocate withdrew the entire suit without the plaintiff/applicant instructions. That the Amasakha advocate is a stranger to the plaintiff/applicant since he acted without instructions and his submissions therefore ought to be disregarded by this honourable court. That the plaintiff/applicant has a good and meritorious case and is desirous of prosecuting this suit to its logical conclusion. That the respondents/defendants are currently wasting, damaging, alienating, selling, removing and disposing the property subject matter of this suit to the detriment of the applicant/plaintiff and other beneficiaries of the deceased's estate.

This court has considered the application and the submissions therein. The application is not opposed. The applicant maintains that she never instructed the counsel to withdraw the suit. I have perused the court file and find that this suit was withdrawn on the 16th October 2014. It is not until the 15th February 2018 that the present application was filed. I find that there is inordinate delay in filing this application and the same is an afterthought.

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 21ST DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE