



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 3 OF 2017**

**FORMERLY NAKURU HCA NO. 108 OF 2013**

**ISAAC PERE.....APPLICANT**

**-VERSUS-**

**TIMINA LEKENI OSIO.....RESPONDENT**

**RULING**

The Application before me is the Appellant's/Applicant's Notice of Motion dated 23<sup>rd</sup> May, 2018 and brought under section 80 and 3A of the Civil Procedure Act, Order 17 Rule 2 and Order 45 Rule 1, 2, 3 of the Civil Procedure Rules seeking that the court do review, vary or set aside its order made on 17<sup>th</sup> April, 2018 dismissing the Appeal and the same be reinstated.

The Application was based on the grounds that the Applicant was not accorded a chance to be heard as neither the advocates nor the Appellant received the notice why the Appeal should not be dismissed and further that the instant Application was made without inordinate delay and the order of the dismissal was made not in the fault of the Appellant but his own advocate.

The Application was supported by the Affidavit of the Applicant in which he averred that he had instructed the firm of Igati Mwai Advocates to lodge the instant Appeal and they informed him that the matter was pending hearing and determination and he will be notified.

He further states that he was surprised to learn that the suit was transferred from Nakuru to Narok and that the same was dismissed for want of prosecution and that he was not informed about the transfer of the suit and its hearing in Narok and that it was the fault of his advocates that the suit was dismissed.

The Application was opposed by the Respondent who had filed a Replying Affidavit. He averred that the appeal was over 5 years old and the Appellant has never bothered to pursue the same and that the Appellant is only interested to frustrate him through the court process.

I have read the Application before me and the submissions which were filed by the respective parties and the issues for determination before me are:-

- i. Whether the delay in the hearing of the matter was deliberate and intentional,
- ii. Whether the Appellant has offered a reasonable explanation for the delay and the dismissal.

It is not in dispute in the instant matter that the Appeal herein was filed in court in 2013 and the Appellant has not taken steps to have the matter prosecuted. However, the Appellant stated that the lack of progress and dismissal was occasioned by his previous advocates.

The Appellant is seeking the court's discretion not to punish him for the mistakes of his advocates.

This being an Application in which the discretion of the court is sought and the Appeal relating to a land matter, I will grant the Applicant the benefit of doubt and it is in the interest of justice that a party shall not be condemned unheard. It is my considered view the Appellant having filed the instant Application expeditiously there was no inordinate delay in bringing this instant application and having so held I will allow the Application dated 17<sup>th</sup> April, 2018 and set aside my order dismissing the Appeal and accordingly reinstate the appeal.

Each party to bear its costs.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 1<sup>st</sup> day of November, 2018.**

**Mohamed N. Kullow**

**Judge**

**1/11/18**

In the presence of:

Langat holding for O.M. Otieno for the Appellant/Applicant

N/A for the Respondent

CA:Chuma