



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 164 OF 2013**

**DAVID WANYONYI WAFULA ::::::::::::::: PLAINTIFF/APPLICANT**

**VERSUS**

**CHARLES NYONGESA WANYONYI :: DEFENDANT/RESPONDENT**

**RULING**

This application is dated 6<sup>th</sup> May 2015 and is brought under Sections 1A, 1, 3A, 63 (e) and 80 of the Civil Procedure Act, Cap 21, Order 17 of the Civil Procedure Rules and seeks the following orders;

1. THAT the order of this honourable court, made on the 10<sup>th</sup> day of February, 2015 dismissing the suit filed herein for nonattendance together with all other consequential orders be set aside.
2. THAT this honourable court be pleased to extend the time within which the plaintiff herein may set the suit herein for hearing.
3. THAT the suit filed herein e reinstated for hearing on merit.
4. THAT this honourable court be pleased to give directions as to an early hearing date for the plaintiff's suit.
5. THAT the costs of this application be provided for.

The ground of the application are that the order of dismissal for non appearance on 10<sup>th</sup> February, 2015 was made through no fault or wrongdoing on the part of the plaintiff/applicant. In the interest of justice, the said order ought to be reviewed and the suit herein be reinstated for hearing and determination. The court has unfettered discretion to set aside a dismissal order and further, that such discretion ought to be exercised judiciously to avoid injustice. The this application has been lodged without any undue delay.

In the supporting affidavit of one **PAUL K. KAMAU** the advocate states that the plaintiff/applicant has sued the respondent/defendant for the removal of a caution placed on L.R. No. KAKAMEGA/NZOIA/261. That since the filing of the suit, I am aware that the matter came up severally. On 10<sup>th</sup> February, 2015 when the matter came up, the court dismissed the same for non appearance. The dismissal has only recently been brought to his attention. The delay occasioned herein is not so inordinate or so great as to be considered inexcusable. That a clerk in our Kakamega Office took the aforementioned date but failed and neglected to diarize the same. The said clerk is now no longer an employee of this firm. The dismissal order was made through no fault or wrongdoing on the part of the applicant, having instructed counsel to act on his behest. The application herein is brought in an effort to rectify this injustice. That this honourable court has unfettered discretion to set aside a dismissal order and further, that such discretion ought to be exercised judiciously to avoid injustice. The suit involves a dispute of land ownership and therefore, land being an emotive issue, the suit should be allowed to proceed on merit as it raises serious and triable issues which can only be determined if the dismissal order is set aside. The plaintiff/applicant is keen on prosecuting this suit and further failure to reinstate the suit would prejudice the plaintiff/applicant's constitutional proprietary rights to the suit property. Finally that the defendant/respondent would not suffer any prejudice if the suit is reinstated as he is not nor has he been in possession of the suit property.

The defendant/Respondent orally opposed the application stating that the matter had taken too long.

This court has considered that above submissions. From the court record this suit was dismissed way back in February 2015 for non attendance. The suit was filed earlier in 2013. This is an old matter and litigation must come to an end. It is also on record that even after this application was set down for hearing the applicant's again failed to attend court on the 8<sup>th</sup> March 2017. The delay occasioned in this matter is inordinate is so great as to be considered inexcusable. I find this application has no merit and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF JUNE 2017.

**N.A. MATHEKA**

**JUDGE**