

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 230 OF 2017

(FORMER HCC 283/91)

JOHN SOMIYU PALANGA :::::::::::::::::::::::::::::: PLAINTIFF (DECEASED)

FRANCIS WAMALWA WERE :::::::::::::::::::::::::::::: 2ND PLAINTIFF

VERSUS

CHEPKOOE KOSKEI :::::::::::::::::::::::::::::: 1ST DEFENDANT

LEVI LUVANDALE NANDOYA ::::::::::::::: 2ND DEFENDANT/APPLICANT

RULING

This application is dated 3rd July 2017 and is brought under Section 1A, 1B and 3A of the Civil procedure Act, order 12 and 51 of the Civil Procedure Rules seeking the following orders;

1. THAT the application herein be certified as urgent and service of the same be dispensed with at first instance.
2. THAT the orders of the honourable court issued in court on the 27th day of June, 2017 dismissing the 2nd defendant's application be stayed pending the hearing and determination of this application.
3. THAT the orders of the honourable court issued on the 27th day of June, 2017 dismissing 2nd defendant's application dated 19th May, 2017 be set aside and the same application be reinstated and heard and determined to its final conclusion on merit.
4. THAT costs of the application herein be provided for.

The applicant submitted that the application dated 19th May, 2017 was coming up for hearing on the 27th day of June, 2017. That on the material date, he was unable to attend to the hearing since he was bereaved and indisposed and had been recommended a 5 day bed rest by a medical doctor commencing 23rd June, 2017. (Annexed and marked CJ 1 is a copy of the treatment note to that effect). That he did instruct an advocate known to hold my brief with instructions to have the matter taken out of the list due to his indisposition but out of reasons not known to me the advocate failed, ignored, neglected and/or refused to attend to the same matter. That his effort in reaching the advocate to ascertain the position on the file were in vain as he failed to pick his calls nor reply to my short message services (SMS). That the following day he made effort and called a clerk to check and confirm what transpired in the same case and he was advised that the application had been dismissed for want of attendance. That it is in the interest of justice if this application is allowed considering that the inadvertence arose on the part of the advocate who failed to appear on my behalf and the same should not be visited upon my client.

The respondent submitted that, litigation has to come to an end and this matter has been in court since 1991, therefore I pray that I be allowed to enjoy the fruits of the judgment by dismissing this application. The defendant/applicant's advocate has deponed that he was indisposed and asked an advocate to hold his brief on 27/6/2017 but the advocate instructed to handle the matter did not attend court as instructed.

That it is perplexing that the name of the advocate requested to hold brief is not disclosed and the said advocate has not sworn an affidavit to that effect detailing reasons why he did not attend court if at all he was requested to handle the matter on 27/6/2017. That the dismissal of the instant application will not prejudice the applicant in any way since he is not the owner of the suit property nor has he ever had possession and/or use of the same as it can be evidence from the judgment delivered herein. That there is no good reason advanced to the court for non-attendance of the counsel to prosecute his application hence he prays that the application be dismissed. That he invites the honourable court to make a finding that the affidavit in support of the application is full of falsehoods as the mobile number nor his name is disclosed of the advocate instructed to handle the matter on behalf of advocate Clarence Jumba. That it is alleged that there was inadvertence on the part of the undisclosed advocate, yet the said advocate has not deposed any evidence or admission to that extent, hence he asks the court to find that there is no plausible explanation given for non-attendance hence pray that the application be dismissed and he be allowed to proceed to realize the fruits of the judgment. That the defendant/applicant has taken the court process for granted with hope that the court can take back and forth for the orders sought. That the application is inept, lacking in substance and merit therefore ought to be dismissed with costs.

This court has carefully considered both the applicants and the respondent's submissions and annexures herein. The application is grounded upon the affidavit of Clarence Jumba advocate for the 2nd defendant and on further grounds that the advocate did not attend court on the 27th day of June, 2017 reason being that he was indisposed on that day which the application was coming up for hearing and therefore not able to attend to the hearing. THE advocate had instructed an advocate to appear and hold his brief on the 27th June, 2017 and handle the matter to its conclusion but the advocate instructed did not attend court as instructed. It is in the best interests of Justice and fairness that the orders sought are granted in default the applicant is likely to suffer prejudice.

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. The applicant in the instant case submitted that the advocate did not attend court on the 27th day of June, 2017 reason being that he was indisposed on that day which the application was coming up for hearing and therefore not able to attend to the hearing. The advocate had instructed an advocate to appear and hold his brief on the 27th June, 2017 and handle the matter to its conclusion but the advocate instructed did not attend court as instructed. The name of this advocate who was to hold brief was never given, I find this is an afterthought. The applicant has not shown any commitment and seriousness in prosecuting the matter from 2015 and there is no serious or plausible reason that has been advanced to the court to warrant setting aside or variation of the orders made on the 27th June 2017. I find the reasons given have no merit and are inexcusable. This application has no merit and I dismiss it with costs.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE