



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 34 OF 2012.**

**IN THE MATTER OF AN APPLICATION BY PARESH NARANDASH SEDANI FOR ORDERS  
OF MANDAMUS, PROHIBITION**

**AND**

**IN THE MATTER OF LAND PARCEL NUMBERS W/BUNYORE/EBUSIKHALE/2153 AND  
W/BUNYORE/EBUSIKHALE/2154**

**BETWEEN**

**REPUBLIC**

**EX-PARTE: PARESH NARANDASH SEDANI :::::::::::APPLICANT/RESPONDENT**

**VERSUS**

**THE LAND REGISTRAR, VIHIGA :::::::::::1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATE, VIHIGA ::::::::::: 2<sup>ND</sup> RESPONDENT**

**VERSUS**

**SAMSON ANGOLO TIMOTHY OSIRU ::::::::::: INTERESTED PARTY**

**RULING**

This application is brought under Section 3A Civil Procedure Act, Chapter 26 Laws of Kenya and all enabling provisions of the law seeking the following orders;

1. THAT this suit be dismissed for want of prosecution.
2. THAT cost of this application be provided for.
  - a. The applicant/respondent has failed to take up steps to have this matter heard and determined since he filed the same.
  - b. The applicant is taking advantage of the orders granted to him for leave to file the proceedings herein as they also operate as stay of Vihiga Principal Magistrate's Court | Miscellaneous Civil application Number 70 of 1998.

c. Justice delayed is justice denied.

d. Interest of natural justice.

The applicant submitted that, on 29<sup>th</sup> April, 2012 ex parte applicant applied for leave to be granted to him to apply for orders of prohibition and mandamus and such leave granted operate as stay. The applicant/respondent was granted leave to apply for mandamus and prohibition which leave operated as stay on 23<sup>rd</sup> April, 2012. The applicant/respondent has used the leave granted to stay proceedings in Vihiga Principal Magistrate's Court in Misc. Civil application No. 70 of 1998 between the interested party/Applicant versus Makutsa Pete. The applicant then raised an objection which preliminary objection was heard and determine by this honourable Court on 8<sup>th</sup> October, 2014. Since then the applicant/respondent has not taken any steps to have this matter heard and determined. The applicant/respondent is using and benefitting from the orders issued on 23<sup>rd</sup> April, 2012 to halt further proceedings in Vihiga Principal Court Misc. No. Application of Miscellaneous No. 70 of 1998. Yet as he is using the land and him not taking a hearing date to his benefit. That due to the above reasons, the applicant/respondent is using the order of 23<sup>rd</sup> April, 2012 to deny him access justice in Vihiga principal Magistrate's Court in Misc. civil application No. 70 of 1998.

The respondent submitted that, on 23<sup>rd</sup> April, 2012, he applied for leave to apply for orders or prohibition and mandamus and such leave operate as stay. That leave to apply for mandamus and prohibition was granted on 23<sup>rd</sup> April, 2012. The interested party/applicant raised preliminary objection which was dismissed by this honourable court on 8<sup>th</sup> October, 2014. That his advocate has been trying to fix the matter for hearing to no avail as the court file could not be traced in the registry. That they have on numerous occasions proceeded to Kakamega High Court Registry and have written several letters to Deputy Registrar requesting that the court file be traced and matter fixed for hearing with no success. That the applicant/respondent has taken substantive action to proceed with the matter by requesting that the file be traced and fixed for hearing. The respondent is not in any way using or benefitting from the orders issued on 23<sup>rd</sup> April, 2012 to halt further proceedings in Vihiga Principal Magistrate's Court Misc. App. No. 70 of 1998. On the contrary, the applicant/respondent is desirous of prosecuting the suit only for the indolence of the High Court Registry in tracing the court file. The respondent is not using the order issued on 23<sup>rd</sup> April, 2012 to deny the applicant access to justice in Vihiga Principal Magistrate's court in Misc. civil application No. 70 of 1998.

This court has carefully considered both the applicant's and the respondent's submissions. 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 respondent submitted that, on 23<sup>rd</sup> April, 2012, he applied for leave to apply for orders or prohibition and mandamus and such leave operate as stay. That leave to apply for mandamus and prohibition was granted on 23<sup>rd</sup> April, 2012. The interested party/applicant raised preliminary objection which was dismissed by this honourable court on 8<sup>th</sup> October, 2014. That his advocate has been trying to fix the matter for hearing to no avail as the court file could not be traced in the registry. That they have on numerous occasions proceeded to Kakamega High Court Registry and have written several letters to Deputy Registrar requesting that the court file be traced and matter fixed for hearing with no success. This is indeed an old matter dated back to 2012. However, **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 that the delay is excusable and give the respondent the benefit of doubt that the file could not be traced in the court registry. I find that the respondent should not to be condemned unheard. I find this application is not merited and dismiss the same on condition that the respondent takes a hearing date in the registry within the next thirty (30) days from today's date. Cost of this application to the applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22<sup>ND</sup> DAY OF  
NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**