



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 206 OF 2016**

**KALASINA WAMBUTSI OMANYO :::::::::::PLAINTIFF/APPLICANT**

**VERUSUS**

**LUCAS OMONDI OMANYO :::::::::::DEFENDANT/RESPONDENT**

**RULING**

This application is dated 4<sup>th</sup> September 2017 and is brought under section 3 & 3A of the Civil procedure Act, order 42 rule 21 of the Civil Procedure Rules seeking the following orders;

1. THAT this honourable court be pleased to set aside the orders issued on 22/6/2017.
2. THAT this case filed vide plaint dated 27<sup>th</sup> September, 2016 be reinstated.
3. THAT cost be in the cause.

It is grounded on the following grounds and other grounds to be adduced during the hearing of this application. On 22<sup>nd</sup> June, 2017, the exact date that this case was scheduled for hearing, the plaintiff arrived at the court late, due to some personal inconveniences, to find this case already called and dismissed thereafter. The plaintiff ought not to be condemned unheard. The plaintiff has an arguable case with high chances of success. The plaintiff will suffer irreparable loss if the said orders are not granted. The plaintiff has acted reasonably and properly in making this application.

The respondent submitted that the plaintiff/applicant is not keen on prosecuting his case to the conclusion. That is the plaintiff who picked the date in the registry on the 3<sup>rd</sup> day of March, 2017 but when the matter came up for hearing in court on 26<sup>th</sup> day of June, 2017, the plaintiff was absent thus the matter was dismissed. That it is in the interest of justice that litigation must come to the end. That the plaintiff/applicant has not rendered any evidence as to where she was on the day the matter was dismissed.

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 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. This matter was filed way back in 2016. It is not disputed that the plaintiff who picked the date in the registry on the 3<sup>rd</sup> day of March, 2017 but when the matter came up for hearing in court on 26<sup>th</sup> day of June, 2017, the plaintiff was absent thus the matter was dismissed. The applicant stated that, on 22<sup>nd</sup> June, 2017, the exact date that this case was scheduled for hearing, she arrived at the court late, due to some personal reasons, to find this case already called and dismissed thereafter. I find that the applicant filed this present application in reasonable time and should not to be condemned unheard. Her absence in court on the material date and time is excusable. I find this application has merit and grant it as prayed on condition that the applicant takes a hearing date in the registry within the next thirty (30) days from today's date. Cost of this application to the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21<sup>ST</sup> DAY OF  
NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**