

REPUBLIC OF KENYA

IN THE LAND COURT OF KENYA AT KAKAMEGA

ELC APPEAL NO. 11 OF 2007

BENSON TSINDOLO SHIPITI ::::::::::::::: APPELLANT/APPLICANT

VERSUS

JOHN LUSENO INGARA ::::::::::::::: RESPONDENT

RULING

This application is dated 17th May 2016 and is brought under Order 51, rule 3 of the Civil Procedure rules and seeks the following orders;

1. THAT this application be certified urgent and heard ex-parte in the first instance.
2. THAT the honourable court be pleased to set aside and/or vary its orders of 9th April, 2015 by the honourable court dismissing the instant appeal in this suit and re-instate the same for hearing and determination on merit.
3. THAT the costs of this application be provided for.

Appellant/applicant submitted that, the suit herein was filed on 18th July, 2005 by his advocates on record M/s. J.A. Guserwa & Co. Advocates. The matter came up for hearing of a dismissal notice on 9th April, 2015. Both parties failed to attend court on the said date when the matter came up for hearing as they were not aware of the date. They have since attempted to take another date for mention at the Registry but the same could not be possible as the file could not be traced. Later on the file was traced by the Deputy Registrar and they were sent a letter dated 4th July, 2014 to proceed with the necessary action. That the applicant stands to suffer great prejudice and injustice if the dismissal order is not set aside as he came to check on the position of the file on 22nd April, 2015 at the registry when he learnt of the dismissal orders issued on the 9th of April, 2015 after which he informed his advocate to make this application.

The respondent submitted that, this appeal could not be heard on the notice for dismissal on 25th June 2013 because the trial court was engaged in an election petition so the appellant ought to have taken action to remedy this situation immediately after the election petition had been concluded. That the appellant did not take any action in this appeal after the notice for dismissal scheduled for 25th June 2013, had been served on the appellant is a clear indication that the appellant is not interested in this appeal. That even after the court had communicated to the appellant's counsel vide the court's letter dated 4th July 2014, that the court file was available in the registry the appellant still took no action to have this appeal fixed for hearing. This shows lack of interest in this appeal on the part of the appellant.

This court has considered both the applicant's and the respondent's submissions. On perusal of the court file I find that both the appellant/applicant's counsel and the respondent's counsel failed to attend court on the said date, when the matter had been listed for dismissal on the 9th of April, 2015. On the said date the court proceeded to dismiss the appeal for want of prosecution. The applicant submitted that he attempted to take another date for mention at the registry but the same was not possible as the file could not be traced.

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 be done despite the delay. Justice is justice for both the plaintiff and the defendant. This matter was filed way back in 2005 and dismissed in 2015. The applicant's maintain that they were not served with the hearing notice and hence their failure to attend. I find the delay is prolonged but excusable as the applicant filed their first application to reinstate on the 7th May 2015. I find this application has merit and grant it as prayed with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF NOVEMBER 2017.

N. A. MATHEKA

JUDGE