



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 708 OF 2019**

**DANIEL MURIUNGI KABERIA.....APPELLANT**

**VERSUS**

**SOLOMON MWANGI WANJAU.....RESPONDENT**

**(Being an appeal from the ruling and order of the Hon. D.O. Mbeja (SRM) dated 28<sup>th</sup> day of November, 2019 in Milimani Commercial Court CMCC 4827 of 2018)**

**JUDGEMNT**

The appellant's suit was dismissed by the lower court on 8<sup>th</sup> August, 2019 for reasons that he was not present in court when the case was called for hearing. Following that dismissal he filed a Notice of Motion dated 14<sup>th</sup> August, 2019 seeking to set aside the dismissal order. In that application he submitted that the suit was dismissed as a result of an innocent mistake on his part after unwittingly stepping out when the case was called out and that the mistake was excusable.

The application was opposed by the respondent who filed grounds of opposition. After considering the application the trial magistrate dismissed the same leading to the present appeal.

In the present appeal the appellant has raised several grounds in the memorandum of appeal dated and filed on 4<sup>th</sup> December, 2019. The summary is that the trial court failed or ignored the unchallenged facts that, the appellant was present in court on the date of hearing and that his absence was duly explained. His mistake fell in the category of innocent and excusable mistakes. Further, the lower court was faulted for finding that the appellant was responsible for delaying the prosecution of the suit. The lower was also faulted for failing to acknowledge that the parties were negotiating a settlement and further that, no prejudice had been occasioned to the respondent and if any, the same could be compensated by an award of costs. Parties have filed submissions relating to the appeal which I have considered.

I have considered the nature of the claim as set out in the pleadings and the circumstances under which the suit was dismissed. From the record, the appellant had never missed attending court at any given time in the past. At the same time, on the date the suit was dismissed, the advocate for the defendant did not apply for its dismissal. In fact, he only told the court that he was ready with one witness and sought costs for that day and witness expenses of Kshs. 1,000/=.

Previously, indulgence had been given to the defendant to amend the defence and also a witness statement out of time. As the first appellate court it is my duty to evaluate the record of the lower court and arrive at independent conclusions. This I have done. I have seen correspondence showing that the parties were inclined to settle the matter out of court. I have also considered the fact that courts are inclined to maintain suits rather than dismiss the same. However, since justice looks at both sides I have to consider whether or any prejudice may be occasioned to either party or if costs may be enough to compensate the aggrieved party.

The right to a fair hearing is constitutionally underpinned. See Article 50 of the Constitution. The suit was dismissed at the instance of the court. The appellant was denied his day in court as a result. No prejudice was alleged shall befall the respondent. In fact, the respondent was prepared to accept costs. I am persuaded that there is merit in this appeal and therefore the same is hereby allowed. The appellant shall pay the costs occasioned by this appeal.

The lower court file shall be remitted for hearing before another magistrate of competent jurisdiction.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Ms. Khakame holding brief for Mrs. Oloo for the Appellant

Mr. Arunda holding brief for Mr. Mwiti for the Respondent