



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CIVIL APPEAL NUMBER 98 OF 2017**

**BERNARD MURIGI MAITHYA.....APPELLANT/RESPONDENT**

**VERSUS**

**HUSSEIN ABDUL KADIR.....1<sup>ST</sup> RESPONDENT**

**MFI OFFICE SOLUTIONS LIMITED.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**DIAMOND TRUST BANK KENYA LIMITED.....3<sup>RD</sup> RESPONDENT**

**THE REGISTRAR OF MOTOR VEHICLES.....4<sup>TH</sup> RESPONDENT**

**THE OFFICER COMMANDING CENTRAL POLICE STATION.....5<sup>TH</sup> RESPONDENT**

**(An appeal from the ruling of the Senior Resident magistrate at Milimani**

**delivered by Hon. L W Kabaira (Ms) on 27<sup>th</sup> February, 2017**

**in**

**CMCC No. 2500 of 2011)**

**R U L I N G**

This is an application by way of Notice of Motion seeking to set aside the order dismissing the applicant's application dated 18<sup>th</sup> June, 2018 which sought to strike out the Memorandum of Appeal dated 9<sup>th</sup> March, 2017.

This application dated 24<sup>th</sup> October, 2018 is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules.

It is opposed and the respondents have filed replying affidavits and cited some authorities. The first affidavit annexed to the application was withdrawn and another one filed which angered the respondents contesting that, this was un-procedural and that it should be expunged from the record. Counsel have filed submissions which I have noted.

The withdrawal of the first affidavit has been explained to the satisfaction of the court. No prejudice has been alleged on the part of the respondents. The reasons advanced for non-appearance of counsel for the 2<sup>nd</sup> Respondent, who is the applicant herein, on the date the application was dismissed, has equally been explained by the counsel appearing. In any case, courts are enjoined to sustain suits and applications rather than dismissing them, so that every party has their day in court.

The order for dismissal made on 18<sup>th</sup> July, 2018 is hereby set aside and the application reinstated for hearing. The parties shall now take a hearing date convenient to them for the application dated 18<sup>th</sup> June, 2018. The costs of this application shall however, be paid by the 2<sup>nd</sup> respondent to the appellant.

**Dated, signed and delivered at Nairobi on 20<sup>th</sup> day of June, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**