

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 246 OF 2012

DANIEL KABUBA MAINA.....APPELLANT

VERSUS

MERCELLINE N. MURIITHI.....RESPONDENT

(Being an appeal against the Ruling of the Chief Magistrate Hon. T.W.C Wamae (Mrs)

delivered on 20th April, 2012 in CMCC No. 2778 of 2009)

JUDGMENT

The appellant's suit in the lower court was dismissed for nonattendance of his advocate. Thereafter he filed an application to set aside the dismissal order and reinstatement of the suit so that it is heard and determined on merit. That application was equally dismissed because the trial magistrate did not believe the medical certificate presented by the advocate, the main reason being that the advocate visited the hospital a day after the suit had been dismissed.

After the dismissal of that application, this appeal was filed. The Memorandum of Appeal faults the trial magistrate for ignoring the evidence tendered before her and disallowing the appellant's application. It is also alleged that she erred in failing to exercise her discretion judiciously to serve the interest of justice. Upon directions by the court for counsel to file submissions, only the counsel for the appellant complied.

There are no limits or restrictions on the judge's discretion to set aside an adverse order because the main objective of the court is to do justice to the parties. – see **Maina vs. Mugiria (1983) KLR 78 and Benjo Travellers Limited & Co. & Another vs. Mary Wangai Mutuku (2008) e KLR.**

That discretion is intended to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. Court decisions have added that it should not be used to evade or otherwise obstruct the course of justice.

There is no suggestion whatsoever on the record that the failure of counsel to attend court on the date of hearing was intended to delay the course of justice, or cause hardship on the part of the defendant. Indeed, it was the appellant's case that was coming up for hearing on the date it was dismissed. The trial court should have, on a balance of probabilities, exercised its discretion to set aside the dismissal order when counsel presented the medical report before her. In any case, dismissal of an action is a very drastic measure which results in locking out a party from the corridors of justice and should be exercised cautiously.

I am persuaded that this appeal should be allowed so that the parties have their day in court. Accordingly, this appeal succeeds and the dismissal order set aside. The suit is reinstated and the file shall be remitted to the lower court for hearing and determination on merit. This being an old case, the hearing dates shall be allocated on priority. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 22nd Day of February, 2018.

A. MBOGHOLI MSAGHA

JUDGE