

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 299 A OF 2011

HELLEN NGINA MUTISYA AND JOHN MUKASA MUSAU

(Suing as personal representative of

NICHOLAS MAUNDU MUSAU – (DECEASED)APPELLANTS

VERSUS

SAMSON NJOROGE GOCHI RESPONDENT

(Being an appeal from the Ruling and Order of Hon. D. Mulekyo Principal Magistrate delivered on 3rd June, 2011)

JUDGMENT

The suit in the lower court was filed by the appellant as personal representatives of the late Nicholas Maundu Musau. The said suit was then listed for hearing on 28th May, 2010. When the case was called out for hearing the appellant and their advocate were absent. The court then dismissed the suit with costs.

Soon thereafter, on 10th June, 2010 the appellants through their advocates filed an application to set aside the said dismissal order. That application was also dismissed. The dismissal order led to the present appeal. Both parties have filed submissions addressing the said appeal. Some authorities have also been cited.

It is important to note that a suit in court is not the property of the advocate appearing for the parties. In both dismissal orders, the learned trial magistrate appeared to blame the advocate who either appeared for the appellants or held brief for the advocate for the appellants.

With respect, the learned trial magistrate failed to appreciate the import of sections 1A, 1B,3 and 3A of the Civil Procedure Act. Those provisions are intended to achieve the objectives of civil litigation in a just, expeditious, and proportionate affordable resolution of disputes. It is also an established principle that mistake of counsel should not be visited upon the litigant.

I have looked at the pleadings and believe that injustice will be occasioned to the appellants if this appeal is not allowed. On the other hand, the respondent shall not suffer any prejudice if this appeal is allowed. Accordingly, the appeal is allowed and all the orders of the lower court set aside.

The suit is reinstated and the original file shall be returned to the lower court for hearing and determination. I note that this is an old case and priority should be given to determine the same. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 14th Day of December, 2016.

A. MBOGHOLI MSAGHA

JUDGE