

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 1 of 2000

MARY WANGUI NDURA

JOSEPH WAKARITU NDURA APPELLANTS

Versus

DOMINICA WAMUYU KIHU..... RESPONDENT

RULING

The applicant DOMINICA WAMUYU KIHU made an application seeking to stay the decree of this court by a Notice of Motion dated 14th November 2007. The applicant fixed that application for hearing on 4th March 2008. When the matter was called out the applicant was absent and the respondent prayed for and obtained the dismissal of that application for non attendance. The applicant has now come before court by way of Notice of Motion dated 10th March 2008 seeking the revival of the dismissed application. In that application the applicant deponed that she has suffered with ill health and on the day the application was dismissed she had attended hospital for routine examination but because of her ill health she was detained in hospital. She therefore sought the court to set aside the dismissal. The application was opposed and in opposing the application the respondent submitted that the applicant should not have taken a date for hearing when she was due to go for medical examination. The respondent argued that failure to attend court was either deliberate or inadvertent. I have considered the application and the opposition by the respondent. A court should exercise its discretion judiciously. The applicant in alleging that she suffers from ill health annexed treatment notes which showed that on the day her application was dismissed she was attending hospital. That I believe is sufficient reason for failing to attend court. I find that is also sufficient reason to invoke this courts exercise of its discretion. Accordingly the order of the court is that the dismissal of the applicant's application dated 14th November 2007 made on 4th March 2008 is hereby set aside. The court also sets aside the consequential orders of that date. The respondent is granted costs of the Notice of Motion dated 10th March 2008.

DATED AND DELIVERED THIS 25TH DAY OF JUNE 2008

MARY KASANGO

JUDGE