

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 519 OF 2013

JULIUS MWANIKI KITHOKOI APPELLANT

VERSUS

THE HON. ATTORNEY GENERALRESPONDENT

(Being an appeal from the ruling delivered by C.C. Kipkorir Ms, Resident Magistrate dated 6th May, 2013 in Nairobi Civil Case No. 6128 of 2004)

JUDGMENT

The appellant herein filed a case against the defendant following a shooting by the police which left him paralysed. At some stage the suit in the lower court was dismissed for what appears to be want of prosecution. He then lodged an application to set aside the dismissal order which application was also dismissed.

Another application followed, this time with two affidavits, one by the appellant and the other by his advocate. That application was once again dismissed because the advocate's affidavit had not been commissioned. A supplementary affidavit had been filed which the court however, did not address itself to. Had that been done I do not believe the application would have been dismissed.

The dismissal of the first application did not address the merits thereof. The second application therefore could not attract the finding that the matter was res judicata. The issues had not been canvassed and no determination had been made. I also note that before the dismissal of the suit, no notice to show cause had been issued under Order 17 Rule 2 of the Civil Procedure Rules.

The appellant was driven out of the seat of judgment without a hearing. Injustice has been visited upon him. I am inclined to allow this appeal and set aside the dismissal order and all other rulings delivered thereafter. The lower court suit is hereby reinstated. The lower court file shall be remitted to the lower court for hearing and determination by a different magistrate of competent jurisdiction. As this is an old case, priority shall be given in allocating hearing dates. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 6th Day of April, 2017.

A. MBOGHOLI MSAGHA

JUDGE