



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA-BAY**  
**CIVIL APPEAL NO. 18 OF 2014**

**BETWEEN**

**MOMBASA CAR IMPORTERS LTD ..... APPELLANT**

**AND**

**KENNEDY OBUYA MBORI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN NGUNJIRI MUTHEE T/A**

**TANGO AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. L. Mwendwa, RM dated 5<sup>th</sup> November 2014 at the Senior Principal's Magistrates Court at Oyugis in Civil Case No. 228 of 2009)***

**JUDGMENT**

This is an appeal from the decision of the subordinate court declining to set aside the *ex-parte* judgment. The ground for setting aside was that the advocate was engaged in another matter in Kisumu. The learned magistrate found that there was intent to delay the matter and no that no basis had been established to exercise such discretion.

I have considered this matter and borne in mind the principles an appellate court exercises in dealing with an appeal against the exercise of discretion by the subordinate court (see *Shah v Mbogo [1967] EA 116*) and the respondents' arguments in opposition to the appeal.

Having looked at the judgment of Hon. S. N. Makila where she stated that special damages were not proved yet she proceeded to make an award of special damages, I am inclined to find that there was valid defence which would have entitled the court to set aside the judgment.

Given the history of the matter and the fact that the appellant is now seeking to set aside *ex-parte* judgment for the second time, I allow the appeal and now make the following orders:-

1. The judgment of Hon. S.N Makila dated 25<sup>th</sup> March 2014 be and is hereby set aside.
2. The appellant shall bear costs of the subordinate court assessed at Ksh 20,000/= to be paid within 30 days.
3. The appellant shall bear the costs of this appeal assessed at Kshs. 15,000/= to be paid within 30 days.
4. The sums deposited in this court shall remain as security and shall only be released subject to the judgment and decree of the subordinate court.

5. The suit in the subordinate court shall be disposed off within 45 days.

**DATED and DELIVERED at HOMA BAY this 25<sup>th</sup> day of August 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Kirenga instructed by Kirenga and Company Advocates for the appellant.

Mr Oguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the respondent.