



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 6 OF 2018**

**SALUTE HOLDINGS LIMITED.....APPELLANT**

**VERSUS**

**A-ONE AUTO SERVICES LIMITED.....RESPONDENT**

***(From the ruling in Milimani Commercial Courts Chief Magistrate's Civil Case No.3947 of 2015 dated 3<sup>rd</sup> April 2019 – M W Murage – RM)***

**JUDGMENT**

1. This appeal arises from a ruling of the trial court dated 3<sup>rd</sup> April 2019, dismissing the appellant's application for setting aside the exparte orders of the trial court dismissing the appellant's suit for non-attendance.

2. This appeal has proceeded by way of written submissions without highlighting and counsel for both parties filed written submissions, which I have perused and considered.

3. The facts are clear that the appellant's counsel through a clerk fixed the case before the magistrate's court for hearing, but on the hearing date did not attend court, and the trial court on request of counsel for the respondent, dismissed the case for non – attendance on 11/4/2017. Thereafter on 3<sup>rd</sup> April 2019, the application of the appellant for reinstatement of the case was dismissed by the trial court precipitating the filing of this appeal.

4. Having considered the facts and circumstances of this matter and the written submissions, I observe that under Order 12 Rule (3) of the Civil Procedure Rules, a trial court may dismiss a suit for non-attendance of the plaintiff. Under rule 7 however the court may set aside or vary the said dismissal orders. In particular, rule 7 provides –

***(7) "Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."***

5. In this appeal, the appellant urges that the exparte judgment be set aside while the respondent argues very strongly against that request.

6. In my understanding, the appellant is saying that the mistake was of counsel and not the appellant and that the interests of substantive justice would require that the ex – parte judgment be set aside. The respondent on the other hand, argues that delays contravened the requirement for of expeditions disposal of cases provided for under Article 159 of the Constitution, and that in any case, the court clerk who is alleged to have fixed the case for hearing and not diarised the said date, did not swear and file an affidavit to that effect in support of the application for setting aside.

7. I agree that the trial court had the discretion to allow the setting aside of the ex parte judgment. In exercising that discretion, the main consideration for a court is to do justice to both parties – see **Patel – vs – East Africa Cargo Handling Services Co. Ltd [1974] EA, 75 and Shah – vs – Mbogo [1967] EA 40**. The trial court in our present case exercised its discretion and declined to set aside the ex-parte judgment.

8. I am alive to the fact that an appellate court can interfere with a trial court's exercise of discretion only when the trial court misdirected itself and arrived at a wrong decision, or if it is manifest from the case as a whole that the court was clearly wrong in the exercise of that discretion and as a result there has been injustice – see **Mbogo & Another – vs – Shah [1968] EA 93**, in which at page 95 Sir Charles Newbold P. stated –

***"A Court of Appeal should not interfere with the exercise of discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there***

has been injustice.

9. In dismissing the request for setting aside the ex-parte judgment herein the trial court stated as follows -

*“It is clear that hearing date was taken by the plaintiff but on the date of the hearing the plaintiff and their advocate failed to turn up for hearing. It is also averred that a clerk took the date and failed to diarise. This clerk did not swear an affidavit. The plaintiff also had the duty to use due diligence to ensure that its advocate attends to this case. He would have checked the progress of his case. Where the plaintiff commits acts as inadvertently delay by failing to prosecute his case be occasioning injustice on the defendant who has dragged (sic) to court. The court of law is a court of justice and must administer if parties does not need the court should not dismiss the suit where it strongly feels that the delay will prejudice the defendant (sic). I therefore find that there is no good reason advanced by the applicant to warrant the orders sought.”*

10. In my view, from the above there were several misdirections by its trial court herein. First, it was not true that the plaintiff (now appellant) took the hearing date. The hearing date was taken

by the plaintiff’s advocate through his clerk. Secondly, though the clerk took the hearing date, he did so on behalf of his principal (the advocate), so in my view it was not mandatory for the clerk to swear an affidavit in the application for setting aside judgment since the advocate swore and filed an affidavit. Thirdly, since the plaintiff did not fix the hearing date, the trial court was wrong in implying that he had a duty to ensure that he and the advocate attended court on the hearing date.

11. In my view, therefore had the trial court directed itself properly on the true facts and circumstances of the case, there would be no justification for denying the appellant the right of substantive justice through hearing of the case through the evidence as envisaged under Article 159 of the Constitution. If anything, throwaway costs to the defendant would have sufficed. I find that the trial court’s discretion was exercised on wrong considerations which caused an injustice.

12. I thus find merits in the appeal. I set aside the decision of the trial court dated 3<sup>rd</sup> April 2019 declining the request of the appellant to set aside its earlier ex – parte judgment. I set aside the ex parte judgment and i reinstate the appellant’s case in the magistrate court, which will be heard by any magistrate other than Hon. M. W. Murage (RM). Costs will follow the decision of the trial court.

13. The case will be mentioned before a magistrate in Nairobi on 20<sup>th</sup> February 2020 for directions.

**Dated and delivered at Nairobi this 6<sup>th</sup> February 2020.**

**GEORGE DULU**

**JUDGE**

**In the presence of -**

Court Assistant .....

For the plaintiff.....

For the defendant.....