



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**COMMERCIAL & TAX DIVISION**

**HCCC NO E 111 OF 2018**

**ASL CREDIT LIMITED .....PLAINTIFF**

**VERSUS**

**ABDI BASID SHEIKH ALI.....1<sup>ST</sup> RESPONDENT**

**RULING**

By Certificate of Urgency Application filed by Plaintiff/Applicant on 17<sup>th</sup> March 2020, the Applicant sought that the Court orders of 3<sup>rd</sup> October 2019, where Hon. L.J M. Kasango dismissed the Plaintiff's suit for non-attendance by the Plaintiff/Applicant be set aside and vacated and the suit reinstated.

The Plaintiff/Applicant instituted by Plaint and filed on 9<sup>th</sup> October 2018 for hearing of the Plaintiff's application filed on 17<sup>th</sup> October 2018.

The Plaintiff/Applicant is apprehensive that its legitimate rights as pursued in the Plaint will be extinguished and the Plaintiff will be condemned unheard and subsequently suffer irreparable loss and damage.

The grounds relied upon are that although the Plaintiff served the Defendant with the application for hearing of the matter on 10<sup>th</sup> July 2019, Counsel was unwell and the Court stood over the matter to another date to be taken by parties.

The Plaintiff took the date of 3<sup>rd</sup> October 2019. The Clerk erroneously and through honest mistake failed to notify the advocate on record the date fixed for the hearing of the application. The advocate failed to attend Court.

The Court on its own motion dismissed the whole suit for non-attendance whereas the matter was coming up for hearing of the application.

The Plaintiff/Applicant sought to peruse the Court file but was unable to trace the same. When the Applicant found and perused the Court file he confirmed the above facts.

The Plaintiff/Applicant wishes to have the dismissed application dated 17<sup>th</sup> October 2018 and the suit filed on 9<sup>th</sup> October 2018 reinstated heard and determined by the Court.

It is in the interest of justice and fairness the suit and application should be heard and determined on merit.

By Affidavit of Service sworn on 17<sup>th</sup> June 2020 and filed through e-filing, the Applicant confirmed that the Defendant/Respondent was served on 17<sup>th</sup> June 2020 through advocates on record A. N.Oeri Advocates with the Hearing Notice and Certificate of Urgency application.

**DETERMINATION**

On 2<sup>nd</sup> July 2020, the Application was heard through virtual conference exparte, the Applicant applied for the suit and application and orders of 3<sup>rd</sup> October 2019 to be set aside and suit and application to be reinstated.

The application was unopposed, the Defendant/Respondent despite service failed to appear during proceedings and/or to be represented. No explanation, circumstances or reasons were explained to the Court to consider and no pleadings or documents were filed with regard to the instant application.

**Order 12 & 17 CPR 2010** address the dismissal of suit for non-attendance and non-prosecution for 1 year. **Order 51 CPR 2010** addresses the process of hearing applications and where a party is absent then the Court proceeds exparte.

In the instant case both parties failed to appear and attend Court on 3<sup>rd</sup> October 2019, the Court dismissed the suit as per **Order 17 Rule 3 and Order 12 Rule 1 CPR 2010** for non-attendance of both parties.

The Applicant outlined in the instant application the reasons for non-attendance and non-prosecution of the application slated for hearing on 3<sup>rd</sup> October 2019. The mistake was by the Plaintiff Advocate's Clerk who failed to diarize the date and inform Counsel and thus counsel did not attend court.

**DISPOSITION**

- 1. The Application is unopposed. The Application filed on 17<sup>th</sup> March 2020 is granted.**
- 2. The Court orders of 3<sup>rd</sup> October 2019 are hereby set aside and vacated.**
- 3. The application and suit are reinstated.**
- 4. They shall be processed in the normal process for hearing and determination through Deputy Registrar Commercial & Tax Division.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 20<sup>TH</sup> JULY 2020. (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**CM ADVOCATES LLP FOR PLAINTIFF/APPLICANT- MS MWANGI**

**A.N.OERI & CO FOR DEFENDANT/RESPONDENT- MS OERI**

**COURT ASSISTANT - TUPET**