**CMC Holdings Limited v Nzioki**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of ruling:** 12 March 2004

**Case Number:** 329/01

**Before:** Tunoi, O’Kubasu JJA and Onyango Otieno AJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Advocate – Mistake – Suit proceeding* ex parte *after advocate failed to inform litigant – Whether litigant entitled to setting aside of* ex parte *judgment.*

*[2] Civil procedure – Setting aside – Suit proceeding* ex parte *after advocate withdrew from acting but failed to inform defendant – Whether defendant entitled to setting aside – Factors to be considered by*

*trial court.*

**Editor’s Summary**

The Respondent filed suit in the Magistrate’s Court claiming special damages at KShs 40 000 being the value of a motor vehicle that was allegedly sold wrongfully by the Appellant. The Respondent also claimed loss of profits at KShs 24 000 per month for a period that the Court would determine. The Appellant, which was a motor vehicle dealer, filed a defence and counterclaim in which it claimed that it was the registered co–owner of the vehicle, and that it had entered into a hire-purchase agreement with the Respondent. It was claimed that the Respondent failed to settle its hire charges thus leading to the sale, of which the Respondent was well aware. After close of pleadings, the Appellant’s counsel applied to cease acting but later withdrew the application. The Respondent then fixed the suit for hearing and served the Appellant’s counsel. The suit proceeded *ex parte* in the absence of the Appellant and his counsel. Judgment was granted for the value of the motor vehicle and for loss of user for three-and-a-half months. The Appellant subsequently learnt of the judgment and applied to have it set aside. It claimed that it had not been informed by its counsel of the said trial date, and that it had a good defence to the suit. The application to set aside judgment was dismissed by the trial Magistrate. The Appellant’s appeal to the superior court was also dismissed, leading to the filing of a second appeal to the Court of Appeal. It was argued that the trial court had erred in giving substantive judgment in the absence of sufficient evidence, and in failing to give the Appellant an opportunity to be heard.

**Held** – A trial court should exercise its discretion in an application to set aside judgment judiciously. On appeal from that decision, the appellate court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or the court had acted perversely on the facts (*Magunga General Stores v Pepco Distributors* [1988–92] 2 KAR 89 followed). A litigant who suffers loss through the mistake of counsel can obtain recourse through suing his former counsel. However where the litigant has not deliberately sought to obstruct or to delay the cause of justice, *ex parte* judgment should be set aside to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error (*Shah v Mbogo and another* [1967] EA 116 approved). By failing to use her discretion to consider whether the Appellant’s non-attendance on the trial date was an excusable mistake, the trial court wrongly drove the Appellant out of the seat of justice empty-handed. In exercising its setting aside discretion, the trial court should also consider whether the defence on record or the draft defence is reasonable and whether it raises triable issues (*Tree Shade Motors Ltd v DT Dobie and Company (Kenya) Ltd and another* [1995–1998] 1 EA 324 followed; *Patel v Cargo Handling Services Ltd* [1974] EA 75 approved). The trial court in this case had failed to look at the matter afresh considering the pleadings before it to see if a *prima facie* triable issue was raised by the defence and the counterclaim. Appeal upheld. *Ex parte* judgment set aside.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Magunga General Stores v Pepco Distributors* [1987] 2 KAR 89 – **F**

*Mbogo and another v Shah* [1968] EA 98

*Patel v Cargo Handling Services Limited* [1974] EA 75 – **APP**

*Shah v Mbogo and another* [1967] EA 116 – **APP**

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*Tree Shade Motors Ltd v DT Dobie and Company (Kenya) Ltd and another* [1995–1998] 1 EA 324 – **F**