



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO.E2 OF 2020

BETWEEN

MARUKUS OGOLLA BWAI.....APPELLANT

AND

HANNINGTON ONDORY OLENJA.....RESPONDENT

(Being an Appeal from the judgment and decree in Mbita Senior Resident Magistrate's

SRMCC No. 9 of 2018 by Hon. Jacinta Orwa –Principal Magistrate).

JUDGMENT

1. Marukus Ogolla Bwai, the appellant herein was the defendant in Mbita Senior Resident Magistrate's SRMCC No. 9 of 2018. This was a suit for a liquidated claim of Kshs. 74,855/=. Judgment was entered against the appellant after he failed to enter appearance or file defence.
2. The appellant was aggrieved by the said judgment and filed this appeal. He was in person. He raised grounds of appeal as follows:
 - a) That I agree with the defendant averment as indicated in paragraph (7) seven of his plaint marked as exhibit 1 meaning that the defendant had got the justice he desired through my conviction and sentence of three years imprisonment and I ought not to have been subjected to another punishment as shown in warrant of sale of property marked as exhibit 2 that led to the confiscation of my seven (7) cows, fifteen(15) goats, a motor bike and cash money of kshs.390,000 that was also taken from my ransacked bed room in excess of the amount of money indicated as debt.
 - b) That I dispute the averment of Hon. Samuel Nyauke the defendant's advocate in his affidavit of service marked as exhibit 3 in paragraph 4, 5 and 6 where he indicated that he travelled to my home and served me with the summons to enter an appearance yet on that day was a Tuesday and I went to Otati Market to sell hoes from 8.00am to 6.30pm when I returned home, so at what time exactly did he find me at home to effect the service.
 - c) That it is not clear whether an order of service requested for by the defendant as indicated in the notice of motion marked as exhibit 4 that was received in Court at Mbita on 16th August 2018 was ever issued by the court, hence I urge the honorable court to find that failure by the defendant to serve me while I was still in prison clearly shows that I would be taken to court by the prisons authority which he didn't want.
 - d) That it is not clear why the defendant came with the auctioneers at my home on 11th October 2019 yet exhibit 2 indicated that the defendant was commanded to return the warrant to court the 30th day of September, 2019 after effecting the order if at all the order was from court.
 - e) That given the above I urge the honorable court to find that I was never served to enter appearance in court and I only learnt of the suit when the auctioneers came to my home an indication that my right to respond to the allegations against was violated.
3. The appeal was opposed by the respondent through the firm of Nyauke & Company Advocates, on the following grounds:
 - a) That the appellant was properly served.
 - b) That the appeal is devoid of merits.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The appellant contends that he was not served with summons to enter appearance. There is an affidavit of service on record indicating that he was served. The recourse open to him was to apply to the trial court for the setting aside of the exparte judgment so that the deponent in the impugned affidavit of service could be cross examined if need be to establish the authenticity of his averment.

6. I am therefore unable to make a finding at this stage on service. The only logical conclusion to make is that the appellant was served with summons to enter appearance but failed to do so or file his defence.

7. The exparte judgment by the trial court cannot therefore be interfered with. The appeal lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE