



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.12 OF 2016**

**HENRY TONUI & DAVID KIBET RONO**

**(Suing as the legal representative of**

**RISPER CHELANGAT RONO (Deceased).....APPELLANTS**

**VERSUS**

**EVANS ANYONA T/A TRANSLINE CLASSIC ....1<sup>ST</sup>RESPONDENT**

**RUBEYA NAILA.....2<sup>ND</sup>RESPONDENT**

**JOSEPH MOKAYA OBWAYA.....3<sup>RD</sup>RESPONDENT**

***(Being an appeal from the Judgment and decree of Hon. G. Kiage (RM) in Bomet RMCC Case No. 9 of 2011 delivered on 8/6/2016)***

**JUDGMENT**

1. The Appellants filed a plaint dated 18/12/2014 against the Respondents seeking special damages, General damages under the Fatal Accident Act (Cap 32) and the Law Reform Act (Cap 26) Laws of Kenya together with costs and interest at court rates.
2. The Appellants filed suit in their capacity as Personal Representatives of the Estate of Risper Chelangat (deceased) who sustained fatal injuries on 20/12/2010 along Bomet– Narok Road when she was knocked by Motor Vehicle Registration No.KBM 256Y which was being driven by the 3<sup>rd</sup> Respondent.
3. The Respondents did not enter appearance or file a defence and the Appellants applied for judgment on 20/8/2014. Interlocutory Judgment was entered and the matter proceeded to formal proof.
4. On 8/6/2016 the trial court dismissed the suit against the Respondent on the basis that there was no proper service of the summons to enter appearance upon the Respondents.
5. The Appellants who are aggrieved with the said order dismissing the suit have filed this appeal on the following grounds:
  - i) THAT the trial magistrate erred in law and fact in dismissing the suit when there was no legal basis for doing so and on Extraneous issues.***
  - ii) THAT the trial magistrate erred in law and fact by failing to appreciate that after Interlocutory Judgment is entered, the court's duty was to assess damages and not to review or set aside the Interlocutory Judgment.***
  - iii) THAT the trial magistrate erred in law and fact in failing to appreciate that improper service of summons was not a ground for dismissing the suit.***
6. The Appellant filed written submission in the Appeal which I have duly considered. The first duty of the first Appellate Court is to re-evaluate the evidence before the trial court and to arrive at its own independent conclusion.
7. 1. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

8. The appeal was not opposed since the Respondents did not respond to the same. I find that the trial court relied on the case of **Nagendra Saena Vs Miwani Sugar Mills & 3 Others [2017]eKLR** where the court set aside an Exparte Judgment on the basis that the summons which were served were not valid.

9. In the current case I find that the issues for determination in this appeal are as follows:

**i) Whether the trial court was right in dismissing the suit after entry of Interlocutory Judgment.**

**ii) Whether the Appeal should be allowed.**

10. On the issue Whether the trial court was right in dismissing the suit after entry of Interlocutory Judgment, I have perused the record and I find that the summons was served upon one Andrew Ogonyo whom the process server said was the company secretary of the 1<sup>st</sup> defendant/respondent.

11. I find that the interlocutory was proper and the court had no basis for setting it aside in the absence of evidence that the 1<sup>st</sup> defendant has no such person working as their company secretary.

12. In the case of **Kimani Kigano & Co Advocates Vs Jimba Credit Corporation Limited (1991) KLR 503** Bosire Judge( as he then was ) held that:

**“1. The power to set aside is discretionary it being a judicial discretion must be exercised on the basis of evidence and sound legal principles.**

**2. Filing of a defence is an essential step which a party is obliged to take to obviate an exparte judgment being entered against a party.**

13. There was no evidence to counter the averments in the Affidavit of service and no defence was filed by the defendant. I find that the Appeal has merit and I accordingly allow it and I reinstate the interlocutory judgment entered on 20/8/2014.

14. I direct that the case proceeds to formal proof before any other magistrate other than the one who dismissed the suit.

15. The Appellants to bear the costs of this Appeal.

**Delivered, dated and signed at Bomet this 5<sup>th</sup> day of August 2020.**

**A. N. ONGERI**

**JUDGE**