



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.21 OF 2019

BETWEEN

ELIAS OMONDI OKINDA (suing as the legal representative of the estate of

CRISPO OKINDA MIEN (deceased).....**APPELLANT**

AND

KCB BANK KENYA LIMITED.....**RESPONDENT**

(Being an Appeal from the ruling and order in Busia Chief Magistrate's

CMCC No. 138 of 2016 by Hon. Maureen T. Madowo – Resident Magistrate).

JUDGMENT

1. The appellant herein was the plaintiff in Busia Chief Magistrate's CMCC No.138 of 2016. The learned trial magistrate delivered a ruling on 2nd April 2019 which allowed the respondent to file a list of documents and ordered the same to be served upon the appellant.
2. The appellant was aggrieved by the ruling and filed this appeal. The appellant was represented by the firm of Calistus Nyegenye & Company Advocates. The appellant raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in and in fact in failing to appreciate the court was *functus officio* in respect to the application dated 22nd August 2018 as a similar application had been made orally on 3rd July 2018 and a determination made by the same court;
 - b) That the learned trial magistrate erred in and in fact in failing to appreciate that the application dated 22nd August 2018 was *res judicata* as a similar application had been made on 3rd July 2018 and a determination rendered by a court of competent jurisdiction;
 - c) That the honourable learned magistrate erred in law and in fact in failing to appreciate that admitting defendant's documents after two plaintiff's witnesses testified would greatly prejudice the plaintiff case because the plaintiff will be robbed a chance to respond to the issues raised in the documents thus being unjust to the plaintiff;
 - d) That the honourable learned magistrate erred in law and in fact in failing to appreciate that it is the defendant who failed to attend court for pre-trial directions despite service where they would have made their request to file the documents out of time but before the trial begun; and
 - e) That the honourable learned trial magistrate erred in and in fact in failing to take into consideration and submissions by the plaintiff applicant.
3. The respondent was represented by the firm of Mukele Moni & Company, Advocates. The appeal was opposed on grounds that it was vexatious, frivolous and an abuse of the process of the court.
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. Contrary to the contention by the appellant that the impugned ruling addressed itself to matters that the court had already rendered itself, I find nothing to support this contention. The issue of admitting the documents was therefore rightly before the court. It is trite law that the onus of prove is on the person who avers the existence of a fact. The court was not, therefore, *functus officio* in respect to the application dated 22nd August 2018.

6. It is good practice not to challenge interlocutory rulings on appeal for this contributes in the delay of hearing and determination of the matter.

7. I find that the appeal herein lacks merit and I accordingly dismiss it with costs.

DELIVERED and SIGNED at BUSIA this 12th day of November, 2020

KIARIE WAWERU KIARIE

JUDGE