

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 32 OF 2018

BETWEEN

CECYPO (K) LIMITED..... APPELLANT

AND

KENNEDY OTIENO AGONDA..... RESPONDENT

(Being an Appeal from the ruling in Oyugis Chief Magistrate's CMCC No. 2 of 2015 by Hon. J.P Nandi –Senior Resident Magistrate).

JUDGMENT

1. On 22nd October 2018 a ruling in favour of the respondent was delivered by the learned trial magistrate. The appellant was aggrieved by the said ruling and filed this appeal. He was represented by the firm of Gadhia Otiemo & Company Advocates. Nine grounds of appeal were raised and which can be summarized as follows:

a) That the decision of the learned trial magistrate denied the appellant the right to be heard.

b) That the learned trial magistrate erred in law and fact by relying on respondent's grounds of opposition and written submissions filed out of time.

c) That the decision of the trial court amounts to raising the standard of proof and/or threshold to beyond a balance of probabilities.

2. The appeal was opposed by the respondents through the firm of Bana & Company Advocates. It was contended that the application dated 23rd August, 2016 was dismissed for want of prosecution on 16th March, 2017.

3. 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.

4. On 16th March, 2017 when this matter went before the trial court, both counsel for the parties were absent. The court went on to dismiss the matter without confirming whether the order made on 2nd March, 2017 was complied with. The order was to ensure that the respondent had served the appellant with the hearing date by the close of business on 9th March, 2017. The order was therefore prejudicial to the appellant.

5. Though there was delay in bringing the application dated 16th March, 2017 and which gave rise to the ruling which is the subject of this case, it would have been prudent for the trial court to decide the application on merits and not on technicalities. The appellant was not accorded a fair hearing.

6. From the foregoing, I find that this appeal must succeed.

7. The matter is remitted to the trial court for hearing of the case on merits. Costs to the appellant.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE