



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 698 OF 2016**

**ONGETT HESBON MOMANYI.....APPELLANT**

**VERSUS**

**ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT**

**RULING**

1) The appellant herein made an oral application in which he sought for the process server who effected service on him and or to his office and or to his staff to be summoned to be cross-examined over certain annexures attached to the replying affidavit of the Interested Party.

2) The appellant averred that he disputes that the person allegedly served was not a member of staff in his office. He also pointed out that one Mercy Wambua had denied swearing an affidavit therefore her affidavit filed in this matter is a forgery.

3) Mr. Kigen, learned advocate for the complainant apposed the appellant's oral application. The learned advocate pointed out that the issue touching on the forgery of documents can only be determined by a document examiner and not through cross-examination. The learned advocate urged this court to dismiss the application and proceed to set a ruling date for the pending applications.

4) Mr. Mugo, learned advocate for the respondent urged this court to dismiss the oral application since the applicant did not lay any foundation to enable this court issue summonses calling upon the process server to attend court to be cross-examined. This was also pointed out that the appellant failed to approach Law Society of Kenya to contact Ms Mercy Wambua to clarify the contents of the disputed affidavit.

5) Under Order 19 rule 2(1) of the Civil Procedure Rules, the court has unfettered discretion to summon the deponent of an affidavit to be cross-examined on the contents of the averments of the affidavit. In this case the appellant has alleged that the process server effected service of process upon a party who was not his employee hence he requires the deponent of the affidavit of service to be cross-examined.

6) I do not think this is one of those grounds where a deponent of an affidavit can be called upon to attend court for cross-examination. Such disputed facts can be resolved by filing other affidavits in response.

7) The appellant has also alleged that he needs to cross-examine the process server to prove that there was forgery. With respect I do not think such an issue can be resolved using cross-examination. Such an issue can be resolved by the services of a document examiner.

8) For the above reasons, I find the appellant's oral application to be without merit. The same is dismissed with costs abiding the outcome of the two applications, one dated 5th May 2021 and the other dated 2nd June 2021.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....for the Appellant

.....for the Respondent