

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 383 OF 2010

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

Versus

LINEAR COACH CO. LTD.....1STDEFENDANT

ALFRED MOFFART MICHIRA.....2NDDEFENDANT

DUNCAN MOGAKA MICHIRA.....3RDDEFENDANT

PARTIAL RULING

Cross-examination of process server

[1] I have considered all the submissions of parties in the application dated 20th August 2013, and what is coming through as the major bone of contention is service of summons to enter appearance.

Apparently, the decision of the court in the application dated 20th August 2013 may as well or substantially turn on service of summons. The Applicant has made allegations that service of summons was not properly done. I after consulting the record, I observe that the Respondent made several requests and even applied for and summons to appear were issued upon the process server to appear for cross-examination on the affidavit of service which he filed in court, but in vain. One thing became quite startling to the court. How can the process server, who is an officer of the court, file an Affidavit of Service and also a Replying Affidavit to defend a service of summons he carried out but fail or avoid to appear when called upon by the court to be cross-examined on the service of summons in question? With tremendous respect, he should know that a process server is an officer of the court, serves process of the court and is accountable to the court on such service. His accountability to the court is through the return he makes under the Civil Procedure Rules and therefore, he must be faithful and be prepared, almost in a conditioned reflex manner, to respond to any call made by the court on any service he has carried out. The facts herein are disturbing and impel the court to seek wisdom provided in Order 5 rule 16 of the Civil Procedure Rules which states as follows:-

“On any allegations that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching this proceedings and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

[2] In light thereof, I order the process server to appear before me on a date I shall fix, to be examined on matters touching on service of summons herein and on his depositions in the affidavit and Replying Affidavit filed by him on the said service. The result of the examination or any such other or further inquiry by the court on the matter will form part of the final ruling by the court on the application dated 20th August 2013. The process server should be wary that should he fail to appear on the appointed date, the court will issue a warrant of arrest for him to be produced in court with all convenient speed at such time and place as the court shall direct in the warrants. The said process server should also be served with a penal notice informing him that disobedience of this court order may attract penal and other coercive sanctions from the court. On his examination in accordance with this order, the court will decide whether

any or further inquiry into the matter will be necessary. I make these orders in most dignified mood but knowing too well that the dignity of the court is at stake here, thus, the fearless posture I have taken to defend court process for the sake of the administration of justice.

[3] Meanwhile, the ruling reserved for today on the application dated 20th August 2013 is hereby arrested and shall be delivered on such date as shall be appointed by the court, but of course after the inquiry on service of summons herein as ordered above has been completed or as the issue of service will have been resolved by this court one way or other. It is so ordered.

Dated and signed at Nairobi this 15th day of May 2015.

F. GIKONYO

JUDGE

Delivered and signed in court at Nairobi this 19th day of May 2015.

E. OGOLA

JUDGE.