

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 186 OF 2012

STEPHEN ODDIAGA T/A

STEPHEN ODDIAGA & CO. ADVOCATESPLAINTIFF

V E R S U S

CHRISTOPHER HAPPEDEFENDANT

RULING

1. The parties in this matter submitted to the Notice of Motion dated 21st November 2012 and today was the day reserved for Ruling. When however I began to consider the application and the submissions it became very clear that the central issue to be determined is whether the Defendant was served with the Summons and Plaint. That being the case it was in error to have received parties submissions without having had the process server HEBRON MAGHANGA cross examined. The Court of Appeal so stated in the case **DICKSON DANIEL KARABA Vs JOHN NGATA KARIUKI & 2 OTHERS [2010]eKLR** as follows-

“Indeed the Superior Court and the parties appreciated this imperative at an early stage of the proceedings and the Court made orders, correctly in our view, that the process server and the 1st Respondent be cross examined on their affidavits. There was a good reason for that order, traceable to the law on such matters, that there is a presumption that the Court process was properly served unless such presumption is rebutted. We allude to the case of Shadrack Arap Baiywo v. Bodi Bach, Civil Appeal NO. 122/86 (UR) cited and applied in Miruka v. Abok & Another [1990]KLR 544, where in the former case Platt JA stated:-

‘There is a qualified presumption in favour of the process server recognized in MB Automobile v Kampala Bus Service [1966]EA 480 at p 484 as having been the view taken by the Indian Courts in construing similar legislation. On Chitale and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say:

‘3. Presumption as to service- There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.’

Also, in Karatina Garments Ltd v. Nyanarua [1976]KLR 94, the predecessor of this Court stated:-

‘Where one party to proceedings denies having been served with a relevant document, it is proper for the Court to look into the matter; if the Court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.’”

2. It is because of the above finding that I make the following orders-

- a. **At the reading of this Ruling the Court shall give a date for cross examination of the process server HEBRON MAGHANGA.**
- b. **There shall be stay of execution of the exparte Judgment hereof until further orders of the Court.**

DATED and DELIVERED at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

JUDGE