

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1508 OF 1998

MARY ROSE ADHIAMBO MEJA.....PLAINTIFF

VERSUS

REGINALD MAJOR OMULO.....DEFENDANT

RULING

This is an application by way of Chamber Summons seeking to set aside the ex-parte judgment entered herein on 11th September, 1998 and all subsequent orders made thereunder. There is also a prayer that there be a stay of execution of the orders made on 7th October, 1998.

The said application which is under Order 9A Rules 10 and 11 and Order 21 Rules 22 and 25 of the Civil Procedure Rules and section 3A of the Civil Procedure Act is supported by an affidavit sworn by the applicant Reginald Major Omulo and the grounds set out in the body of the application.

The application is opposed. The respondent has filed a replying affidavit alongside the grounds of opposition. Both learned counsel have also made their submissions which I have on record.

The basic ground upon which this application will turn is whether or not the applicant was served with the originating summons or other pleadings herein.

The learned counsel for the applicant has addressed the return of service dated 30th July, 1998 and filed on 2nd September, 1998.

I agree that the process server, one Peter Odinga, was not accompanied by anyone who knew the applicant. The said process server did not know the applicant. Had he known him he would have said so in the affidavit of service.

He said he found the applicant's wife. The wife is not named. How he reached the applicant's home is not clear. Had he known the home he would have said so.

The affidavit of service is supposed to include the time when the service was effected. This is a mandatory requirement under order 5 Rule 15 (1) of the civil Procedure Rules. The affidavit on record does not show the time.

Further to the foregoing, the applicant's address for service is a box number in Nairobi. The process server does not say who instructed him to proceed to Kakrao School in Migori Town and how he located the home of the applicant.

With respect, the affidavit of service is wanting in so many material particulars that, it would be unsafe to hold that it passes the test of proper service under the rules.

Accordingly, I find that the applicant was not served with the court process. It follows that the ex-parte judgment of 11th September, 1998 and the orders of 7th October, 1998 must be set aside. It is so ordered. The costs herein shall be in the cause.

Dated and delivered at Nairobi this 12th day of July, 2000.

A MBOGHOLI MSAGHA

JUDGE

Mr Ochieng hold brief for Achola for the respondent

No appearance to applicant.