



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 297 OF 2008**

**DR. JOSEPH NATHANIEL KIPRUTO ARAP NG'OK...1<sup>ST</sup> PLAINTIFF**

**LIVINGSTONE KIPNG'ETICH RONO.....2<sup>ND</sup> PLAINTIFF**

• **VERSUS -**

**EABS BANK LIMITED.....DEFENDANT**

**RULING**

1. On 29<sup>th</sup> November 2013 Havelock J. heard and determined the defendant's application dated 28<sup>th</sup> October 2013. The said application had sought the dismissal of the suit, on the grounds that there had been a want of prosecution.
2. The plaintiff and their lawyers were absent from court on 29<sup>th</sup> November 2013. However, the Learned Judge was satisfied that the plaintiff had been duly served. Therefore, notwithstanding the absence of the plaintiff, the court proceeded to hear the application.
3. Having given due consideration to the application, the court concluded that there had been no steps taken by the plaintiff for a period exceeding two (2) years. It is because of that lack of action by the plaintiff that the court dismissed the suit.
4. On 20<sup>th</sup> February 2014, the plaintiffs filed an application dated 19<sup>th</sup> February 2014. Through that application, the plaintiffs were asking this court to reinstate the suit unconditionally.
5. It was the plaintiffs' case that they were unaware of the defendant's application which culminated in the dismissal of the suit.
6. The 1<sup>st</sup> plaintiff, **DR. JOSEPH N.K. ARAP NG'OK**, swore an affidavit in support of the current application. He explained that on or around mid-December 2013, he had visited the court Registry, where he perused this court file.
7. He described his said visit to the Registry as a part of his regular practices.
8. Upon learning that the suit had been dismissed, Dr. Ng'ok phoned his lawyer, **CHERYL ONINDO** Advocate, to inquire about that development. When his lawyer denied knowledge of the defendant's application, Dr. Ng'ok made copies of the said application, which he delivered to Mr. Onindo.
9. Mr. Onindo Advocate swore an affidavit in support of the plaintiff's application. He said that he was the lawyer who had been handling the case for the plaintiffs herein.
10. Mr. Onindo emphasized that he was never served with the defendant's application dated 29<sup>th</sup> October 2013. Therefore, he was not aware that that application had been set down for hearing on 29<sup>th</sup> November 2013.
11. After Dr. Ng'ok drew the attention of Mr. Onindo, to the dismissal of the suit, the lawyer also perused the court file.

12. Whilst acknowledging that the Application dated 29<sup>th</sup> October 2013 bore a stamp in his name together with a signature purported to be his, Mr. Onindo Advocate categorically denied either stamping or signing the application.
13. Secondly, Mr. Onindo pointed out that he had never practiced law from offices located at the 13<sup>th</sup> Floor of Electricity House.
14. Mr. Onindo further explained that his offices were originally located at **CAXTON HOUSE**. Thereafter, he relocated to **AGIP HOUSE**, and then relocated again to the **MAENDELEO HOUSE**, Nairobi.
15. Obviously, if the process server purported to effect serve upon the plaintiffs' lawyers at a place where the said lawyers did not have offices, that would not constitute proper service.
16. The plaintiffs have now taken over the personal conduct of their case. They have withdrawn the instructions which they had earlier given to the Law Firm of **ONINDO & ASSOCIATES, ADVOCATES**.
17. It is the right of the plaintiffs to choose their lawyers and also to choose when to drop any such lawyers. Therefore, the very fact of withdrawing instructions from Onindo & Associates Advocates is not, of itself, to be criticized. However, the timing of that action is suggestive of the plaintiffs' loss of confidence in their previous advocates. But the plaintiffs are entitled to represent themselves, as and when they choose to do so.
18. Nonetheless, it is noteworthy that the court is now faced with conflicting affidavits. On the one hand, the process server swore that he served the Law Firm of Onindo & Associates Advocates; whilst on the other hand, the lawyer denies being served.
19. In the case of **KARATINA GARMENTS LIMITED NYANARUA** [1976-80] I KLR 11, the Court of Appeal said;

*“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 to establish the truth”.*

20. As the defendants relied upon that authority, it is deemed to have been aware of the need for the deponents of the conflicting affidavits to have been examined on oath.
21. In other words, the need for the deponents to be examined on oath is not limited to one or the other party. The deponents of the conflicting affidavits need to be all examined on oath, so that the court can thereafter arrive at an informed decision.
22. Therefore, although the defendant faults the plaintiffs for failing to cross-examine the process server, the defendant can also not escape blame for failing to cross-examine Mr. Onindo Advocate or the particular person who was served at the offices of Onindo & Associates Advocates.
23. If the failure to cross-examine the process server were deemed to constitute an acceptance of the contents of his affidavit of service, the converse would be equally true; that because Mr. Onindo Advocate was not cross-examined, the contents of his affidavit would also be deemed to be factually accurate.
24. Yet, it is obvious that both affidavits cannot be telling the truth because their contents, are inconsistent and contradictory. The application was either served or it was not. If the plaintiffs' lawyers were served, then Mr. Onindo cannot be telling us the truth when he says that he was not served. On the other hand if Mr. Onindo was not served, then the process server was telling an untruth when he said that he had effected service.
25. That further underscores the need to examine on oath the deponents of the two affidavits, if the court was to thereafter make an informed and accurate decision.
26. In the case of **MIRUKA VS ABOK & ANOTHER** [1990] KLR. 541, the process server was cross-examined about the service of summons which the defendants had disputed.
27. In that case, Omolo J. (as he then was) quoted with approval the following words of Platt J.A in **BAIYWO VS BACH** [1987] KLR 89;

*“There is a qualified presumption in favour of the process server recognized in MB Automobile Vs Kampala Bus Service [1966] E A 480 at page 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 page 1670, the learned commentators say;

‘3. Presumption of 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 in the witness box and opportunity of cross-examination given to those who deny the service”.*

28. In this case, the alleged service was disputed. Had there been no dispute the affidavit of the process server could have constituted sufficient proof that the applicant had been served.
29. Therefore, it is necessary for the court to strive to ascertain whether or not the dispute raised herein was enough to discharge the burden placed on the applicants who were asserting that their lawyer had not been served with the application.
30. It is not simply enough to say that you had not been served, when a process server had sworn an affidavit stating that he had served you. If it were made that simple then anybody who wished to challenge the process of service of pleadings or orders need only say that he was not served. That would not be in the interests of justice.
31. The plaintiff’s advocate says that his Law Firm cannot have been served at the Electricity House, because his said firm did not have offices at that building.
32. It is not clear why the lawyer deemed it necessary to make that statement because the process server never said that service was effected at Electricity House.
33. In his affidavit of service, the process server, **GEORGE WAITIRI**, actually said that the offices of M/s Onindo & Associates Advocates was situated at **AGIP HOUSE**, 1<sup>st</sup> Floor, Haile Sellasie Avenue, Nairobi.
34. That therefore means that the process server went to the very same premises where Mr. Onindo said that his offices were located.
35. Incidentally, the court did become somewhat curious about why anybody should have suggested that the Law Firm of Onindo & Associates were based at the 13<sup>th</sup> Floor of Electricity House. I therefore perused the court file in this case and noted that when the plaint was filed, the physical address shown on the plaint showed that the firm of Onindo & Associates Advocates had offices on the 13<sup>th</sup> Floor of the Electricity House.
36. Even as late as 12<sup>th</sup> January 2009, the said lawyers filed a consent letter dated 7<sup>th</sup> January 2009. That letter was on a letter-head which gave their address as being at Electricity House.
37. Thereafter, the firm of Onindo & Associates Advocates moved to the 3<sup>rd</sup> Floor of **CAXTON HOUSE**. That can be discerned from the plaintiff’s written submissions which were filed on 15<sup>th</sup> April 2009.
38. It is from **CAXTON HOUSE** that the firm moved to **AGIP HOUSE**: And it is at that address where the application was served upon that firm of advocates.
39. Mr. Onindo has also categorically denied having been personally served. He added that he did not know the person who was served with the defendant’s application for the dismissal of the suit for want of prosecution.
40. It is not clear why Mr. Onindo decided to tell the court that he had not been personally served, when the process server had not indicated he served Mr. Onindo.
41. The process server stated clearly that he effected service upon the clerk.
42. In those circumstances, I find that the plaintiff has failed to discharge the burden of dislodging the presumption that the process server had effected service in the manner specified in his affidavit of service.
43. Secondly, the plaintiffs have not provided the court with any plausible reason for their failure to take steps to prosecute their case for a period of over two (2) years.
44. The existence of a pending appeal does not constitute a stay of proceedings.
45. In the final result, I find no reason in law or in fact for reinstating the plaintiffs’ suit. Accordingly, the application dated 19<sup>th</sup> February 2014 is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>st</sup> day of December 2014.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

.....for the 1<sup>st</sup> Plaintiff

.....for the 2<sup>nd</sup> Plaintiff

.....for the Defendant

Collins Odhiambo – Court clerk.