



**Kingsley Construction Ltd v Federal Republic of Somalia & another (Civil Case E265 of 2019)
[2023] KEHC 18142 (KLR) (Commercial & Admiralty) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E265 OF 2019**

A MABEYA, J

MAY 26, 2023

BETWEEN

KINGSLEY CONSTRUCTION LTD PLAINTIFF

AND

FEDERAL REPUBLIC OF SOMALIA 1ST DEFENDANT

THE ATTORNEY GENERAL OF SOMALIA 2ND DEFENDANT

RULING

1. This is a ruling on an application dated 16/5/2022. It was brought under Order 10 Rule 4(2) of the [Civil Procedure Rules](#), Sections 3A and 63e of the [Civil Procedure Act](#).
2. The application sought orders that judgment in default of appearance be entered against the defendants as prayed in the amended plaint dated 26/11/2020.
3. The application was supported by the affidavit sworn by Charles Madowo on 16/5/2022. It was based on grounds that following this court's ruling of 16/6/2020, the plaintiff filed an amended plaint and applied for fresh summons to enter appearance. That on 1/10/2021, this Court granted leave for the summons to be served afresh and the same was done via DHL Express International Shipping on 2/11/2021.
4. That the defendants have since not entered appearance and it was proper for judgment in default of appearance to be entered.
5. The plaintiff filed submissions in support of its application. The same have been taken into consideration.



6. Vide a ruling dated 16/6/2020, this Court found that international law recognizes that a state does not enjoy immunity from suits in respect of ordinary commercial transactions. That the defence of sovereign immunity was not available to a state where it was not acting in a governmental position but in a private or commercial capacity when it entered into a contract with the plaintiff.
7. The suit herein revolves around a contract for refurbishment of the 1st defendant's embassy premises in Kenya for a total cost of Kshs. 53,514,214/=. The suit is for breach of contract and a claim for judgment of Kshs. 23,493,004/= for general damages, interest and costs. The same is found to be a commercial transaction and the defendants are correctly sued.
8. In the ruling, the Court also found that leave of the Court to serve documents outside Kenya had first to be obtained as per Order 5 Rule 21 and 27 of the Civil Procedure Rules. The plaintiff obtained the said leave and served the summons afresh through DHL Express International Shipping as per the affidavit of service attached to the affidavit as CM2. The plaintiff also attached the shipment receipt.
9. Order 5 Rule 22A provides for Internationally registered and recognized courier services and states: -
 - “(1) Summons may be sent to the Defendant by way of registered courier service provider; service shall be effected only with the leave of the Court through an internationally registered and recognized courier service provider to the defendant's last known physical address.
 - (2) Service shall be deemed to have been effected when the person being served acknowledges receipt by affixing his signature on the document or on confirmation of delivery by the courier service provider.
 - (3) An officer of the court duly authorized to effect service shall file an Affidavit of Service attaching the way bill receipt or consignment note from the courier service provider confirming service.
 - (4) An affidavit of service shall be proof enough that service was effected, even if the person being served declines to acknowledge receipt.”
10. Having considered the evidence produced, this Court is satisfied that service was done in accordance to the above provisions of the law.
11. Having been duly served, the defendants failed to enter appearance contrary to Order 7, rule 1 of the Civil Procedure Rules 2010 which provides that;
 - “Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”
12. Order 10 of the *Civil Procedure Rules* provides for consequences of none appearance. Rule 4 thereof provides for Judgment upon a liquidated demand and states: -
 - “Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the



filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”

13. The Amended Plaintiff herein is for both liquidated and unliquidated claim. In this regard, the defendants having failed to enter appearance after summons had been duly served upon them, I enter judgment against them on the liquidated claim accordingly plus interest and costs. The unliquidated claim be listed for trial.
14. The upshot is that the application dated May 16, 2022 is found to be merited and is allowed as prayed. Judgment is hereby entered as prayed for in the amended plaintiff dated November 26, 2020. The claim for general damages do proceed for trial.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

