



***the World Bank is immune from action or legal process, and its property and assets are immune from all forms of seizure, attachment or execution, and the Executive Director thereof is immune from legal process with respect to acts performed by him/her in his/her official capacity;***

***(c) the 3<sup>rd</sup> defendant has not been served with summons to enter appearance;***

***(d) service of summons upon 4<sup>th</sup> defendant was irregular, as the World Bank had no authority to receive summons on behalf of 4<sup>th</sup> defendant;***

***(e) entry of the interlocutory judgment was inadvertent and in error, in the light of the provisions of the law, and so should be set aside ex debito justitiae;***

***(f) there had been no delay in filing the application.***

**Johannes Zutt**, the 3<sup>rd</sup> defendant, swore a supporting affidavit on 9<sup>th</sup> April, 2010 deponing that the World Bank is an international organization established and operating in Kenya by virtue of the provisions of the Bretton Woods Agreements Act (Cap. 464, Laws of Kenya). Of 4<sup>th</sup> defendant, the deponent avers that it is a ***sui generis*** financial mechanism without a separate legal existence, and serves the purpose of providing funds for grants to developing countries, as well as countries with economies in transition for projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, and persistent organic pollutants – for the benefit of the global environment and in a nexus with local, national and global environmental challenges and the promotion of livelihoods. The deponent states that at all material times, the World Bank was the Trustee and implementing agency of 4<sup>th</sup> defendant, as well as 4<sup>th</sup> defendant’s implementing agency with respect to projects.

The deponent deposes that he has never at any time, in his personal capacity, or as World Bank Country Director for Kenya, entered into any agreements with the plaintiffs or any other person on their behalf.

The deponent avers that 4<sup>th</sup> defendant could not have entered into any agreement the effect of which is compel inhabitants of the Tana Delta to vacate their homes and be translocated without sufficient compensation.

The deponent deposed that there were only two agreements relevant to the instant matter, both entered into on 25<sup>th</sup> February, 1997: (i) the Global Facility Trust Fund Grant Agreement (Tana River Primate National Reserve Conservation Project) – concluded between the Republic of Kenya and the World Bank; and (ii) the Global Facility Trust Fund Project Agreement (Tana River Primate National Reserve Conservation Project) – made between the World Bank and the Kenya Wildlife Service.

Under the two agreements, the World Bank, acting as implementing agency for 4<sup>th</sup> defendant, availed to the Republic of Kenya grant funds from 4<sup>th</sup> defendant, for use by Kenya Wildlife Service in implementing the project described in the two agreements.

The deponent deposes that the plaintiffs have sued him personally as the World Bank Country Director for Kenya, but the World Bank itself has not been sued. The 3<sup>rd</sup> defendant deposes that he has not been served personally or through his duly authorized agent; nor has he been served as the duly authorized and recognized agent of 4<sup>th</sup> defendant. The deponent believes to be true the advice of his advocate, that such service was improper and insufficient for the purposes of effluxion of time for entry of appearance and filing of defence.

The deponent believes to be true the advice from his advocate: that the World Bank, by virtue of the Bretton Woods Agreements Act (Cap. 464), is immune from such a suit, and its property and assets are held inviolable and immune to all forms of seizure, attachment and/or execution; and that under the same provision, the World Bank’s Governors, Executive Directors, Officers and employees are immune from legal process with respect to acts performed by them in their official capacity, except where the World Bank waives this immunity; and there has been no such waiver.

The deponent expresses his belief and understanding, that since the World Bank was implementing the two agreements for and on behalf of 4<sup>th</sup> defendants, the immunities applicable to the World Bank were imputed to and covered 4<sup>th</sup> defendant entirely.

The plaintiffs responded by filing grounds of opposition, which grounds are as follows:

***(i) the application is misconceived, frivolous, vexatious and otherwise an abuse of Court process;***

***(ii) 3<sup>rd</sup> and 4<sup>th</sup> defendants were as a fact served with summons to enter appearance, plaint, and copy of verifying affidavit;***

***(iii) 3<sup>rd</sup> and 4<sup>th</sup> defendants have no good reasons for not entering appearance or filing a defence;***

(iv) ***the interlocutory judgment entered is a proper judgment which should not be set aside;***

(v) ***3<sup>rd</sup> and 4<sup>th</sup> defendants have no good defence to the claim: they enjoy no immunity from being sued; their property has no immunity against attachment; the suit is not against an individual or individuals but against 3<sup>rd</sup> and 4<sup>th</sup> defendants as bodies corporate;***

(vi) ***the claim is not time-barred.***

The 9<sup>th</sup> plaintiff **also** swore a replying affidavit (dated 20<sup>th</sup> April, 2010) which he claims to be swearing also on behalf of other plaintiffs.

The deponent avers that the suit is against (i) World Bank as a body corporate, and (ii) Country Director, as the office that is the source of authority for officers serving the World Bank.

The deponent believes to be true his advocate's advice: that summons to enter appearance, copy of plaint, and verifying affidavit were properly served upon 3<sup>rd</sup> and 4<sup>th</sup> defendants on 15<sup>th</sup> February, 2010 and duly received by **Nightingale Rukuba-Ngaiza** who presented herself as Senior Counsel for both 3<sup>rd</sup> and 4<sup>th</sup> defendants. It is deponed that the said **Nightingale Rukuba-Ngaiza** also received notice of entrance of judgment on behalf of 3<sup>rd</sup> and 4<sup>th</sup> defendants.

Although both sides in the suit have devoted themselves to the question whether or not service of the suit documents was properly effected, a much more important question, which lies at the core of this application and which is linked to the destiny of the suit itself, is the relevance of **immunity against civil proceedings**.

For if it is held that 3<sup>rd</sup> and 4<sup>th</sup> defendants are covered by such immunity, then the fact of service of summons becomes relegated to mere gratuitous engagement.

The basis for determining the question of immunity, learned counsel **Mr. Ojiambo** urged, is the Bretton Woods Agreements Act (Cap. 464, Laws of Kenya), which bears the preamble:

***“An Act of Parliament to provide for acceptance by Kenya of the Agreements for the International Monetary Fund and the International Bank for Reconstruction and Development and to provide for matters related thereto.”***

The Bretton Woods Agreements Act carries a schedule devoted to “Status, Immunities and Privileges”, and this schedule thus provides:

***“The Fund shall possess full juridical personality, and, in particular, the capacity –***

- (i) to contract;***
- (ii) to acquire and dispose of immovable and movable property;***
- (iii) to institute legal proceedings.***

***“Section 3. Immunity from Judicial Process –***

***“The fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.***

***“Section 4. Immunity from Other Action –***

***“Property and assets of the Fund, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.***

.....

***“Section 8. Immunities and Privileges of Officers and Employees –***

***“All Governors, Executive Directors, Alternates, Officers and employees of the Fund –***

***(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity;***

***(ii) not being local nationals, shall be granted the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members.....”***

Learned counsel submitted that the Bank itself is immune from any legal action, except in respect of its lending or commercial transactions; and that all its executive directors and other officers and employees are immune from legal process in respect of official action, unless there is a specific waiver of immunity.

Counsel urged that there was no evidence of any kind of waiver of immunity by 3<sup>rd</sup> and 4<sup>th</sup> defendants: that they do not appear in the plaintiffs' documents which are said to have been signed by parties; that the annexes to the said agreements have nothing to do with the World Bank, nor with 3<sup>rd</sup> or 4<sup>th</sup> defendant; that the plaintiffs' attachments bearing architectural drawings have nothing to do with 3<sup>rd</sup> or 4<sup>th</sup> defendant; and so, it was submitted, the plaintiffs had failed to show any kind of connection with 3<sup>rd</sup> or 4<sup>th</sup> defendant.

Such elements show, **Mr. Ojiambo** urged, that real arguable and triable issues exist, which ought to be canvassed before judgment can be entered in favour of the plaintiffs; and in this regard, it was urged, the fact that large sums of money were involved, restated the appropriateness of a hearing on the merits. **Mr. Ojiambo** submitted that the Deputy Registrar's order was unlawful, because he failed to inquire into things apparent on the face of the documents of suit themselves.

Learned counsel submitted that, even assuming the plaintiffs could properly lodge a suit against the World Bank, they had an obligation to show that the personification of the World Bank for the purpose of being sued, was the Country Director; and that the plaintiffs ought to show that the right person to receive service of the suit papers was the legal officer of the World Bank. Such a suit, it was urged, ought to be directed at the corporate persona of the World Bank, but not at a director; and the corporate persona was that of an international body constituting a separate legal entity; the ordinary law of corporations, in this regard, was inapplicable.

**Mr. Ojiambo** contested the plaintiffs' position, that the World Bank lacked immunity against suit; by law the World Bank enjoyed immunity, except in respect of guarantees of loan.

**Mr. Ojiambo** devoted much attention to the issue of **service** of the suit documents, and contended that the service as effected, was invalid. In the plaint it is stated that the 3<sup>rd</sup> defendant is the World Bank Country Director; but 3<sup>rd</sup> defendant really stood as an individual, and did not embody the corporate persona of the World Bank; the description in the plaint had not indicated **which** Country Director of the World Bank was being sued; so the service upon 3<sup>rd</sup> defendant was merely embarrassing, and this defendant did not know who to respond to; if the proper target of the suit was 3<sup>rd</sup> defendant, then service must be effected upon him individually, or upon his recognized agent; and this same argument applied to 4<sup>th</sup> defendant, a facility which is run by the World Bank. The effect, counsel urged, was that the suit papers had not been served upon 3<sup>rd</sup> or 4<sup>th</sup> defendant; only a legal officer of the World Bank had been served, but she was not the agent of the World Bank for the purpose of service. By law, counsel urged, service of the suit papers had to be personal service, or service upon somebody with direct authority or a power of attorney (Order III, rule 1 of the Civil Procedure Rules); so if service of the papers indeed took place, then such service was insufficient.

Counsel relied on the Court of Appeal decision, **Kanji Naran v. Velji Ramji** (1954) EACA 10 for the proposition that an interlocutory judgment, where there was insufficient service, amounts to an unlawful finding; the Court thus stated (P.21):

**“...the learned trial Judge appears to have thought that he had a discretion in refusing the motion, whereas, in fact, he had none, because in the absence of proper service the order of the Registrar was unlawful.”**

In the same category is the High Court (**Harris, J.**) decision in **Jesse Kimani v. McConnell & Another** [1966] E.A. 547, in which the following passage (at p.555) appears:

**“Looking at O.IX as a whole, and attempting to comprehend the purpose of rr.10 and 24, it seems to me that a reasonable approach to the application of these rules to any particular case would be for the Court, first, to ask itself whether any material factor appears to have entered into the passing of the *ex parte* judgment which would or might not have been present had the judgment not been *ex parte*, and then, if satisfied that such was or may have been the case, to determine whether, in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed”.**

Learned counsel relied on still other cases, dealing with the same point: **Patel v. E.A. Cargo Handling Services Ltd.** [1974] E.A. 75 (Ct of Appeal); **Remco Ltd. v. Mistry Jadva Parbat & Co. Ltd and others** [2002] 1 E.A. 223 (**Ringera, J.**).

On the question of proper service of suit papers, in the context of the instant case, counsel relied on **Mulla: The Code of Civil Procedure**, 16<sup>th</sup> ed (**Solil Paul & Anupam Srivastava**), where the following passages appear:

(i) [p. 1709] –

**“It is only an agent who is empowered, as provided in O.3, r6, that can accept service under this rule. Mere oral authorization is not sufficient. Thus service of the summons on a clerk of a party is not sufficient unless such a clerk is duly authorized to accept service”.**

(ii) [p. 1711] –

**“The object of the service of a summons, in whatever way [it] may be effected (other than substituted service to which other considerations apply), is that the defendant may be informed of the institution of the suit in due time before the date fixed for hearing. Where the defendant is not served with summons, the mere fact that he had knowledge of the suit is immaterial”.**

Learned counsel urged that the plaintiffs had misapprehended the nature of legal personality in international law, and that this led them to fail the test, in effecting service upon the defendants; and that the World Bank and the Global Environmental Facility did not typify the ordinary kind of corporate personality known in Municipal law and which is thus defined (*Halsbury’s Laws of England*, 4<sup>th</sup> ed. Reissue, Vol 9(2) (London, 1998)) (para. 1001, p. 570):

**“A corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question.”**

Legal personality in international law is considered by **Professor D. W. Bowett** in his work, *The law of International Institutions*, 2<sup>nd</sup> ed. (London: Stevens & Sons, 1970), at p. 327:

**“The attribution to an international organization of legal personality, both under international and municipal law, should not be allowed to obscure the fact that there is no single, comprehensive body of law to govern its transactions and activities; unlike the corporation in private law which has a personal law (whether based on the test of place of incorporation, place of control or siège social), the international corporation has in general no personal law or ‘law of incorporation’.”**

Learned counsel, **Mr. Kenzi**, did not endeavour to address the foregoing points on their technical and substantive merits; he took only the broad sweep, in these words:

**“On behalf of the plaintiffs, we oppose. The application is misconceived. In an application of this nature, a Court has to be satisfied there was service of Summons: Summons to enter appearance; copy of the plaint; affidavits. On 15<sup>th</sup> February, 2010 service was effected upon 3<sup>rd</sup> defendant, and was received by a lady, a Senior Counsel for 3<sup>rd</sup> and 4<sup>th</sup> defendants, Nightingale Rukuba-Ngaiza, who duly signed and stamped [the documents]. One Musau, a process-server, duly signed.....The defendants in their application, did not deny the existence of this Senior Counsel.....They have refused to mention that name. Therefore, service was properly effected.”**

Learned counsel did not address the question whether the recipient of the plaintiff’s service of suit papers was a designated person for that purpose, on behalf of 3<sup>rd</sup> and 4<sup>th</sup> defendants; counsel’s position was thus stated: “Someone describing herself as Senior Counsel cannot be said to be a mere clerk; if she was a lawyer, she was the most suitable person to receive service; and therefore, 3<sup>rd</sup> and 4<sup>th</sup> defendants were properly served”.

On the basis that 3<sup>rd</sup> and 4<sup>th</sup> defendants were properly served, counsel urged, “there is no basis for a discretion” [on the part of the Court]. For, it was urged, “there is no reason why the defendants did not enter appearance or file a defence”. The plaintiff’s case was all the stronger, **Mr. Kenzi** submitted, because “*Nightingale Rukuba-Ngaiza* also received notice of entrance of judgment, and she duly signed”. Counsel urged that the Deputy Registrar was right to enter judgment, for “the defendants have no good defence to the claim”.

**Mr. Kenzi** submitted that, contrary to 3<sup>rd</sup> and 4<sup>th</sup> defendants’ contention, the plaintiff’s claim is not against an individual, but is “against the World Bank as a body corporate”. Counsel urged: “We sued the office of Country Director as an office. The World Bank is not synonymous with a particular Country Director”. And learned counsel submitted that “the Bank does not enjoy immunity as alleged”. Counsel submitted that 3<sup>rd</sup> and 4<sup>th</sup> defendants “cannot claim they were not a party to the agreement between the plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> defendants and the present applicants”.

The applicants have asked that the interlocutory judgment recorded by the Deputy Registrar on 4<sup>th</sup> March, 2010 be set aside or varied. The guiding principles for such an issue are clear from the case law already considered above; and this Court, indeed, has recently considered those principles, in *Joseph Kimatu and others v. Rukiya Soud Ali Bashir and*

**Others**, Mombasa HCCC No. 284 of 2003; the following is the pertinent passage:

**“It is to be regarded as meritorious judicial practice, moreover, that a belated defence which enables the Court to take the correct decision in law, and in the absence of which opportunity the judgment-creditor is likely to win outside the framework of the law, is for allowing. In such a situation, the late-comer defendant walks a meritorious path, and his or her defence cannot be peremptorily excluded, even when laches, or lack of diligent prosecution of defence, is apparent”.**

Is the instant matter one in which the Court would be under such a well-defined obligation to set aside an interlocutory judgment?

In this matter there are **questions of law** which did not form part of the background to the interlocutory judgment of 4<sup>th</sup> March 2010: does immunity from legal process apply to the World Bank, on the facts of this case? What is the legal standing of 3<sup>rd</sup> defendant, in relation to the corporate persona of the World Bank? What is the nature of the legal personality of 4<sup>th</sup> defendant, in relation to the suit herein? How is summons to be effected upon the World Bank? What is the effect of the Bretton Woods Agreements Act (Cap. 464, Laws of Kenya) in relation to the suit as filed? Was there any waiver of immunity from legal process, on the part of 3<sup>rd</sup> and 4<sup>th</sup> defendants?

In so far as there was no opportunity to consider the foregoing questions, the legal framework does not, in my opinion, exist for entry of an interlocutory judgment, and, in particular, for execution of any decree based on such judgment.

It follows that all the relevant questions must be the subject of **inter partes** hearing, before a proper judicial decision is arrived at.

Consequently, I hereby set aside the interlocutory **ex parte** judgment entered against 3<sup>rd</sup> and 4<sup>th</sup> defendants on 4<sup>th</sup> March, 2010. The 3<sup>rd</sup> and 4<sup>th</sup> defendants shall file and serve their defences within 21 days of the date hereof. The costs of this application shall be in the cause.

**DATED** and **DELIVERED** at **MOMBASA** this 25<sup>th</sup> day of June, 2010.

**J. B. OJWANG**  
**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Plaintiffs/Respondents: *Mr.kenzi*

For 3<sup>rd</sup> & 4<sup>th</sup> Defendants/Applicants: *Mr. Ojiambo*