



**Transworld Safaris Limited v Eagle Aviation Limited & 3 others (Miscellaneous Civil Case 238 of 2003) [2025] KEHC 153 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 153 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL CASE 238 OF 2003**

**JWW MONG'ARE, J**

**JANUARY 16, 2025**

**BETWEEN**

**TRANSWORLD SAFARIS LIMITED ..... APPLICANT**

**AND**

**EAGLE AVIATION LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KIRAN CHANDUBHAI PATEL ..... 2<sup>ND</sup> RESPONDENT**

**GILBERT MACHARIA KIBE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CHARLES KYALO MUTHAMA ..... DEFENDANT**

**RULING**

1. This ruling pertains to the Notice of Motion dated 27<sup>th</sup> November 2023, brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 12 Rule 7, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, as read with Article 159(2)(d) of *the Constitution* of Kenya. The Applicant seeks the following orders:
  - i. spent
  - ii. spent
  - iii. The court be pleased to set aside the orders issued on 8<sup>th</sup> November 2023 by Honourable Lady Justice Josephine Mong'are by which the court allowed the Application urged by the 2<sup>nd</sup> Respondent in the absence of service upon the Applicant.



- iv. That consequent upon the grant of prayer 3 above, the court be pleased to issue such other and/or further directions for the expeditious hearing of the 2<sup>nd</sup> Respondent's said application including the directions that the same be served upon the Applicant to enable the Applicant to respond thereto as appropriate.
  - v. That costs of this application be in the main cause.
2. The application is premised on the grounds stated on the face of the record and supported by the annexed affidavit of ELIAS MASIKA, sworn on 27<sup>th</sup> November 2023. The Applicant contends that its attention was drawn, on 24<sup>th</sup> November 2023, to the existence of court orders issued on 8<sup>th</sup> November 2023, which allowed the 2<sup>nd</sup> Respondent's application without service upon the Applicant. The effect of these orders was to render the execution proceedings herein nugatory. The Applicant argues that the orders are prejudicial to its interests, as a substantial decretal sum remains unsettled. Furthermore, the Applicant asserts that the 2<sup>nd</sup> Respondent filed a similar application to the one dated 4<sup>th</sup> October 2023, which the court had already dismissed.
  3. Opposing the application, KIRAN CHANDUBHAI PATEL filed a Replying Affidavit sworn on 12<sup>th</sup> February 2024. He challenges the Applicant's counsel for swearing the supporting affidavit to the application dated 27<sup>th</sup> November 2023, asserting that this act is improper. He further avers that the issue of non-service is baseless and that the application is fatally defective because the supporting affidavit was deposed by the advocate personally. Mr. PATEL contends that the application dated 4<sup>th</sup> October 2023 was duly served upon the Applicants through their advocates on 6<sup>th</sup> October 2023 via email. As a result, the Applicant has not given sufficient explanation for the failure to attend court. Additionally, he states that pursuant to the court's directions on 17<sup>th</sup> October 2023, the Applicant was granted time to file a response to the matter but failed to adhere to the court's directions despite service of the directions.
  4. The application was heard by way of written submissions which I have carefully considered together with the application and the response filed by the parties.
  5. The Applicant's primary reason for seeking to set aside the court orders of 8<sup>th</sup> November, 2023 is the claim that they were not served with the application, and the orders were issued ex parte.
  6. It is a fundamental principle that courts should favour allowing parties to present their disputes thoroughly. In the pursuit of justice, every party to a lawsuit must be granted its day in court. An ex-parte hearing, which occurs without the presence of one party, inherently deprives that party of this essential opportunity. Such hearings should only be conducted in exceptional circumstances, particularly when it is evident that the Defendant was properly served but either failed to respond or chose not to attend court. In the case of *Republic v Vice Chancellor Jomo Kenyatta University of Agriculture and Technology Nairobi HC Misc Civil Appl. 30 of 2007* (Unreported) [2008] eKLR, the court observed that,

“The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles.”
  7. The power to set aside ex parte orders is discretionary, and the court must exercise this discretion judiciously to ensure that justice is served. Discretion in this context refers to the authority of the court to decide based on the unique circumstances of each case, within the confines of established legal principles. Importantly, this discretion must not be exercised arbitrarily or capriciously but must instead aim to uphold fairness and equity.



8. Order 51, Rule 15 of the Civil Procedure Rules provides:

“The court may set aside or vary an order made ex parte where it is satisfied that the interests of justice require such action or where sufficient cause is shown by the aggrieved party.”

9. This rule underscores the need for a balanced approach, ensuring that the rights of the parties are respected while maintaining the integrity of judicial proceedings. Courts are required to consider factors such as whether the affected party had a fair opportunity to present their case, whether there was any abuse of process, and whether setting aside the order would prejudice the other party.
10. It is incumbent upon the Applicant to establish sufficient reason for non-attendance when seeking to set aside an ex parte order. This burden arises from the principle that judicial proceedings must be conducted fairly, and parties must engage actively in the process. In the present case, the Applicant asserts that there was no service of the application or the resulting orders, thereby raising concerns about procedural fairness.
11. The 2<sup>nd</sup> Respondent, however, strongly refutes the Applicant’s claim, reiterating that the Applicant was served via email. They question the Applicant’s failure to summon the deponent of the affidavit of service for cross-examination, a procedural step that could have clarified any doubts regarding the validity of the service. The 2<sup>nd</sup> Respondent further emphasizes that the email used for service did not generate a bounce-back notification, signifying that the email was successfully delivered. This position remains uncontested by the Applicant, who neither provided evidence disputing the service nor demonstrated that service should have been effected at the Applicant’s physical offices.
12. A review of the court record reveals critical details pertinent to this matter. On 17<sup>th</sup> October 2023, only the counsel for the 2<sup>nd</sup> Respondent was present in court. They informed the court that no response to the application had been received, despite proper service being effected. Furthermore, on 8<sup>th</sup> November 2024, when the application was granted, there was no appearance on behalf of the Applicants, further suggesting a lack of diligence on their part. The absence of both the Applicant and their counsel on both dates raises questions about the service of the court’s directions. These circumstances suggest that the Applicant may not have been aware of the proceedings, supporting their claim of non-service.
13. It is therefore not in doubt that this court has jurisdiction not only to set aside ex parte proceedings but to do so ex debito justitiae where there has been no service to a party directly affected by the order. This principle ensures that the fundamental right to be heard is upheld, as no party should be bound by orders issued in proceedings where they were not given an opportunity to participate.
14. Considering the circumstances surrounding this case, the court finds that the application is meritorious. Consequently, I allow the application dated 27<sup>th</sup> November, 2023 and set aside my orders of 8<sup>th</sup> November 2023. The costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 16<sup>TH</sup> DAY OF JANUARY 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In The Presence:-

1. No appearance for the Applicant.



2. Mr. Teddy Ochieng for the Respondent.

3. Amos - Court Assistant

