



**Diamond Trust Bank of Kenya Limited v Arcade & 2 others (Commercial Case E356 of 2022)  
[2025] KEHC 1407 (KLR) (Commercial and Tax) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1407 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E356 OF 2022  
JWW MONG'ARE, J  
FEBRUARY 24, 2025**

**BETWEEN**

**DIAMOND TRUST BANK OF KENYA LIMITED ..... PLAINTIFF**

**AND**

**PARKVIEW SHOPPING ARCADE ..... 1<sup>ST</sup> RESPONDENT**

**ATULKUMAR MAGN Lal SHAH ..... 2<sup>ND</sup> RESPONDENT**

**NAKUMATT INVESTMENTS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a plaint filed on 14<sup>th</sup> September 2022 the Plaintiff moved this Honourable Court seeking judgment against the Defendants, jointly and severally for the sum of Kshs.46,606,025.84/= together with interest at the compound rate of 24% per annum from the date of filing suit until payment in full. The Plaintiff also sought for costs of the suit with interest at court rates thereon from the date of judgment until payment in full.
2. Subsequently, on 27<sup>th</sup> February 2023, the Plaintiff obtained judgment in default of appearance and defence, as prayed in the plaint and the court proceeded to tax the party and party Bill of Costs at Kshs.912,900.38/= and a decree for the sum of Kshs.137,096,917.51/=. Warrants of sale of the Defendants assets to satisfy the decree were issued on 14<sup>th</sup> August 2024 to Upstate Auctioneers.
3. On 8<sup>th</sup> November 2023 the Defendants by a Notice of Motion filed under a Certificate of Urgency moved this court under order 10 Rule 11, Order 5(1) and (2) Order 22 Rule (6), Section 1A, 1B and 3A of the Civil procedure Act seeking the following orders:-
  - a. Spent



- b. Spent
  - c. That upon hearing interparte this Honourable court be pleased to set aside the default judgment entered herein on the 21<sup>st</sup> of November 2022 against the Defendants jointly and severally.
  - d. That further to the above this Honourable Court be pleased to set aside all consequential orders made thereafter upon such terms as will be just and expedient.
  - e. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants be granted leave to file their respective statements of defence within a period of seven (7) days after such setting aside.
  - f. That in the alternative the draft statement of defence attached herewith be deemed as duly filed and thereafter this matter proceed for hearing on merits.
  - g. That costs of this application be provided for.
4. The application is supported by the grounds set out on its face and the supporting affidavit of Loise Wairange, the legal counsel for the 1<sup>st</sup> Defendant. The Plaintiff, in opposing the application, has filed a replying affidavit sworn by Faith Ndonga, the Debt Recovery Manager of the Plaintiff, sworn on 4<sup>th</sup> March 2024. On the directions of the court, the matter was canvassed by way of written submissions. Both the Applicants and the Respondent have filed written submissions which I have considered.

#### **Analysis And Determination**

5. It is the Applicants' case that they were never served with summons to enter appearance by the Plaintiff and that the email addresses displayed by the Plaintiffs are not those of the Defendants. They further allege that the purported summons to enter appearance dated 29<sup>th</sup> September 2022 are not signed and sealed by the court in strict compliance of Order 5 rule 2 of the Civil Procedure Rules and therefore there exists no proper and valid summons capable of service in the first place and capable of commanding the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to submit to the jurisdiction of the court failing which judicial consequences can flow therefrom. Subsequently, they urge the court to set aside the default judgment and allow them to enter appearance and file their respective defence and have the matter proceed to be determined on merit.
6. In opposing the application, the Plaintiff has sworn a replying affidavit by Faith Ndonga, the Debt Recovery Officer of the Plaintiff, on 4<sup>th</sup> March 2024. It is the Plaintiff's position that the Defendants were duly served with the Summons to Enter Appearance and Defence but chose not to file the requisite court document and in so doing necessitated the entry of judgment by the court in default of appearance and defence and in accordance with the law. The Plaintiff points to the fact the deponent to the Supporting affidavit of the application herein Ms. Loise Wairange wrote back to their advocate on 12<sup>th</sup> May 2021 acknowledging receipt of the email from the Plaintiffs lawyers that was used to serve the original demand notices and the subsequent court process and even wrote back explaining the reasons for the failure by the Defendants to meet their obligations under the loan and overdraft agreement.
7. The Plaintiff argues that the said email annexed and marked "FN2" clearly demonstrates that indeed the email were active and in use by the Defendants and indeed there was service of the court documents upon the Defendants as required by law. The Plaintiff further argues that the draft defence sought to be filed is a sham and contains admission of debt claimed in the plaint and does not raise any triable issues to warrant setting aside of the default judgment and prosecution of the Plaintiff's suit on its merit.



8. Upon careful perusal, consideration and analysis of the pleadings filed by both parties and the rival submissions therein I note that this court is being called to determine whether the present application meets the threshold for grant of the orders sought. The Defendant seek to have the judgment and resultant decree of this court set aside and that they be allowed to file a defence to the Plaintiff's claim and have the matter determined on merit.
9. Order 10 Rule 1 of the Civil Procedure Rules provides as follows; "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just". The court of appeal in *Pithon Waweru Maina V Thuka Mugiria* [1983] eKLR citing the principles set out in the case of *Shah vs Mbogo* (1967) E.A 116; observed as follows; "... the principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:
  - a. Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. .... Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"
10. From the annexed correspondence by the Plaintiff to its supporting affidavit it is clear that the Defendants indeed were served with the court documents and acknowledged receipt of the same. I have perused affidavit and the annexures therein and note that the email from the Defendant Legal officer and deponent of the replying affidavit, Ms. Loise Wairange, reads as follows; " Reference is made to the above matter and the letter dated 28<sup>th</sup> April 2021 received via gmail from jackkisinga@gmail.com on 29<sup>th</sup> April 201, at 6.11pm and wish to address you as hereunder.."
11. I have in addition perused the affidavit of service sworn by Jackson Muema Kisinga on 14<sup>th</sup> November 2022 in which he confirms having served the demand letter on 28<sup>th</sup> April 2021 through the emails of the Defendants being park-view@live.com and atul@nakumatt.net and ramon@nakumatt.net to the Defendants which had elicited the response from Ms. Loise Wairange, the deponent of the supporting affidavit to this application. I note that Ms. Wairange acknowledges having received an email from the email off Jackson Kisinga in 2021. This therefore defeats the argument by the Defendants argue that these emails were not I use since 2019, they fail to offer an explanation as to how they became aware of the claim herein that resulted in the response via the email of 12<sup>th</sup> May 2021 from Ms. Loise Wairange.
12. It is therefore my finding that indeed the Defendants were duly served with the requisite court documents that included the plaint and summons to enter appearance but chose not to do so. Instead, they chose to offer an explanation as to why they had not met their obligations under the charge instrument for the repayment of the loan and overdraft facilities extended to them by the Plaintiff by passing the blame on their inability to fulfill their obligations on third parties not privy to the said contract and or agreement between the Plaintiff and the Defendants.
13. Having found that the Defendants were duly served and did not within the required period file a defence, I therefore turn to the next element in their application that they have filed a defence that raises triable issues and require to be heard and the matter determined on merit. I note that the Plaintiff's claim is for liquidated damages plus interest as per the contracts entered into by the parties.



14. I have perused the draft defence herein and note that the Defendants indeed admit to the existence of the loan facility and the overdraft but claim to have exited the premises where the business was located and the same having been taken over by a third party, seek to have the Plaintiff exercise its preemptory rights of repossession created by the debenture over the charged assets. The Defendants attach correspondence to this effect. It is therefore my finding that indeed the defence sought to be filed herein amounts to an admission of liability and does not raise any triable issues as there is no limitation to what the Plaintiff can do to collect its debt. I agree therefore with the Plaintiff that the said draft defence is therefore a sham and is only intended or meant to delay the Plaintiff from enjoying the fruits of its judgment.
15. In conclusion therefore it is my finding that the application by the Defendants seeking to set aside the default judgment and decree of this court is without merit. The same is hereby dismissed with costs to the Plaintiff. Any interim ex parte orders issued herein before are discharged and vacated forthwith. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF FEBRUARY 2025**

.....

**J.W.W. MONGARE**

**JUDGE**

In the Presence of:-

1. Mr. Kisinga for the Plaintiff/Respondent.
2. Ms. Wairange holding brief for Mr. Aduda for the Defendant/Applicant.
3. Amos- Court Assistant

