



**Stanbic Bank Kenya Limited v Bardad (Commercial Case E255 of 2022)
[2025] KEHC 1608 (KLR) (Commercial and Tax) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E255 OF 2022
A MABEYA & F GIKONYO, JJ
FEBRUARY 6, 2025**

BETWEEN

STANBIC BANK KENYA LIMITED PLAINTIFF

AND

MOHAMED FARAH BARDAD DEFENDANT

RULING

1. Before Court is the application dated 9/3/3034. The same is brought under section 3, 3A and 63(i) of the *Civil Procedure Act*, Order 5 rule 16, Order 10 rule 11, Order 40 rule 1 of the *Civil Procedure Rules*. It seeks for the cross examination of Mr. Paul Lukendo Mafura on the contents of the affidavits he swore on 2/6/2023 and 27/7/2022, respectively. That the ex-parte interlocutory judgment herein be set aside and the defendant be granted leave to defend the suit.
2. The application was supported by the grounds on the face of the Motion and the affidavit of Mohamed Farah Bardad sworn on 9/3/2024. He deposed that he was made aware of the matter when he was informed that there was a warrant of arrest issued by the Court.
3. He contended that Paul Lukendo had made a misleading affidavit where he had averred that he was in Mandera. He confirmed that he had left Daa Intergrated School on 8/2/2022. That he was released from that School on 1/3/2022 following his early retirement. He states that he was not familiar with Mr. Hassan Juma who is alleged to have identified him to the process server and therefore the deponed information was false.
4. He stated that the draft defence raised triable issues as the interest charged was excessive and performance of the hire purchase contract was frustrated by hostile security situation in Northern Kenya. That the demands were sent to the postal address he had provided however he could not access it and the plaintiff ought to have used his phone number to inform him of the notices.



5. The application was opposed by the respondent vide a replying affidavit sworn by Amos Mugambi on 8/4/2024. He deposed that the defendant had been personally served with the summons to enter appearance as well as the pleadings on 22/7/2022. That despite the service, the defendant failed to enter appearance or file a defence in time or at all.
6. That the defendant was found within the Dua Intergrated School premises where service was effected on him. That the application was brought as an afterthought after execution proceedings were commenced against the defendant. That in any event, there was inordinate delay in filing the application and that the draft statement of defence was not sufficient to answer the plaintiff's claim.
7. I have considered the application, the response thereto and the submissions on record. There are two issues for determination; whether the process server should be called for cross-examination and consequently whether the interlocutory judgment should be set aside.
8. I propose to first deal with the first issue. There is no dispute that there is on record an affidavit of service of the process server on whose strength the interlocutory judgment was entered. The defendant has disputed the contents thereof and wishes to cross-examine the deponent thereof.
9. The general rule is that if the averments in an affidavit of service are not contradicted, rarely will an interlocutory judgment is to be set aside. The service will always be considered to have been proper. However, where a party disputes service and calls for an opportunity to test the averments in an affidavit of service, that in my view is the best route to establish whether an interlocutory judgment should stand or not.
10. In the present case, the process server stated that he travelled to Mandera on 19/7/2022. He took 3 days to reach Mandera. He went to Daua Intergrated School and the defendant came and effected service of process upon him at that school on 22/7/2022 at 3;00pm.
11. On the other hand, the defendant has denied being in that School. He also denies ever knowing the person who allegedly pointed him out to the process server for service.
12. In my view, for the interests of justice, the moment the defendant contested service and requested for the cross-examination no the process server, the plaintiff should have willingly offered him for such cross-examination since there was nothing was being hidden.
13. I have personally seen the detailed affidavit of service by the process server. It is too detailed to be doubted. But there is also the defendant's contention on oath. If I proceed and consider the application on merit without hearing the process server, an injustice may be committed.
14. I therefore think that there is merit in summoning the process server for cross-examination on his affidavit.
15. Accordingly, I grant prayer no.3 of the Motion. He shall attend Court on the day and time to be fixed by the Court. After cross-examination, the Court will then consider the rest of the prayers in that Motion.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

F. GIKONYO



JUDGE

