



**Sichuan Huashi Enterprises Corporation East Africa Limited v
Windsor Gardens Limited & 2 others (Civil Suit E110 of 2023)
[2025] KEHC 8326 (KLR) (Commercial and Tax) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E110 OF 2023
FG MUGAMBI, J
JUNE 13, 2025**

BETWEEN

**SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA
LIMITED RESPONDENT**

AND

WINDSOR GARDENS LIMITED 1ST APPLICANT

OAKLADE GARDENS LIMITED 2ND APPLICANT

KINGSPRIDE CONTRACTORS LIMITED 3RD APPLICANT

RULING

1. Before the Court is the Notice of Motion dated 15th October 2024 brought pursuant to Order 10 Rule 11, Order 45 Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), Articles 159 and 50(1) of [the Constitution](#) of Kenya and all other enabling provisions of the law.
2. The application seeks the following reliefs:
 - i. That Mr. Peter Ngeno be summoned for cross-examination on the contents of the affidavits of service sworn on 21st April 2023 and 17th July 2023;
 - ii. That the Ruling and/or Orders issued on 20th July 2023, together with the resultant Decree dated 2nd August 2023, be set aside;
 - iii. That the applicants be granted leave to respond to the Originating Summons and defend the suit on merit; and
 - iv. That the costs of the application be in the cause.



3. The applicants contend that the orders issued on 20th July 2023, which restrained the 1st to 3rd applicants from dealing with Title Number Dagoretti/Riruta/2699 and recognized an informal charge permitting a statutory power of sale, were obtained irregularly. The application is supported by the grounds on the face of the Motion and the affidavit of David Karau. It is opposed through a replying affidavit sworn by He Wenbin on 30th October 2024.

Analysis and Determination

4. I have carefully considered the pleadings, rival submissions and authorities presented before the Court. The main issue for determination is whether the Court should set aside the ruling and/or orders issued on 20th July 2023 and the subsequent decree dated 2nd August 2023 on the ground that the applicants were not properly served, and whether they should be granted leave to defend the suit.
5. On the issue of service, the applicants contend that they were not served with the Originating Summons, supporting pleadings, or the hearing notice and were thus denied the opportunity to be heard. Consequently, a decree was issued against them on 2nd August 2023.
6. The applicants further contend that upon perusal of the court record, they discovered affidavits of service sworn by one Peter Ngeno, who alleged to have effected service at a location along the Southern Bypass and through an email address which they state is unrelated to them. They further deny any service, stating that the alleged office does not exist and that the email address used for service is not theirs. They also point to the irregular use of a stamp belonging to Windsor Golf Hotel, a third party with no relation to them.
7. The applicants aver that they first learned of the suit when they came across a newspaper advertisement for a public auction scheduled for 30th May 2024. This discovery prompted them to file a separate suit, HCCC No. E289 of 2024, in which interim orders were issued. They contend that no statutory notices were served upon them prior to the auction process, and that the impugned decree is being executed clandestinely to deprive them of an opportunity to challenge it. They urge the Court to set aside the orders and allow the matter to be heard on its merits.
8. The respondents on the other hand maintain that service was properly effected via the email address info@kingsprideproperties.co.ke, which was allegedly provided by the applicants through a company resolution dated 25th March 2018. Through his replying affidavit, Wenbin states that various mention notices and pleadings were sent to this email address without delivery failure, in accordance with Order 5 Rule 22B of the Civil Procedure Rules. He notes that by 6th June 2024, the applicants had responded to the suit in HCCC No. E289 of 2024, undermining their claim of ignorance of this suit.
9. Order 5 Rule 22B of the Civil Procedure Rules, 2010, governs service of court process through electronic means, specifically by electronic mail (email). The provision stipulates that electronic service is deemed valid and effective where the email is sent to the party's last confirmed and regularly used email address. The rule further mandates that the party effecting service must obtain a delivery receipt or any other form of confirmation indicating that the email was successfully transmitted.
10. In addition, such service must be supported by an affidavit of service, which sets out the details of the email transmission, including the date and time of dispatch, the address to which it was sent, and the confirmation of delivery.
11. Notably, nothing in the language of Order 5 Rule 22B suggests that electronic service is merely supplementary to or dependent on physical service. To the contrary, electronic service stands on equal footing with traditional modes of service and, once properly effected in accordance with the Rule, is



sufficient on its own. Therefore, there is no legal requirement that electronic service must be followed by or accompanied with physical service by hand or otherwise.

12. I have carefully examined the affidavits of service sworn by Mr. Ngeno, as well as the company resolution dated 7th March 2018 which forms part of the record. From the face of the resolution, it is evident that the email address info@kingsprideproperties.co.ke is listed as the official contact address of the applicants. This email address was relied upon by the process server for purposes of effecting service of the court process. There is no suggestion, either in the affidavits of service or from the applicants, that the said email address was no longer in use, had been abandoned, or that delivery of the electronic communication failed. Indeed, no bounce-back notification or failure-to-deliver message has been placed before the court.
13. Order 51 Rule 15 of the Civil Procedure Rules provides that the Court may set aside any order made ex parte. It is clear from the proceedings that the orders issued by this Court on 20th July 2023 followed the hearing of an unopposed application dated 15th March 2023. The Court relied on affidavits of service sworn on 20th April 2023, 12th June 2023, and two affidavits both dated 17th July 2023 to confirm service on the applicants. The applicants now challenge the validity of that service and seek to cross-examine the process server, Mr. Peter Ngeno, on the contents of the affidavits sworn on 21st April 2023 and 17th July 2023.
14. In the absence of any credible challenge to the authenticity or accuracy of the mode of service, I am satisfied that the process server complied with the requirements of Order 5 Rule 22B of the Civil Procedure Rules. Given that the applicants have not demonstrated any irregularity or deficiency in the process server's affidavits, and in view of the objective confirmation of service through a known and accepted email address, I find no justification to summon the process server for cross-examination. The request to that effect appears to be without merit and is accordingly declined.
15. On whether the applicants have demonstrated an arguable defence to the plaintiff's claims, the applicants assert that they possess a valid and bona fide defence, which if heard, would disclose triable issues warranting adjudication on the merits. They contend that the orders and the resultant decree were obtained in their absence and without their participation, thereby infringing upon their constitutional right to a fair hearing as guaranteed under Article 50(1) of *the Constitution*.
16. On that basis, they urge this Court to exercise its discretion to set aside the ex parte orders and to reinstate the matter for hearing inter partes, so as to allow them an opportunity to ventilate their case fully before the Court.
17. While the right to be heard is a fundamental tenet of fair trial and natural justice, the exercise of the Court's discretion to set aside ex parte orders must nonetheless be guided by established principles, including whether the applicant has demonstrated a plausible defence to the claim. In the present case, I agree with the respondent that the Court can only evaluate the existence of a prima facie or arguable defence if the applicants set out the grounds on which they challenge the plaintiff's claim.
18. Unfortunately, the applicants did not annex a draft response to the Originating Summons, such as a replying affidavit, a proposed statement of defence, or any pleading outlining their position, to demonstrate the nature and substance of the alleged defence. This omission is not merely procedural but goes to the heart of the inquiry into whether any triable issue exists. In the absence of any such material, the Court is left to speculate on the merits of the purported defence.
19. The failure to provide a draft defence or at the very least a summary of the intended grounds of opposition dents the applicants' plea that the matter be reopened. The Court cannot be called upon to set aside regular orders merely on the general assertion of a right to be heard, without more. As such,



I find that this failure is a serious defect which must weigh against the applicants in the exercise of the Court's discretion. It would seem to me that the applicants were in fact jolted only by the prospect of execution.

20. The respondent accuses the applicants of material non-disclosure, particularly their failure to disclose the pendency of HCCC No. E289 of 2024, in which similar issues, including service and statutory notices, are already under adjudication. He argues that the applicants are forum shopping to secure parallel injunctive relief and frustrate enforcement. The applicants have not controverted or rebutted the assertion regarding the existence of a parallel suit.
21. On the contrary, the respondents have annexed pleadings filed in HCCC No. E289 of 2024, which confirm that a related matter involving the same parties and subject matter is actively pending before the High Court. This Court takes the view that the applicants, had they been acting with candor and in furtherance of their duty of full and honest disclosure, ought to have brought this fact to the attention of the Court at the earliest opportunity. The deliberate omission to disclose the existence of the parallel proceedings suggests an attempt to secure a favourable outcome through non-disclosure, a practice that this Court strongly deprecates.
22. More significantly, it is evident from the annexed pleadings in HCCC No. E289 of 2024 that the issues surrounding the chargee's statutory power of sale including validity and propriety of the statutory notices are already pending determination before a court of competent jurisdiction. These are not collateral or peripheral matters, but rather central questions that lie at the heart of both proceedings.
23. As such, they fall squarely within the doctrine of sub judice, as codified under Section 6 of the *Civil Procedure Act*, which prohibits courts from proceeding with a matter where the issues directly and substantially in issue are also directly and substantially in issue in a previously instituted suit between the same parties or parties claiming under them. To entertain and determine those very same issues in the present application would risk inconsistent or conflicting decisions on the same subject matter.
24. Such a course of action would amount to a duplication of judicial effort and would run afoul of the principle against re-litigation of matters pending before court. Accordingly, this Court must refrain from making any determination on issues that are already the subject of active adjudication in HCCC No. E289 of 2024.

Disposition

25. Accordingly, the application dated 15th October 2024 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF JUNE 2025.

F. MUGAMBI

JUDGE

