



**Ethics & Anti-Corruption Commission v Amailo Investment Company Ltd & 7 others  
(Anti-Corruption and Economic Crimes Case E025 of 2022) [2023] KEHC 994 (KLR)  
(Anti-Corruption and Economic Crimes) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E025 OF 2022  
EN MAINA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**AMAILO INVESTMENT COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT  
MATHEW KIPCHUMBA KIPKEMEI ..... 2<sup>ND</sup> DEFENDANT  
GRACE MUREI ..... 3<sup>RD</sup> DEFENDANT  
SAMUEL EREGAE ..... 4<sup>TH</sup> DEFENDANT  
JAMES ARONO CHEGEM ..... 5<sup>TH</sup> DEFENDANT  
ESTHER LOKAI ELIM ..... 6<sup>TH</sup> DEFENDANT  
ELIM PETER EPAGAN ..... 7<sup>TH</sup> DEFENDANT  
PETER EKOROT ENDAPAL ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me are two applications. The first application is the Notice of Motion dated November 18, 2022 in which the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants seek an order to set aside a default judgment entered against them on August 25, 2022 and for leave to cross examine the process server/deponent of the affidavit of service. Although they have listed 33 grounds the gist of the application is that they were not served with summons to enter appearance and the default judgment is therefore irregular and it ought to be set aside; that they have a defence on the merits and they ought therefore to be allowed to defend the suit so that it may be determined on the merits and that it is in the interest of justice that



the suit be heard on the merits. The application is expressed to be brought under article 159 (2) (d) of the Constitution, section 1A and 1B of the Civil Procedure Code and Order 5 Rule 3, Order 10 Rule 11 and 16 of the Civil Procedure Rules. It is supported by the affidavit of Peter Ekorot Endapal. The application is vehemently opposed by the plaintiff through the replying affidavit of Michael Kasilon on December 13, 2022.

2. The second application dated November 25, 2022 is brought by the 1<sup>st</sup> defendant and it seeks an order for a review of the preservation order issued by this court on July 14, 2022 in order to give the 1<sup>st</sup> defendant partial access to the account No. xxxx Equity Bank Lodwar Branch so as to draw a sum of Kshs.11,187,155.31 which it contends is not the subject of this suit. The application is made under article 23, 24, 31, 40, 50 and 165(6) of the Constitution, sections 1A and 1B of the Civil Procedure Rules. The application is supported by the affidavit of Peter Ekorot Endapal sworn on November 25, 2022. The application is vehemently opposed by the plaintiff through the replying affidavit of Michael Kasilon sworn on January 13, 2023.
3. The applications were both canvassed through written submissions.
4. In the Plaint dated July 13, 2022 the plaintiff seeks judgment against the Defendants jointly and severally as follows:
  - (a) A declaration that the contract dated March 23, 2020 between the 1<sup>st</sup> defendant and the County Government of Turkana for the supply and delivery of corn soya blend (unimix) 25 kilogrammes was founded on illegalities and procurement irregularities and is therefore null and void.
  - b. An order for restitution against the 1<sup>st</sup> defendant by payment in sum of Kshs. 24,999,600.00/- to the plaintiff on behalf of the County Government of Turkana.
  - c. Judgment against the 2<sup>nd</sup> to 8<sup>th</sup> defendants jointly and severally for the sum of Kshs. 24,999,600.00
  - d. Interest of (c) above at court rates from the date of filing this suit to the date of payment in full
  - e. Costs of this suit and interest therein at court rates
  - f. Any other relief that this honourable court may deem fit and just to grant”
5. By August 25, 2022 no appearance had been filed by any of the defendants and so on that date the plaintiff filed a request for judgment under Order 10 Rule 4 of the Civil Procedure Rules. The plaintiff’s request was for judgment against all the defendants for a sum of Kshs.24, 999,600 together with interest as prayed in the Plaint. Annexed to the request was an affidavit of service sworn on August 24, 2022 by one Margret Kavochi Igunza, a process server employed by the plaintiff/Commission. Annexed to the affidavit are copies of the summons to enter appearance served upon the defendants with signatures acknowledging service by the persons served. Upon considering that affidavit of service the Deputy Registrar being satisfied that the defendants were duly served proceeded to enter judgment in favour of the plaintiff/Commission as prayed. That judgment is dated September 7, 2022.
6. Whereas a view was expressed by learned Counsel for the plaintiff that the judgment entered was an interlocutory one, the claim by the plaintiff is a liquidated demand and hence the judgment entered under Order 10 Rule 4 is a final judgment. The plaintiff’s claim against the defendant being for a liquidated demand, it is my finding that the judgment entered by the Deputy Registrar for want of appearance was a final judgment.



7. Order 10 Rule 11 of the [Civil Procedure Rules](#) provides that even then this court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.
8. This court's discretion is unfettered but it must as always be exercised judicially. In determining whether to grant the application where the judgment is a regular judgment, a court is expected to inter alia consider the explanation given by the defendant/applicant for his failure to appear and whether or not there is a defence on the merits. In the case of *Mbogo v Shab* [1968] EA 93 the court stated that the discretion to set aside a judgment obtained *ex parte* "is to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice." Those principles would also apply to this case. However, where the judgment is not a regular one the principle is that it must be set aside as a matter of right.
9. In the instant case the contention of the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants is that the judgment is not a regular one as they were not served with the summons to enter appearance. I have carefully considered the affidavit of service and I am persuaded that the defendants/applicants were not properly served. The manner in which summons are to be served is provided for in Order 5. Order 5 Rule 3 which deals with service on a corporation, as is the 1<sup>st</sup> defendant in this case, provides that in the first instance service shall be on the secretary, director or other principal officer of the corporation or where the said persons cannot be found, by leaving the summons at the registered office of the corporation, or through registered mail, or by leaving the summons at the place where the corporation carries on business or service through courier. The alleged service upon the 1<sup>st</sup> defendant herein clearly does not comply with the provisions of Rule 3.
10. In regard to service on the defendant in person Order 5 Rule 8 provides that it is only where the defendant cannot be found that service may be effected on an agent or an Advocate who has instructions to accept service and to enter an appearance to the summons. In this case service upon the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants and even the 1<sup>st</sup> Defendant is alleged to have been through a relative and it therefore does not meet the threshold set out in Order 5 Rule 8 and in the premises I agree with Counsel for the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants that the default judgment entered against them is not a regular judgment and it accordingly ought to be set aside as a matter of right. The application dated 1 November 8, 2022 is therefore allowed and the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants be and are hereby granted leave to defend the suit. To that end, it is hereby directed that they shall file their defence(s), statements of witnesses and documents within 14 days of this ruling.
11. As for the application dated November 25, 2023, I am of the considered opinion that the same would be best heard together with the Plaintiff's Notice of Motion dated December 16, 2022 which seeks orders to extend the preservation orders granted by this court on July 14, 2022. As Learned Counsel for the parties have filed their submissions in the application, this court shall deliver a ruling in regard to that application and the 1<sup>st</sup> defendant's application on March 9, 2023. The preservation orders shall be extended until then.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF FEBRUARY 2023**

**E N MAINA**

**JUDGE**

**In the presence of:-**

Ms Ashitva for the Plaintiff



Mr. Bigambo for the 1st, 6th, 7th and 8th Defendants

Mr. Suge for the 2nd, 3rd, 4th and 5th Defendants

Potishoi/Raymond – Court Assistants

