



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.96 OF 2011**

**CFC STANBIC BANK LIMITED formerly known as  
CFC BANK LIMITED .....PLAINTIFF**

**VERSUS**

**AEROMARINE FREIGHTERS & TRAVEL  
(NAIROBI) LIMITED .....1ST DEFENDANT  
VICTOR – OCEANIC VIEWERS LIMITED.....2ND DEFENDANT  
BERNARD NJOROGE WACHAI .....3RD DEFENDANT  
LYDIA WANJIRU NDUMA .....4TH DEFENDANT**

**RULING**

1. The 3rd and 4th Defendants' Notice of Motion dated 2nd February, 2012 is brought under Sections 3A of the Civil Procedure Act as well as Order 10, Rule 11 and Order 22 Rule 52 of the Civil Procedure Rules, 2010. The application seeks an order for the setting aside of the ex-parte judgment entered against the 3rd and 4th Defendants and that they be allowed unconditional leave to defend the suit. The grounds for the application as stated in the Motion are that, the 3rd and 4th Defendants were not served with summons in the suit; that they have a valid and arguable defence; that no notice of entry of judgment was ever served upon them as required by law and that there were serious anomalies between the amount stated in the Decree and the Notice to Show Cause which needs rectification. The Motion was supported by the Affidavit of the 3rd Defendant sworn on 2nd February, 2012.
2. The 3rd Defendant swore that neither he nor the 4th Defendant was served with summons to enter appearance and as such, they were condemned unheard. The contents of the Affidavit of Service sworn by the Process Server were also denied by the 3rd Defendant and it was contended that the Process Server had never met him nor his wife, the 4th Defendant, prior to 5th January, 2012. the 3rd Defendant also disputed the claim that he was a Director of the 2nd Defendant Company and denied ever informing the Process Server that he had authority to accept legal process on her behalf. He asserted that the averments in the Process Server's Affidavit of service dated 1st July,

2011 were mere fabrications unsupported by facts. He further contended that it was only on 3rd January, 2012 when a Process Server visited his residence and left a Notice to Show Cause. That this prompted him to instruct the firm of D. Ndungu & Co. Advocates to pursue the matter on behalf of the Defendants. That, when the Notice to Show Cause came up for hearing on 2nd February, 2012, the Court declined to adjourn the hearing of the same and instead issued Warrants of Arrest for the 3rd and 4th Defendants. The 3rd Defendant also stated that, upon perusal of the Notice to Show Cause and the Decree, he discovered that there were serious anomalies as to the sums owed to the Defendant in that the Notice to Show Cause indicated an amount of Kshs.7,800,000/= yet the Decree reflected a sum of Kshs.15,043,608/55 making it difficult for the Defendants to ascertain the exact figure demanded from them. Consequently, the deponent maintained that the ex-parte judgment entered against him and the 4th Defendant was irregular for the foregoing reasons and prayed that the same be set aside.

3. The Plaintiff opposed the application through the Replying Affidavit of Boniface Machuki sworn on 23rd February, 2013. While referring to the Affidavits of Service by the Process Server, Francis Kiongo Chabari, sworn on 1st July, 2011 and 20th September, 2013 respectively, the Plaintiff averred that, summons to enter appearance, the Plaint, as well as the Notice of entry of judgment were properly served upon the Defendants given the detailed depositions of the Process Server. The Plaintiff further asserted that the Process Server relied on the details of an investigation report dated 23rd October, 2011 by Flash Recovery Services to aid him in tracing the judgment debtors' home. That furthermore, the Defendants had not disputed the service of summons to enter appearance or that the default judgment entered by the Court was regular. It was also contended that the Defendants had no valid defence against the Plaintiff's claim and that a dispute as to accounts did not amount to a good defence as the same could be easily resolved at the execution stage. The Plaintiff further contended that the 3rd and 4th Defendant, being husband and wife, could accept process on behalf of each other. As such, the Plaintiff urged the Court to dismiss the application as the same lacked merit.
4. The 3rd and 4th Defendants filed their written submissions. It was submitted that the Plaintiff did not prove that the summons in the suit were indeed served on the parties. That service was personal and should have been effected on the 3rd as well as the 4th Defendant. That through the draft defence, the Defendants had in paragraph 5 thereof raised triable issues as to the extent of the amount of monies owed by the Defendants. It was argued that since the parties did not agree on the extent of the Defendants' indebtedness, the same warranted judicial scrutiny which could only be done after the interlocutory judgment is set aside. The case of **Chemwology & Ano -v- Kubembe [1986] KLR 492** was cited in support of those submissions.
5. Counsel for the 3rd and 4th Defendants urged the Court to decide the instant matter on merit and concern itself with doing justice between the parties. That even if the Court were to find that service was indeed proper, it was incumbent upon it to set aside the interlocutory judgment upon such terms as it would deem expedient. It was further contended that there was no prejudice that the Plaintiff would suffer if the orders sought were granted and that if there were, such prejudice could be adequately compensated by an award of costs and damages. That, the 3rd and 4th Defendants having not received a Notice of Entry of judgment as provided for in law, that was a grave anomaly which should make the Court allow the application and set aside the default judgment.
6. In its written submissions dated 12th June, 2013, the Plaintiff submitted that, the Defendants had failed to give substantive reasons as to why they did not enter appearance and file their defences. It was contended that contrary to the allegations by the 3rd and 4th Defendants, the Plaintiff was able to demonstrate that Court process was properly effected upon them. That any allegations of non-service were untrue and intended to obstruct the course of justice. That the affidavit of service filed by Mr. Francis Kiongo Chabari clearly set out how the 3rd Defendant and 4th Defendant were served, including an incident on 27th May, 2011 when the 3rd Defendant lied to Mr. Kiongo about his real identity.
7. The Plaintiff's Counsel submitted that the Defendant's proposed defence did not raise any triable issue as the 3rd and 4th Defendant admitted having executed a guarantee dated 24th April, 2007, in favour of the Plaintiff to the limit of Kshs.7,800,000/=. That the said defence contained mere denials that did not properly address the Plaintiff's claim. Further, it was submitted that none of the Defendants had paid anything towards the principal debt.

8. Counsel for the Plaintiff further submitted that although the Court had unfettered discretion in setting aside an interlocutory judgment, it was necessary to bear in mind that the Plaintiff had been kept away from its monies in respect of credit facilities that, the 3rd and 4th Defendants had guaranteed in case of default by the 1st Defendant. That as such, setting aside the judgment would cause the Plaintiff undue hardship as the instant application was an attempt by the 3rd and 4th Defendant to delay the course of justice. The Plaintiff further argued that the 3rd and 4th Defendant had chosen to deal with irrelevant matters, to wit, the allegation that they were not served with the notice of entry of interlocutory judgment. That the same, did not have a bearing on the judgment already entered. The Plaintiff, however, reiterated that service of the Notice of Entry of Judgment was carried out as indicated in the Affidavit of Service of Francis Kiongo Chabari sworn on 2nd September, 2011.
9. With regard to the discrepancy in the judgment amount in the decree and the Notice of Entry of Judgment, submitted that the same did not in any way affect the judgment already entered. Counsel was of the view that, the discrepancy could be dealt with at the execution stage and was therefore not a valid reason to set aside the judgment. In the Plaintiff's opinion, the application lacked merit and should be dismissed.
10. Having carefully considered the Affidavits on record, the rival submissions and the various authorities cited. The core issue is whether the 3rd and 4th Defendants have established a basis for this Court to exercise its discretion in their favour in setting aside the interlocutory judgment. In an application to set aside a judgment in default of appearance, the applicant must satisfy the Court that there is good cause that prevented him from taking cognizance of the Court proceedings. Service of summons in this case has been challenged by the 3rd and 4th Defendants. Furthermore, it has been contented that the 3rd and 4th Defendants have raised a triable defence to warrant the urging of the same on merit.
11. I shall first deal with the issue of service of summons. While asserting that, there was proper service of the summons to enter appearance on the 3rd and 4th Defendant, the Plaintiff relied on the Affidavit of Service sworn by Francis Kiongo Chabari on 1st July, 2011. The 3rd and 4th Defendants, with the consent of the Court, cross examined the said Process Server on his Affidavit of Service. Mr. Kiongo informed the Court that he was a licensed Process Server and was duly licensed to serve Court Process in 2011 and 2012 respectively. In his affidavit, Mr. Kiongo stated that on 27th May, 2011 he received copies of summonses to enter appearance, list of witnesses and index documents accompanying the Plaintiff for service upon the Defendants from the Plaintiff's Advocate. On cross-examination, he testified that upon receipt of the said documents, he proceeded to Norwich Union House, 6th floor where the 1st Defendant's Offices were located.
12. He told the Court that he met the 3rd defendant on that day who introduced himself as a "Mr. Kamau". That the said Mr. Kamau informed him that the 1st Defendant had vacated the premises two (2) months previously. Mr. Kiongo did not therefore leave any documents with that man. He said that he was able to tell that this was the business premises of the 1st and 2nd Defendants as he saw files bearing the names of the said Defendants in that office. Mr. Kiongo further testified that after leaving the said man behind, he proceeded to the offices of the Management of the said building located on the 8th Floor, where he was informed that the 1st Defendant still occupied an office in the sixth floor together with the 2nd Defendant. That both the 1st and 2nd Defendants were owned and run by the 3rd and 4th Defendants who were a married couple. That, upon receiving this information, he left the building but made subsequent visits on 30th May, 2011 and 29th June, 2011, respectively. He told the Court that on 30th May, 2011, when he visited the 1st and 2nd Defendants' offices on 6th Floor, Norwich Union House, he met a lady by the name Sylvia, who introduced herself as the 3rd Defendant's personal secretary. Upon making further inquiries, Sylvia informed him that the 3rd Defendant was not in Nairobi but nevertheless gave him a business card with the 3rd Defendant's contact details.
13. According to the Process Server, upon calling the phone numbers in the business card, he managed to speak to the 3rd Defendant who promised to contact him upon his arrival from Mombasa. That when he returned to those premises on 29th June, 2011, Mr. Kiongo was introduced to the 3rd Defendant, by the said Sylvia. That it was then that discovered that the man who had introduced himself as a "Mr. Kamau" on 27th May, 2011 was in fact the 3rd Defendant. That the 3rd Defendant thereupon introduced himself as Mr. Benard Njoroge and confirmed that he was a Director of the 1st and 2nd Defendant Companies and was also the husband to the 4th

- Defendant. The Process Server, therefore, proceeded to serve the copy of the Summons to enter appearance and the Plaintiff upon the 3rd Defendant. That the latter accepted the service of the same but nevertheless refused to sign the original copy on the reverse side as a sign of acknowledgement thereof.
14. With regard to the summons to enter appearance and the Plaintiff being served on the 4th Defendant, it was the testimony of Mr. Kiongo that the 3rd Defendant told him that the 4th Defendant was his wife and that she knew about the instant suit. That further, he had the authority to receive service on her behalf. Mr. Kiongo therefore proceeded to serve the copy of the summons to enter appearance and the Plaintiff for the 4th Defendant upon the 3rd Defendant. That, the 3rd Defendant accepted the service of the same but refused to sign the original copy on the reverse side.
  15. Having gone through the Affidavit of Service of the Process Server and his testimony upon cross-examination, it is clear that Mr. Kiongo was vivid and consistent with the details of the service that he carried out upon the 3rd Defendant. The date, the time and place of service is shown. The place of service was actually the 3rd Defendant's place of business. The mode of identification of the 3rd Defendant was properly explained given that the 3rd Defendant was pointed out to the Process Server on 29th June, 2011, by a named person, Sylvia, who was said to be the 3rd Defendant's personal secretary. Further, the 3rd Defendant introduced himself to the process server on the 29th June, 2011 while accepting the court process. His testimony remained unshaken. Of note however, is the fact that the Process Server deposed that he recognized the 3rd Defendant as he had met him before on the 27th of May 2013 in the same premises, but that, the 3rd Defendant had introduced himself as a "Mr. Kamau". These facts were not seriously challenged by the 3rd Defendant. It would thus appear the 3rd Defendant was trying to evade service by giving his name as a "Mr. Kamau". In sum, I am of the view that the 3rd Defendant was properly served with summons to enter appearance and Plaintiff.
  16. This now leads me to the question of whether the 4th Defendant was properly served or at all. According to the explanation given by the Process Server, the 3rd Defendant admitted that he was the 4th Defendant's husband and had admitted to have authority to receive Court Process on her behalf. According to the Plaintiff's submissions, Order 5, Rule 12 of the Civil Procedure Rules, 2010 permitted the service on a Defendant through an adult member of his/her family. In rejoinder, the 3rd Defendant contended that 4th Defendant should have been personally served. The issue to resolve is whether service on the 3rd Defendant, the 4th Defendant's husband, was sufficient and good service.
  17. Order 5, Rule 7 of the Civil Procedure Rules provide that where there are more Defendants than one, service of the summons shall be made on each Defendant. Further, Order 5, Rule 12 provides thus;

***"12. Where in any suit, after a reasonable number of attempts have been made to serve the Defendant, and the Defendant cannot be found, service may be made on an agent of the Defendant empowered to accept service or on any adult member of the family of the Defendant who is residing with him." (Emphasis mine)***

From the above, it follows that where in any suit the defendant cannot be found, service may be made on an agent of the Defendant empowered to accept service, or on any adult member of the family of the Defendant who is residing with him/her. The Plaintiff contends that the 4th Defendant was served under Order 5, Rule 12.

18. From the Affidavit of Service of Francis Kiongo Chabari sworn on 1st July 2011 and his testimony in Court, the Process Server made several attempts to effect service upon the 3rd and 4th Defendants at the Offices of the 1st Defendant. Both the 3rd and 4th Defendants were directors of the 1st Defendant. This testimony was neither denied nor challenged. The Process Server testified that the 3rd Defendant had informed him that he had the authority of the 4th Defendant to receive process. The 4th Defendant chose not to swear an Affidavit to deny this fact or to deny that her offices were in the 1st Defendant's offices. It was also not denied that the 3rd and 4th Defendants are man and wife. Neither did the 3rd Defendant deny these facts. I am therefore of the view that in the circumstances of this case, the service upon the 4th Defendant through her husband was proper and effective.

19. The other issue is whether the 3rd and 4th Defendants have a *bona fide* defence to the Plaintiff's claim. In determining this issue, the Court need not necessarily be satisfied that there is a real likelihood that the 3rd and 4th Defendants will succeed in their defence. The Court only needs to satisfy itself merely that the Defendants have *bona fide* triable issues. See the Case of **Day -vs- RAC Motoring Services Ltd [1990] 1 ALL ER 1007.**
20. I have looked at the draft defence. The contention of the Plaintiff is that it advanced the 1st Defendant various loan facilities on diverse dates in the year 2007. The 2nd, 3rd and 4th Defendants executed continuing guarantees and indemnities in favour of the Plaintiff in consideration of the Plaintiff continuing to and affording the 1st Defendant credit and banking facilities. The principal amount recoverable from the 3rd and 4th Defendants, jointly and severally, was capped at Kshs.7,800,000/=. That the 1st Defendant fell into arrears, prompting the Plaintiff to call up the guarantees held by the 2nd, 3rd and 4th Defendants. When the said Defendants failed to pay the sums demanded, the Plaintiff instituted the instant suit praying for judgment against the 3rd and 4th Defendants, jointly and severally, for Kshs.7,800,000/= together with the interest thereon at the rate of 25.25% per annum.
21. Through their draft defence, the 3rd and 4th Defendants' dispute the amounts claimed and assert that the same are erroneous and overstated. They take issue with the fact that the amount in the decree vary from that in the Notice to Show Cause thus making it hard for them to ascertain the extent of their indebtedness. That in view thereof, the issue of their indebtedness requires judicial scrutiny and determination by the Court as the parties cannot agree on the correct figure. On his part, Counsel for the Plaintiff submitted that failure to honour obligations set out in the guarantees that the 3rd and 4th Defendants executed in favour of the Plaintiff was the basis of the suit. That a dispute as to the amounts owed or accounts does not necessary amount to triable issues.
22. I have considered that the execution or existence of the guarantees have not been denied. The amount guaranteed is also not denied. Neither has default been denied. What is in issue is the amount appearing in the decree and Notice to Show Cause due. My view is that, it is possible that the exact indebtedness of the 3rd and 4th Defendants can be established through proper calculation of the interest due on the principal sum from the date of entry of judgment. That can be easily ascertained by the Deputy Registrar at the execution stage. That cannot in my view affect the judgment properly entered.
23. In view of the discrepancy in the amounts in the Notice to Show Cause and the Decree and failure to effect service of the notice of entry of judgment, I will set aside the execution proceedings, to wit, the Notice to Show Cause and direct that a fresh Notice of entry of Judgment be served whereupon proper execution process may be proceeded with. As regards the prayer to set aside the judgment, the same is declined. The costs of the application is awarded to the Plaintiff.

**Dated and Signed at Bungoma this 14th day of February, 2014.**

**A. MABEYA**

**JUDGE**

**Dated and Delivered at Nairobi this ...4<sup>th</sup> ..... day of .....March..... 2014.**

**H. B. HAVELOCK**

**JUDGE**