

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. 149 OF 2017**

**BETWEEN**

**GREEN AFRICA INTERNATIONAL LIMITED.....**

**.....PLAINTIFF**

**AND**

**KINGDOM BANK LIMITED**

**(FORMERLY JAMII BORA BANK LIMITED) .....**

**RESPONDENT**

**AND**

**EVANSON GITHINJI KINYANJUI.....1<sup>ST</sup>**

**INTERESTED PARTY**

**CAROLYNE KIRIGO MURAGE.....2<sup>ND</sup>**

**INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. By an application dated 11<sup>th</sup> November 2024, the 2<sup>nd</sup> Interested Party (“the Applicant”) seeks an order summoning Mr. NOEL M.N. MUNYITHYA, a process server, for purposes of cross examination and that the Notice to Show Cause issued on 26<sup>th</sup> June 2024 directing

him to appear in Court for an oral examination concerning the Plaintiff company's assets and ability to pay a debt be set aside. The application is supported by the Applicant's affidavit sworn on 11<sup>th</sup> November 2024 and opposed by the Defendant through the replying affidavit of its Head of Legal, JACKSON KIMATHI sworn on 10<sup>th</sup> March 2025. The application was canvassed by way of written submissions that I have considered and I will be making relevant references to them in my analysis and determination below.

### **Analysis and Determination**

2. From the application, the response and the submissions, the Court is being called to determine whether the process server should be cross examined and whether the Court should set aside the Notice to Show Cause proceedings. The Applicant swears that she was never personally served with the Notice to Show Cause by the process server on 12<sup>th</sup> September 2024, as claimed in his affidavit of service. She states that cross-examining the process server is necessary to challenge the presumption that she was properly served.
3. The Applicant states that as a non-executive director, she is not involved in the day-to-day operations of the Plaintiff states that the 1<sup>st</sup> Interested Party is the Managing Director with full authority to

act for the company. She contends that directors are separate from the company itself and a decree against the company cannot be executed against its directors personally unless there is evidence of fraud or wrongdoing that justifies lifting the corporate veil. She asserts that the Defendant has not alleged any fraudulent activity that would warrant examining her as a director. She submits that the affidavit of service, without corroboration through oral testimony, is deemed insufficient to establish proper and effective service upon the her.

4. In response, the Defendant depones that due to the directors' failure to comply with previous Court orders, the Court has already exercised its discretion and lifted the corporate veil in its order of 16<sup>th</sup> October 2023 and that this order explicitly summoned the directors for examination and threatened to hold them personally liable. The Defendant argues that the Applicant is now attempting to re-litigate an issue that has already been decided. The Defendant counters the Applicant's claim of non-service by pointing out that her advocate appeared in Court on 23<sup>rd</sup> September 2024, specifically in response to the Notice to Show Cause and that this

Court appearance is clear proof that she was aware of the notice and its contents, making her current denial of service untenable.

5. The Defendant argues that as a director of the company, the Applicant has a statutory obligation to maintain and produce company records and that her argument that she is a non-executive director not involved in day-to-day affairs does not absolve her of this fundamental legal responsibility, especially when ordered by the Court in aid of execution. For these reasons, the Defendant urges the Court to dismiss the application with costs.
6. From the record, I am in agreement with the Defendant whereas the Applicant challenges the receipt of the Notice to Show Cause, the subsequent conduct of her advocate estops her from challenging the service. It is clear and it has not been contested, that following the alleged service on 12<sup>th</sup> September 2024, an advocate instructed by the Applicant appeared before this Court on 23<sup>rd</sup> September 2024 in response to the very same Notice to Show Cause and sought time to file a response. A party cannot approbate and reprobate. They cannot, through their advocate, acknowledge the existence of a Court process and seek the Court's indulgence, and then subsequently turn around and claim they were never served. The act of the advocate is imputed to the client

and where a party's advocate appears in Court and engages with a matter, the party is precluded from later challenging the service. I therefore find that the appearance of Applicant's advocate, specifically to address the Notice to Show Cause, constitutes an unequivocal undertaking to the Court and amounts to a waiver of any procedural irregularities in the mode of service. The Applicant is deemed to have submitted to the jurisdiction of the Court for the purposes of that proceeding and I reject her contention that she was never served with the Notice to Show Cause.

7. Having found that the Applicant, through her advocate, was aware and participated in the Notice to Show Cause proceedings, the next issue to determine is whether the same is to be set aside. I am in further agreement with the Defendant that this issue has already been determined by the Court which issued a specific and unambiguous order on 16<sup>th</sup> October 2023 expressly lifting the corporate veil and summoning the directors for examination. The current Notice to Show Cause is a direct consequence of the directors' failure to comply with that prior order. The Applicant cannot now re-litigate the issue of whether the veil should be lifted by stating that she is a non-executive director.

8. Let me restate that the proceedings under **Order 22 Rule 35** of the **Civil Procedure Rules** are not to impose personal liability *ab initio*, but are a discovery mechanism in aid of execution against the judgment debtor. The Applicant, as a director, is a custodian of the company's records and possesses knowledge of its affairs. The Court is entitled to summon any person who may provide information on the judgment debtor's property or means of satisfying the decree. Her directorship, regardless of its nature, places her squarely in this category and to hold otherwise would allow companies to shield themselves from legitimate execution simply by appointing 'non-executive' directors who then plead ignorance, thereby rendering the Court's execution powers nugatory. Accordingly, I find that the Applicant has failed to demonstrate any sufficient ground to warrant the setting aside of the Notice to Show Cause.

### **Conclusion and Disposition**

9. In the foregoing, I find and hold that the Applicant's application dated 11<sup>th</sup> November 2024 is without merit. The same is dismissed with costs to the Defendants.

**DATED SIGNED AND DELIVERED virtually this 28<sup>TH</sup> DAY OF  
OCTOBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF:-**

1. Ms. Mangich holding brief for Mr. Mango for the 2<sup>nd</sup>  
Interested Party/ Applicant.
2. Ms. Mkaka for the Def/Decree-Holder.
3. Amos - Court Assistant