REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 27 OF 2022

FIRST CAPITAL LIMITED……..…PLAINTIFF/RESPONDENT
-VERSUS-
STEPHEN NGIGE KAHENI……...1ST DEFENDANT/APPLICANT
ANTHONY KAOGO GEORGE…….2ND DEFENDANT/APPLICANT

RULING

1. The application before court is a motion dated 22 November 2024. In the main, the applicants seek he following orders:

> ***"2. That the Honourable Court stay the execution of the Judgment and Decree herein together with the Warrants of Arrest dated 9th August, 2024 emanating therefrom pending the hearing and determination of this Application inter-partes.***
>
> ***3. That the Honourable court set aside the Judgement together with the Decree herein and all other consequential orders and proceedings subsequent thereto including the Warrants of Arrest dated 9th August, 2024.***
>
> ***4. That the Defendants be allowed to file their respective Defenses***."

2. The application is supported by the affidavit of Stephen Ngige Kaheni, the 1st applicant in the application.

3. According to Kaheni, he and his co-defendant have never been aware of this suit and, in particular, they have never been served with any plaint or pleadings or any Summons to enter appearance. Although they did not enter appearance, no Notice of Entry of Judgment has been served upon them before the execution proceedings were commenced against them. In particular, it is their contention that neither the application for execution of decree nor any other proceedings in this matter has been served upon them.
4. They swear that they only learnt of the suit upon being informed by one of their former employees who is said to have “stumbled” upon the warrants against the applicants when he was in court on a different matter.
5. The applicants claim that the proceedings were conducted in their absence, and effectively, they were condemned unheard and now face the threat of being jailed jail on account of a matter they are not aware of. They seek the intervention of this Honourable court to set aside the judgment against them so that they can defend themselves against the suit by the plaintiff.
6. To demonstrate that they were indeed not served with any summons to enter appearance, they have brought to the attention of this Honourable Court the fact that the affidavit of service purportedly sworn in proof of service of summons to enter appearance, shows that the email address

through which they were served is indicated as info@newgeneration.co.ke.

7. They have denied that this is their email address. The email address, according to the applicants, is for a company called New Generation Self Service Stores Ltd, in which they were apparently directors but which, at the time of the alleged service, had been placed under administration by NCBA Bank Limited. By that very fact, the applicants had ceased being directors of the company and, therefore, were not in its control. To be precise, the Administration took effect on 9 May, 2022 yet the applicants are alleged to have been served through the company address on 22 May 2022.
8. The respondent filed a replying affidavit opposing the application. The affidavit is worn by Dan Osira who has introduced himself as the Credit Operations Manager of the plaintiff.
9. As far as the basic question of service of the summons and the rest of the pleadings upon the applicants is concerned, Osira has sworn as follows:

> ***"4.3 The Plaintiff then served the aforesaid Plaint, Witness Statement, List of Documents all dated 27 April 2022 and Summons dated 04 May 2022 upon all the Defendants on 11 May 2022 vide their only known email and postal address contained in Defendant/Applicants' letter dated 27 October 2021 showing that***

the Applicants and the company share the aforementioned addresses."

10. The letter dated 27 October 2021 to which reference has been made is a letter from New Generation Self Service Stores Limited; it is typed on the company's letter-head and addressed to the plaintiff. In the plaintiff's plaint dated 27 April 2022, New Generation Service Stores Limited is named as the 1st plaintiff while the applicants are named as the 2nd and 3rd defendants respectively.
11. It is not disputed that as at the time the summons were served through the email address of the company, the defendants had lost control of the company as it was under administration or in receivership. Perhaps, it is in realisation of this fact that by a notice of withdrawal dated 29 May 2023, the plaintiff withdrew its suit against New Generation Self Service Stores Limited. There is also another notice of withdrawal dated 4 July 2023 showing that the plaintiff had withdrawn part of the claim against the defendants.
12. That notwithstanding, there does not appear to have any amendment of the plaint to reflect the changes in the plaintiff's claim although in the application for execution, and the warrants of arrest issued in execution of the decree, only the applicants are named as parties targeted for execution.

13. Be that as it may, considering that the applicants were sued in their personal capacities, they ought to have been served personally. Admittedly, they were served through an address belonging to a company that they were not in control of. And even if they were still directors of that company at the time material to the suit, it cannot be assumed that they were one and the same with the company; indeed they are seperate and distinct legal entities and service of summons on one cannot be assumed to be service of summons on the other.
14. For these reasons, I am satisfied that service of the summons to enter appearance upon the applicants was not effective.
15. And even if it was to be assumed that the judgment in default was regular, there is no evidence that the applicants were served with the notice of entry of judgment. This is contrary to the proviso in Order 22 rule 6 according to which the defendants ought to have been notified of the judgment before the execution of the decree. This rule reads as follows:

> ***Application for execution***
>
> ***Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and***

applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.

16. I am therefore satisfied that the judgment against the applicants is irregular. For the reasons I have given, I would invoke order 10 rule 11 of the Civil Procedure Rules and set aside the judgment. This rule provides that where, as in the instant case, judgment has been entered under Order 10 of the rules, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.
17. In the ultimate, the applicants' application is, allowed. The applicants have 14 days to file and serve their defence. The applicants will also have costs of the application.

It is so ordered.

Signed, dated and delivered on 1 December 2025

Ngaah Jairus

JUDGE