

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMM NO. E358 OF 2020**

**DAWN AVIATION
LIMITED.....PLAINTIFF**

VERSUS

**KENYA AIRPORTS AUTHORITY (KAA)1ST
DEFENDANT**

**WILKEN AVIATION.....2ND
DEFENDANT**

**PERFECT AVIATION LIMITED.....3RD
DEFENDANT**

RULING

1. Before me for determination is the 3rd Defendant/Applicant's Notice of Motion dated 29th November 2024 seeking, in material part, leave for Odero Osiemo & Co. Advocates to come on record post-judgment, and an order setting aside the default judgment dated 6th June 2024, and that they be granted leave to defend the suit.
2. The principal ground upon which the application is based is that the Applicants were never served with the Amended Plaintiff, which introduced the substantive reliefs that formed the basis of the default judgment.

3. According to the Applicants, they only became aware of the same on 28th November 2024 when the decree was served upon them.
4. The Plaintiff opposed the application, terming it misconceived and an abuse of process, and prays that it be dismissed with costs, that execution proceed, and that the judgment of 6th June 2024 be upheld.
5. The matter proceeded by way of written submissions. The 2nd and 3rd Defendants/Applicants filed two sets of submissions, one dated 14th April 2025, and the other dated 6th November 2025 (following cross-examination of the process server on 30th October 2025). The Applicants asserted principally that there was no proper service of the amended pleadings and that the default judgment as against them is irregular and must be set aside *ex debito justitiae*.
6. The Respondent, on the other hand, filed submissions dated 24th March 2025, contending that service was properly effected and therefore the application ought to be dismissed with costs and execution allowed to proceed.
7. I have considered the Motion, affidavits, the detailed rival written submissions, and the record as highlighted by counsel. From the prayers and arguments, I find that the sole issue for determination is whether service upon the 2nd and 3rd Defendants of the amended pleadings was proper, and the consequence for the judgment of 6th June 2024.
8. On the prayer to come on record post-judgment, the Applicants seek leave for **Odero Osiemo & Co. Advocates** to come on record in place of Danish & Collins Advocates post-judgment. The Plaintiff does

not oppose this limited prayer. It is trite that post-judgment changes must comply with Order 9 Rule 9 Civil Procedure Rules. Here, there being no opposition, leave is hereby granted as prayed.

9. On whether service on the 2nd and 3rd Defendants was proper, the Plaintiff asserts that all processes, including Summons, Amended Plaintiff, and hearing notices, were duly served, that the 3rd Defendant participated in the pre-trial at the commencement of the proceedings and even filed a Preliminary Objection, and that the matter proceeded to formal proof only after due service.
10. The Applicants counter that they were never served with the Amended Plaintiff introducing substantive relief against them. They impugn the stamp impression on the served copy as inauthentic, pointing to the absence of the recipient's name and signature, and to the process server's inability (upon cross-examination on 30th October 2025) to identify which "Wilken" entity was served among distinct companies (Wilken Aviation, Wilken Solar, Wilken Telecommunication), or the person who allegedly received service.
11. On the record before this Court, particularly from the examination of the process server, the Court notes the following:
 - i. The process server could not name the individual who received service for the Applicants, nor secure a signature.
 - ii. The stamp impression "Wilken ..." is said to be unknown to the Applicants, against the backdrop that distinct sister companies are bearing the "Wilken" name.

- iii. The affidavit of service cited by the Plaintiff failed to sufficiently identify the recipient or office-holder upon which service was effected.
 - iv. a defect the Applicants say is material in corporate service;
12. Order 10 Rule 11 of the Civil Procedure Rules, 2010 empowers the Court to set aside or vary a default judgement entered under Order 10 (in default of Appearance or Defence) and any consequential decree or Order upon such terms as are just. It provides that: -

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

13. The well-established principles of setting aside interlocutory judgments were laid out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per Duffus P., who stated as follows: -

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

14. In the case of **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR**, the court stated thus:

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he has failed to enter appearance or to file defence, resulting in default judgment.”The court went further to state:“.....such a defendant is entitled, under Order 10 rule 11 of the Civil procedure Rules to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.....”.

15. In the present case, based on the submissions and process-server cross-examination, I am not satisfied that proper service of the Amended Plaintiff was effected upon the 2nd and 3rd Defendants. Accordingly, the Court issues the following orders: -

- i. The firm of **Odero Osiemo & Company Advocates** is hereby granted leave to come on record for the 2nd and 3rd Defendants/Applicants, in place of Danish & Collins Advocates, in accordance with Order 9 Rule 9 of the Civil Procedure Rules.

- ii. The judgment delivered on 6th June 2024, and the decree issued on 7th November 2024, insofar as they relate to and impose obligations upon the 2nd and 3rd Defendants, are hereby set aside *ex debito justitiae* on account of lack of proper service of the Amended Plaintiff.
 - iii. All execution steps, notices, warrants, or enforcement measures issued against the 2nd and 3rd Defendants pursuant to the impugned judgment and decree are hereby vacated.
 - iv. The matter to proceed for case management before the Deputy Registrar, or as may otherwise be directed.
16. Costs to be in the cause.
17. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21st JANUARY 2026.



**HON. JUSTICE MOSES ADO
JUDGE**

In the presence of: -

C/A - Moses

Osiemo.....for the Applicant

Nyakirega.....for the Respondent

