

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

COMMERCIAL CAUSE NO.E002 OF 2024

HEKIMA KIJANI KENYA LTD.....PLAINTIFF/RESPONDENT

VERSUS

CHINA STATE CONSTRUCTION ENGINEERING

CORPORATION KENYA

LTD.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant has moved this court vide a Notice of Motion dated 1/8/2025 seeking the following relief/prayers namely;

(a) Spent.

(b) Spent.

(c) That this hon court be pleased to set aside the ex parte judgment and proceedings and all consequential orders issued therein and grant the defendant unconditional leave to defend this suit and the draft statement of defence annexed hereto be deemed as duly filed and served upon payment of requisite court fees.

(d) That this hon court be pleased to refer this dispute to Arbitration in accordance with Clause 17 of the contract dated 5/9/2018 between the parties.

(e) That leave be granted for counsel for the applicant to be admitted on record for purposes of representing the applicant in this matter.

(f) Costs of this application be provided for.

2. The applicant has listed the following grounds as a basis for its prayers;

(i) That the applicant was not served with summons to enter appearance or any pleadings in the suit.

(ii) That the case proceeded ex parte without knowledge of the applicant.

(iii) That the applicant became aware only after being served with execution papers and proclamation by auctioneers.

(iv) That failure to enter appearance was not deliberate but was due to lack of service and that the defendant is desirous of defending the matter on merit.

(v) That it has a strong defence which raises triable issues which ought to be heard on

merit and that the matter be referred to arbitration in accordance with the contract.

(vi) That the contract between the parties herein dated 5/9/2018 contains a valid Arbitration Clause 17 which mandates that all disputes arising be referred to arbitration.

(vii) That the plaintiff instituted the suit prematurely in breach of the binding arbitration clause.

(viii) That it is in the interest of justice that the defendant be heard and the matter be determined on its merits and that the matter be referred to arbitration in accordance with the contract.

(ix) That unless the orders sought are granted, the applicant stands to suffer irreparable loss, grave injustice and prejudice.

(x) That the respondent stands to suffer no prejudice if the matter is heard on merit.

(xi) That the application has been brought without unreasonable delay.

3. The application is supported by an affidavit sworn on 1/8/2025 by LIU TONG a legal representative of the defendant where he has majorly reiterated the above grounds. He has exhibited a copy of draft defence as exhibit LT1 to demonstrate that the defendant has a good defence.

4. The deponent insists that the defendant was not served and that there is an arbitration clause in the contract entered between the defendant and the plaintiff.
5. He further denies having dealt with a company known as KONVEST SOURCE LIMITED and prays that the matter be referred to arbitration pursuant to the arbitration clause.
6. In its written submission dated 28/8/2025 done through counsel M/s Amule & Co Advocates, the applicant faults the plaintiff/respondent for using substituted service which in its view should be the last resort to be used when a party is trying to evade service. In that regard, it relies on the decision of **Samuel Mbugua -vs- Francis Kimani Njau (2018)eKLR.**
7. It contends that the plaintiff knows the defendant's physical address where its offices are located adding that it has never relocated from the known premises.
8. It faults the respondent for misrepresentation and obtaining leave for substituted service wondering why it was easy to locate the same offices easily when effecting service of the decree and commencing execution. The applicant contends that the same is a clear demonstration of abuse of court process calculated to obtain judgment through subterfuge.
9. The defendant submits that judgment entered without proper service should be set aside to uphold the constitutional right to a fair hearing. It relies on the case of **Fidelity Commercial Bank Ltd -vs- Thurania Karani &**

Another (2008)eKLR. According to the applicant the judgment entered herein was irregular and the defendant has been condemned unheard.

10. It submits that while its initial prayer is leave to defend, the primary purpose of its application is to address injustice of *ex parte* judgment so that the matter can be properly ventilated either by way of defence or through arbitration as provided for in the contract. It contends that the jurisdiction of this court to refer a matter to arbitration is not a matter of timing but upholding the parties' contractual autonomy adding that parties should be held to their contractual bargain. On this point it relies on the decision in **Charles Kimani Teresia & Anor -vs- Peter Njoroge Kimani & Anor (2018)eKLR.** According to the applicant a court has no jurisdiction to hear a matter where there is a valid arbitration agreement, until the arbitration process is exhausted.
11. The applicant submits that arbitration process is a cornerstone of Alternative Dispute Resolution enshrined under Article 159(2) of the Constitution. It takes the position that by granting this application this court in its view would be upholding the parties' contractual intent and promoting the constitutional value of alternative dispute resolution.
12. The respondent has opposed this application through a replying affidavit sworn by Victoria Mukiiri sworn on 20/8/2025.

13. The deponent avers that she is a representative of the plaintiff/respondent and that the defendant was duly served by way of substituted service vide an advert published in the Standard Newspaper on 12/6/2024 following leave of court. She has exhibited an affidavit of service together with except from Standard Newspaper dated 12/6/2024.
14. The respondent avers that the defendant/applicant failed and/or neglected to enter appearance and/or file defence within the prescribed period and that consequently it applied for judgment in default of appearance which was granted by this court.
15. It further avers that interlocutory judgment was entered and the matter proceeded on formal proof upon which judgment was entered in its favour.
16. The respondent further avers that the defendant was duly served with Notice of entry of judgment together with a notice to settle the judgment sum thereby notifying it about the outcome of the proceedings and demanding compliance.
17. According to the respondent the defendant failed and/or neglected to settle judgment sum within prescribed period forcing them to extract the decree and apply for execution.
18. It faults the applicant for afterthought in this application stating that it aims at delaying the fruits of judgment.
19. The plaintiff further contends that the draft defence in paragraph 7 & 10 admits the existence of the debt and that

besides that it was well aware of the proceedings herein as well as entry of judgment because it was duly served.

20. That by virtue of Section 6(1) of the Arbitration Act, an application for a referral of dispute to arbitration must be made not later than the time the applicant submits its first statement on the substance of the dispute.
21. It contends that by submitting a statement of defence without simultaneously or prior application to refer the matter to arbitration, defendant may be deemed to accept court's jurisdiction thereby waiving the right to arbitration.
22. The respondent submits that the applicant cannot now retreat behind the arbitration clause after failing to apply for it timeously.
23. It is the respondent's contention that its claim is a clear and admitted debt and contends that there is no dispute to be referred to arbitration.
24. According to the respondent the judgment entered was regular and there are no satisfactory reasons given why defence was not filed within stipulated time.
25. The plaintiff prays that should this court find merit in this application, then the defendant should pay costs incurred in execution and a deposit of entire amount in court.
26. In its written submissions dated 9/9/25 done through learned counsel ANO Advocates LLP, the respondent insists

that the application before court is devoid of merit in fact and law.

27. It submits that the ex parte judgment entered herein was regular because it is founded on due process and procedural propriety. It submits that service of summons to enter appearance was effected strictly in the manner sought and sanctioned by this hon court. It is its conclusion that service was properly effected by way of advertisement pursuant to the leave of this court.
28. It further contends that the applicant has not raised any reasonable challenge to the regularity or legality of Order 5 Rule 17 (1) of the Civil Procedure Rules or to the directions by court issued pursuant thereto and that the orders granted for substituted service have not been impugned and remain unchallenged and that acts undertaken pursuant thereto are consequently valid and valid in law.
29. According to the respondent it was unable to effect personal service upon the applicant as the applicant had no known or operational office having closed and abandoned its known project site at Endebess.
30. It claims that it was forced to resort to procedure under Order 5 Rule 22B of Civil Procedure Rules and effected service through electronic means. It further contends that the service in itself was valid and cannot be impeached.
31. The respondent submits that applicant's reliance on the decision of Fidelity Commercial Bank Ltd is misplaced as the

decision bears no relevance to the circumstances in the present case.

32. The respondent contends that the applicant has already filed a defence thereby waiving the right to arbitration and that besides that there is no triable issue or genuine dispute for arbitration since liability is undisputed. It claims that it has adduced uncontroverted evidence on applicant's indebtedness and that the admission extinguishes any conceivable dispute capable of being referred to arbitration. It submits that Section 6 of the Arbitration Act can only arise where there is a bona fide dispute between the parties and that invocation of the arbitration clause is misplaced in this instance. It relies on the decisions of **UAP Provincial Insurance Co Ltd -vs- Michael John Beckett (2013)eKLR** and **Niazsons (K) Ltd -vs- China Roan & Bridge Corporation (2001)eKLR**.

33. It further submits that admission of indebtedness extinguishes any arguable issue and that arbitral process cannot be invoked to delay or obstruct enforcement of admitted obligations. In that regard it cites the decision of **Momanyi -vs- Hatimy & Anor (2003) 2 EA 600** and **Corporate Insurance Co Ltd -vs- Nyali Beach Hotel Ltd (1995-1998) I EA 7** where courts took the position that a dispute presupposes a denial of a claim and where there is none, arbitration cannot be invoked. According to the respondent, the application for reference to arbitration is

intended to merely buy time and avoid judgment. It submits that this court has a duty to guard against such abuse of its process and relies on the decision of **Fina Bank Ltd -vs- Spares & Industries Ltd (2001)eKLR.**

34. The respondent contends that the applicant has approached this court and has invoked arbitration in a bad faith having admitted its indebtedness to the plaintiff.

35. This court has set out the applicant's case and the prayers sought, the grounds and its submissions. I have also laid out the response from the defendant/respondent. The applicant substantively seeks to set aside the judgment entered in default of appearance and to have the case referred to arbitration. Its main argument is that it was never served with summons to enter appearance or the plaint. It further argues that this matter should be referred to arbitration owing to the existence of an arbitration clause in the contract agreement between the parties herein. That is the applicant's case in summary.

36. The respondent's case on the other hand is that the applicant was duly served via substituted service sanctioned by this court, that the process of service has not been impeached and that the applicant has not denied the plaintiff's claim. To the defendant there is no dispute to be referred to arbitration as the defendant has admitted its indebtedness to the plaintiff.

37. The issues arising from this application therefore are;

- (i) Whether the defendant was duly served with summons and plaint but failed to enter appearance within the stipulated time.***
- (ii) Whether there are triable issues raised in the draft defence.***
- (iii) Whether there is an arbitration clause advocating referral of matter to Arbitration.***

38. (i) Whether the defendant was duly served with summons to enter appearance and plaint.

It is well settled that service of summons and any other process for that matter is an imperative under Order 5 of the Civil Procedure Rules. The procedures of service provided under that rule are intended to protect and respect the right of the other party to be heard. The applicant's assertion to that right is well taken.

39. The big question posed is whether the defendant was duly served as provided for by the law. It is not disputed that the plaintiff/respondent approached this court with an application for substituted service after its attempts to effect personal service became futile because of lack of defendant's permanent address. The record shows that order for substituted service was granted by Justice

Nyakundi on 6/6/24 upon application dated 17/5/2024 brought by the plaintiff.

40. It is also uncontested that the applicant has not challenged the leave granted by court on 6/6/24 for substituted service. The respondent has exhibited an affidavit of service by the respondent's counsel namely by Ninah Joshua Mwachofi sworn on 12/6/2024 and the newspaper advert from Standard Newspaper of 12/6/2024 demonstrating that service of summons was indeed carried out via a Newspaper with wide circulation. The applicant has not denied this fact but insists that the applicant should have tried personal service in the first instance and use substituted service as a last resort.

41. This court however finds that though the applicant has submitted it did not relocate from its known physical address, it did not make any averment to that effect in an affidavit. The affidavit of Liu Tong sworn on 1/8/2025 is quite silent on that crucial fact. What that means is that the respondent's claim in the application dated 17/5/24 and in particular the averment of Victoria Mukiiri that the defendant changed its last known construction site and vacated to unknown location is unchallenged and uncontested.

42. Flowing from this finding of fact, this court finds that the basis for substituted service has not been challenged or impeached as the respondent describes it. Order 5 Rule 17(1) of the Civil Procedure Rules provides as follows;

“Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit”.

43. The applicant has not raised any issue regarding the legality or regularity of the mode of service sanctioned by court vide its order dated 6/6/2024.

44. This court therefore finds that service of summons to the defendant was regular, proper and done in accordance with the law. The defendant was duly served with summons and plaint but failed due to undisclosed reasons to enter appearance and defence within the stipulated time as provided for under Order 6 Rule 1 of the Civil Procedure Rules. The applicant has not offered reasonable explanation to explain why it did not comply with the law in entering appearance and defending itself.

45. (ii) **Whether the draft defence raises triable issues.**

It is quite evident that the claim herein is colossal but from the documents tendered by the respondent, it is apparent

that the amount was owing from contracted service well captured in the plaint.

46. In the draft defence the applicant in paragraph 7 admits the contents of paragraph 14, 15 and 16 of the plaint and claims that it paid Kshs.6,500,000/- out of the Kshs.48,218,485/-. This means that the defendant in its defence admits being indebted to the tune of Kshs.41,718,485/-. The defendant in paragraph 10 further admits another invoice of Kshs.10,000,000/- and states that the amount was to be paid upon receiving funds from Kenya National Highways Authority (KENHA). This means that going by the pleadings out of the principal sum of Kshs.70,026,559/-, Kshs.51,718,485/- is expressly admitted leaving a balance of Kshs.18,308,074/- which can be termed as the amount in dispute or contested.

47. This court finds that other than the disputed amount which is Kshs.18,308,074/- as per the above calculations, the other amount is admitted and the applicant cannot invoke the provisions of Section 6 of the Arbitration Act as doing so will be an abuse of court process aimed at using the said provision as a shield to its obligation to pay its debts. That is not tenable in law because just as the defendant has a right to be heard so to the plaintiff's right to access justice.

The applicant cannot be allowed to delay or obstruct justice through invocation of Section 6 of Arbitration Act particularly where a claim is partly admitted as in this instance.

48. This court finds that to the extent that the applicant partly admits the sum of Kshs.51,718,485/-, there is no triable issue for referral to arbitration even if the applicant had established the existence of an arbitration clause. I say so because the applicant simply stated that there is an arbitration clause in their contract between it and the respondent. They should have exhibited the same in this application to support its prayer for arbitration. The relief sought in that regard is not well founded. That disposed off the 3rd issue in this application.

49. This court from the foregoing finds that it is in the interest of justice despite failing to demonstrate that it was not properly served, this court will partly allow the application dated 1/8/2025 by setting aside judgment in the sum of Kshs.18,308,074/- which sum is found to be contested.

The defendant is granted leave to defend the contested amount but the judgment on the balance or the admitted amount shall remain payable to the decree holder. Costs of this application inclusive execution charges incurred shall be paid by the defendant/applicants because it is to blame for inaction in this matter. It has 14 days to either file defence or pay court fees for the draft defence. For clarity prayer (c) of the application is allowed only to extent stated herein above. Prayer (d) for now is declined but parties are at liberty to move the court. Prayer (e) is

allowed as a matter of course. A mention date for further orders/or pre-trial will be taken upon delivery of this ruling.

DELIVERED, DATED and SIGNED at KITALE this20th day ofJANUARY....., 2026.

**HON JUSTICE R.K. LIMO
KITALE HIGH COURT**

Ruling delivered in open court

In the presence of;

Sundwa holding brief for Okullo for plaintiff/respondent

Amule for defendant/applicant

Duke/Chemosop- court assistants