REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMM NO. E864 OF 2021

AFRICAN BANKING CORPORTION LIMITED …PLAINTIFF/RESPONDENT

-VERSUS-

DIASPORA GLOBAL INVESTMENTS LIMITED ……..…. 1ST DEFENDANT/APPLICANT

LANDMERK INTERNATIONAL PROPERTIES LIMITED……..2ND DEFENDANT/APPLICANT

PATRICK MACHARIA NDERITU…...…….....3RD DEFENDANT/APPLICANT

ANNA NJERI GITANYU……...……..4TH DEFENDANT/APPLICANT

JOSHUA GITONGA WANGANGA……..…….5TH DEFENDANT

FREDRICK MUCHIRI KARIUKI……..…….6TH DEFENDANT

CRYSTAL VALUERS LIMITED……...…….7TH DEFENDANT

CHIEF LANDS REGISTRAR…….…….8TH DEFENDANT

RULING

1. The 1st to 4th defendants/applicants filed a Notice of Motion application dated 11th December 2024 pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 12 Rule 7 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law, seeking orders that pending the hearing and determination of this application, the Court issues an order restraining the plaintiff whether acting personally or through agents, assigns, or servants, from executing the decree dated 24th November 2022, an order adjourning the hearing of the main suit scheduled for 6th February 2025 (now past), and an order to set aside the Judgment entered against them.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Patrick Nderitu Macharia, the 3rd defendant herein and one of the Directors of the 1st & 2nd defendant companies. Mr. Macharia averred that the applicants entered into a loan Agreement with the plaintiff for Kshs.60,000,000/=, secured by a parcel of land registered in the name of the 1st defendant. That upon default in repayment, the plaintiff issued the requisite Statutory Notices to sell the charged property, but disputes subsequently arose regarding the valuation and size of the land. He deposed that thereafter, the plaintiff instituted this suit to recover the amount allegedly due, but they were never served, as service was purportedly effected upon one Fredrick Muchiri, a deceased former Director of the 1st & 2nd defendant companies. He deposed that the suit proceeded without their knowledge, culminating in a Judgment and decree dated 24th November 2022 against them. Mr. Macharia contended that the 1st to 4th defendants only became aware of this suit when the plaintiff sought to execute the decree, prompting the instant application.

3. In opposition to the instant application, the plaintiff filed a replying affidavit sworn on 12th March 2025 by Mr. Louis Omukhulu, an Advocate of the High Court of Kenya and the plaintiff's Assistant Legal Manager. Mr. Omukhulu averred that upon being served with Summons and pleadings on 8th December 2021, the 1st to 4th defendants appointed the firm of Matiaria & Co. Advocates, which duly filed a Notice of Appointment and has remained on record, continuing to receive service of documents without filing any application to cease from acting. He deposed that interlocutory Judgment was entered on 4th May 2022 by Hon. Elizabeth Tanui for Kshs.162,141,472.59, plus contractual interest at 19.5% per annum from 6th February 2021 until payment in full, and a decree dated 23rd November 2022 was subsequently extracted.

4. Mr. Omukhulu stated that a Notice of Entry of Judgment was served in compliance with Order 22 Rule 6 of the Civil Procedure Rules and the matter appeared in Court several times thereafter, including for the delivery of a Ruling on 9th February 2024, in respect of an application by the 7th defendant. He asserted that the plaintiff later initiated execution through a Notice to Show Cause, and it was only at that stage that the 1st to 4th defendants re-emerged claiming lack of knowledge of the suit. Mr. Omukhulu noted that the 1st to 4th defendants' supporting affidavit acknowledged the existence of the credit facility secured by Title Number KJD/Kaputiei-North/73629 and guaranteed by the 2nd to 6th defendants, as well as the 1st to 4th defendants' default and receipt of Statutory Notices, thereby confirming their indebtedness.

5. He further averred that no plausible explanation has been given for the failure to file a defence, no draft defence has been annexed, and that the new Advocates have not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, regarding change of Advocates after Judgment. Mr. Omukhulu stated that the outstanding sum remains unpaid and that setting aside of the Judgment would greatly prejudice the plaintiff. In the alternative, she urged this Court to order the 1st to 4th defendants to deposit the decretal sum in a joint interest-earning account as security, if this Court is inclined to grant the orders being sought herein.

6. In a rejoinder, the 1st to 4th defendants filed a further affidavit sworn on 10th June 2025 by Mr. Patrick Nderitu Macharia, the 3rd defendant herein and one of the Directors of the 1st & 2nd defendant companies. Mr. Macharia denied that the law firm of Mariaria and Company Advocates was ever instructed or authorized by the 1st to 4th defendants to act on their behalf. He asserted that there was no Board resolution or authority granting such instructions, thus the said law firm acted without their consent. He maintained that the 1st to 4th defendants had no

knowledge of the pendency of this suit and annexed a draft statement of defence dated 6th October 2021.

7. The application herein was canvassed by way of written submissions. The 1st to 4th defendants' submissions were filed by the law firm of Okatch & Partners Advocates on 3rd July 2025, while the plaintiff's submissions were filed on 25th August 2025 by the law firm of Kimani & Michuki Advocates.

8. Ms. Amutavi, learned Counsel for the 1st to 4th defendants relied on the cases of **Oriental Commercial Bank Limited v Central Bank of Kenya** [2012] KEHC 4758 (KLR) and **Njuguna & another v Tamirat Court Company Limited** (Environment and Land Miscellaneous Application 182 of 2022) [2023] eKLR, and submitted that no Board resolution or authority was issued instructing the law firm of Mariaria and Company Advocates to represent the 1st to 4th defendants, thus no Advocate-client relationship existed. She cited the cases of **Wachira Karani v Bildad Wachira** [2016] KEHC 6334 (KLR) and **Patel Vs East Africa Cargo Handling Services Ltd** [1974] EA 75, for the proposition that an *ex parte* Judgment is not on the merits and may be set aside where a triable issue is disclosed.

9. Counsel stated that the 1st to 4th defendants' draft statement of defence attached to their affidavit, raises triable issues, particularly, concerning the valuation dispute, and that service upon an Advocate without prior service upon the corporation, contravenes Order 5 Rule 3 of the Civil Procedure Rules, 2010. In conclusion, she submitted that the 1st to 4th defendants have demonstrated sufficient cause to warrant the setting aside of the *ex parte* Judgment, staying execution, and awarding costs of the application to them, in the interest of justice.

10. Mr. Gakunga, learned Counsel for the plaintiff submitted that the instant application is incompetent and misconceived, having been brought under Order 12 Rule 7 of the Civil Procedure Rules, 2010, instead of Order 10 Rule 11 of the said Rules, with the latter provisions governing the setting aside of default Judgments entered for failure to file a defence. He contended that no *ex parte* hearing occurred, as the 1st to 4th defendants entered appearance through Counsel but failed to file a defence within time, leading to a regular default Judgment. Counsel relied on the cases of **Phylis Amwayi Okuyosi v Paul Musyoka Kaloki** [2019] KEELC 896 (KLR) and **John Langat v Kipkemoi Terer, Independent Electoral and Boundaries Commission & Interim County Assembly Clerk Bomet County** [2013] KEHC 2986 (KLR), and argued that the current Advocates for the 1st to 4th defendants are improperly on record contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, as no leave of Court or consent with the previous Advocates was obtained after Judgment.

11. Mr. Gakunga asserted that the impugned Judgment was regular, as proper service was effected pursuant to the provisions of Order 5 Rule 3 of the Civil Procedure Rules, 2010. Counsel argued that the affidavit of service detailed the mode of service upon the Director of the 1st & 2nd defendants via email, and that the 1st & 2nd defendants neither applied to cross-examine the Process Server nor rebutted the presumption of service. Counsel relied on the Court of Appeal case of **Shadrack Arap Baiywo v Bodi Bach** [1987] KECA 69 (KLR) and the case of **Njoroge v Smith** [2024] KEHC 5251 (KLR), for the proposition that an affidavit of service stands unless successfully challenged. He submitted that the law firm of Mariaria & Co. Advocates entered appearance and remains on record, and that allegations of lack of instructions are unsubstantiated and unsupported by any proceedings against the said law firm.

12. Counsel cited the Court of Appeal cases of **Abdalla Mohamed & another v Mbaraka Shoka** [1990] KECA 49 (KLR) and **Shanzu Investments Ltd v Commissioner of Lands** [1993] KECA 36 (KLR), and submitted that the draft defence discloses no triable issues, as it admits the existence of the credit facility, default, guarantees, and issuance of Statutory Notices, which amount to an admission of liability. Mr. Gakunga referred to the Court of Appeal case of **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono** [2015] KECA 846 (KLR), in asserting that the 1st to 4th defendants' draft statement of defence raises triable issues that ought to be determined on merits. He maintained that no reasonable explanation has been offered for the failure to file a defence, thus setting aside the impugned Judgment would prejudice the plaintiff by delaying recovery of admitted sums.

ANALYSIS AND DETERMINATION.

13. I have considered the application filed herein, as well as the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issues that arise for determination are-

    i) **Whether the instant application is fatally defective for being brought under the wrong provisions of the law; and**
    ii) **Whether the application herein is merited.**

Whether the instant application is fatally defective for being brought under the wrong provisions of the law.

14. The instant application has been brought pursuant to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010, which grant Courts the discretion to set aside or vary a Judgment entered for non-attendance and/or an order dismissing a suit for non-attendance, upon such terms as may be just. The

record shows that the impugned *ex parte* Judgment entered against the defendants was not as a consequence of their non-attendance in Court, but it was as a result of the defendants entering appearance but failing to file a defence within the prescribed timelines. The instant application ought to have been filed pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, which provides for the setting aside of default Judgments entered for failure to enter appearance and/or file a defence.

15. In the premise, save for the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, I am persuaded that the instant application has been brought under the wrong provisions of the law.

16. As to whether the instant application is fatally defective for being brought under the wrong provisions of the law, this Court refers to the provisions of Sections 1A and 1B of the Civil Procedure Act. The said provisions require Courts to uphold substantive justice by giving effect to the overriding objective, which includes the just determination of proceedings, the efficient resolution of disputes, the effective use of judicial and administrative resources, and the timely and affordable disposal of cases. The effect of the overriding objective was considered by the Court of Appeal in **Stephen Boro Gitiha v Family Finance Building Society & 3 others** [2009] KECA 44 (KLR), as hereunder –

> ***The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way... I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with***

> ***unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.***

17. Bound by the aforementioned decision, this Court finds that the fact that the instant application has been filed under the wrong provisions of the law affects its form rather than its substance. This is particularly so, because the contents of the instant application would remain the same even if 1st to 4th defendants were to bring it under the correct legal provisions.

18. In the circumstances, I am of the view that the shortcoming, is a procedural technicality curable under Article 159(2)(d) of the Constitution of Kenya, 2010, thus not a fatal error. Accordingly, this Court finds that the instant application is not fatally defective on that basis.

Whether the application herein is merited.

19. Upon examination of the orders being sought by the 1st to 4th defendants in the instant application, it is clear that they are all framed to remain in force only pending the hearing and determination of the application herein. Accordingly, this Court is of the considered view that even if it was to find that the 1st to 4th defendants have established a case to warrant being granted the orders being sought herein, such orders cannot be granted as they would effectively lapse upon the delivery of this Ruling.

20. To this end, I concur with the holding in the case of **Catherine Njeri Macharia v Macharia Kagio & another** [2013] KEHC 4031 (KLR), where the Court when faced with a similar situation made the following observation -

> ***I accept and approve the holding by Hon. Justice Lesiit in HCCC No. 329 of 2003 ANO SHARIFF MOHAMMED VS. ABDULKADIR SHARIFF ABDIRAHIM and Hon. Justice Fred Ochieng in HCCC No. 2047 of 2000 WILFRED O. MUSINGO VS. HABO AGENCIES LTD where my colleague judges were faced with applications seeking prayers similar in wording as in the instant application by the plaintiff. Justice Lesiit rendered herself as follows in the case referred to:***
>
> > ***The prayer seeks a stay of execution of decree pending the hearing and determination of this application. The issue is that once the application is heard and determined then what. I do not think the prayer is worded correctly as the stay of execution should be prayed pending something other than the application itself. Considering this prayer and the manner it is worded, it is my view that the entire application is spent and that there remains nothing for me to stay.***
>
> ***For his part Hon. Justice Ochieng rendered himself thus: -***
>
> > ***Now I revert to the orders sought by the Defendant. First it seeks an order of stay of execution pending the hearing and determination of this application. In other words, the very moment the court will have heard and determined the application dated 27th September, 2005 there would be no orders for stay of execution. Therefore, even if I were to grant prayer 2 as prayed, it would lapse as soon as I finish reading***

this ruling. As on 28th October, 2005, I had already given an order staying execution until today.

I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given.

21. Consequently, this Court finds that given the manner in which the prayers sought herein are framed, there will be no orders remaining for this Court to grant once this Ruling is delivered.

22. In the circumstances, this Court finds that the instant application is defective. It is hereby struck out with costs to the plaintiff.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** on this **6th** day of **March 2026. Ruling delivered through Microsoft Teams Online Platform.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mark Otieno h/b for Mr. Okatch for the 1st to 4th defendants/applicants

Mr. Gakunga for the plaintiff/respondent

Ms Bubi for the 7th defendant

No appearance for the 5th and 8th defendants

Ms. B. Wokabi – Court Assistant.