

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**HCCC 822 OF 2010**

**CANUK HOLDINGS LIMITED.....**  
**.....PLAINTIFF**

**VERSUS**

**PATRICK LUTTA**

**T/A LUTTA & COMPANY ADVOCATES.....1<sup>ST</sup>**  
**DEFENDANT ENOCK**

**TUITOEK.....2<sup>ND</sup> DEFENDANT**

**MAURICE ALDOUS OPAR.....3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

1. Before the court is the 3<sup>rd</sup> defendant's notice of motion dated 12.2.2025, seeking: -

**(4) The default Judgment entered on 24<sup>th</sup> June 2024 against the 3<sup>rd</sup> Defendant and Decree issued together with all subsequent warrants of arrest and any other orders (if any) herein be set aside.**

**(5) Leave to enter appearance and defend the suit herein unconditionally.**

2. The grounds are that: -

- (1)The plaintiff has obtained warrants of arrest against him.
- (2)The judgment was entered against him in default yet he was never served with any summons to enter appearance.
- (3)The plaintiff made an application for substituted service on grounds that he could not be traced yet after the entry of judgment in default it caused him to be arrested and charged in **Criminal Case No. 609 of 2012.**
- (4)The application for substituted service was based on falsehood.
- (5)He learnt of this suit when he was served with the notice to show cause (NTSC) on 28.11.2024 within the court precincts.
- (6)He complained that the plaintiff never mentioned this suit earlier whenever they met in court for the criminal case.

### **Response**

3. The plaintiff highlighted that it filed the suit in 2010. On 31.1.2011, the process server

confirmed having served the 1<sup>st</sup> defendant but could not trace the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

4. The plaintiff then filed an application dated 31.1.2011 seeking court's leave to serve the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by way of substituted service. Pursuant to the court order of 7<sup>th</sup> March 2011, it proceeded to advertise the summons in the *Daily Nation*.
5. The plaintiff also highlighted that the 3<sup>rd</sup> defendant did not enter appearance and court entered judgment in default against him. 7.10.2011. It claimed that the application seeks to set aside a non-existent default judgment of 24.6.2024.
6. The plaintiff underlined that the 2<sup>nd</sup> defendant entered appearance and filed his defence but did not participate in the hearing. The matter proceeded to full hearing with the 1<sup>st</sup> defendant. The court delivered a judgment dated 21.9.2015.
7. The plaintiff stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant made a similar application for stay dated 9.10.2015. Once they got stay in 2015,

they did not prosecute it until it applied to set it aside on 14.4.2020. Through a ruling dated 22.1.2021, the court dismissed the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's application for stay and set aside the stay orders.

8. The plaintiff faulted the 3<sup>rd</sup> defendant for not moving the court to set aside the default judgment since it was entered, about 15 years ago. It postulated that since the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were long time partners, it is not plausible that the 2<sup>nd</sup> defendant came to know about the summons through the newspaper advertisement and did not inform the 3<sup>rd</sup> defendant.
9. The plaintiff asserted that it complied with **Order 5 Rule 17 of the Civil Procedure Rules** on substituted service. It relied on subrule 2 to the effect that substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
10. The plaintiff confirmed that the 3<sup>rd</sup> defendant was arrested over the same case and criminal

charges were preferred against him on 7<sup>th</sup> May 2012 vide **Criminal Case No. 609 of 2012**. It disclosed that when it knew the 3<sup>rd</sup> defendant's whereabouts, he was always served with all subsequent applications in person or *WhatsApp*.

11. The plaintiff highlighted that it served the 3<sup>rd</sup> defendant with bill of costs in 2021 and that he responded. It argued that the application is vexatious and out to delay the execution of the judgment.

12. The plaintiff further submitted that the 3<sup>rd</sup> defendant has not met the legal threshold for a stay of execution. It faulted the 3<sup>rd</sup> defendant for not filing any appeal since default judgment was entered.

13. The plaintiff relied on: -

(1) **Anjeli Limited v Kenga Simba & 12 others; Chengo Omar & 19 others (Intended Interested Parties) [2021] KEELC 1463 (KLR)**

(2) **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR**

(3) **Mwangi S. Kimenyi v Attorney General and Another, Civil Suit Misc. No. 720 of 2009,**

(4) **M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No. 63 Of 1997**

#### **Analysis and Determination**

14. The issue for determination is whether the default judgment entered against the 3<sup>rd</sup> defendant should be set aside for improper service.

15. At the outset, I note that the 3<sup>rd</sup> defendant seeks to set aside the default judgment entered on 24.6.2024. However, the record shows that the interlocutory judgment was entered on 7.10.2011.

16. Guided by **Article 159 (2) (d) of the Constitution**, I will take it that the date of 24.6.2024 may have been an error and

therefore consider the merits of the application.

17. The court has discretion to set aside a default judgment based on principle according to the unique circumstances of a case. **Order 10 Rule 11 of the Civil Procedure Rules.**

18. A regular default judgment is entered where the defendant was duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file a defence, resulting in the default judgment.

19. An irregular default judgment is entered against a defendant who has not been served or properly served with summons to enter appearance would be set aside *ex debito justitiae*, as a matter of right, to uphold the dignity of the legal process. **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**

20. In this case, the 3<sup>rd</sup> defendant claims that the judgment was entered against him in default yet he was never served with any summons to

enter appearance. He contends that the application for substituted service was based on falsehood that he could not be traced yet the plaintiff was the complainant in **Criminal Case No. 609 of 2012** that he was charged in.

21. In **Boskill v Jofwe & 7 others [2024] KEELC 5836 (KLR)** the court underscored that: -

***“In setting aside applications and especially those based on non-service, the court needs exercise maximum caution to prevent the injustice that may occur of declining a setting aside application and hence barring a litigant in the event it eventually turned out that the claims of non-service were, after all, correct. The court must carefully assess the evidence supplied by the parties claiming non-service and weigh it against the assertions of the party alleging service, and determine which of the opposing positions is likely to lead to justice in the case. And under the Civil Procedure Rules, even where service has been effected but the court is***

***persuaded on the basis of the material presented in a setting aside application that such service was insufficient and is likely to engender an injustice, it may exercise its discretion and set aside the judgment in the case. All this approach is intended to jealously guard a citizen's constitutional right to a fair hearing as envisaged in Article 50 of the Constitution."***

22. As earlier noted, default judgment was entered against the 3<sup>rd</sup> defendant on 7.10.2011. He was charged in the criminal case sometime in 2012.

23. The plaintiff applied for leave to serve the 3<sup>rd</sup> defendant by way of substituted service on 31.1.2011. This was after the process server indicated that he was unable to trace the 3<sup>rd</sup> defendant and effect service upon him personally.

24. I note that the 3<sup>rd</sup> defendant has filed this application over 14 years after the default judgment was entered. The 3<sup>rd</sup> defendant challenges the basis for the substituted

service. Yet, the process server's averments in the affidavit of service remain uncontroverted.

25. Moreover, the 3<sup>rd</sup> defendant claims that the plaintiff knew his whereabouts at the time when it applied for substituted service in January 2011 because of the Criminal Case which was initiated in 2012. I have read the charge sheet dated 7.5.2012. exhibited.

26. My take is that the criminal case, having been instituted in May 2012, cannot retrospectively establish the plaintiff's knowledge of the 3<sup>rd</sup> defendant's whereabouts in January 2011. Thus, I find that the claim that the plaintiff knew his thereabouts then is speculative and unsupported by evidence.

27. **Order 5 Rule 17 (2) of the Civil Procedure Rules** provides that substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.

28. Therefore, I find that the 3<sup>rd</sup> defendant was properly served. Thus, the default judgment is a regular one.

29. However, the court has unfettered discretion to set aside a regular default judgment in the interest of justice, to prevent prejudice, where the defence raises triable issues, plausible explanation has been provided for the failure to file appearance of defence. **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [supra], Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).**”

30. Default judgment was entered against the 3<sup>rd</sup> defendant on 7.10.2011. The application to set aside the default judgment is dated 12.2.2025. The 3<sup>rd</sup> defendant has not given plausible explanation or any justification for the delay in filing the application.

31. There is evidence that the 3<sup>rd</sup> defendant knew about the case as he and the 2<sup>nd</sup> defendant applied for stay of execution in 2015. No demonstrable justification on what prevented

him from applying to set aside the default judgment at the time.

32. The draft statement of defence annexed to the application is a mere denial of the plaintiff's claims against him. It raises no triable issues.

33. Taking all the circumstance into consideration, I am satisfied that setting aside of the default judgment would be prejudicial and an injustice to the plaintiff.

34. The 3<sup>rd</sup> defendant has not demonstrated proper grounds for setting aside the default judgment.

### **Disposal**

35. In the upshot, the 3<sup>rd</sup> defendant's application dated 12.2.2025 is dismissed for want of merit with costs to the plaintiff.

**Dated, signed and delivered at Nairobi through  
Microsoft Teams online application this 9<sup>th</sup> day  
of April, 2026**

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

Ojienda for 2<sup>nd</sup> defendant

Kyobika for Plaintiff

3<sup>rd</sup> defendant absent

CA - Ivan/Aggrey