



**M Oriental Bank Limited v East African Logistics Limited & 2 others (Civil Case E096 of 2021)
[2025] KEHC 1043 (KLR) (Commercial & Admiralty) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E096 OF 2021
FG MUGAMBI, J
FEBRUARY 27, 2025**

BETWEEN

M ORIENTAL BANK LIMITED PLAINTIFF

AND

EAST AFRICAN LOGISTICS LIMITED 1ST DEFENDANT

NIRAV PRAHBULAL SHAH 2ND DEFENDANT

RAJEN DINESH CHNDRA SHAH 3RD DEFENDANT

RULING

1. For determination is the application dated 27th September 2024 in which the applicant seeks a review and/or setting aside of the interlocutory judgment delivered by this court on 30th April 2021 along with the consequential decree and orders. Additionally, the applicant seeks to restrain the plaintiff/respondent (the Bank) from executing the decree and seeks leave to be allowed to defend the suit on its merits.
2. The application is supported by affidavits sworn by the applicant. The applicant contends that he was unaware of the suit and was never served with the summons and pleadings, which prevented him from entering an appearance or defending the suit. He asserts that he only became aware of the case when a police officer and a bailiff visited his residence to execute the judgment. The applicant further states that he received a call from the Bank's counsel informing him of the suit and its pleadings, which he maintains he had never been served with.
3. The applicant argues that, although the affidavit of service sworn on 26th April 2021 indicates that he was served via email at nirav.shah2606@gmail.com, he was 'unable to trace the alleged documents.' He further asserts that he has a valid defense against the Bank's claim. In his defense, the applicant contends



that the Bank was duty-bound to first pursue the principal borrower of the loan facility before seeking recovery from him as a guarantor.

4. The applicant has attached a draft statement of defense, in which he further contends that the Bank has already received payments exceeding the amounts originally borrowed by the 1st defendant. He faults the Bank for failing to provide him with statements of account despite his requests and denies having been informed of the 1st defendant's default. Additionally, he disputes the amounts claimed by the Bank, arguing that they are excessive, particularly given that the Bank has already repossessed some of the securities.
5. The application is opposed through the replying affidavit sworn by Wilfred Machini, on behalf of the Bank. The Bank maintains that the summons to enter appearance, along with the plaint and the mention notice, were duly served on the applicant via email at nirav.shah@ameg.co.uk. The Bank further states that the applicant later contacted its advocates using a different email address, nirav.shah@gmail.com, enquiring about the suit.
6. The Bank contends that even after judgment had been entered, it served the notice of entry of judgment upon the applicant on 2nd August 2021, via the same email address he had used to reach out to the Bank's advocates. Noting that there were no assets available for attachment against the defendants, the Bank confirms that it was constrained to proceed with execution by way of committal to civil jail of the 2nd and 3rd defendants. The applicant was served with notices to show cause on 18th May 2023 through the email nirav.shah@gmail.com, but failed to respond. Consequently, warrants of arrest were issued against him.

Analysis and Determination

7. The parties filed their respective submissions, which I have carefully considered alongside the application, responses, case law, and the evidence presented.
8. The power to set aside an interlocutory judgment is discretionary. It is provided for under Order 10, Rule 11 of the Civil Procedure Rules, which states as follows:

“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”.
9. The rationale for this discretion was articulated by this court in *Kabiro Ndaiga & Co. Advocates Vs Kenya Tea Development Agency Ltd* [2002] KeHC 946 (KLR), citing *Harris J in Shah v Mbogo* 1967 EA 116. The court observed as follows:

“The principles governing the exercise of the courts discretion to set aside judgment obtained ex-parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.
10. One of the key grounds on which the applicant seeks to set aside the interlocutory judgment is the issue of service. Under Order 5, Rule 22B of the Civil Procedure Rules, electronic service is permissible. However, the burden of proof rests on the Bank to demonstrate that proper service was effected. To discharge its burden, the Bank attached the email which was sent to the applicant on 11th March 2021, via nirav.shah@ameg.co.uk. The email explicitly indicates that it contained attachments, including the plaint, summons to enter appearance and a mention notice. The applicant, however, disputes having



received these documents, asserting that this particular email address was blocked, preventing him from accessing any emails sent to it.

11. To support his claim, the applicant attached a printout from the said email address. However, the printout does not indicate the sender of the email or the date on which the message was received, apart from a time stamp of 14:32. This contrasts with the Bank's records, which show that their email serving the applicant was sent at 4:29 pm.
12. That notwithstanding, the applicant's own email of 22nd July 2021 to the Bank's counsels through his gmail address confirms that he was aware of the suit, at least at that time. Despite this awareness, he took no steps to set aside the judgment. This remained the case even after the notice of entry of judgment had been served on him through the same gmail address on 2nd August 2021.
13. It is evident that the applicant has not been candid with the court and, given this trail of events, is undeserving of the court's discretion. The record clearly shows that he knowingly disregarded the court process since April 2021, only to file this application in September 2024, almost four years post-judgment, and certainly too late. It appears that the application was brought only after the reality of civil jail became imminent, following the issuance of warrants of arrest.
14. Additionally, in the case of *Kimani v MC Connell* (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set it aside the judgment unless it is satisfied that the defence raises triable issues. The applicant has raised several issues in his statement of defense.
15. The audit report relied on is incomplete and inconclusive, making it insufficient for this court's consideration. Upon reviewing the Bank's trial bundle, I note that the applicant, in his capacity as a Director, executed a Form of Acceptance for the facilities extended to the 1st defendant. Additionally, he signed a guarantee in favor of the Bank, in which he expressly undertook to pay, on demand, any amount due to the Bank, either as principal or surety or jointly with any other person....This clause effectively meant that his liability could be primary, rather than merely secondary.
16. Additionally, the Bank attached the statements of account, rendering the applicant's claim that he had not received them moot. By virtue of Section 176 of the *Evidence Act*, these statements serve as prima facie evidence that the 1st defendant owed the Bank the amount of Kshs. 159,898,182/= as at July 2020, an amount that was subsequently correctly demanded from the applicant and the 3rd defendant as guarantors. Furthermore, the demand dated 7th October 2020 which was sent to the applicant and is included in the trial bundle, directly contradicts his assertion that no formal demand was made by the Bank.
17. The long and short of this is that the defense put up by the applicant is unconvincing and lacks merit. He has equally failed to demonstrate any valid grounds to justify the setting aside of the interlocutory judgment. His delay in seeking redress, only after the execution process had commenced, suggests that this application is an afterthought rather than a genuine attempt to defend the suit on its merits.

Disposition

18. In light of the foregoing, I find that the application dated 27th September 2024, is without merit and is therefore dismissed with costs to the respondent.

SIGNED IN NAIROBI

F. MUGAMBI

JUDGE



DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF FEBRUARY 2025.

A. VISRAM

JUDGE

