



**Mandera County Government v Engi-Consult Ltd (Civil Suit
E001 of 2021) [2025] KEHC 14200 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL SUIT E001 OF 2021
JN ONYIEGO, J
OCTOBER 8, 2025**

BETWEEN

MANDERA COUNTY GOVERNMENT APPLICANT

AND

ENGI-CONSULT LTD RESPONDENT

RULING

1. The matter for determination before me is a notice of motion dated 20.06.2025 brought pursuant to Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 10 Rule 11, Order 19 Rule 2 and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 seeking orders that:
 - i. Spent.
 - ii. Pending hearing and determination of this application, this Honourable Court be pleased to grant and hereby grants a stay of execution of the interlocutory judgment entered on 19.06.2023, the decree issued on 12.07.2023, the judicial review orders issued on 09.05.2025 in HCJR E004/2025; Republic vs Chief Officer Finance County Government of Mandera and 3 Others and all other ensuing orders issued towards execution of the decree.
 - iii. This court be pleased to and hereby issue summons to the process server to be availed for purposes of cross examination into the alleged service of the summons to enter appearance and pleadings in this matter.
 - iv. This Honourable court be pleased to and hereby set aside the interlocutory judgment entered on 19.05.2023 and the decree issued on 12.07.2023 and the judicial review orders issued towards execution of the decree.
 - v. Defendant /applicant be granted leave to file and serve its statement of defence out of time.
 - vi. This Honourable Court be pleased to order the re-hearing of the suit.



- vii. This Honourable Court be pleased to make and/or issue such orders as it may deem fit to grant.
- viii. Costs of the application be provided for.
2. The application is supported by the affidavit of Hassanoor Adan, the deputy county secretary of the County Government of Mandera. Brief facts of the case are that the suit herein was initiated by way of a plaint dated 16.12.2020 seeking judgment against the applicant for the sum of Kes. 162,183,655.52 together with interest and damages for breach of payment and for inconvenience, hardship and suffering. Interlocutory or default judgment was entered on 19.05.2023 for the principal sum of Kes. 162,183,655.52/- together with interest accruing from 14.04.2016 until full payment alongside costs of the suit.
 3. Subsequently, the respondent obtained a taxed cost of Kes. 1,745,130.64/- against the applicant. Consequently, Judicial review proceedings in case number E004 of 2025 were initiated and an order of mandamus issued compelling the applicant to settle a bill of Kes. 162,183,655.52 together with interest compounded at 12% from 14.04.2016 till payment in full together with taxed costs at Kes. 1,745,130.64. Faced with the threat of execution, the applicant moved to this court seeking the orders highlighted above on grounds that the pleadings and summons to enter appearance were not served upon them.
 4. They urged that they became aware of the matter sometime in January, 2025 when the certificate of order against government was informally delivered through Mandera County Offices.
 5. It was deposed that upon perusing the pleadings, they realized that the summons to enter appearance issued by court on 08.02.2021 were served at Delta House, Westlands, 5th floor 1st wing Waiyaki Way in Nairobi hence not at the applicant's office. That Order 5 Rule 9 of the Civil Procedure rules provides that the county secretary in this case is the person/office that service ought to be served. It was urged that owing to this defective service, the applicant did not receive the pleadings and therefore, it was not aware of the existence of the suit herein hence the prayers sought.
 6. That following the service of the judgment and certificate of costs, the applicant sought to inquire into the respondent's claim regarding the payment in question. That it was discovered that the services allegedly rendered were in regards to the project of upgrading roads within Mandera Town to Bitumen standards. It was averred that it emerged that in August 2016, the applicant through its ministry of public works published a consultancy services status report concerning the respondent's contract with the applicant dated 10.09.2014 which revealed material breaches of the contract occasioned by the respondent.
 7. That the said report noted a number of irregularities in the performance of the contract. That despite the large scale nature of the project, the respondent failed to provide adequate number of personnel as per the project specifications and that the respondent fraudulently named unqualified staff thereby misleading the applicant as to its compliance with the contractual terms. It was averred that the applicant established that the contract price for the project was Kes. 124,517,300/- out of which the respondent was paid Kes. 49,134,640/- which amount was based on the actual work completed.
 8. It was contended that the respondent is not entitled to the balance and in any event, the amount claimed exceeds the contract price and without any basis. This court was therefore urged to allow the application as prayed.
 9. The application was opposed via a replying affidavit sworn by Kamunyu Kahenya on 22.07.2025 deposing that he is the managing director of the respondent and that indeed, there was lawful and proper service upon the applicant. That the pleadings were served upon the applicant via its mail



accounts and that it was interesting that the applicant did not deny that it was served via its email and neither did it indicate that the said emails did not belong to it.

10. It was deposed that indeed the respondent initiated the judicial review proceedings in question and consequently served the orders upon the applicant on 18.02.2025. He deposed that the applicant did not explain the unreasonable delay by the applicants and why the application was brought to court late. Additionally, that the applicant did not annex a draft defence raising triable issues. That it was common ground that there existed a contract between the parties herein as the respondent offered consultancy services for construction and supervision during the upgrading of roads within Mandera Town to Bitumen Standards.
11. The deponent averred that the respondent offered services and was equally given a variation of the contract with an additional Kes. 24,903, 460/-. That the applicant through its advocates confirmed the contract and most importantly confirmed that there were pending payments and further, from the said letters, the applicant had stated that it was willing to negotiate and agree with the respondent on the outstanding amount. Further, that the applicant confirmed that the amount owed would be paid in August, 2017 as it had already been included in 2017/2018 budget. That having made the admission, the applicant cannot possibly have a triable defence against the claim for the recovery of unpaid services.
12. It was deposed that from the said letter which the applicant had requested for more time to settle the bill, it failed to honour the said promise. That from the foregoing admissions, it is not possible for the applicant to claim to have a defence with triable issues.
13. The application was canvassed by way of written by way of written submissions.

Applicant's submissions

14. The applicant filed submissions dated 28.07.2025 submitting in regards to two issues as follows:
 - i. Whether there was proper service of the summons to enter appearance.
 - ii. Whether the defendant's defence raises triable issues.
15. On the first issue, counsel submitted that it is not in doubt that the decision of whether or not to set aside an ex parte judgment is a discretion of the court and the same must be used judicially. That the applicant was not served and if at all there was any service, the same was irregular as the pleadings were not served at the applicant's offices. It was contended that due to the foregoing reason, the judgment by this court should be set aside. It was argued that the respondent in this case failed to adduce evidence in form of an affidavit of service that indeed, it served the applicant the pleadings herein.
16. It was contended that where service is disputed, the correct procedure is for the person who allegedly effected service, the process server in this case, to swear an affidavit and if required, submit to cross examination hence the applicant's prayer for the process server to be summoned and cross examined to test the veracity of the alleged service. That a party who did not effect service cannot competently attest to how service was effected. Reliance was placed on the Court of Appeal Case of Giro Commercial Bank Ltd vs Ali Swaleh Mwangula [2016] KECA 259 (KLR) where the court stated that:

“Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment



of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend".

17. On the second issue, counsel submitted that there exist triable issues that merit the setting aside of the interlocutory judgment. That the contract between the plaintiff and the defendant was subject to blatant breaches occasioned by the plaintiff as captured in the applicant's ministry of roads, public works and transport in a report dated 10.09.2024. It was alleged that due to the failure by the respondent to perform its obligations, the applicant was forced to contract the Kenya Urban Roads Authority to supervise and complete the stalled project resulting into increased costs.
18. That public policy militates against allowing a party to benefit from its own inactions particularly where public finances are implicated. The respondent's conduct was pointed to amount to an abuse of judicial process and that should the judgment be allowed to stand; the public is likely to suffer irreparable prejudice.
19. Counsel urged further that the respondent did not demonstrate any irreparable prejudice its likely to suffer that cannot be compensated by costs should the prayers herein be allowed. In the end, counsel urged this court to allow the application as prayed.

Respondent's Submissions.

20. The respondent filed submissions dated 28.07.2025 submitting in regards to three issues as follows:
 - i. Whether there was service of pleadings and summons to enter appearance;
 - ii. Whether there was a delay in filing this application; and
 - iii. Whether the defendant/applicant has a defence that raises triable issues.
21. It was contended that in as much as the applicant urged that the impugned service was not effected at their offices, it did not deny that the place where service was effected not its offices. It was urged that the applicant did not deny that the emails indicated on the affidavit of service did not belong to it. Additionally, that in the said affidavit of Kennedy Manyara, it was clearly indicated that the pleadings were served via the applicant's email address and not at Delta house.
22. On the second issue, counsel submitted that the applicant did not demonstrate the reasons for the six-month delay in filing the application herein. Counsel relied on the case of Gerald Kithu Muchanje vs Catherine Muthoni Ngare & another [2020] eKLR where the court stated that:

‘There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible...’.
23. On the second issue, counsel urged that even if the defendant were to be given a chance to defend the suit, no defence was annexed to enable the court discern whether triable issues had been raised. That from one of the applicant's correspondences, it admitted that the contract price had not been paid. It was contended that the respondent in the impugned contract had demanded Kes. 143,346,775 being the accumulated balance (principal and contractual interest).
24. Further, it was submitted that the applicant had admitted that the contract sum was for Kes. 124,517,300 out of which 49,134,640 had been paid. That from the said letter, the applicant had equally asked to be given time till August, 2017 when the payment would be made. It was opined therefore that the applicant was estopped from urging that it has a triable defence.



Analysis and determination.

25. I have considered the application herein together with the supporting affidavit, the replying affidavit by the respondents and parties' submissions. The only issue for determination is whether the orders sought can issue.
26. Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules grant Court discretion to set aside an interlocutory or ex parte judgement in default of appearance.
27. Order 10 Rule 11 of the Civil Procedure Rules empowers a Court to set aside or vary a default judgement and any consequential decree or order entered under Order 10 Rules 6 & 10 of Civil Procedure Rules upon terms it may deem fit.
28. From the application, counsel for the applicant submitted that the applicant was not served and if at all there was any service, the same was irregular as the pleadings were not served at the applicant's offices. That it came to learn of the suit herein sometime in January, 2025 when the certificate of order against the government was informally delivered through its offices.
29. The principles for setting aside an interlocutory or ex-parte judgement were set out in the case of *Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75* where the Court 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.”
30. It follows therefore, that there exists a distinction between a default judgment, that is regularly entered and the one that is irregularly entered. The difference between these two was set out by the Court of Appeal in the case of *James Kanyita Nderitu vs Marios Philotas Ghikas (2016) eKLR*, where the Court held as follows:

“In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others.
31. On the other hand, an irregular judgement, the considerations are different. The Court further stated;

“In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice



that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

32. From the record, it is clear that the respondent filed a plaint and the accompanying documents dated 16.12.2020. The said pleadings according to one Kennedy Manyara, a court process server, were not served physically. That on 31.03.2021, when he visited Delta House, 5th Floor, Westlands, Nairobi City, Nairobi County, he was informed that the applicant and or the occupant of the said office he had visited had since shifted. That he managed to find from the applicant’s website the e.mail accounts upon which he effected service of the pleadings from the respondent. According to him, he served the pleadings via email addresses known as; info@mandera.go.ke; info@mandera.go.ke;nairobiliaisonoffice@mandera.go.keandnairobi@mandera.go.ke. That the respondent did not deny that the foregoing email addresses belonged to it.
33. I do note that the pleadings herein were served on 13.05.2021 at 12.54 p.m. to the above listed emails associated with the applicant. It is also important to note that service of the pleadings herein was allegedly effected during Covid – 19 period. Additionally, it is not lost to this court that vide gazette Notice No. 2357 the Chief Justice made some practice directions pursuant to electronic case management commonly referred to as the Electronic Case Management Practice Directions, 2020.
34. Under para 5, it is clear that the objectives of the Practice Directions were to guide the integration of Information Communication Technology (ICT) in judicial proceedings and in particular to provide for —
 - a. electronic filing and electronic service of court documents;
 - b. electronic case search;
 - c. electronic diary;
 - d. electronic case tracking system;
 - e. electronic payment and receipting;
 - f. electronic signature and electronic stamping;
 - g. exchange of electronic documents, including pleadings and statements; and
 - h. use of technology in case registration and digital recording of proceedings for expeditious resolution of cases.
35. Para 6 provides for use of Technology in Judicial Proceedings as follows:
 - (1) Where under any law a document is required to be lodged or filed in court, the filing shall be effected by electronic means in accordance with these Practice Directions.
 - (2) In every judicial proceeding, the court and the parties to the case shall employ the use of technology to expedite the proceedings and make them more efficient.
 - (3) The technology referred to in subparagraph (2) shall include —



- a. e-filing;
- b. e-service of documents;
- c. digital display devices;

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(5) The use of electronic devices under sub paragraph (3) shall comply with any directions and requirements issued by the court in relation to the use of such technology.

36. Noting that during this time, service of pleadings could be effected also via e-mail as already mentioned above, and the respondent having averred through the affidavit of service that indeed the applicant was served via mail, it was incumbent upon them to prove such service. The applicants have no duty to prove that they were not served save for denial.

37. However, the most critical question in this case which needs an answer is; whether the respondent ever filed electronic mail service delivery receipt as a sign of acknowledgment of the alleged service. Order 5 rule 22B (4) of the civil procedure rules provides as follows;

“Electronic Mail Services (E-mail) [Order 5, rule 22B] (1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used Email address. (2) Service shall be deemed to have been effected when the Sender receives a delivery receipt. (3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent. (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”

38. Faced with a similar scenario, the high court in the case of BOD County Referral Hospital Kitale & another v DN (Suing through her next friend & Grandmother SK) (Civil Appeal E043 of 2023) [2025] KEHC 5344 (KLR) (30 April 2025) (Judgment) had this to say on email service.

26 “This Court has carefully perused the Affidavit of service which was relied upon by the trial Court to approve of the hearing on 22nd May 2023. It was sworn by Learned Counsel Vivian A. Shibanda on 27th March 2023. Paragraphs 2, 3, 4 and 5 of the said affidavit states as follows: -

2. That on the 27/03/2023, I received a copy of hearing notice dated 22/05/2023 from the firm of V.A. Shibanda & Co. Advocates with instructions to serve the same upon respondent Advocate herein Z.K. Yego & Co. Advocates.
3. That on the 27/03/2023, I sent a copy of the said document S.K. Yego & Co. Advocates via electronic mail to xxxx.com.
4. That copy of the electronic mail extract are hereby returned marking the same as duly served to the above recipient.
5. That I return herewith a duly served copy of the hearing notice in to court for further action.

27. The electronic mail extract referred to in paragraph above was a copy of the email that attached the hearing notice sent by Vivian xxxx.com to xxxx.com. The email requested the recipient to <https://new.kenyalaw.org/akn/ke/judgment/kehc/2025/5344/eng@2025-04-30>



5 acknowledge receipt thereof. The affidavit, however, contains no further evidence on whether there was confirmation of receipt of the email

28. Returning to Order 5 Rule 22B [4] of the Civil Procedure Rules, an Affidavit of Service is supposed to attach an Electronic Mail Service delivery receipt as the confirmation of service. What then is an email delivery receipt? Simply put, an email delivery receipt is a notification confirming that an email message was delivered to the recipient's mailbox. It must, however, be understood that an email delivery receipt is different from an email read receipt. The latter is a notification confirming that the email message was opened and/or read by the recipient.
29. In this case, the law calls for only an email delivery receipt. As such, as far as there is evidence that the email was delivered to the recipient's mailbox, service thereof is confirmed. How then does a sender of an email get a delivery receipt? For one to receive a delivery or read receipt in respect of an email sent to a recipient, the sender must activate the appropriate settings in the email set up. Once the settings are in place, a delivered and/or read receipt, as the case may be, will automatically be received by the sender once the email is delivered and/or read. It is that delivery receipt which the law calls upon a sender to annex to an affidavit of service as evidence of service through electronic mail.
30. The Respondent's Counsel in this case did not, therefore, meet that requirement of law. What was annexed to the affidavit of service was the email as sent the Appellants' email address and nothing more. There was no evidence confirming that the email was delivered to xxxx.com. Without an email delivery receipt on record, there is no evidence of service and nothing more should turn on such. It is on the basis of the foregoing that this Court finds favour with the Appellants in affirming that there was no evidence that the Appellants were electronically served with a hearing notice for 22nd May 2023.
31. With the above finding, this Court finds and hold that the Appellants were not accorded an opportunity to present their case contrary to Article 50(1) of *the Constitution*. As such, the appeal is merited.
39. From the record, there was no service delivery receipt attached to the process server's affidavit. To that extent, there was no proof of service thus the interlocutory judgment herein was irregularly entered hence cannot stand. Having held as such, I need not go further. The judgment having been entered irregularly, it is void abinitio hence no need to interrogate whether the applicant has a good defence raising triable issues or not at this stage or whether there was inordinate delay in seeking to set the interlocutory judgment aside. See James kanyita nderitu (supra).
40. Regarding the question of setting aside JR proceedings a fore mentioned under which mandamus orders were made, the prayer is misplaced as the same should have been made under that file.
41. In a nutshell, it is my finding that the application is merited hence allowed with orders as follows.
 1. The interlocutory judgement entered herein on 19th June 2023 and the decree issued on 12th July 2023 be and are hereby set aside.
 2. The defendant is hereby granted leave to enter appearance and file defence with 14 days from the date of delivery of this ruling.
 3. Upon service, the plaintiff to file a reply to the defence within 7 days.
 4. Parties to file witness statements and properly paginated and indexed documents within 7 days of service of the reply to the defence.



5. Mention on 17th November, 2025 to fix hearing date and further directions.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF OCTOBER, 2025.

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J. N. ONYIEGO

JUDGE

