



**Chanjera v Trident Insurance Co.Ltd (Civil Case E003 of 2025)  
[2025] KEMC 190 (KLR) (27 June 2025) (Ruling)**

Neutral citation: [2025] KEMC 190 (KLR)

**REPUBLIC OF KENYA  
IN THE LAMU LAW COURTS  
CIVIL CASE E003 OF 2025  
FM MULAMA, RM  
JUNE 27, 2025**

**BETWEEN**

**SHADRACK TUMAINI CHANZERA ..... PLAINTIFF**

**AND**

**TRIDENT INSURANCE CO.LTD ..... DEFENDANT**

**RULING**

**A. Introduction.**

1. An application dated 22/5/2025 under certificate of urgency seeks among other orders;
  - a. Spent.
  - b. There be a stay of execution of the judgement entered by this honourable court in favour of the Plaintiff against the defendant/Applicant herein and all subsequent orders or proceedings herein be stayed pending the hearing and determination of this application inter-partes and/or further orders of the court, the defendant/Applicant be and is hereby granted leave to file his defence for the suit to be heard and determined on merit.
  - c. That this honourable court be pleased to unconditionally set aside the judgment given by this honourable court in favour of the plaintiff/Respondent herein as against the defendant/applicant and all orders and proceedings thereof and the defendant/Applicant be and is hereby granted leave to file his defence and counter claim against the plaintiff/Respondent
  - d. That the costs of this Application be provided for.
2. The application is supported by 7 grounds on the face of the application and the supporting affidavit of Cyril Alusa.



3. The application and the orders due for consideration at this moment are the setting aside of the judgment entered in favour of the plaintiff/Respondent and leave to the applicant to file a defence and counterclaim as against the plaintiff's suit.
4. The main contention in the application is that the defendant/Applicant was not served with any pleadings, was unaware of the matter and hence condemned unheard as it only became aware of the matter when served with a notice of entry of judgment dated 16<sup>th</sup> May 2025.
5. The application is opposed by the affidavit of Geoffrey Kilonzo an advocate practising in the name and style of Wambua Kilonzo & Co. advocates on record for the plaintiff/Respondent and it is his averment that the pleadings in this matter were duly served upon the defendant/Applicant and affidavits of service filed.
6. He further states that the application has been made in bad faith, it is solely intended to deny the plaintiff enjoyment of the fruits of the judgment and that the same is bad in law.
7. It is his main contention that the defendant/Applicant was personally served and an affidavit of service confirming service dated 8/4/2025 marked as ATM-1 filed.

### **Submissions**

8. The application was disposed of by way of written submissions. I have read and considered the submissions dated 21<sup>st</sup> June 2025 and 9<sup>th</sup> June 2025 for the plaintiff and defendant respectively. I have also read and appreciated the authorities cited and attached by the plaintiff in his submissions.

### **B. Issues for Determination.**

9. The court has formulated 3 issues for determination and which are:
  - a. Whether the applicant has satisfied the conditions for setting aside an ex parte judgment.
  - b. Whether the applicant can be granted leave to defend the claim.
  - c. Who bears costs of the application.

### **C. Analysis and Determination.**

#### **a. Whether the applicant has satisfied the conditions for setting aside an ex parte judgment.**

10. The decision as to whether to set aside an ex-parte judgment is discretionary and it is not in doubt that the discretion is intended to be exercised by courts to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but in the same vein it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
11. For an applicant to be able to trigger the exercise of this discretion in his favour, one has to demonstrate 3 things. One that he has a defence that raises triable issues, there is no inordinate delay in making the application for setting aside and no prejudice will be suffered by the claimant if the judgment is set aside and the overriding objective. These principles so to speak were enunciated in the case of Rahman vs Rahman (1999) LTL 26/11/9.



12. The principles to be considered in determining application to set aside *ex parte* judgments were restated in the case of *James Kanyiita nderity & Another vs= Marios Philotas Ghika & Another (2016) eKLR*, where the court expressed itself as follows:

“In a regular judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other...”

### **Defence that raises triable issues**

13. In order for the court to make a finding as to whether the intended draft defence raises triable issues, the court should have the opportunity of perusing the said defence. The court has had no such opportunity as no such draft response has been filed and as such it cannot make that finding. This ground has not been demonstrated.
14. The applicant seems to opine in his application and paragraph 9 of the supporting affidavit that the respondent has declined, rejected and/or refused to furnish counsel for the applicant with pleadings in this matter but falls short of attaching any evidence speaking of such refusal.
15. Furthermore, in this day and age, once you are mapped to a case as it was done to the applicant enabling him to file his memorandum of appearance, one is able to access the court file as it were. One is able to access all documents that have so far been filed.
16. This seems to suggest why a draft defence has not been filed. To me this is not viable. It is a clever way of hoodwinking the court that the applicant could only attach a draft defence once served with pleadings. This is dishonesty on the part of the applicant for the stated reasons.
17. There being no draft defence, I am unable to ascertain whether the intended defence raises triable issues if any.

### **Inordinate delay.**

18. It is the Applicant’s averment that upon being instructed on 17/5/2025 entered appearance on 19/5/2025 and the application was filed soon thereafter and from the record and considering that judgment was delivered on 16/5/2025 I find and hold that there was no inordinate delay in filing the instant application.

### **Prejudice**

19. The applicant has addressed this court on the issue of prejudice and what seems to form the basis of the prejudice it is likely to suffer is he will be condemned unheard against the rules of natural justice. The plaintiff on the other hand has indicated that he will be greatly prejudiced if the judgment is set aside and this is a scheme meant to delay his enjoyment of the fruits of judgment.



20. The applicant has not expressly denied and/or challenged the means of service that he was served with other than just a mere denial that he was not served with any other pleadings save for the notice of entry judgement and the judgment. The applicant does not indicate or suggest that the respondent used a different email to serve summons to enter appearance and the plaint and used another different one to serve the notice of entry of judgment and the judgement.
21. The respondent vehemently denies the averment that the applicant was not served and states that they were duly served and in support thereof annexed the affidavit of service dated 10/05/2025 and further that the applicant was physically served in their offices and attached an affidavit of service dated 08/04/2025. The applicant has not challenged any of those affidavits.
22. The affidavit of Teddy Tumaini Kenga sworn on 8/4/2025 at paragraph 3 explains how he travelled to Nairobi to the defendant's offices in Capitol hill towers, 1<sup>st</sup> floor and he met one Ms. Mercy a legal officer with the defendant and who upon being served with a plaint, list of documents, bundle of documents and other pleadings acknowledged by stamping on the principal copy. The applicant has not challenged any averments in the said affidavit of service.
23. In his second affidavit he avers that he served the applicant with a mention notice through email. I have perused the email extract and it shows that indeed the applicant was served on 10/5/2025 a Saturday for a court date of 14/5/2025. The applicant has not denied ownership of the said email addresses.
24. A further perusal of the affidavit of the said Teddy Tumaini Kenga sworn on 16/5/2025 and the annexures thereto clearly indicates that the applicant was duly served on 4/4/2025 with the summons to enter appearance and there is an acknowledgement stamp serialized 000000064 and as such it cannot lie in the applicant's mouth that he was never served when in actual sense they acknowledged receipt.
25. Judgment in the matter was entered on 16/5/2025 a month and 15 days after being served with summons to enter appearance. No explanation was given as to why there was failure on the part of the applicant to enter appearance in good time. The applicant was further served with a mention notice for 14/5/2025 but still gave these proceedings a wild berth. The applicant cannot therefore cry foul when due its own indolence saw it fit to ignore the case and now rushes to court pleading to have the judgment set aside. I wish to remind the applicant that equity aids the vigilant and not the indolent.
26. It is clear that despite being served on 4/4/2025 the applicant only instructed counsel a month and 13 days later. He cannot therefore blame the court for issues the orders that it gave when it was at fault.
27. When a court and especially this court issues an interlocutory judgment, it has properly satisfied itself that service was proper and there is evidence of such service and no wonder despite entering interlocutory judgment on 14/5/2025, the court reserved its judgment for 16/5/2025. The 2 days gave this court enough time to comb through the affidavits of service and its annexures and therefore the applicant cannot purport to lecture this court on the matters it can presume and/or take judicial notice off.
28. The court in its judgment issued and published on 16/05/2025 was and still is clear that the applicant cannot now feign ignorance of this matter and indeed the parent suit that has given rise to this suit to wit LAMU PMC CC No. E009 of 2024 yet it properly instructed counsel who actually entered appearance and was eventually served with the decree in the primary suit and just like it did ignore the service of decree in that matter, it has done the same herein and now claiming lack of service. It does not happen like that in the temple of justice and I thus agree with the respondent and that indeed the applicant has approached this court with unclean hands.



29. In my view therefore, the application as presented will greatly prejudice the respondent and further delay his enjoyment of the fruits of his judgment that were procedurally and legally obtained. The applicant for reasons best known to him decided to be ignorant and indolent, let him pay for his indolence.
30. Having made the finding that the applicant has only satisfied one of the conditions which is filling the application in good time hence avoiding inordinate delay, I have also demonstrated from the applicant's own conduct in the matter and the primary suit, his filing of the application in good time is to hoodwink this court to exercise its discretion in its favour. The fact that he satisfied that sole condition, does not make its application merited for the reasons stated in this ruling.

**D. Conclusion and Disposition.**

31. The application dated 22/5/2025 is with no doubt destined for dismissal which I hereby do with costs to the Plaintiff/Respondent.
32. Litigation has come to an end. It is so ordered.

**DATED AT LAMU LAW COURTS THIS 27<sup>TH</sup> DAY OF JUNE 2025**

**F.M. MULAMA**

**RESIDENT MAGISTRATE.**

In the presence of:

Court Assistant:- Daniel Joshua.

Ms. Mwombe for the Plaintiff/Respondent.

Mr. Otieno for the Defendant/Applicant

