

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. E471 OF 2022**

**BETWEEN**

**LAXMANBHAI CONSTRUCTION LIMITED.....**  
**.....PLAINTIFF**

**AND**

**PRAISE MALL LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**

**EVELYN KENDI KIMATHI T/A**  
**PURPLE LILAC INSURANCE AGENCY .....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

**INTRODUCTION & BACKGROUND**

1. The 1<sup>st</sup> Defendant (“the Applicant”) has filed the Notice of Motion dated 11<sup>th</sup> April 2025 seeking to set aside the default judgment and the consequent decree that was entered against it on 27<sup>th</sup> January 2023. It further seeks leave to file a defence and be heard on the merits of the case. The application is supported by the affidavit of Bishop KIOGORA MAGAMBO, sworn on 11<sup>th</sup> April 2025 and

opposed by the Plaintiff through the replying affidavit of its director, ARVIND RAGHWANI, sworn on 22<sup>nd</sup> April 2025. The application was disposed by way of written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **ANALYSIS AND DETERMINATION**

2. Upon careful consideration of the pleadings and the parties' rival submissions I note that the primary issue for determination is whether the interlocutory judgment against the Applicant ought to be set aside. **Order 10 rule 11** of the **Civil Procedure Rules** empowers the court to set aside or vary such judgment and any consequential decree or Order upon terms that are just. This power is discretionary and is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice (See **Mbogo & Another v Shah [1967] EA 116** and **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] KECA 282 (KLR)**)
3. The Applicant claims it was never served with the pleadings that would have required it to enter an appearance or file a defence

and that it only received a Mention Notice and later the Decree after judgment had been entered. It avers that the entry of the default judgment denied it any opportunity to present its side of the story or defend itself on the merits. The Applicant finds it impractical and unjust that a final judgment was entered against it while the suit continued against the 2<sup>nd</sup> Defendant for the same claim. The Applicant further contends that this case involves a significant amount of money, making it crucial for it to be given a chance to defend itself.

4. In response, the Plaintiff refutes the Applicant's claim of non-service. It states that the Applicant was electronically served through its known and actively used email address (Kiogora\*\*\*\*\*@gmail.com) on 2<sup>nd</sup> December 2022 and that this email was used in the parties' prior business correspondence. The Plaintiff states that after the Applicant failed to enter an appearance or file a defence despite proper service, it regularly applied for and obtained a default judgment on 20<sup>th</sup> January 2023, and a decree on 27<sup>th</sup> January 2023. The Plaintiff highlights that the Applicant's application has been filed more than two years after the default judgment was entered, which is an unreasonable delay.

5. The Plaintiff contends that the Applicant has not raised any credible or triable issue in its defence that would justify re-opening the case and that it has consistently used the same email address to serve subsequent court documents, including Mention Notices in January and February 2025, further undermining the Applicant's claim of being unaware of the proceedings. As such, the Plaintiff primarily urges the court to dismiss the application with costs.
6. **Order 5 Rule 22B** of the **Rules** provides for e-mail service as follows:
  - (1) *Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail 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.*
7. From the above provision, a party is entitled to serve summons upon another party before court at their last confirmed and used

e-mail address. Going through the pleadings, the Plaintiff has exhibited an Affidavit of Service sworn by SHARON NDOIGO, Advocate, on 13<sup>th</sup> December 2022. This affidavit, together with the attached email printout, demonstrates that on 2<sup>nd</sup> December 2022, the Plaintiff's advocates electronically served the Summons to Enter Appearance, the Plaint, the Verifying Affidavit, the Witness Statement, and the Bundle of Documents upon the Applicant at its email address: [kiogora\\*\\*\\*\\*\\*@gmail.com](mailto:kiogora*****@gmail.com).

8. Although the Applicant has not denied that this email address is the one used by the Applicant and it indeed it appears on the Applicant's own official letterhead used in prior correspondence with the Plaintiff, among other correspondence, it is possible that the Applicant may have failed to see the correspondence from the Plaintiff forwarding the pleadings. Indeed, I have looked at the court record and note that there is no indication that the court notified the Applicant, once entry of judgment was done at an interlocutory stage.
9. The guiding principle for setting aside a default judgment is well settled: the Applicant must not only provide a reasonable explanation for the default but must also demonstrate that it has a prima facie defence with triable issues on the merits (see **James Kanyiita Nderitu & another v Marios Philotas Ghikas &**

**another [2016] KECA 470 (KLR)**]. A "triable issue" is one which raises a prima facie case and is not a mere sham or a moonshine. The Applicant bears the burden of placing before the Court some evidence of a defence that is not frivolous or vexatious. I note that upon becoming aware of the interlocutory judgment against it the Defendant moved with speed to place before this court its present application to set aside the same and to be allowed to defend the suit against it. In the supplementary affidavit filed by the Plaintiff on 16<sup>th</sup> May 2025, the Applicant has at paragraph 16 therein annexed a draft defence that it intends to file in these proceedings. A perusal of the said draft defence reveals that the same is not a sham but raises triable issues that the court will need to consider. I am satisfied therefore that the Defendant has demonstrated that it is keen to be heard and is intent defending the suit.

10. In view of the above, I find that the Applicant has made out a case for setting aside the default judgment against the 1<sup>st</sup> Defendant. I allow the application as prayed and grant leave to the Applicant to file its defence forthwith but not later than 30 days from today. Costs shall be in the cause.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 7<sup>TH</sup>  
DAY of NOVEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF:-**

1. Mr. Obegi for the Plaintiff/Respondent.
2. Mr. Ateka for the 1<sup>st</sup> Defendant/Applicant.
3. Amos - Court Assistant

ORIGINAL