

**CITATION::** Bigabo Mugunda v. Miller-Richard et al., 2025 ONSC 3836

**COURT FILE NO.:** CV-24-96185

**MOTION HEARD:** 20250626

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ANTOS BIGABO MUGUNDA v. MARK MILLER-RICHARD and KIERSTEN CHOMIAK

**BEFORE:** Associate Justice Kamal

**COUNSEL:** Frank Van Dyke, for the Plaintiff  
No one appearing, for the Defendants  
No one appearing, for the TD Insurance, Third Party on the motion

**REASONS FOR DECISION**

1. An order for substituted service is not appropriate in circumstances of mere inconvenience. Furthermore, this Court is to apply the Rules as they are today, not what they might be in the future.
2. This is a motion brought by the Plaintiff seeking the following orders:
  - a) An order for substituted service of the Statement of Claim by way of personal service on the Defendant, Kierstan Chomiak, through her insurer, TD Insurance at 5045 South Service Road, Burlington, Ontario;
  - b) An order for service by registered mail to the Defendant at her last known address;
  - c) Extending the time for service on the Defendant, Kierstan Chomiak, to September 30, 2025;
  - d) An order amending the Statement of Claim.
3. At the outset of the motion, I asked counsel to clarify whether the request for service by registered mail to the Defendant at her last known address was a request on its own, or only if I also granted the request to serve the Defendant's insurer. Counsel clarified that the request for service by registered mail to the Defendant at her last known address was tied to the request to serve TD Insurance. Due to the reasons set out below, I would have denied that request as a standalone request.

4. This matter arises out of a motor vehicle accident which occurred on December 26, 2023, involving the Defendant Kiersten Chomiak. A Statement of Claim was issued on June 19, 2024.

### **Substituted Service on TD Insurance**

5. I am not prepared to grant this request.
6. TD Insurance was served with the motion materials, although it did not respond to the motion.
7. First, the *Rules of Civil Procedure* say that where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service. The evidence before me does not satisfy me that it is impractical to effect prompt service.
8. Second, the specific request to effect substituted service through a Defendant's insurer has requirements that have been developed in the case law. The evidence before me does not satisfy these requirements.

### **General Principles regarding substituted service**

9. [Rule 16.04\(1\)](#) of the [Rules of Civil Procedure](#) provides for substituted service. It reads, in part:  
16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process. . . the court may make an order for substituted service . . .
10. This requires the moving party to demonstrate that it is impractical to effect prompt service of an originating process, and the Court must be confident that documents will be brought to the person's attention.
11. The evidence provided in support of this motion reveals the following:
  - a) The affidavit is from a law clerk at the law firm of the Plaintiff. It attached a brief affidavit of attempted service from a process server, Mr. McNulty.
  - b) Attempts to serve Kierstan Chomiak were made by Mr. McNulty on June 22, 2024; June 26, 2024 and July 4, 2024. All the evidence states is that "there was no response to the door on any of these occasions."
  - c) The law clerk deposes that "Mr. McNulty" is of the understanding that "the Defendant, Kierstan Chomiak, may not be willing to open the door as she resides in a dangerous neighbourhood." An email from Mr. McNulty is attached to the affidavit to this effect. There is no further detail as to why Mr. McNulty thinks the Defendant would not answer the door.

- d) On January 30, 2025, Mr. Van Dyke (counsel for the Plaintiff) wrote to the Defendant's insurer providing them with a copy of the Statement of Claim.
  - e) On March 13, 2025, TD Insurance asked for an Affidavit of Service showing that the insured/defendant had been served.
  - f) On March 14, 2025, Mr. Van Dyke responded that he has not served the Defendant and they are experiencing difficult effecting service. Mr. Van Dyke asked for the Defendant's current address.
  - g) On the same date, TD Insurance refused to confirm the Defendant's address.
  - h) The Plaintiff tried to serve the Defendant at her last known work address, but she no longer works there.
12. The three most important words in rule 16.04(1) are "impractical", "prompt" and "may". These are not synonymous with "inconvenient". In a motion of this nature, there is an obligation upon counsel to show that they are unable to carry out prompt personal service. Substituted service is not intended to spare a plaintiff the inconvenience or expense of personal service, if the latter can be effected. Mere difficulty in serving a defendant personally is not enough. Rule 16.04(1) does not provide an automatic right to an order for substituted service whenever there is some delay, expense, inconvenience or difficulty locating a party. See [Laframboise v. Woodward, 2002 CanLII 49471](#).
13. The inability to serve a party personally is proved by showing that all reasonable steps have been taken to locate the party and to personally serve him or her. What is reasonable will depend on the nature of the case, the relief claimed, the amount involved and all of the surrounding circumstances.
14. The evidence does not establish that all reasonable steps were taken. For example, the process server did not leave a note at the home any of the times they attended. No one tried to call the Defendant. No one tried to locate the Defendant's email address or social media. In this era, reasonable efforts must include online searches. I do not have evidence of such efforts. In my view, all reasonable steps were not taken.

#### Service on TD Insurance

15. There are criteria set out in case law which should be satisfied before an order for substitutional service on an insurer is granted.
16. In [Mullay v. Shaba, 2023 ONSC 2022](#) at paragraph 17, the court wrote:  
A court may only make an order that substituted service be effected on the defendant's insurer where:
- a) The insurer agrees to accept service on behalf of its insured,
  - b) There is evidence that the insurer has a current address for its insured and that by serving the insurer, the insured is likely to become aware of the claim against him or her, or

- c) The plaintiff undertakes not to strike out the defence if the insurer cannot produce its insured person at Examinations for Discovery.
17. In [Laframboise v. Woodward, 2002 CanLII 49471](#), the Court wrote, “substituted service is intended merely as an artificial alternative to personal service. Surely, substituted service must have some likelihood of informing a defendant of the proceeding; otherwise, the exercise of obtaining an order for substituted service is a charade.”
18. Both decisions state that substituted service on the insurer of a defendant is an anomaly. It should not be allowed, as a rule, as it places the onus of finding the insured on the insurer.
19. Interestingly, counsel relied on [Mullay v. Shaba, 2023 ONSC 2022](#) in their factum for the proposition that where a Plaintiff looks to serve a Defendant’s insurer as substituted service, it must be in addition to another method, such as mailing it to the Defendant’s last known address.
20. Counsel should not cite a case without applying the legal test set out therein.
21. In my view, the Plaintiff failed to address any of the evidentiary requirements in the affidavit evidence. The evidence before me does not satisfy me that the insurer agrees to accept service on behalf of its insured, or that the insurer has a current address for its insured and that by serving the insurer, the insured is likely to become aware of the claim against them. Furthermore, the plaintiff did not undertake not to strike out the defence if the insurer cannot produce its insured person at Examinations for Discovery.
22. Counsel submitted that I am not bound by the cases because they are other cases of the Superior Court and are not binding on me. Counsel requested I take a flexible approach in these circumstances. I disagree. These cases provide helpful guidance in interpreting the *Rules* and ensuring procedural fairness. These cases demonstrate the importance of ensuring service as required by the *Rules*. In my view, it is appropriate to apply the approach outlined in these cases.
23. Furthermore, counsel submitted that I consider the proposed new civil rules to take a more modern approach to the rules of service. I disagree. My role in June 2025 is to apply existing *Rules of Civil Procedure*, not consider what the rules may be in the future.
24. Counsel submits that the case law is based on traditional notions of personal service, and this needs to be adapted. I disagree. Firstly, *Mullay* is from 2023. More importantly, the current *Rules of Civil Procedure* outline the requirements for service of originating documents. These Rules apply and must be followed.

25. I make no comment on whether the current rules regarding service are outdated. However, the fundamental tenet of the rules and procedural fairness require that the Defendant actually be made aware of the documents. The evidence before me does not give me confidence that TD Insurance will be able to bring the document to the Defendant's attention, nor should they be required to unless they agree.
26. Counsel also submitted that there would be no prejudice as TD Insurance is aware of the claim. The evidence before does not establish that there would be no prejudice. The evidence does not even confirm whether TD Insurance has the defendant's current address.
27. I am not satisfied, based on the evidence, that it is appropriate to grant the motion for substituted service on the Defendant's insurer.
28. This request is adjourned to be brought back with appropriate evidence, for example, addressing the considerations in paragraph 14 above.

### **Extending Time for Service**

29. The Defendant, Kierstan Chomiak, has not yet been served, but reasonable efforts have been made to attempt to locate her so far. It is appropriate to extend the time to the time for service of the Statement of Claim on the Defendant, Kierstan Chomiak, to September 30, 2025.

### **Amending the pleadings**

30. The Plaintiff seeks leave to amend the Title of Proceedings and the Statement of Claim. An amended Statement of Claim was provided.
31. The Plaintiff has been in three car accidents. The nature of the requested amendment is to add the Defendant in relation to the recent car accident.
32. Rule 26.01 reads as follows:
- 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
33. Rule 26.01 has as a prerequisite that the proposed amendment or change in the parties must not give rise to prejudice that cannot be compensated by costs or an adjournment. Previous decisions of this court have undertaken the prejudice analysis under rules 26.01 and 5.04(2) in a two-step process: see e.g. *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CanLII 8620 (ON CA), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.) and *Mota v. Hamilton-Wentworth (Regional Municipality) Police*

Services Board (2003), 2003 CanLII 47526 (ON CA), 63 O.R. (3d) 737, [2003] O.J. No. 1100 (C.A.).

34. In my view, there is a presumption that leave to amend a pleading must be granted, unless prejudice would result that could not be compensated for by costs or an adjournment.
35. There is no prejudice to the Defendants that cannot be compensated in costs. In fact, one of the defendants still has not been served, and this action is in its early stages.
36. The evidence establishes an appropriate explanation for the amendment being sought.
37. The request to amend the Statement of Claim is granted.

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Associate Justice Kamal

**DATE:** June 26, 2025