



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwalalya v Dwa Estate Limited (Civil Case 259 of 2017)  
[2025] KEMC 229 (KLR) (8 September 2025) (Ruling)**

Neutral citation: [2025] KEMC 229 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
CIVIL CASE 259 OF 2017  
YA SHIKANDA, SPM  
SEPTEMBER 8, 2025**

**BETWEEN**

**WAMBUA MUSINGILA MWALALYA ..... PLAINTIFF**

**AND**

**DWA ESTATE LIMITED ..... DEFENDANT**

**RULING**

1. Before me is an application dated 17/3/2025 filed by the plaintiff. The application seeks the following orders:
  1. That the applicant be granted leave to file a supplementary list of witnesses to introduce Dr. Cyprianus Okoth Okere;
  2. That the applicant be granted leave to file a supplementary list of documents to introduce the medical report by Dr. Cyprianus Okoth Okere together with the receipt;
  3. That the costs of the application be provided for.
2. The application is supported by the affidavit sworn by Counsel for the applicant and is premised on the following general grounds:
  - i. The applicant wishes to substitute a witness who is unavailable;
  - ii. It is in the interest of justice that the application be allowed and the defendant/respondent will not be prejudiced if the orders sought herein are granted.
3. In the affidavit, the plaintiff reiterated the grounds in the application and annexed copies of the medical report and receipt that he wishes to produce.



## The Defendant's Response

4. The defendant opposed the application by filing a Replying affidavit sworn by Counsel for the defendant. Counsel deposed that the matter has come up for hearing on several dates however the same has not proceeded due to the fact that the Plaintiff/Applicant has been unable to secure the presence of their Expert witness, Dr. Mwendu K. Ndibo to the stand and have now sought to replace her with another expert witness, Dr. Cyprianus Okoth Okere together with his Medical report dated 4th February 2025, to which the defendant objects. The defendant argued that the application was irregular, prejudicial and offends the principles of Article 50 of the Constitution of Kenya, fair trial, orderly procedure and Integrity of filed evidence.
5. The defendant further argued that the original Medical Report dated 28th June 2027 by Dr. Mwendu K. Ndibiso formed the foundation of the Plaintiff's case and the Defence and therefore an attempt by the Plaintiff/Applicant to substitute the medical report together with the expert witness is a fundamental alteration of the evidentiary proof of the Plaintiff's case and would greatly prejudice the Defendant/Respondent who had prepared their Defence which includes cross examination strategy based on the original report. That the new Medical report by Dr. Cyprianus Okoth Okere dated 4<sup>th</sup> February 2025 is issued more than Eleven (11) years after the alleged injury is a delayed medical assessment and it is trite law that medical reports must be based on first hand post-accident/ injury examination to be considered credible and persuasive in nature.
6. The defendant averred that the Honourable Court should not allow the Plaintiff/Applicant to alter material facts of the case under the guise of an amendment, substitution especially after pleadings have already closed and the matter is in the middle of the hearing stage. That the Plaintiff/Applicant has not shown or demonstrated to this court their effort and due diligence they applied to secure the attendance of Dr. Mwendu K. Ndibo. The defendant argued that the introduction of new medical report is intended cure a huge evidentiary gap and it mounts to unfair ambush which is contrary to the Defendant's /Respondent's right to fair trial as enshrined under Article 50 of the Constitution of Kenya. That the said application is an abuse of the Court's process, is contrary to the rules of natural justice and therefore ought to be dismissed in its entirety.

## Main Issues For Determination

7. In my opinion, the main issues for determination are as follows:
  - i. Whether the plaintiff has given sufficient grounds to warrant the granting of the orders sought;
  - ii. Whether the plaintiff should be allowed to substitute the witness;
  - iii. Who should bear costs of the application?

## Submissions By The Plaintiff/applicant

8. The plaintiff gave a history of the case although some of the facts were distorted. The plaintiff submitted that the reason for seeking substitution is that Dr. Mwendu K. Ndibo has been unavailable due to numerous personal and professional responsibilities. The plaintiff further submitted that the contents of the medical report by the new doctor will be in tandem with the previous report. As such, no prejudice will be occasioned to the defendant. The plaintiff urged the court to condemn the defendant to pay costs of the application. The plaintiff relied on the following authorities:
  - a. Ogutu & another v Kenya Power and Lighting Company & 2 others [2024] KEHC 2550 (KLR);



- b. [Nduru v Avenue Service Station Ltd](#) [2024] KEELRC 528 9KLR);
- c. [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2024] eKLR.

### Analysis And Determination

9. I have considered the application, the response by the defence and given due regard to the submissions made by the plaintiff. The defendant did not file submissions. Section 1A of the [Civil Procedure Act](#) provides as follows:
- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
  - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".
10. Section 1B provides thus:
- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology".
11. Section 3A provides:
- Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".
12. Articles 159(2)(b) and (d) of the [Constitution](#) provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities and justice shall not be delayed.
13. Hearing is yet to commence. The plaintiff alleges that the previous doctor is unavailable due to personal and professional commitments. It is not true as stated by the plaintiff that the matter has come up on several occasions and that the previous doctor has not been available. The only time the matter came up for hearing was on 30/9/2024 but no proceedings were taken then as the court did not sit. Since then, the matter has never been set down for hearing.
14. I agree with the defence that the plaintiff has not demonstrated that he has made efforts to secure the attendance of the previous doctor in vain. As already indicated, the matter has had one hearing date on which it did not proceed. In as much as the matter is fairly old, it is still fresh as no evidence has been taken herein. I have perused both medical reports. No additional evidence has been presented in



the report sought to be produced. I do not see any prejudice that will be occasioned to the defendant if the application is allowed. In any event, the defendant will have an opportunity to cross-examine the substitute doctor or challenge his evidence.

15. Other than the authorities relied upon by the plaintiff, there is a litany of authorities on the subject. For instance, the following authorities support the court's discretion to allow substitution of a witness:

- a. *Meera Umoja Kenya Ltd v David Gikara & another* [2020] KEHC 7746 (KLR);
- b. *Joseph Kihara Mwaura v Earthline Properties Ltd & 11 others* [2022] KEELC 368 (KLR);
- c. *Marjory Njeri Njoroge v Joseph Muchiri Njuguna* [2021] KEELC 3138 (KLR).

I will thus exercise my discretion in favour of the plaintiff.

### **Disposition**

16. In view of the foregoing, I find the application meritorious. I make the following orders:

- a. The application dated 17/3/2025 is hereby allowed;
- b. The plaintiff to file and serve a supplementary list of witnesses and supplementary list of documents within seven (7) days from today;
- c. The defendant will have corresponding leave to file and serve any further document(s) in rebuttal within seven (7) days from the date of service upon them;
- d. The costs of the application shall be borne by the plaintiff. It would not be fair to condemn the defendant to pay costs of the application yet the substitution is sought by the plaintiff. The defendant had a right to oppose the application and it is not the defendant's fault that the plaintiff's witness is unavailable.

**DATED, SIGNED AND DELIVERED VIA CTS THIS 8<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

