



**Chere v Lake Basin Development Authority (Judicial Review
E045 of 2023) [2025] KEELRC 2913 (KLR) (28 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E045 OF 2023
JK GAKERI, J
OCTOBER 28, 2025**

BETWEEN

FREDRICK ONYANGO CHERE APPLICANT

AND

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

RULING

1. Before the Court for determination is the Applicant’s Notice of Motion dated 6th August, 2025 filed on even date seeking Orders that:-
 1. The Honourable court be pleased to set aside the dismissal Order made on 23rd July, 2025 and any other consequential Orders thereto.
 2. The Honourable court be pleased to reinstate the application dated 10th July, 2025 for hearing.
 3. The Honourable court be pleased to issue such further or other Order(s) as it may deem just and expedient for the ends of justice.
2. The Notice of Motion is expressed under Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* and is based on the grounds set out on its face and the applicant’s Supporting Affidavit sworn on 6th August, 2025.
3. The applicant deposes that he had challenges with the virtual link on 23rd July, 2023 having made several unsuccessful attempts and when he called the court Registry, the virtual court link was sent via WhatsApp and he accessed the virtual court but was notified that the matter had been called out earlier and dismissed for non-attendance.
4. That it was in the interest of justice that the application be allowed. To buttress his case, the applicant attached 3 plain pages of call-logs of a Safaricom line. The first call was made to ELRC, Eveline on



23rd July, 09:09 am and short messages followed at 9:11am and 9:17am after the virtual court link was forwarded at 9:11am.

5. In opposition to the application, the respondent filed Grounds of Opposition dated 23rd September 2025 that the application was incompetent, fatally defective, misconceived and abuse of court process.
6. Further, by a Replying Affidavit sworn by Patrick Barasa on 14th October, 2025, the affiant deponed that on the material day he accessed the virtual court via the link <https://cut/gm800N> provided in the publicly available Cause List for the Kisumu Employment and Labour Relations Court, without any challenge and was present when the application was dismissed.
7. The affiant further deponed that he had no challenge accessing the virtual court and the applicant's averment that he had challenges was untrue as the link was working well and the applicant had not provided the link he was using and which had challenges in accessing the virtual court.
8. That the applicant merely logged in late by which time his application had already been dismissed for non-attendance and was blaming the link which had no challenges.
10. That the applicant was duly bound to act diligently and attend court on time but failed to do so and the instant application was for dismissal.

Applicant's submissions

11. Mr. Chere, the applicant, submitted that he was relying on the Supporting Affidavit and added that he had availed evidence to demonstrate that he had challenges accessing the virtual court on 23rd July, 2025 as he had sought to do so through the E-filing.
12. The applicant submitted that the dismissal Order was not cast in stone and prayed that his application be allowed.
13. On reinstatement of the dismissed application, the applicant submitted that it was a matter of justice and the court had the requisite discretion to reinstate the application. He prayed that the court finds it just to reinstate the application dated 10th July, 2025 for hearing and determination.

Respondent's submissions

14. Counsel for the respondent submitted that he was present in court on the material day and contended that the instant applicant was not supported by admissible evidence as the annexures relied upon were electronic evidence filed without the mandatory certificate of Electronic evidence under Section 106B of the [Evidence Act](#) to verify their authenticity. That it was difficult for the court to verify the electronic evidence.
15. Counsel, further submitted that the applicant was blaming the virtual court link for not attending court on the day, yet the link had been provided on the courts Cause List and thus accessible to members of the public and there was no evidence that the virtual court link had any challenges on 23rd July, 2025.
16. It was submitted that blaming the court link for non-attendance was not sufficient ground for the court to set aside the Order made on 23rd July, 2025.
17. Counsel, submitted that the applicant ought to have been diligent to attend court.
18. Counsel prayed for dismissal of the instant application with costs.



19. In a rejoinder, Mr. Chere submitted that the annexures attached were stamped under oath and the respondent had not indicated that a Certificate of Electronic Evidence ought to have accompanied the annexures.
20. That the respondent did not demonstrate the prejudice it stood to suffer if the application was granted.
21. After careful consideration of the instant application, response and viva voce submissions by counsel and the applicant, the only issue for determination is whether the instant application has merit.
22. Court records reveal that this suit was filed on 5th December, 2023 vide Certificate of Urgency and leave was granted for the applicant to commence Judicial Review proceedings against the respondent and Judgment was delivered on 25th July, 2024.
23. Subsequently, the applicant filed an application dated 10th July, 2025 almost one year later seeking a review of the Judgment delivered on 25th July 2024.
24. The application was fixed for hearing on 23rd July 2025 in the presence of the applicant. The respondent was unrepresented.
25. On 23rd July, 2025, Mr. Baraza was present for the respondent but the applicant was absent. In the circumstances, counsel sought dismissal of the application for non-attendance and the court was in agreement and dismissed the application with no Orders as to costs. This was informed by the fact that *inter alia* the application had been filed under Certificate of Urgency.
26. The instant application was filed thereafter.
27. It is trite that the court has jurisdiction to vary or set aside the Order of dismissal of the application dated 10th July 2025 and such jurisdiction ought to be exercised judicially based on the grounds relied upon by the applicant as well as other circumstances of the case including prejudice to the respondent.
30. Although the applicant averred and submitted that he had challenges accessing the virtual court session, the respondent's counsel countered these arguments by asserting that he accessed court through the publicly available link and had no challenges and the applicant had not demonstrated the challenges and his evidence was unauthenticated, as by law required.
31. Section 106B of the [Evidence Act](#) provides:
 1. ...
 2. ...
 3. ...
 4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - a. identifying the electronic record containing the statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - c. dealing with any matters to which conditions mentioned in subsection (2) relate; and



- d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).
32. Shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
33. This provision makes it mandatory for any party relying on an electronic record which is printed on a paper, stored, recorded or copies on optical or electro-magnetic to have a Certificate of Electronic Evidence to accompany such record and as submitted by respondent's counsel, a fact the applicant admitted, that no certificate of Electronic Evidence was provided to authenticate the records relied upon.
34. The absence of the certificate in question rendered the annexures relied upon by the applicant inadmissible as evidence for purposes of this application.
35. Without the annexures, the applicant had no other verifiable evidence to explain his non-attendance of court on 23rd July, 2025. The application lacked any firm anchorage for sustainability.
36. In the court's view, even if the annexures attached by the applicant were admissible as evidence, the applicant's case would most likely have failed for the following reasons:
- i. The applicant did not avail details of the link he attempted to use on 23rd July 2025.
 - ii. The applicant either by default or design did not disclose at what time he attempted to access the virtual court having been aware that the court sits from 9:00am. This omission is important because it would have demonstrated whether the applicant was a diligent litigator, bearing in mind that he had a pending application to prosecute on that day. It is trite law that a case belongs to the party in the suit.
37. In this instance, the applicant failed the test of diligence.
- See *Africa Blooms Ltd V Gatari* (suing as the legal Representative of the Estate of Samuel Karuga Gatari – Deceased [2023] KECA 918 (KLR)), *Solomon Mbugua Kori V Brooke Bond (K) Ltd* [2019] KEHC 2720 (KLR), *John Obanda V Stage Coach International Services Ltd & another* [2002] KECA 155 (KLR).
38. Finally, the applicant did not disclose the nature or type of the challenges the virtual court link had on 23rd July, 2025 and how they were resolved. This is because the respondent's counsel was in court having used the virtual court link available to other court users and the public at large.
39. For the foregoing reasons, it is the finding of the court that the applicant has failed to prove that he had sufficient justification for non-attendance of court on 23rd July, 2025, for the court to exercise its discretionary favour.
40. Flowing from the foregoing, it is discernible that the Notice of Motion dated 6th August, 2025 is for dismissal and it is accordingly dismissed.
41. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 28TH DAY OF OCTOBER, 2025

DR. JACOB GAKERI



JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

