Sewe v Anjimbi & another (Suing as the Legal Representative of the Estate of Salim Anjimbi – Deceased) (Civil Appeal E002 of 2022) [2026] KEHC 2354 (KLR) (25 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2354 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E002 OF 2022

JN KAMAU, J

FEBRUARY 25, 2026

BETWEEN

DOROTHY ODHIAMBO SEWE ..... APPELLANT

AND

ABDUL AZIZ ANJIMBI ..... 1ST RESPONDENT

SYLVIA REHEMA OTIENO ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SALIM ANJIMBI – DECEASED

(Being an appeal from the Ruling and Order of Hon M. M. Gituma (RM) delivered at Vihiga in Principal Magistrate's Court Case No 81 of 2020 on 23rd February 2022)

JUDGMENT

Introduction

1. In her decision of 23rd February 2022, the Learned Trial Magistrate, Hon M. M. Gituma, Resident Magistrate, dismissed the Appellant's application for adjournment and closed her case.

2. Being aggrieved by the said decision, on 7th March 2022, the Appellant filed Memorandum of Appeal dated 28th February 2022. She relied on three (3) grounds of appeal.

3. Her Written Submissions were dated 15th June 2025 and filed on 8th July 2025 while those of the Respondents were dated 16th June 2025 and filed on 17th June 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the Grounds of Appeal were all related and that the only issue that had been placed before it for determination was whether the Trial Court erred in dismissing the Appellant's application for adjournment.

5. The Appellant submitted that the Trial Court closed her case prematurely on 23rd February 2022 after an application was made for an adjournment, without any misconduct or waiver on her part. She argued that the sickness of her Advocate's child and who had handed over all Vihiga Court matters was excusable and sufficient to warrant an adjournment as it was made in good faith.

6. She was categorical that she was contesting liability herein. She asserted that the closing of the defence case when she had not abandoned or withdrawn the defence and was ready to proceed another time constituted a miscarriage of justice. She relied on Article 50 of *the Constitution* of Kenya, 2010 and contended that it was necessary that the defence case be reopened to enable her call witnesses to bring out all the relevant issues to help the court reach a just decision.

7. She cited Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules and placed reliance on the case of Patritic Guards Ltd vs James Kipchirchir Sambu [2018]eKLR where it was held that whenever a court was called upon to exercise its discretion it had to do so judiciously and not capriciously.

8. She submitted that the court had unfettered discretion to re-open the defence case provided that the discretion was exercised judiciously and without exposing the opposite party to prejudice. She pointed out that the Respondents would not suffer any prejudice if the defence case was re-opened. She argued that the Respondents had not demonstrated how this application would prejudice them hence urged this court to allow this appeal as prayed.

9. She asserted that matters ought to be determined on merit as was held in the case of Brance Arabe Espanol vs Bank of Uganda [1999] 2 EA 22. She added that denying her the re-opening of her case would leave her unable to adduce evidence central to the contested liability, an outcome which was antithetical to justice.

10. She was emphatic that she was still desirous, willing and ready to defend this matter and that she had explained that she was not at fault as the inability to proceed was due to the sickness of her Advocate's child. She asserted that she would suffer irreparable harm, loss and damages unless this court set aside the proceedings of 23rd February 2022 and re-opened the defence case.

11. On their part, the Respondents submitted that the Appellant's Appeal herein had no merit and the same ought to be dismissed with costs to the Respondents. They placed reliance on the cases of Mercy Kirito Mugeti vs Beatrice Nkatha Nyaga & 2 Others[2013]eKLR and Selle & Another vs Associated Motor Boat Co Ltd & Others (Supra) where the common thread was that courts were required to reconsider and evaluate the evidence and draw their own conclusions though it was always to be borne in mind that it had neither seen nor heard the witnesses and thus make due allowance in that respect.

12. They were emphatic that the Trial Court fully took into account the relevant factors being the oral application made by the Appellant's counsel and the response thereto by their counsel and correctly declined the Appellant's application for adjournment thus proceeded to close the defence case.

13. They were categorical that their case at the Trial Court was closed on 7th July 2021 upon which the Appellant's Advocate sought the first adjournment and the matter was fixed for defence hearing on 22nd September 2021. They asserted that on 22nd September 2021, the Appellant's Advocate obtained the

second adjournment after alleging that the Appellant's witness had a sick child and the matter was given another date for defence hearing on 24th November 2021. They added that on 24th November 2021, the Appellant's Advocate sought the third adjournment citing that the defence witness was indisposed and was granted the last adjournment and the matter rescheduled for defence hearing on 23rd February 2022.

14. They further contended that on 23rd February 2022, counsel for both parties appeared before the Trial Court and once again, the Appellant's counsel sought for an adjournment claiming that counsel who had never handled the matter but was supposedly meant to handle the matter had a sick child. They pointed out that the Trial Court sought to find out whether the defence witness was present in court but it turned out that he was not in court leading to the Trial Court rejecting the application for adjournment and proceeded to close the Appellant's case and gave a date for mention for submissions.

15. They argued that the court had to be guided by the constitutional principles of a right of a party to be heard but this right was not to cause injustice and prejudice others. They asserted that the requirement that a party be granted a chance to file their documents and be heard did not extend ad infinitum. They added that at some point, litigation had to come to an end and that parties were not to be allowed to abuse the court process as the Appellant had done.

16. They further asserted that strict compliance of court orders and directions was fundamental as courts assert their authority to avert anarchy and/or disrespect to the court. They added that advocates and their clients were obliged under Section 1A (3) of the *Civil Procedure Act* to assist the court to further the overriding objective of the Act and to that effect to participate in the process of the court and to comply with the directions and orders of the court.

17. They contended that the Trial Court did not err when it closed the defence case for reasons that at no particular point in time during trial was the Appellant denied a chance to be heard but that instead, all the Appellant's counsel gave were excuses for adjourning the case each time the matter came up for defence hearing. They termed the Appeal herein as mischievous and intended to malign the Trial Court which in its decision to deny the adjournment, exercised its judicial discretion as required by law to dismiss unmerited applications.

18. They placed reliance on the case of Mbithuka Titus vs Jackline Mutindi [2020]eKLR where it was held that any application for adjournment must be grounded in law. They argued that it could not be said that the Trial Court erred in denying the Appellant an adjournment given that no good reasons were given. They argued that allowing the Appellant to re-open her case and testify would greatly prejudice them as the same would violate the provisions of Articles 50(1) of *the Constitution* of Kenya, 2010.

19. They further relied on the case of Japheth Pasi Kilonga & 8 Others vs Mombasa Autocare Limited [2015]eKLR where it was held that adjournments had been identified as the leading contributing factor to delay in the determination of cases resulting in overwhelming case backlog. They also relied on the case of Fitzpatrick vs Batger & Co Ltd (1972) 2 All ER 657 where it was held that public policy demanded that the business of the courts should be conducted with expedition.

20. They invoked Article 159(2)(b) and (d) of *the Constitution* of Kenya, Sections 14(5) of the *Supreme Court Act*, 3A and 3B of the *Appellate Jurisdiction Act*, 1A and 1B of the *Civil Procedure Act* and Order 17 Rule 1 of the Civil Procedure Rules which required courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes. They added that the Appellant had failed to prove that the Trial Court exercised its discretion in a wrong, unjustified and prejudicial manner as was held in the case of Okaka & Another vs Wesonga[2022] KEHC 9804 (KLR). They urged this court to dismiss the Appellant's appeal with costs.

21. Notably, a perusal of the proceedings of the Trial Court on 23rd February 2022 indicted that the counsel who held brief for the Appellant's counsel informed the court that the latter was not ready to proceed as she had a sick child that she was taking care of. The said counsel who was holding brief indicated that an email to that effect was sent to the Respondent's counsel.

22. The Respondent's Advocate opposed the application on grounds that the Appellant's counsel had never appeared in court and that on three (3) preceding occasions when the matter came up, the witness had a sick child while on another occasion, the said Appellant's counsel's child was unwell. He noted that it appeared to be a pattern in which the Appellant had been securing unnecessary adjournments. He added that the court had granted the last adjournment on 24th January 2021 and asked that the defence case be closed.

23. In reply to the Respondent's counsel, the counsel who was holding brief for the Appellant's counsel stated that the Appellant's counsel had taken over the files and hence the application had been made in good faith. She prayed for another date as there was no witness in court.

24. The Trial Court rendered itself as follows

> "I have considered the application. The defence was granted last adjournment. I note Ms Tesot has never been on record in this matter. Ms Tesot and Turgutt are from the same law firm. If indeed Ms Turgutt's child is unwell which this court sympathises the firm would have made arrangements on how to ensure her matters do not stall by having another colleague handle them. Ms Turgutt is present and would have done that. Further, if the application was in good faith then witness for the defence ought to have been available and ready to testify only for the impediment of unavailability of counsel. I'm inclined to agree with Mr Okoth, reject application for adjournment and proceed to close of defendant's case."

25. This court noted the Respondents' argument that the Appellant had sought for adjournments about two (2) times before and had been given a last adjournment on 24th November 2021. Even so, courts must restrain themselves from shutting out parties summarily without hearing their disputes on merit because they have power to compensate the opposing party with an award of costs. Unless a defence was a sham, vexatious, frivolous and an abuse of the court process, a party to a civil litigation ought not be deprived of his right to have his day in court and have the suit determined in a full trial.

26. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. The court should, therefore, act cautiously and carefully consider all facts of the case without rushing to embarking on closing a defence which raises triable issues.

27. With this in mind, this court perused the Appellant's Defence and noted that she denied the Respondent's claim in specificity and particularity. It was apparent to this court that her Defence could not be termed as a mere denial, sham, an abuse of the court process, vexatious or frivolous or that it was likely to prejudice, embarrass or delay the fair trial of the suit. The issues that she raised were triable and substantive.

28. To the mind of this court, the reason that the Appellant's counsel child was unwell was a plausible one as nobody chooses to have a sick child on the morning of going to work. It was a natural event.

29. The court was also required to consider if the opposing side would suffer any prejudice if the orders sought were granted. This court did not see any prejudice that the Respondents would suffer or were likely to suffer if the Appellant herein pursued her constitutional right to be heard on merit. If there was prejudice, then they did not demonstrate the same. Indeed, if there was any prejudice, then the same could be compensated by way of payment of costs.

30. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Appellant be given an opportunity to have her case heard on merit as she would suffer prejudice if she was denied an opportunity to fully present her case.

31. The power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) was well captured in Section 3A of the *Civil Procedure Act* Cap 21 (Laws of Kenya) that states that: -

> " Nothing in the 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 (emphasis court) or to prevent abuse of the process of the court."

Disposition

32. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 28th February 2022 and filed on 7th March 2022 was merited and the same be and is hereby allowed in the following terms: -

    1. That the decision of the Learned Trial Magistrate, Hon M. M. Gituma, (RM) delivered in Vihiga SPMCC No 81 of 2020 dismissing the Appellant's application for adjournment be and is hereby set aside and/or vacated. The effect of this decision was that the stay of proceedings at the Trial Court be and is hereby lifted for the matter to proceed from where it had reached.

    2. That as it was evident that the Respondent had had to go backwards in a matter that was already concluded, it is hereby directed that the Appellant pays the Respondent throw away costs in the sum of Kshs 30,000/= within thirty (30) days from the date of this Ruling.

    3. That in the event the Appellant shall not pay the Respondent the said throw away costs, the Respondent will be at liberty to institute recovery proceedings for the same.

    4. That this matter will be mentioned before the Senior Principal Magistrate on 17th March 2026 for allocation of this matter for hearing before any lower court at Vihiga Law Courts and/or for further orders and/or directions.

    5. That although the Appeal herein was allowed, this court deviated from the general principle that costs follow the event as the Appellant was responsible for many delays in the lower court matter and direct that each party will bear its own costs of this appeal.

33. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF FEBRUARY 2026

J. KAMAU

JUDGE