Chege v Chira (Civil Suit E509 of 2021) [2025] KEMC 346 (KLR) (11 December 2025) (Ruling)

Neutral citation: [2025] KEMC 346 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL SUIT E509 OF 2021

PA NDEGE, SPM

DECEMBER 11, 2025

BETWEEN

ANTHONY MAKENA CHEGE ..... PLAINTIFF

AND

GEORGE NGURE CHIRA ..... DEFENDANT

RULING

1. The defendant filed the application dated 19th April 2025, that is brought under Article 159 (2) (d) of *the Constitution*, Sections 1A, 1B, 3and 3A of the *Civil Procedure Act*, and Order 51, Rules 1 and 3 of the Civil Procedure Rules, seeking for orders inter alia:

    i. Spent.

    ii. Spent.

    iii. That this Honorable Court be pleaded to set aside the proceedings dated 15/04/2025 wherein the court closed the defence case yet the Defendant/ Applicant was in his advocate's chambers and ready to proceed with his case and that the Applicant herein be allowed to tender his evidence and defend the suit on its merit.

    iv. That this Honorable Court be pleased to set aside the subsequent ex-parte proceedings of 15/04/2025 in this suit in their entirety as against the Defendant/ Applicant.

    v. spent

    vi. That the costs of this application be in the cause.

2. The application is premised on the fourteen (14) grounds on its face marked (a) to (n), and is supported by the affidavits of George Ngure Chira, the defendant/ applicant and Hilda M. Oseko, his advocate, both sworn on the 19th April 2025.

3. It is the defendant's case that the matter was scheduled for defence hearing on 15th April 2025, when he attended court virtually from his advocate's chambers and was ready to proceed with the same. That his counsel was also in court dealing with another matter being Nakuru CM ELC No. 050 Of 2023 listed as No. 8 in the cause list in which this matter was listed as No. 18 before the Honorable Court. That however, shortly after addressing the said matter, there was sudden power outage and hence loss of network for a brief duration of time. That the counsel opted to use her personal telephone as an alternative gadget to join the Court session but most unfortunately, by the time they were admitted to the session, the matter had been called out and adverse orders issued against the Defendant/ Applicant. That in light of the above circumstances, it is clear that the inaction to be in attendance at the time when the matter was called out was an honest inadvertence and unintended and that the mistake should not be mete upon the innocent litigant. That the applicant therefore implores this court to grant it a chance to defend this suit, considering that he has a strong defence and which raises numerous triable issues. That the omissions can be cured vide the provisions of Article 50 and 159 (2) (d) of *the Constitution* of Kenya, 2010. That regardless of any shortcomings of the Applicant, this Honorable Court is obliged by the rules of natural justice to hear and determine each case on its merit and that no litigant should be driven away from the seat of justice without being heard.

4. The application is opposed by the plaintiff, through his replying affidavit, sworn on 9th June 2025, in which he inter alia deposed that the application herein is malicious, inept, vexatious and a waste of the precious time of the court hence undeserving of the Honorable Court's consideration. That the Defendant/ Applicant has at all times since inception of the suit herein in 2021 employed all tricks, schemes and orchestrations to derail the full hearing and determination of the matter herein. That as is evident in the proceedings, the Defendant and his counsel on record have for a whooping 5 times either failed to appear in court, sought adjournments of the hearing of their case and/or showed up with flimsy unfounded excuses seeking leave to file other documents. That on 25/10/2021, 13/12/2022, 06/06/2023. 30/07/2024 and as recent as 15/05/2025, when the defence case was slated for hearing, the Defendant was either unavailable, seeking a further date or an adjournment with the promise that he would put his house in order. That the court, in its extension of grace and benevolence upon the defendant, always allowed its application for adjournment and on 13/12/2022, the court stated that the adjournment thereof would be marked as the final one. That the defendant has however never been minded in adhering to the court's directions, little wonder he never showed up for the subsequent hearings of 06/06/2023, 30/07/2024 and 15/05/2025. That in view of the foregoing, the application herein is for all purposes and intents frivolous and an ill-intended scheme to delay the conclusion of the matter herein. That had the Defendant's counsel inadvertently missed the hearing of the matter herein, nothing would have been easier that for him to make an urgent application on the same date to seek review of the Court's orders herein. That they have already drafted, served and filed their submissions on the substantive matter herein dated 23/05/2025 and the Defendant and his advocates on record are therefore seized of the same. That as such, opening the case for the defence hearing, long after their substantive submissions have ben served is an orchestration to steal a match on the plaintiff by the defendant. That there ought to be an end to litigation and that parties are bound to ensure expedient disposal of matter. That the defendant had not demonstrated any justifiable reason as to why he should be allowed to be heard long after the case herein was closed and in view of the subsequent developments herein.

5. The learned counsel for the parties filed their written submissions for and against the application that the court has considered. The issues for determinations in the notice of motion are as follows:

    i. Whether the defendant has made a reasonable case for setting aside of the proceedings of 15th April 2025 and reopening of the defence case.

ii. Whether the defendants do pay the costs?

6. The court has carefully considered the grounds on the notice of motion, affidavit evidence, written submissions by the learned counsel for both parties, the court record and come to the following findings.

7. The court record confirms that this suit was commenced through the plaint dated 12/05/2021 and filed on 07/06/2021. There were pretrial directions taken on 25/08/2021 and in the absence of the defendant, despite there being evidence of service on him. This matter was nevertheless certified ready for hearing and fixed for 15/02/2022. During the hearing, both parties were however present. A witness testified for the plaintiff, after which the plaintiff's case was closed. Mr. Abuya for the Defendant then prayed for adjournment to call his witness. After lengthy arguments, in which the plaintiff opposed the application for the adjournment, Hon. Khatambi, Principal Magistrate, PM, as she then was, then presiding, ruled as follows:

> " I have considered the application by the defence counsel and response by the plaintiff.
>
> Suit filed on 7/6/21. Same mentioned on 25/10/21. I note defence were absent despite being notified of date. Matter fixed for hearing. It would appear that the defence failed to ensure compliance with Order 11. The plaintiff counsel indicates that allowing plaintiff to comply would amount to trial by way of ambush.
>
> I have considered rival submissions. It is my considered view that in order for matter to be determined on merit it would be prudent to receive evidence from both parties. On said premise I make following orders;
>
> 1. Defence to file and serve the statement of George Ngure Chira, list of documents and the documents they intend to rely on within 7 days.
> 2. If documents not filed and served as stated above defence would be locked out.
> 3. Upon service the plaintiff's case would be reopened and plaintiff will be at liberty to file any other document they intend to rely on within 7 days, if need be.
> 4. I note hearing proceeded. No orders as to cost.
> 5. Plaintiff at liberty to be recalled if need be. Mention on 16/5/22[1].

8. There was a further application filed herein before the matter was finally set down for defence hearing on 13/01/2022. On that day, the defence prayed for adjournment on the ground that the defence counsel was unwell. The hearing was nevertheless commenced afresh, with the plaintiff testifying and calling another witness. The matter was then adjourned for defence hearing on 06/06/2023. The court in allowing the adjournment granted the defence a final chance to put its house in order. It also awarded costs to the plaintiff to be paid before the next hearing date.

9. Due to change in the trial magistrate, directions had to be taken as to the mode of proceedings and subsequent typing of proceedings. The matter was then fixed for the defence hearing on 30/07/2024. On that date, Ms. Karungu appeared for the defence. She prayed for adjournment on the basis that their client, the defendant, was not present. The court agreed with them and adjourned the hearing to 02/12/2024. On the next date, 15/04/2025, neither the defendant nor the counsel was present. This court thus deemed the defence case as closed and fixed this matter for submissions.

[1] Refer to pg. 5 of the typed proceedings

10. The defendant is through their application, asking the court to set aside the proceedings of 15/04/2025, basically the orders of the court marking their case as closed. The application is anchored on various provisions of the law as stated therein. They are Article 159 (2) (d) of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 51, Rules 1 and 3 of the Civil Procedure Rules, 2010.

11. Section 3A restates the inherent powers of the court to make orders necessary for the ends of justice, while Article 159 (2) provides for the principles guiding the courts and tribunals in the exercise of judicial authority.

12. The defendant and his counsel claim technological failure. That they was power outage that made them unable to access the online proceedings on that date. They now seek that the proceedings be set aside and defence hearing reopened for further hearing. While faced with a similar application the superior court in Susan Wavinya Mutavi versus Isaac Njoroge & Nairobi City County Government [2020] KEELC 8 (KLR) held that;

> " Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See (i) Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others (2018) eKLR; (ii) Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another (2015) eKLR; (iii) Ladd v Mashall (1954) 3 All ER 745); (iv) Reid v Brett [2005] VSC 18; (v) Smith v New South Wales Bar Association (1992) 176 CLR 256; and (vi) EB v CT (No 2) [2008] QSC 306."

13. The reasons fronted by the defence on why they did not attend the court on time or at all was that there was power outage. While there are no hard rules upon which the court ought to exercise its discretion, the same must be exercised judiciously, with due regards to the facts of each case and for the ends of justice.

14. While exercising my discretion, I take into consideration the conduct of the parties and their counsel throughout these proceedings. The defendant and his counsel's conduct has been less than satisfying as they have occasioned multiple delays, contrary to the provisions of section 1A (3) of the *Civil Procedure Act* chapter 21 of the Laws of Kenya, that obligates the parties and their counsel to assist the court to further its overriding objectives under the Act, by participating in the processes of the court, complying with the directions and orders of the court. This matter was instituted vide a plaint filed on 07/06/2021, was confirmed ready for hearing on 25/10/2021, the plaintiff's case was heard and closed on 25/10/2021, it was reopened at the instance of the defence and closed again on 13/12/2022. This being a fairly old case, and therefore falling in the category of backlog, the court is obligated by Sections 1A & 1B of the *Civil Procedure Act*, to further the overriding objective of the Act, which includes the just and expeditious determination of disputes before it. Further to that, the court has inherent

powers under Section 3A of the *Civil Procedure Act* to make orders that are necessary for the ends of justice or to prevent abuse of the process of the court. In the case of Catherine Njeri Angote (suing as the Administrator of the Estate of Samuel Angote Ababu (Deceased) versus Lucy Wangari Ngugi & another [2017] eKLR, it was held that;

> " Sections 1A and 1B of the *Civil Procedure Act* deal with the issue of overriding object of the Act which is to facilitate the just, expeditious proportionate and affordable resolution of disputes. Further, the Court has a duty to further the said overriding objective of this Act. The Court is called to further the said overriding objective by ensuring that disputes are determined in a just manner to all the parties, efficient and expeditious disposal of the matter and timely disposal of the proceedings. How does the Court ensure that the above objectives are achieved? The Court is supposed to manage its proceedings and ensure that parties are not given leeway to cause unnecessary delay in timely disposals of proceedings before it. Further that the proceedings of matter in court should be controlled and regulated by the Court but not the parties."

15. The reality of litigation is that counsel and parties come from far and wide, to access justice for their litigants, and the virtual courts have eased up access to courts from wherever a party or counsel could be at the time their matter is called. The virtual court sessions have saved time and expenses that would otherwise have been spent in travelling to the court. However, parties and or counsel with matters that are confirmed for hearing during the virtual call-over should not delay the hearing of their cases and waste the other counsel's/party's and court's time, by failing to arrive in court by the scheduled time. In this case, however, and as contended by the learned counsel for the plaintiff, there is no evidence of the power outage alleged. Further there is no evidence that the defendant had travelled and was in the counsel's chambers on the material day as alleged.

16. The court has been considerate enough and indulged the defence with the adjournments herein. It appears that the defendant has been taking the schedule of this case for granted. In the case of Elishaphan Omolo Nyasita versus John Ojowi Onuko [2015] eKLR, the court had this to say;

> " While it is not something to be encouraged it is a reality that the court cannot ignore. The court nonetheless would like to emphasize that parties should not take scheduling of their cases for hearing for granted and parties must be ready to proceed with the hearing of their cases as scheduled noting that cases are scheduled for hearing on the basis of availability of dates and once allocated on a particular date or time that denies and/or precludes the court the opportunity of allocating another case on the allocated date or time. Given the backlog of pending cases it is undesirable for a party to take a hearing date of a case and fail to proceed with the hearing especially where the court has confirmed and allocated time for the hearing of the case."

17. The defendant's reliance on Article 159 (2) of *the Constitution* is merely an attempt to cover up for their failure to be present for the hearing of their case. The Court of Appeal in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR held that;

> " I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover

to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

18. I find the defense's past conduct herein and their inability to attend to their case, further lack of proof of the circumstances they allege that made them not to attend the hearing herein to amount to an affront to the overriding objective with the aim of ensuring that the court attains just determination of this suit, which is four years old, in an efficient, timely and cost-effective manner, by failing to be in court at the time set. Allowing the application will be prejudicial to the plaintiff and definitely, will be tantamount to encouraging abuse of the court process. As such, I find no merit in the defendant's application dated 19/04/2025. In terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the events unless where for good cause otherwise ordered, the plaintiff is awarded costs.

19. Flowing from the foregoing findings on the defendant's notice of motion dated 19/04/2025, the court finds and orders as follows:

    a. That the application has no merit and is hereby dismissed.

    b. That the defendant will pay the plaintiffs costs.

    It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 11TH DAY OFDECEMBER 2025.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the Presence Of:

Plaintiff: Oyondi h/b Mukira

Defendant:N/A

Oyondi: We had filed submissions in the main suit. The same are dated 23/05/25. We can take a judgment date.