



**Smith v Kigera & another (Miscellaneous Civil Application  
E009 of 2025) [2025] KEHC 11779 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11779 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CIVIL APPLICATION E009 OF 2025**

**CM KARIUKI, J  
JULY 31, 2025**

**BETWEEN**

**STEPHANIE UMMA SMITH ..... RESPONDENT**

**AND**

**JOHN WAWERU KIGERA ..... 1<sup>ST</sup> APPLICANT**

**ABDULGANI TRADING COMPANY LIMITED ..... 2<sup>ND</sup> APPLICANT**

**RULING**

**1. Introduction**

1. The Applicant, John Waweru Kigera, moved this Court by way of a Notice of Motion dated 25th March 2025, brought under the provisions of Article 159(2)(d) of *the Constitution*, sections 2A and 3A of the *Civil Procedure Act*, and Order 4 Rule 4 of the Civil Procedure Rules. He seeks orders to reopen this case so that the application dated 17th February 2025 may be heard inter partes.
2. The impugned orders were issued on 24th February 2025, when the Court allowed the said application ex parte, having found that the Respondents had been served and had not responded or attended court.

**2. Procedural History and Background**

3. The application dated 17th February 2025 sought three substantive prayers:
  - (b) Stay of execution of judgment delivered on 31st October 2024 pending inter partes hearing;
  - (c) Stay of execution pending hearing and determination of an intended appeal;
  - (d) Enlargement of time for lodging an appeal out of the judgment in Narok CMCC No. 166 of 2018.



4. Upon hearing the application ex parte on 24th February 2025 and noting the lack of response or attendance by the Respondents, this Court granted prayers (b), (c), and (d), and subsequently closed the file.
5. In the instant application, the Applicant alleges that although he was served with the application itself, he was not served with the hearing date or directions and was thus denied an opportunity to respond.

#### **The Applicant's Case**

6. The application is supported by the affidavit of Julia Kariuki, learned counsel for the Applicant. She deposes that there was no service of directions issued by the Court concerning the hearing of the application dated 17th February 2025, and that the Applicant only learned of the Court's determination upon inquiring at the Court registry.
7. The Applicant contends that he was condemned unheard, and that the orders were obtained by misrepresentation and non-disclosure of material facts—particularly the fact that the 1st Respondent had allegedly been notified of the judgment earlier than claimed.
8. The Applicant relies on *Aldermen Ltd v Shah & 3 others* [2022] KEELC 2311 (KLR), where the court held that any order obtained without proper service is liable to be set aside ex debito justitiae.
9. It is further submitted that the principle of audi alteram partem was violated, contrary to the holding in *Mandeep Chauhan v Kenyatta National Hospital* [2013] eKLR, which principle has been endorsed in numerous decisions, including *Odwesso v Nyaga* [2024] KEHC 9123 (KLR).
10. The Applicant also cited *Wachira Karani v Bildad Wachira* [2016] eKLR, arguing that courts should ensure substantive justice and avoid technicalities that hinder fair hearing.

#### **4. The Respondent's Case**

11. The application is opposed by the 1st Respondent, Stephanie Umma Smith, who filed a replying affidavit sworn on 17th April 2025 and written submissions dated 23rd April 2025.
12. The Respondent argues that the application lacks merit, is brought in bad faith, and was overtaken by events since the leave to appeal out of time was already granted, and the appeal filed as Narok HCAP No. E011 of 2025.
13. She asserts that service of the application was properly effected and evidenced by the affidavit of service dated 21st February 2025, and that the Applicant's failure to respond within time cannot be blamed on lack of diligence.
14. The Respondent relies on *Susan Wavinya Mutavi v Isaac Njoroge & Another* [2020] eKLR, arguing that the Court should only allow reopening where new and compelling evidence is presented, and where no prejudice would be occasioned.
15. She further cites *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR, where the Court affirmed that discretion must be exercised judiciously and not whimsically, especially where timelines have lapsed.
5. Analysis And Determination.

#### **6. Issues for Determination**

16. The Court identifies the following issues for determination:



- a. Whether the orders issued ex parte on 24th February 2025 were irregular for want of service of hearing directions;
- b. Whether the application dated 25th March 2025 meets the threshold for setting aside the ex parte orders and reopening the case;
- c. What orders should issue as to costs.

### **A. Irregularity of the Orders**

17. Service of hearing notices is an essential element of due process. In this case, while the application dated 17th February 2025 was served, there is no evidence on record that the directions for hearing were ever communicated to the Applicant. The court record shows that the matter was listed for hearing on 24th February 2025, but the Respondents were absent. The affidavit of service makes no mention of communicating the hearing date.
18. In *Mandeep Chauhan (supra)*, the court underscored the importance of notifying parties of hearing dates, and held that failure to do so renders the proceedings liable to be set aside.
19. I am therefore persuaded that the orders of 24th February 2025 were irregular, and that the Applicant was denied a fair opportunity to be heard.

### **B. Whether to Reopen the Case**

20. The decision whether or not to reopen a matter is discretionary and guided by the interests of justice. The court in *Philip Kiptoo Chemwolo v Mumias Sugar Co. Ltd* [1982-88] KAR 1036 held that courts exist to do justice and should not be shackled by procedural technicalities.
21. The application was made promptly—barely a month after the ex parte ruling. While there is some delay in filing a response, it is not inordinate. In any event, the right to a fair hearing under Article 50 and the principle of Article 159(2)(d) of *the Constitution* militate against shutting out the Applicant before the issues can be ventilated inter partes.
22. The 1st Respondent argues that the application is overtaken by events, as the appeal has already been filed. I do not find this argument persuasive. An appeal filed pursuant to an ex parte order can be amended or withdrawn. Its filing cannot defeat the Court’s power to revisit an earlier order that was irregularly obtained.
23. Further, the Respondent has not demonstrated any irreparable prejudice that would be suffered if the application dated 17th February 2025 is reheard. Any inconvenience can be addressed through an award of costs and timelines for compliance.

## **7. Disposition**

24. In the result, I find merit in the application dated 25th March 2025. To ensure that justice is done, and is seen to be done, I make the following orders:
  - i. The orders issued on 24th February 2025 are hereby set aside in their entirety.
  - ii. The file is hereby reopened for hearing of the Notice of Motion dated 17th February 2025 inter partes.
  - iii. The Applicant shall file and serve his response and submissions to the application dated 17th February 2025 within seven (7) days of today’s ruling.



- iv. The Respondents shall have seven (7) days thereafter to file and serve any supplementary affidavits and submissions.
- v. The application shall be listed for inter partes hearing on a date to be fixed at the registry on priority basis.
- vi. The costs of the present application shall be borne by the 1<sup>st</sup> Respondent.

25. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
31<sup>ST</sup> DAY OF JULY 2025**

.....

**CHARLES KARIUKI**

**JUDGE**

