



REPUBLIC OF KENYA



**Bwachete v Karen Hospital Training College & another (Civil Case
20 of 2022) [2025] KEHC 1947 (KLR) (Civ) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 20 OF 2022

TW CHERERE, J

FEBRUARY 27, 2025

BETWEEN

VICTOR BWANCHETE PLAINTIFF

AND

KAREN HOSPITAL TRAINING COLLEGE 1ST DEFENDANT

KAREN HOSPITAL LIMITED 2ND DEFENDANT

RULING

1. Before this Court is the Defendants' Notice of Motion dated 16th August 2024, brought under Section 3A of the *Civil Procedure Act*, seeking the following orders for:
 - a. Leave to file a supplementary list of witnesses;
 - b. That the supplementary list of witnesses dated 16th August 2024 be deemed as properly filed and admitted on record;
 - c. That costs of this application abide the outcome of the suit.
2. The application is premised on the grounds that the statement of one Charles Masese, a crucial witness for the Defendants, was inadvertently neither filed nor served upon the Plaintiff. The Defendants contend that the Plaintiff will not suffer prejudice as they are amenable to the reopening of the Plaintiff's case should the need arise.
3. The application is supported by the affidavit of Mandela K. Chege, advocate for the Defendants, sworn on 16th August 2024, reiterating the grounds on the face of the application. He owns up to the mistake of failure to file and serve the statement of one Charles Masese but asserts that mistakes of counsel should not be visited upon the Defendants.



4. Plaintiff opposes the application by way of grounds of opposition dated 24th October 2024 mainly on grounds that:
 1. Defendants are seeking review of orders dated 30th July 2024
 2. The Application has been brought late without explanation
 3. The Application will only serve to delay the matter
 4. The Application does not meet the threshold for the grant of the orders sought therein. The Application is manifestly prejudicial to the Plaintiff, given the history of the matter as can be noted from the record.
5. In a rejoinder contained in his supplementary affidavit dated 30th October 2024, Mandela K. Chege, advocate for the Defendants deposes that the application is in no way meant to delay the hearing and determination of this matter but is made out of sheer necessity and in the interest of justice and to ensure the Defendant is able to adduce his defence as per law provided.
6. By their submissions dated 22nd November 2024, the Defendants argue that Section 3A of the [Civil Procedure Act](#) gives this court inherent power to issue orders that meet the interests of justice. The Defendants cited [Raindrops Limited v County Government of Kilifi](#) [2020] eKLR, where the court permitted the reopening of a case to introduce new evidence, and [Joseph Ndungu Kamau v John Njibia](#) [2017] eKLR, where the Plaintiff was allowed to reopen his case and produce a document that was previously unavailable.
7. The Defendants urge the court to find that failure to file the statement in issue was an honest human mistake by counsel and should not be visited upon them.
8. By submissions dated 19th December 2024, the Plaintiff gives a chronology of the proceedings in this matter and argues that the application as presented under Section 3A of the [Civil Procedure Act](#) does not meet the threshold for grant of the orders being sought. The Plaintiff contends that Order 7 Rule 5 of the [Civil Procedure Rules](#) requires every party to a suit to furnish their evidence in advance before the commencement of every trial. Since pleadings had already closed under Order 11 of the [Civil Procedure Rules](#), the Plaintiff argues that the Defendant ought to have re-opened the pre-trial conference to have their list of witnesses adopted on record.
9. In support of this position, the Plaintiff relies on [Alois Oceano D'sumba v Rajnikant Narshi Shab & another](#) [2017] eKLR, where the court emphasized the need for parties to seek leave to file additional statements and documents before the hearing of the plaintiff's case.

Analysis

10. The key issues for determination are:
 - a. Whether the Defendants have provided sufficient justification for filing the supplementary list of witnesses out of time;
 - b. Whether allowing the application would prejudice the Plaintiff;
 - c. Whether the Court should exercise its discretion in favor of the Defendants.
11. Order 7 Rule 5 of the [Civil Procedure Rules](#)

“The defence and counterclaim filed under Rule 1 and 2 shall be accompanied by—



- a. an affidavit under Order 4 Rule 1(2) where there is a counterclaim; (b) a list of witnesses to be called at the trial; (c) written statements signed by the witnesses except expert witnesses; and (d) copies of documents to be relied on at the trial:

Provided that statements under sub-rule (c) may, with leave of the court, be furnished at least fifteen days prior to the trial conference under Order 11."

12. Order 11 of the *Civil Procedure Rules*

"Where orders or directions are given at a case management conference—

- a. the judge or deputy registrar or magistrate or case management officer shall record the orders or directions and inform the parties thereof; and
- b. where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit."

13. The foregoing orders require parties to disclose all witnesses and documents before trial. Any late filing must be justified by compelling reasons, and courts must weigh the prejudice caused against the need to facilitate substantive justice.
14. There is evidence that Defendants did not comply with the foregoing orders. Their counsel has owned up to the failure to file the statement of one Charles Masese and seeks the court's indulgence on the ground that it was an inadvertent mistake
15. In *Itute Ingu & Another v Isumael Mwakavi Mwendwa* [1994] eKLR, the Court of Appeal emphasized that the nature and quality of a mistake by counsel must be examined before excusing it.
16. Similarly, *Shital Bimal Shab & 2 Others v Akiba Bank Limited* [2006] 2 EA 323 recognized that while mistakes of counsel can justify an extension, courts must guard against total inaction disguised as an excusable mistake.
17. The Supreme Court in *Raila Odinga & 5 Others v IEBC & 3 Others* (2013) eKLR held that late submission of additional evidence should only be allowed if it does not unduly prejudice the opposing party. The Court emphasized that parties must adhere to procedural timelines, as failure to do so would disrupt the orderly administration of justice. The Court further stated that while a small or limited introduction of evidence may be permissible if it does not significantly disadvantage the opposing party, substantial additions that affect the fundamental nature of the case should not be allowed. The Court noted that such discretion must be exercised cautiously to maintain a level playing field and ensure that litigation is not unduly prolonged.
18. Article 159 (2)(d) of *the Constitution* of Kenya requires courts to administer justice without undue regard to procedural technicalities even as they balance this with the need to respect procedural timelines.
19. The holding in *Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another* [2001] eKLR, that procedural rules are handmaidens of justice rather than its mistress further supports the view that procedural technicalities should not override substantive justice.



20. Section 3A of the *Civil Procedure Act* provides that:

“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.”

21. I have evaluated the delay by the Defendants in the context of fairness and the ability of the Plaintiff to respond effectively to the new witness and I find that:

- a. The omission to file the statement of Charles Masese has been explained as an inadvertent mistake of counsel.
- b. While clients should not be unduly penalized for mistakes of counsel, courts must assess the nature and impact of such mistakes before granting relief.
- c. The mistake only became apparent after directions by Nang’ea J. issued on 30th July 2024 for the reason that the directions were based on the two statements that the Defendants had already filed.
- d. The Defendants have demonstrated that the intended witness is crucial to their case, and the delay in filing and serving his statement was not deliberate
- e. The Plaintiff’s case has been closed, but this does not bar reopening it for fairness.
- f. The prejudice to the Plaintiff can be compensated by costs and by allowing him an opportunity to respond to the new witness.

22. In the end, this Court finds that the interests of justice would best be served by allowing the Defendants to file the additional witness statement, while ensuring that the Plaintiff is not prejudiced through the opportunity to respond and an award of costs.

23. Consequently, the Notice of Motion dated 16th August 2024, is allowed in the following terms:

- a. Leave is granted to Defendants to file a supplementary list of witnesses specifically the witness statement of Charles Masese
- b. The supplementary list of witnesses dated 16th August 2024 shall be filed and served on the Plaintiff within 7 days from today’s date
- c. The Plaintiff is granted corresponding leave, should he so wish, to reopen his case to respond to the additional witness and to file and serve a supplementary witness statement within 7 days of service of the Defendants’ supplementary list of witnesses and the witness statement of Charles Masese
- d. The Defendants shall bear the costs of this application in any event.
- e. Mention before Justice Mulwa on 11th March 2025 to confirm compliance and to take a hearing date

DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances



Court Assistant - Ubah

For Plaintiff - Ms. Anyango for Ako Advocates LLP

For Defendant - Mr. Mandela for Njoroge O. Kimani & Co Advocates

