



**Cancer Investments Limited v Nairobi City County Government & 4 others (Environment & Land Case 81 of 2019) [2023] KEELC 19307 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19307 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 81 OF 2019**

**JO MBOYA, J  
JULY 25, 2023**

**BETWEEN**

**CANCER INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL CONSTRUCTION AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL BUILDING INSPECTORATE ..... 3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING MINISTRY OF LANDS AND  
PHYSICAL PLANNING ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide Notice of Motion Application dated the 23<sup>rd</sup> May 2023; the Plaintiff/Applicant herein has approached the Honorable court seeking for the following reliefs;
  - i. ....(Spent).
  - ii. That this Honorable court be pleased to grant Leave to the Plaintiff/Applicant to re-open the Plaintiff's case and adduce additional evidence.
  - iii. That this Honorable court be pleased to grant Leave to the Plaintiff to file a Supplementary List and Bundle of Documents and have the Documents produced as Evidence in this case.
  - iv. That the Honorable court be pleased to give such further and other orders and directions as it may fit deem and just to grant.
  - v. That the costs of this Application be in the cause.



2. The instant Application is premised and/or anchored on the various grounds which have been alluded to at the foot thereto. Further and in addition, the Application is supported by the affidavit of Muktar Pakar; sworn on the 23<sup>rd</sup> May 2023 and to which the Deponent has attached various annexures thereto.
3. Upon being served with the instant Application, the 1<sup>st</sup> Defendant/ Respondent, has responded thereto by way of Grounds of opposition dated the 22<sup>nd</sup> June 2023; and wherein the 1<sup>st</sup> Defendant/ Respondent has inter-alia contended that the instant Application constitutes an afterthought and is otherwise intended to plug the loopholes that were exposed in the Plaintiff's case during cross examination.
4. Other than the foregoing, the 2<sup>nd</sup> Respondent reacted to the Application by way of Replying affidavit sworn by Arch. Stephen Mwilu; on the 3<sup>rd</sup> July 2023; and to which the Deponent has attached one document, namely, a report relating to a site visit onto the suit property undertaken by the National Construction Authority on the 19<sup>th</sup> June 2023.
5. Furthermore, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have opposed the Application vide Grounds of opposition dated the 6<sup>th</sup> June 2023. For good measure, the named Defendants have contended inter-alia that the instant Application has been filed/mounted with inordinate and unexplained delay.
6. First forward, the Application herein came up for hearing on the 7<sup>th</sup> June 2023, whereupon the advocates for the respective Parties agreed to canvass and dispose of the Application by way of written submissions. In this regard, the court thereafter circumscribed timeline for the filing and exchange of the written submissions.

## **Submissions by the Parties**

### **a. Applicant's Submissions:**

7. The Applicant herein has filed written submissions dated the 15<sup>th</sup> June 2023; and in respect of which same has raised, highlighted and canvassed two (2) salient issues for consideration by the Honourable court.
8. Firstly, Learned Counsel for the Applicant has submitted that the Applicant herein has established and demonstrated sufficient cause and/or basis to warrant the exercise of discretion of the Honourable Court in re-opening the Plaintiff's case and thereafter allowing the Plaintiff to tender and adduce further evidence.
9. Furthermore, Learned counsel for the Applicant has contended that the impugned evidence, which is sought to be tendered and produced, subject to an order reopening the Plaintiff's case, was never available to or within the custody of the Plaintiff/Applicant at the time when the Plaintiff's case was heard and closed.
10. Additionally, Learned counsel has contended that the Plaintiff/Applicant herein made frantic and concerted efforts to procure and obtain the impugned evidence, by writing several Letters to the 4<sup>th</sup> Defendant herein, but the efforts did not culminate into fruition or at all.
11. Further and in any event, Learned counsel for the Applicant has contended that the impugned documents were only availed and supplied to the Applicant herein on the 19<sup>th</sup> May 2023; and hence the reason why the current Application was filed on the named/mentioned date.



12. Other than the foregoing, Learned counsel for the Applicant has also contended that the impugned evidence, which is sought to be produced is critical and paramount in helping the Honourable court to arrive at a fair and just determination of the dispute before the court.
13. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on inter-alia the case of Mohamed Abdi Mahamud versus Ahmed Abdulai Mohamed & 3 Others (2018)eKLR, Okiya Omutata Okoiti versus The Director of Public Prosecution; Inspector General of National Police Service & Another (2021)eKLR and Raindrops Ltd versus County Government of Kilifi (2010)eKLR, respectively.
14. Secondly, Learned counsel for the Applicant has submitted that the Defendants/Respondents herein shall not suffer any prejudice and/or detriment, whatsoever, if the current Application is allowed and granted.
15. Further and in addition, Learned counsel for the Applicant has submitted that the Defendants/Respondents shall still be at liberty to cross examine the Plaintiff witness and to challenge the additional documents during the trial, subject to an order reopening the Plaintiff's case.
16. To amplify the fact that the Defendants herein shall not be disposed to suffer any prejudice and/ or inconvenience, whatsoever, Learned counsel for the Applicant has cited and relied on the decision in the case of Raindrops Ltd versus County Government of Kilifi (2020)eKLR.
17. Premised on the foregoing submissions, Learned counsel for the Plaintiff/Applicant has thus implored the Honourable court to find and hold that it is in the interest of justice that the said Application be allowed and the Plaintiff be granted liberty to produce and tender before the court additional evidence at the foot of the Application herein.

**b. 1<sup>st</sup> Defendant's/respondent's Submissions.**

18. The 1<sup>st</sup> Respondent filed written submissions dated the 30<sup>th</sup> June 2023; and in respect of which same has highlighted and canvassed two (2) pertinent issues for consideration by the Honourable Court.
19. First and foremost, Learned counsel for the 1<sup>st</sup> Respondent has submitted that the instant Application has been made and mounted with inordinate and unreasonable delay, which delay has neither been explained nor accounted for.
20. Furthermore, Learned counsel for the 1<sup>st</sup> Respondent has also contended that the instant Application and the intended additional documents, are merely intended to fill-in the gaps and loopholes, which were exposed in the Plaintiff's case during the cross examination by the Counsel for the Defendants.
21. Additionally, Learned counsel has contended that where an Application for re-opening of a Party's case is calculated to fill-in the gaps and thereby to steal a match on the adverse Party, the Honorable court should be reluctant to grant and/or allow such Application.
22. In any event, Learned counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that an Application to re-open a Party's case once same is closed touches on and concerns exercise of discretion which must however be exercised Judicially and depending on the obtaining circumstances.
23. Having made the foregoing submissions, Learned counsel for the 1<sup>st</sup> Respondent has thereafter cited and relied on inter-alia the case of David Muthami Muthii versus Estate of James Titus Wambua & 4 Others (2022)eKLR, Agwu Ukiwe Okali versus Suresh Sofat & 3 Others (2020)eKLR and Gideon Sitelu Konchela v ersusDaima Bank Ltd (2013)eKLR, respectively.



24. Secondly, Learned counsel for the 1<sup>st</sup> Respondent has submitted that the current Application constitutes and amounts to an abuse of the Due process of the Honourable court and thus same ought to be Dismissed with costs.

**c. 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' Submissions:**

25. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' herein have filed written submissions dated the 14<sup>th</sup> July 2023; and in respect of which same have highlighted and canvassed four (4) Salient issues for consideration by the Honourable court.

26. Firstly, Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents has contended that the instant Application, which has been filed long after the Defendants have summoned and called all their witnesses and thereafter closed their respective cases, is merely intended to fill-in the gaps and loopholes which were exposed on the Plaintiff's case during cross examination by counsel for the named Defendants.

27. To the extent that the Application and the intended evidence is meant to fill-in/ plug the loopholes, Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, has thus submitted that it would be inappropriate to allow the current Application either in the manner sought or at all.

28. Secondly, Learned Counsel for the named Respondents' has submitted that it behooved the Plaintiff/Applicant to tender and produce before the Honourable court all the relevant evidence that same needed to prove her case during the normal process of the hearing.

29. Furthermore, Learned counsel has contended that having not procured and produced the evidence that is now alluded to at the onset, the Plaintiff/Applicant cannot now be allowed to procure and bring the evidence at this late stage, long after the rest of the Parties have tendered their evidence in rebuttal.

30. Thirdly, Learned counsel for the named Respondents has also submitted that the Applicant herein has neither tendered nor adduced before the Honourable court any credible evidence as to why the evidence now sought to be produced was neither procured nor obtained from the onset.

31. Further and in addition, Learned counsel has submitted that where it is evident that the failure to procure and obtain the impugned evidence was informed by lack of diligence, sloppiness and Slovenliness; on the part of the Applicant, the court must not sanitize such negligence by exercise of Judicial discretion.

32. In support of the foregoing submissions, Learned counsel for the named Respondents has cited and relied on inter-alia, the case of *Ooyo Osodo versus Rael Obara Ojuok & 4 Others* (2017)eKLR, *Kimani & Another* (2022)KEELC 3233 (KLR) and *Michael Kiplangat Cheruyiot versus Joseph Kipkoech Korir* (2019)eKLR, respectively.

33. Fourthly, Learned counsel for the named Respondents has also submitted that the instant Application other than to seeking to fill-in the loopholes that were exposed during cross examination has also been mounted with undue and inordinate delay, which delay has not been sufficiently accounted for and/or explained.

34. In respect of the submissions that the current Application has been made and mounted with inordinate delay and thus not deserving of equitable discretion, Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents has cited and quoted inter-alia the decision in the case of *Patriotic Guards Ltd versus James Kipchirchir Sambu* (2018)eKLR and *Saaid Sweilem Geitham Saanum versus The Commissioner of Lands (being sued through the Attorney General & 5 Others)* (2015)eKLR.



35. In view of the foregoing submissions, Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents has therefore impressed upon the Honourable court to find and hold that the instant Application is otherwise misconceived; and that same constitutes an abuse of the Due process of the court.
36. Consequently and in the premises, Learned counsel has sought to have the subject Application dismissed.

### **Issues for Determination**

37. Having reviewed the Application dated the 23<sup>rd</sup> May 2023; and the various Responses thereto; and having taken into account the written submissions filed by and on behalf of the Parties, the following issues do arise and are thus worthy of determination.
  - i. Whether the Applicant herein has established and demonstrated sufficient cause and basis to warrant exercise of Judicial discretion in her favor.
  - ii. Whether the Defendants/Respondents shall suffer any prejudice or otherwise; if the instant Application is allowed.

### **Annalysis and Determination**

#### **Issue Number 1**

Whether the Applicant herein has established and demonstrated sufficient cause and/ or basis to warrant exercise of Judicial discretion in her favor.

38. The gravamen/substratum of the current Application before the Honourable court relates to and or concerns re-opening of the Plaintiff's case, with a view to enabling the Plaintiff to tender and produce before the court additional evidence in support of her case.
39. Furthermore, the Plaintiff/Applicant herein has contended that the further and additional evidence which is sought to be produced before the Honourable court, subject to the Application being granted; were evidence, which were not within the Applicant's possession and/or custody at the time when her case was heard and closed.
40. Additionally, the Applicant has contended that same undertook and made concerted efforts to procure and obtain the documents, which are now sought to be produced; but her efforts to procure and obtain the impugned documents did not bear fruits or otherwise. Be that as it may, the Applicant has ventured forward and averred that the impugned documents were however ultimately availed and/or supplied unto her on the 19<sup>th</sup> May 2023 and thereafter same was constrained to file and mount the current Application.
41. Other than the foregoing, the Applicant has also contended that the documents which are sought to be produced, subject to re-opening of the Applicant's case, are critical and paramount, in determining the dispute before the Honourable court.
42. Consequently and based on the foregoing, the Applicant herein has therefore impressed upon the Honourable court to find and hold that same has established and demonstrated sufficient cause to warrant the exercise of Equitable discretion towards the grant of the instant Application.
43. Before venturing to determine the question as to whether or not the Applicant has established a sufficient cause/basis to warrant the grant of the orders sought, it is imperative to underscore that the impugned documents which the Applicant now wishes to tender and produce before the Honourable



court are indeed Public Documents, which could be procured and obtained by the Applicant pursuant to and in line with the provisions of Article 35 of *The Constitution* 2010.

44. Further and in addition, it is also important to recall that any citizen, the Applicant not excepted, is entitled to procure and obtain such Public Documents by complying with and adhering to the requisite provision of the *Access to Information Act*, 2015; which prescribes the manner in which such application is to be made and the necessity to pay the requisite charges, as advised by the designated Public officer.
45. Additionally, it is not lost on the Honourable court that where any citizen discerns any reluctance or failure on the part of the designated Public officer, then the citizen, the Applicant not excepted, is provided with an adequate mechanism, inter-alia, mounting a complaint with the Commission on Administration of Justice and even approaching the Superior courts, in the prescribed manner.
46. Having made the foregoing remarks, I beg to revert to the circumstances relating to and concerning the subject matter. In this respect, I am reminded of the averment by the Applicant that same made frantic efforts to procure and obtain the documents now sought to be produced before the Honourable court, but same were not availed unto the Applicant between the year 2019 up to and including the 19<sup>th</sup> May 2023.
47. Consequently and in this respect, the question that needs to be addressed and interrogated is whether the Applicant herein acted reasonably and in accordance with the law in her endeavor to procure and obtain the impugned documents.
48. Nevertheless and to my mind, I am not persuaded that the Applicant herein either made frantic or concerted efforts, to procure and obtain the impugned documents, in accordance with the prescribed mechanism, whose details are elaborated/enumerated in the *Access to Information Act*, 2015.
49. Clearly and to my mind, concerted efforts can only be made in line with the law and if there was any failure or inaction on the part of the designated Public officer, an appropriate court order would have sufficed.
50. Secondly, it is also not lost on this Honourable court that even though the Applicant has contended that the impugned documents were only supplied and or availed unto her on the 19<sup>th</sup> May 2023, however there is no evidence placed before the Honourable court to vindicate and/or confirm this particular allegation or otherwise.
51. For good measure, it is worthy to note and observe that the impugned documents could only be availed to the Applicant vide a forwarding Letter, if any, transmitting the documents to the Applicant. In this respect, one would have expected the Applicant to annex and/or exhibit such forwarding Letter, for purposes of authenticating the timeline, when the documents were indeed availed.
52. Alternatively, the impugned documents could have been collected by a representative of the Applicant but, in such event, the representative could have been called upon to pay the requisite charges. To this end, one would have expected the Applicant to exhibit and annex a copy of the Revenue receipt, if any; so as to help the court to discern the date of procurement.
53. Other than the foregoing, it is also imperative to point out that the documents which have been attached to the affidavit and which are intended to be adduced before the court, have not been certified in accordance with the provision of Section 80 of the *Evidence Act*. Consequently, even assuming that the re-opening is granted, there exists yet another Legal hurdle that lies ahead of the Applicant herein, namely, the admissibility of the impugned documents before a court of law.



54. In this respect, it is imperative to take cognizance of the holding of the court in the case of Okiya Omtatah Okoiti & 2 others versus Attorney General & 3 others [2014] eKLR, where the court stated and held as hereunder;

85. I agree with the above sentiments and the law in Kenya as regards the procedures for introducing a public document into Court as evidence is also clear. Section 80 of the Evidence Act states thus;

“Every public officer having the custody of public documents which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees thereof, together with certificate written at the foot of such copy that it is a true copy of such document or as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title and shall be sealed”.

55. In view of the foregoing; two things do arise. Firstly, the certification of the impugned documents would also go along way in helping the court to discern when, if at all, the impugned documents were availed to the Applicant and thereafter to discern whether the Application before the court has been made timeously and with due promptitude.

56. Secondly, the certification of the documents, would be testament to the fact that the documents have been procured and obtained in the prescribed manner and not otherwise. In this regard, it is imperative to underscore that being public documents, the manner in which same are obtained is critical to the admission thereof and by extension, the Administration of Justice.

57. In this respect, it is important to cite and reiterate the succinct position taken by the Supreme Court in the case of Njonjo Mue & another versus Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR, where the supreme court stated and held as hereunder;

(22) Again that is the correct interpretation of the issue at of hand generally but in the instant matter, the Constitution provides for the right of access to information which has been operationalized through two pieces of legislation, the Independent Electoral and Boundaries Commission Act and the Access to Information Act. We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

(23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.

58. From the foregoing exposition, it suffices to note; that I have pointed out that the Applicant herein has neither demonstrated that same paid for the impugned documents and or had same certified, in accordance with the prescription of Section 80 of the Evidence Act or at all.

59. In the premises, a debate remains as to whether or not the documents intended to be used were procured in accordance with the law. However, in the absence of the requisite evidence to demonstrate compliance with the law, there exists a blemish on the part of the Applicant, which blemish, negates the exercise of discretion in favor of the Applicant.



60. Notwithstanding the foregoing, there is yet another issue that deserves mention and a short deliberation. For good measure, the issue herein relates to why the Applicant did not procure and obtain witness summons, if at all as against the 4<sup>th</sup> Defendant or any officer working thereat, for purposes of production of such other documents, if any, that the Applicant had hitherto intended to produce.
61. For the avoidance of doubt, it is important to underscore that where a Party discerns that critical information is in the hands of a Third Party and in this case a Public officer, then same is obligated to comply with and/or invoke the provisions of Order 16 Rule 1 of the Civil Procedure Rules 2010.
62. For ease of reference, the provisions of Order 16 Rules 1 of The Civil Procedure Rules, 2010 (supra), provides as hereunder;

Summons to attend to give evidence or produce documents [Order 16, rule 1.]

At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

63. Notably, it is worthy to point out that during the entire duration up to and including the close of the Plaintiff's case, there was no intimation to the court that the Plaintiff herein had hitherto sought for certain documents from the 4<sup>th</sup> Defendant and which had not been availed and neither was there a request for issuance of summons to witness, for whatever purpose.
64. Surely, the Applicant herein was aware of all the outlined provisions of the law, inter-alia Article 35 of *the Constitution* 2010; Section 6, 7 and 9 of the *Access to Information Act*, 2015; and Order 16 Rule 1 of The Civil Procedure Rules, 2010; but no effort was made to invoke the import and tenor thereof.
65. Finally, in this respect, it is important to point out that whenever a party is desirous to prove and demonstrate the existence of sufficient cause, it is worthy to recall and underscore that such a Party must act with due diligence and dispatch. For good measure, sufficient cause cannot exist where one has been sloppy, casual and perfunctory.
66. To this end, I beg to borrow and adopt the Dictum in the case of *Odoyo Osodo versus Rael Obara Ojuok & 4 Others* (2017)eKLR, where the court stated and held thus;

“While I have sympathy for the litigants (defendants in this case) I fail to understand how it could be an oversight to adduce evidence which was always available. The defendants must all along been aware of the case they were facing from the plaintiff and in that regard filed a defence and counterclaim. The defendants had a whole day scheduled for defence hearing and in preparing for the hearing must have determined the evidence that they would require. It defeats logic how the defendants who all along were represented by counsel could overlook evidence that was necessary for their case. There is no case of genuine mistake or error on the part of counsel which perhaps could invite sympathy of the court. The defendants and their counsel appear to have treated the matter with a lot of casualness such that they only realized the lacuna in their case when the plaintiff served upon them the plaintiff's final written submissions”.

67. In view of the foregoing, I come to the conclusion that the Applicant herein, has neither established nor demonstrated that there exists sufficient cause and/or basis to warrant exercise of equitable discretion in her favor. In any event, event if the court were to decree the reopening of the Plaintiff's case, the Plaintiff herein would still have difficulty in adducing before the court the impugned documents, which clearly



do not accord with the mandatory provisions of Section 80 of the Evidence Act, Chapter 80 Laws of Kenya.

## Issue Number 2

Whether the Defendants/Respondents shall suffer any prejudice or otherwise; if the instant Application is allowed.

68. The Defendants/Respondents herein have variously contended and averred that if the subject Application were allowed and the Plaintiff/Applicant afforded opportunity to tender and produce before the court the impugned documents, then the Defendants/Respondents would suffer undue prejudice and detriment.
69. Furthermore, the Defendants/Respondents have also averred that the introduction of the impugned documents is merely intended to allow the Plaintiff to fill-in and plug the loopholes that were exposed in the Applicant's case during cross examination.
70. Essentially, what the Defendants/Respondents are stating is to the effect that the production of the additional evidence, would afford the Applicant herein a second bite on the cherry and thereby culminate into undue mileage being granted to the Applicant.
71. In short, the Defendant/Respondent contend that the import and consequence of the instant Application would be tantamount to the Applicant stealing a match on the Defendants/Respondents and thereby subject the Defendants to unfair treatment and infringement of their Right to Fair Hearing and Trial.
72. On the other hand, the Applicant contends that the Defendants/Respondents will not suffer any prejudice or at all insofar as same will be at liberty to cross examine the Applicant's witness, if any; and/or to rely on the previous evidence tendered by and on behalf of the Defendants/Respondents.
73. Despite the contention by and on behalf of the Applicant, it is not lost on this Honourable court that the adduction of the intended additional evidence, would indeed cause and have a ripple effect on the entire case. In this regard, what will happen is that the Defendant/Respondents may very well be called upon to also procure and avail further documents and file additional witness statement.
74. Consequently and for good measure, what shall arise is that the entire proceedings will have to re-opened and the Parties will revert to the purview and/ or province of Order 11 of the Civil Procedure Rules, which essentially underpins pre-trial directions/conference.
75. In my humble view, the net effect of the current Application on the cause of Justice would then impact negatively on the import and tenor of Order 159(2) (b) of the Constitution 2010.
76. To my mind, time is ripe for the Litigants and their counsel to learn to put together all the requisite documents and evidence that same would require, to facilitate the hearing and prosecution of their case, once and for all. Consequently and in this respect, litigation shall thereafter be synchronized and what is tantamount to litigation by installment, (which is evident in the current application), would thus be averted.
77. On the other hand, the courts of law would be helped and assisted to comply with and adhere to the dictates of the overriding objectives; and in particular, to dispense Justice without further and undue delay. For coherence, the Courts will be complying with the Overriding Objectives as espoused in terms of Section 1A and B of the The Civil Procedure Act, Chapter 21, Laws of Kenya.



78. At this juncture, it is imperative to recall and reiterate the dictum of the Court of Appeal in the case of Said Sweilem Gheithan Saanum versus Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the court stated and held thus;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure.

79. Lastly, I hold the opinion that re-opening of a case/matter ought not to be allowed to assist an Applicant to plug/fill-in loopholes which were (sic) exposed during cross examination. Instructively, to do so, would amount to a serious miscarriage of justice and by extent prejudice the adverse Party.

80. In this respect, I adopt and reiterate the holding in the case of Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR, where the court held thus;

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.

81. In a nutshell, it is my humble albeit considered opinion that the reopening of the instant matter and the adduction of the additional evidence, in the manner proposed by the Applicant herein, would certainly occasion undue prejudice to the Defendants/Respondents and by extension the administration of Justice.

82. Consequently and in this regard, I would still be dis-inclined to allow the Application on the basis of the question of prejudice; let alone the fact that the impugned documents, which are intended to be adduced before the Honourable court, do not meet the statutory threshold in terms of Section 80 of the *Evidence Act*, Chapter 80, Laws of Kenya.

### **Final Disposition**

83. Having considered the twin issues which were enumerated in the body of the Ruling, it must have become evident, if not apparent, that the subject Application, (which has been mounted with inordinate delay) is not only misconceived, but is devoid and bereft of merits.

84. Consequently and in the premises, the Application dated the 23<sup>rd</sup> May 2023; be and is hereby Dismissed with costs to the Defendants/Respondents.

85. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**OGUTTU MBOYA**

**JUDGE**

**In the presence of:**

Benson – Court Assistant



Ms. Neddie Akello for the Plaintiff/Applicant.

Mr. Ojong'a for the 1<sup>st</sup> Defendant/Respondent.

Ms. Korir for the 2<sup>nd</sup> Defendant/Respondent.

Mr. Allan Kamau for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondent.

