



REPUBLIC OF KENYA



KENYA LAW

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Kariuki (Suing on behalf of the Board of Governors Tseikuru Technical Training Institute) v Kavaka & 5 others (Environment and Land Appeal E005 of 2022) [2023] KEELC 19349 (KLR) (30 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19349 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E005 OF 2022
LG KIMANI, J
AUGUST 30, 2023

BETWEEN

GEOFFREY KIARIE KARIUKI (SUING ON BEHALF OF THE BOARD OF GOVERNORS TSEIKURU TECHNICAL TRAINING INSTITUTE) APPELLANT

AND

SAMMY KAVAKA 1ST RESPONDENT
MWENDE KATHINGO 2ND RESPONDENT
NDEKE MUNUVE 3RD RESPONDENT
MUMBE KIMWELE 4TH RESPONDENT
MICHEAL MUTILI 5TH RESPONDENT
MUNUVE MUSYOKA 6TH RESPONDENT

(Being an Appeal from the Ruling of the Honourable Mercy Nasimiyu PM delivered on 10th March 2022 in Kyuso ELC Suit No.7 of 2018)

JUDGMENT

1. This appeal was instituted by way of the Memorandum of Appeal dated 14th March, 2022 on the following grounds:
 1. That the Learned Magistrate erred in law and in fact by disallowing the Applicant's Notice of Motion application dated 24th January 2022, to recall the District Land Surveyor, one Christopher Mbuvi Nzengu for cross-examination and call the Director of Land Adjudication to produce the Satellite Image Map for Tseikuru 'A' Adjudication Section.



2. That the Learned Magistrate misdirected herself in law and fact by failing to appreciate that discretion to permit a witness to be recalled for inter alia, cross-examination as provided for under Section 146(4) of the Evidence Act CAP 80 Laws of Kenya ought to be exercised judiciously to ensure that ends justice are met.
 3. That the learned magistrate erred in fact in failing to acknowledge the fact that the Appellant sought to have the District Land Surveyor recalled for cross-examination, on materials and/or information directly connected with his misleading report and/or evidence produced by him during the locus in quo.
 4. That the learned magistrate erred in fact in failing to appreciate that the Appellant didn't have the opportunity to cross-examine the District Land Surveyor, Christopher Mbuvi Nzengu on the veracity of his report filed in court on 14th August 2019 and on the joint survey conducted on 21st September 2021 by the District Surveyor and the Appellant's private surveyor during the locus in quo.
 5. That the learned magistrate erred in fact in failing to appreciate that the delay by the Appellant to file the private surveyor's report was not deliberate and on the two occasions that the matter came up in court, the Appellant's advocates duly informed the court via the court's email on 30th November 2021 and 16th December 2021 that the private surveyor's report had not been filed and asked for 21 days extension on both occasions to allow the private surveyor to file his report.
 6. That the learned magistrate erred in fact in failing to appreciate that failure to file the report on time was occasioned by the delay occasioned by the office of the Director of Land Adjudication area which was necessary for the surveyor to back up his report.
 7. That the learned magistrate erred in law and in fact in holding that on 21st September 2021 when the last locus in quo was conducted, the private surveyor hadn't carried his tools as alleged yet a joint survey was carried out by the private surveyor and the District land surveyor in the presence of the Honourable Magistrate.
 8. That the learned magistrate erred in law and in fact in failing to appreciate that the law imposes a duty on the court to further the overriding objective in handling disputes which is to facilitate the just resolution of the civil disputes governed by the law and that the orders sought in the Notice of Motion Application were meant to enable the court to establish the correctness of all facts presented before it.
2. The Appellant prays inter alia that the ruling delivered on 10th March, 2022 be set aside and the orders sought in the Notice of Motion Application dated 24th January, 2022 be granted.
 3. The suit before the trial court was instituted vide Plaintiff dated 20th January 2018 where the Plaintiff instituted the suit in his capacity as the Principal and the Secretary to the Board of Governors of Tseikuru Technical Training Institute the registered proprietor of land parcel No. Tseikuru/Tseikuru 'A'/367 measuring 19.61 Ha registered in 2011. Plaintiff claimed that on or about the 22nd of December 2009, the defunct County Council of Mwingi, whose functions were taken over by the County Government of Kitui, allocated the institute an extra 40 acres of land. During the adjudication process, the extra 40 acres were registered as part of land parcel No. Tseikuru "A"/315.
 4. Sometime in 2012, when the Institute's foundation stone was being laid on the suit land, the Respondents tried to stop the construction claiming ownership of the suit land. That on the 7th November 2016, the Appellant wrote to the County Government of Kitui and requested for



- identification of beacons. The Sub-County surveyor visited the suit land on the 28th of November 2016 and identified beacons. In April 2017, the Institute fenced the suit land with concrete posts on the strength of a report by the County Government of Kitui. That sometime in August 2017, Plaintiff averred that the Defendants caused destruction to the Institute's property and have been grazing livestock on their land and made permanent structures as homesteads. On 31st of January 2018, the Plaintiff filed a suit as Kyuso MC. ELC No. 7 of 2018 seeking an order for a permanent injunction against the Defendants and an order to compel them to give vacant possession of the suit land.
5. The Defendants denied being in occupation of Tseikuru/Tseikuru "A"/367 and stated that they were the proprietors of land parcel No. Tseikuru/Tseikuru "A"/139 which was their ancestral land and that they occupy and have constructed on their land.
 6. From the proceedings before the trial court, it is shown that on 1.3.2018, the trial court directed the District Land Registrar and Land Surveyor to ascertain the boundary between land parcel Nos Tseikuru/Tseikuru "A"/139 and Land Parcel No. Tseikuru/Tseikuru "A"/367 and file a report in court. On 5.6.2018 Counsel for the Plaintiff confirmed that the report had been filed but Counsel complained that the same was inadequate. On 20.2.2019 the court directed a scene visit and that the District Land Registrar, District Surveyor and county surveyor be in attendance and the surveyor to carry maps. The scene visit was conducted on 11th July, 2019 and the Land Registrar and Land Surveyor were directed to file a surveyor's report and the court confirmed filing of the report on 1st August, 2019.
 7. On 21st January, 2020 when the matter came up for hearing, Counsel for the Plaintiff made an application to the court stating that they were not satisfied with the findings of the surveyor and had engaged a private surveyor and filed a report in that regard. The court adjourned the hearing of the suit and directed a scene visit on 7th February, 2020.
 8. It appears from the record that the scene visit did not take place on the date anticipated but a consent order was filed on 7th February, 2020 where the parties agreed that the scene visit would take place on 21st February, 2020 and the plaintiff was granted leave to engage a private surveyor during the scene visit. The Defendants consented to being represented by the District Land Surveyor. The Director of Survey was directed to assign a cartographer to be present to determine the boundaries of the suit lands. The Land Registrar was directed to be present during the scene visit.
 9. On 21st February, 2020 the court went on the scene visit and the following persons were recorded as present, Mr. Nzengu, the District Land Surveyor, Mr. Kinyanjui, the District Land Registrar, Mr. Githae, Cartographer representing the Director of Survey and Mr. Mango and Mr. Muli private surveyors.
 10. The Cartographer is stated to have adopted the map published by the Director of Survey which had been relied upon by the District Land Surveyor during the first scene visit. The report was challenged by Mr. Mango the private surveyor. However, the court noted that Mr. Mango had failed to carry the total station that he used in his second report and hence he was not in a position to survey the presence of the court. The matter was thus adjourned.
 11. The suit was finally set down for hearing and the same proceeded on 12th August, 2021 when the Plaintiff and Defendants closed their cases but with a request by the Plaintiff for a scene visit with a private surveyor. The court directed that as per the court orders issued on 7th February, 2020, a scene visit be conducted on 21st September, 2021 and a summons to be issued to Gilbert Yegon the sub-county surveyor Mwingi and the Land Registrar Mwingi.



12. The scene visit was conducted as scheduled and apart from the court and Counsel for the parties, the following persons were in attendance; Mr. Kinyanjui- Land Registrar Mwingi, Mr. Eddy Mango -private surveyor, Mr. Nzengu -District Land surveyor, Mr. Athinas Muli- District surveyor, Mr. Kitonga- driver, Mr Kariuki -Principal TTTI (Plaintiff) and the 1st, 2nd, 3rd, 4th and 6th Defendants. The purpose of the scene visit was recorded as “to determine the boundaries Marked A-B-C-D as per the sketch Map annexed to the District Land Surveyor and Land Registrar report dated 14th August, 2019.”
13. The finding of the court was that the private surveyor did not carry any tools for conducting the survey and the District surveyor confirmed the earlier points as per his report. The private surveyor differed from him and the private surveyor was directed to file his report.
14. The case was mentioned on 26th October, 2021, 30th November, 2021 and 16th December, 2021 when the court noted that the private surveyor’s report had not been filed. On 16th December, 2021 the court directed the parties to file written submissions within 30 days and judgement was reserved for 10th February, 2022.
15. On 25th January, 2022 the Plaintiff filed an application dated 24th January, 2022 to which the Defendants replied and a ruling on the same was set for 10th March, 2022. It is this application and the ruling thereof that form the basis of this appeal. In the said application, the Plaintiff prayed for the following orders;
 1. Spent
 2. That the court be pleased to reserve its judgement scheduled for 10th February 2022.
 3. That the court orders the Director of Land Adjudication and Settlement or a person appointed by him to be called to identify and produce the Satellite Image Map for the Tseikuru Adjudication area.
 4. That the Mwingi District Land Surveyor, Christopher Mbuvi Nzengu be recalled for cross-examination
16. The grounds relied upon in support of the application were set out on the face of the application and in the supporting affidavit of Geoffrey Kiarie Kariuki sworn on 24th January, 2022. The Plaintiff stated that on 21st September, 2021 a joint survey was carried out at the suit land by the Mwingi District Surveyor, the Mwingi District Land Registrar and a private surveyor appointed by the Plaintiff in the court’s presence. During the survey exercise, the distance for boundary A-B as marked in the map by the private surveyor attached to the report dated 19th January, 2023 was jointly measured with the aid of a handheld GPS and was not disputed. That the distance between boundary B-C as shown in the map by the private surveyor was measured, initially agreed upon by the surveyors but later disputed by the District Land Surveyor.
17. The Plaintiff claimed that they had obtained from the survey of Kenya a copy of the Satellite Image Map for Tseikuru A adjudication area which image showed the District Land Surveyor, on 21st September, 2021 deliberately and dishonestly misled the Court as to the location of the point marked "B" in the sketch map filed in court by him on 14th August, 2019. He further stated that it was in the interests of justice that the Director of Land Adjudication and Settlement or a person authorized by him be called to identify and produce the Satellite Image for Tseikuru A adjudication area to give the correct position.
18. According to the Applicant, it was not until 19th January 2022 that the private surveyor’s report was availed to the Appellant’s Advocates and the Appellant states that the delay was occasioned by the



Office of the Director of Land Adjudication in furnishing the private surveyor with the satellite image Map for Tseikuru 'A' Adjudication area which was necessary for the surveyor to back up his report.

19. The Defendants opposed the application and filed a replying affidavit sworn by the 6th Defendant stating that the application was incompetent, defective an afterthought and without merit for various reasons. They stated that the Applicant had ample time to comply with the court's orders issued on 23rd September, 2021 but they failed to file the private surveyors report and no explanation was given for the failure.
20. The Defendants noted that the Court had observed that the private surveyor failed to carry the requisite tools to carry out a complete survey hence points C to D were never established. The surveyors never agreed to any points other than points A to B and the District Land Surveyor relied on the report dated 14th August, 2019 that was relied upon by the Plaintiff in his application to enjoin the interested party to the suit. The Defendants stated that allowing the application would mean setting aside orders made on 16th December, 2021 directing the filing of submissions and reserving judgment and would greatly prejudice them. They stated that the Plaintiff seeks to challenge the surveyors report dated 14th August, 2019 which they had relied on previously and allowed to be produced in court by consent and with no request for cross-examination of the maker of the report.
21. The trial court delivered its ruling on 10th March 2022 and considered the provisions of the law under which the application was anchored noting that the decision on whether or not the court should re-open a case is discretionary. The trial Court noted that it had visited the suit land three times to ascertain the boundaries on the application of the Plaintiff and before that had sent the district land surveyor to the scene to establish boundaries. The court observed that it allowed Plaintiff to bring in a private surveyor who contested some of the points identified by the district land surveyor but failed to bring his tools to carry out his assessment of the boundaries. The court further allowed the Plaintiffs private surveyor time to file a report in court but the same was never filed. The court observed that the Plaintiff had the advantage of Counsel representing them and they had a period of four years since the filing of the suit to prepare and present its case and they cannot complain that they were denied an opportunity to be heard.
22. Further, the trial court stated that the main reason for the application was to allow Plaintiff to produce the satellite map and the same was aimed at challenging the earlier report filed by the district land surveyor and the district land registrar. The Court found that if the application was allowed, it would amount to allowing the plaintiff to fill the gaps in its evidence and that would be prejudicial to the defendants. The court declined to exercise her discretion in favour of the Plaintiff, dismissing it with costs. Being dissatisfied with the ruling, the Appellant has filed an appeal seeking to overturn this decision.

The Appellant's written submissions

23. Counsel for the Appellant submitted that since the said application dated 24.1.2022 was brought under Sections 1A, 1B and 3A of the Civil Procedure Act CAP 21, the 'oxygen principle' which is the overriding objective of the Court that derives its legitimacy from Article 159(2)(d) of the Constitution applied. They cited and relied upon the holding in the case of Parliamentary Service Commission vs. Martin Nyaga Wambora & others (2018) eKLR on the exercise of discretion by the Court. They also relied on the cases of Chemwolo vs. Kubede(1986)eKLR, Githere vs. Kimungu (1976-1985) EA 101 and United India Insurance Company Limited vs. East African Underwriters Kenya Ltd (1985)KLR 898.



24. Counsel for the Appellant submitted that the Learned Magistrate did not address the prayer to recall the District Land Surveyor for Cross-examination and proceeded to fix the matter for judgment. It is the Appellant's submission that parties must assist the court in arriving at a just decision and that it is necessary for the Director of Land Adjudication and Settlement or a person appointed by him to be called to identify and produce the Satellite Image Map for 'Tseikuru 'A' adjudication area to give the correct position and the District Surveyor to be recalled for cross-examination on the contents of his report filed in Court on 14th August 2019. Adding that the Appellant is a public institution the Appellant submitted that if this appeal is not allowed then the Appellant will be occasioned substantial loss and hardship since a huge chunk of its land would be hived off by the Respondents.
25. Further, the Appellant submits that the Respondents did not demonstrate by way of affidavit before the trial court that they would suffer any prejudice and/or loss should the magistrate have exercised her discretion and allowed the application before her and urged the Court to allow the Appeal.

The Respondent's submissions

26. Counsel for the Respondents relied on Order 18 Rule 10 of the Civil Procedure Rules that allows the court to recall any witness at any stage of the proceedings as well as Section 146 of the *Evidence Act*, submitting that the Appellant had the chance to cross-examine the District Land Surveyor but chose not to. They also submitted that the private surveyor engaged by the Appellant was given an opportunity twice to demonstrate how he arrived at the findings of his report but both times he stated that he did not have the total station/tools that he required for the exercise and did not file his report in Court.
27. The Respondents submitted that this is a matter where the Appellant was given ample time to file evidence in support of their case which they failed to do and chose not to cross-examine the district surveyor when he was given the opportunity on 21st September 2021 and proceeded to close their case.
28. The Respondents stated that the Appellant did not alert the court that they had new evidence that they wished to adduce when the matter came up for mention severally. He relied on the case of Raila Odinga & 5 others vs IEBC & 3 others SCK Presidential Petition No.3,4 and 5 of 2013(2013) eKLR where the Supreme Court considered the matter of filing new evidence outside of given timelines.
29. Counsel for the Respondents is therefore of the opinion that the Learned Magistrate did not err in law in failing to exercise her judicial discretion to aid indolence. He relied on the cases of Agulu Ukiwe vs Soresh Sofat & 3 others (2020) eKLR and Andrew Mugandi Nuri & 2 others v. China Dalian International Group (2020) eKLR.

Analysis and Determination.

30. The role of an appellate court by way of re-trial and re-evaluation of evidence is well settled as was stated in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”



31. The Court has considered the grounds of appeal, the record of appeal and submissions by Counsel for all the parties to this appeal and concluded that the grounds of appeal may be consolidated and dealt with as follows;
- A. Grounds 1, 2, 3 and 4: Whether the trial court erred in disallowing the Plaintiff's prayer to recall the District Land Surveyor, Christopher Mbuvi Nzengu for cross-examination.
 - B. Grounds 5 and 6: Whether the trial Court erred in disallowing the Plaintiff's prayer for calling additional witnesses and adduction of additional evidence.
 - C. Ground 6: Whether the trial Court erred in the application of the principles of the court's overriding objective.
 - A. Grounds 1, 2, 3 and 4: Whether the trial court erred in disallowing the Plaintiff's prayer to recall the District Land Surveyor, Christopher Mbuvi Nzengu for cross-examination.
32. Prayer 1 of the Notice of Motion dated 24th January 2022 sought an order to recall the District Land Surveyor, Christopher Mbuvi Nzengu for cross-examination. Section 146 (4) of the *Evidence Act* generally grants the court powers to recall a witness and states that;
- “The court may in all cases permit a witness to be recalled either for further examination—in—chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
33. Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the court powers to recall any witness who has been examined. It provides thus:
- “The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”
34. The trial before the trial court commenced on 12th August, 2021 when the Plaintiff called one witness and adduced into court 10 documents as exhibits. Counsel for the Plaintiff closed the Plaintiff's case with a request for a court visit with a private surveyor.
35. The Defendant's case proceeded on the same date and they called one witness, the 6th Defendant, who produced in evidence three exhibits. Exhibit 3 was the report by the District Land Surveyor Mwingi dated 14th August, 2019 and the same was the subject of the Plaintiff's prayer for recall of the District Land surveyor, the maker of the document, for cross-examination.
36. The literal meaning of the term "recall" is calling a witness who has already given testimony in a proceeding, to give further testimony or in this case for further cross-examination. Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of the Civil Procedure Rules are clear that the witness being recalled must have testified before the court for them to be subject to an application for recall. In this case Christopher Nzengu was never called or examined as a witness and in the court's view, he cannot be recalled.
37. It is noted that the Appellant did not seek an order to re-open the case to pave way for any subsequent orders of recalling witnesses and adducing additional evidence. That notwithstanding, the trial court considered the circumstances under which a court may allow an application for re-opening of a case. The Court concluded that the power to recall a witness is a discretionary one but which must be



exercised judiciously. The court relied on the case of *Andrew Mugandi Nuri & 2 others v China Dalian International Group* [2020] eKLR where the court stated that:

“The jurisdiction to re-open a case and receive additional evidence in a trial court 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. Secondly, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. The plea for re-opening of a case will also be rejected if there is an inordinate and unexplained delay on the part of the applicant in bringing the application. The applicant is also required to show that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing his case. Further, 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 *Victoria Naitano Kiminta – Gladys Kiminta Prinsloo* (supra); *Mohamed Abdi Mohamed – v – Ahmed Abdullahi Mohamed & Others* (2018)eKLR; *Samuel Kiti Lewa –v- Housing Finance Company Limited & Another* (2015)eKLR; and, *Ladd –v- Marshall* (1954) 3 ALL ER 745).”

38. It is noted from the trial court record that the impugned report by the District Land Surveyor dated 14th August, 2019 was prepared by the District Land Surveyor Mwingi and signed by the Land Registrar Mwingi and filed in court on 25th August, 2019. The scene visit that gave rise to this report was carried out on 11th July, 2019 and the court directed that the report be made and filed in court.
39. On 21st January, 2020 when the suit came up for hearing, Counsel for the Appellant indicated that his client was dissatisfied with the findings of the surveyor and requested to file a report by a private surveyor. The court directed that another scene visit be carried out. This Court has detailed what transpired during the various scene visits and will not repeat the same here.
40. The court, in the ruling on the application subject matter of this appeal, made a summary of the trial court proceedings and noted the number of times it made scene visits at the request of the Appellant Counsel. It comes out clearly that the Appellant was aware of the joint report of the District Land Registrar and the District Surveyor even before the trial commenced on 12.8.2021. The Appellant had adequate time to seek attendance of any witness he deemed necessary to testify and be cross-examined on the report and produce any documents they deemed necessary. Further, the Appellant did not through pretrial seek attendance of the District Land Surveyor to produce and/or be cross-examined on the report. The said report was adduced in evidence without objection and/or request to call the makers thereof.
41. It is observed that the trial court made scene visits three times in the presence of the District Land surveyor who confirmed his findings in the report. The information contained in the report was all along within the knowledge of the Appellant. Further, the Appellant did not give any reason as to why the District Land Registrar was not called as a witness during the trial before either of the parties closed their cases.
42. This court agrees with the trial court that the Appellant was given sufficient indulgence and time to call the District Land Surveyor for cross-examination from the time of filing of the suit, filing the report to the time of commencement of the hearing and the close of the cases by all parties. This is evidenced by the by the sequence of events showing that the trial court case was filed on 3rd January, 2018, the



report was filed on 25th August, 2019 and the hearing proceeded on 12th August, 2021 and judgment was reserved for 10th February, 2022.

43. When the court went on a scene visit on 21st February, 2020 and 21st September, 2021, the trial Court noted that the private surveyor appointed by the Appellant failed to carry any tools for conducting the survey and he could therefore not assist the court in determining the boundary issues before it.

44. It is this court's view that re-opening the case will cause delay, embarrass and prejudice the defendants.

B. Grounds 1, 2, 3 and 4: Whether the trial court erred in disallowing the Plaintiff's prayer to recall the District Land Surveyor, Christopher Mbuvi Nzengu for cross-examination.

45. The Appellant sought orders that the Director of Land Adjudication and Settlement or a person appointed by him be called to identify and produce the Satellite Image Map for the Tseikuru Adjudication area. It is the Appellant's case that the District Surveyor misled the Court as to the position of certain points in the Tseikuru Adjudication Map. On this issue the trial court found that allowing the said prayer would amount to allowing the Appellant to fill in gaps in its case which would be prejudicial to the Respondent herein.

46. The court retains discretion in allowing an application for re-opening a case and adducing additional evidence. That discretion must, however, 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 a case should not be allowed where it is intended to fill gaps in evidence. Courts have held that a prayer for the re-opening of a case will be defeated if failure to adduce the evidence was deliberate or by inordinate and unexplained delay. In a similar application to the one dealt with by the trial court, this position is taken in *Joseph Ndungu Kamau v John Njihia* [2017] eKLR, where the court held that:

“The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. The reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in *Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another* [2015] eKLR Kasango J. stated:

Uganda High Court, Commercial Division in the case *Simba Telecom –v- Karuhanga & Anor* (2014) UGHC 98 considered an application to re-open the case to submit fresh evidence. That court referred to an Australian case *Smith –versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete or one in which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”



The Ugandan Court in the case *Simba Telecom* (supra) held thus:

“I agree with the holding in the case of *Smith Versus South Wales Bar Association* (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

The court retains the discretion to allow the 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 a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for the re-opening of the case will be defeated by inordinate and unexplained delay.”

47. In the present case there is no reason given for failure to adduce the Satellite Image Map in evidence during the trial. The reasons given that the Appellant did not get the map in time is not sufficient this happened after the trial had been concluded and the matter was only pending judgment. Allowing the application would amount to allowing the Appellant to fill in the gaps in their case.

48. The Respondents in opposing the appeal stated that the Appellants were indolent and did not inform the trial court that they needed to adduce additional evidence during the trial and did not seek an adjournment. They relied on the Supreme Court's holding in *Raila Odinga vs Independent Electoral and Boundaries Commission and 3 Others* Supreme Court Election Petition No. 5 of 2013 where the Court stated:

“There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertence which were foreseeable or could have been avoided.”

49. The Supreme Court of Kenya laid guidelines for the admission of additional evidence before appellate courts in Kenya in the case of *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR. The guidelines were set out as follows:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case-by-case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We, therefore, lay down the governing principles for allowing additional evidence in appellate courts in Kenya as follows:

- a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;



- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. The evidence must be credible in the sense that it is capable of belief;
- f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. Whether a party would reasonably have been aware of and procured the further evidence in the course of a trial is an essential consideration to ensure fairness and due process;
- h. Where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then, sparingly with abundant caution.”

- 50. The above guidelines are applicable to matters before a trial court and in seeking to apply the above guidelines by the Supreme Court, the court has perused the additional evidence sought to be adduced being the Satellite Image Map for Tseikuru A adjudication area attached to the supporting affidavit of Geoffrey Kiarie Kariuki sworn on 24th January, 2022 and marked as GKK-3. It is noted that the said map does not show its origin or its maker. Nowhere on the said map is it indicated that the Director of Land Adjudication and Settlement is the one who authored it and whether the map is of the relevant area under consideration in the suit before the trial court even though the Appellant sought orders that the Director of Land Adjudication and Settlement or a person appointed by him be called to identify and produce the map.
- 51. It is the court's view that the Appellant did not show to the trial court that the Satellite Image Map is directly relevant to the matter before it and that adducing the same is in the interest of justice especially considering that its source is not clear. It is further the court's view that the Appellant did not show in what way the intended additional evidence if given, would influence or impact upon the result of the court's verdict.
- 52. The Appellant further failed to show that the map could not have been obtained with reasonable diligence for use at the trial, or that its existence was not within the knowledge of, or could not have been produced at the time of the suit. It is observed that throughout the trial the Appellant was represented by Counsel and at some point the Appellant had a private surveyor. It is thus the court's view that the



document would have been reasonably and easily obtained at any time during the course of the trial before the parties closed their cases. It is further the court's view that allowing evidence that would have been easily obtained before trial would not be in the interests of fairness and due process. The Court is also satisfied that the additional evidence was being utilized for the purpose of removing lacunae and filling gaps in evidence already adduced before the court.

53. After assessing the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence, the balance tilts in favour of rejecting the application for re-opening the Appellants case, calling of witnesses and adducing additional evidence.
54. The trial magistrate had the discretion to allow or disallow the application before her. This is a discretion that the courts must exercise judiciously and courts have been reluctant to grant an application for additional evidence when the criteria discussed above have not been met. Kasango J in the case of Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR held that:

“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 a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for the re-opening of the case will be defeated by inordinate and unexplained delay. In this case, the Plaintiff's counsel stated that the Plaintiff if allowed to re-testify would show that the charge document, which he did not produce in evidence, was diametrically different to the one produced by the 1st Defendant's witness, in evidence. In my view if the Plaintiff was allowed to re-open his case to so prove it would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants. But more importantly, Plaintiff did not submit in evidence a charge instrument to be compared to the one produced by 1st Defendant.”

55. The court has recapped elsewhere the reasons the trial court gave for the rejection of the application by the Appellant. I am satisfied that the court exercised its discretion judiciously, and properly and did not err in any way. In the case of Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR the Supreme Court had this to say on the question of upsetting a trial court discretion:

“(26) On appeal of this decision, the Court of Appeal in (Mbogo and Another v Shah [1968] EA 93 at 96) affirmed the decision of the High Court thus:

“We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”



(27) We are persuaded by this decision of the Court of Appeal, the apex Court then, and affirm that it is still good law as regards an appeal or review motion to upset an exercise of discretion by a Judge. While the principles therein were set in an appeal, they are applicable to an application for review like this one.”

56. In the present case this court is not convinced that as an appellate court it should interfere with the exercise of the discretion of the trial Court. The Appellant has not persuaded the Court that the trial court in exercising her discretion misdirected herself on the law or misapprehended the facts and as a result arrived at a wrong decision. The Court is also not satisfied that the trial court took into consideration factors that it ought not to have taken into account or failed to take into consideration factors that it ought to have taken into consideration. Further, the court is required to be satisfied by the Appellant that it is manifest from the case as a whole that the trial court was wrong in the exercise of her discretion and that as a result there has been mis-justice. This court is not satisfied that this was so.

(C) Ground 6: Whether the trial Court erred in the application of the principles of the court's overriding objective.

57. The Appellant relied on the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* famously known as the “oxygen principle” and Article 159 (2) (d) of *the Constitution* of Kenya 2010 stating that the orders sought by the Appellant were meant to enable the court to establish the correctness of all facts presented before it and thus it was prudent for the court to exercise its discretion and allow the application.

58. The Court of Appeal stated that a foundation for the application of the “oxygen principle” must be properly laid and the benefits of its application judicially ascertained before it is applied to avoid its misuse and abuse. In the case of *Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010* held:

“The applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view, this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.” [Emphasis added].

59. In the present case the court is persuaded that the Appellant was given adequate time and opportunity to file the relevant documents and call the witnesses they desired to call. They therefore cannot turn around and find fault with the trial court when it exercised the same requirements of the Oxygen



principles which provide for the just, expeditious, proportionate and affordable resolution of civil disputes and appeals governed by the respective acts. The trial court considered the age of the case which at the time of the ruling was four years old and that the case was considered backlog in the court's system and whose delay was primarily caused by the Appellant. The court further considered the anxiety caused to the Respondents and the costs incurred due to the delay. Further, the court considered the totality of the case and formed the view that the provisions of Section 1A, 1B of the Civil Procedure Act and Article 159 of the Constitution necessitated the application of the Court's discretion in favour of disallowing the application.

60. This court agrees with the decision of the trial court and finds the appeal herein to be lacking in merit and the same is hereby dismissed with costs to the Respondents. The Court further directs that the trial court file be returned for delivery of judgment.

DATED AND DELIVERED AT KITUI THIS 30TH DAY OF AUGUST, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT

Judgement read virtually in the presence of;

Musyoki: Court Assistant

Mwikali holding brief for Mwalimu for the Appellant

Omoyo for the Respondents

