



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 34 OF 2018

RHODA S. KILU.....PLAINTIFF

VERSUS

JIANXI WATER AND HYDROPOWER CONSTRUCTION KENYA LTD.....DEFENDANT

RULING

A. THE APPLICATION

1. By an application dated 17.12.2021, the defendant/applicant seeks to arrest the delivery of judgment herein, leave to re-open the defence case and call crucial witnesses to testify and produce virtual documents and lastly an order that the OCS Maua police station do provide the defence agents and requisite witnesses with protection while visiting the plaintiff's properties to conduct the requisite assessments for purposes of preparing reports necessary for the hearing and determination of the plaintiff's case. The application is based on the grounds on the face of the application and a supporting affidavit of Ran Longbing sworn on 17.12.2021.

2. The grounds upon which the application is made are the matter has been heard and awaits the setting of a judgment date after parties were directed to file and exchange written submissions; some defence witnesses and exhibits were inadvertently left out; if the witnesses and documents are not produced, the defence shall suffer grave injustice; the application has been brought without unreasonable delay and that the plaintiff will not suffer any prejudice.

3. In the supporting affidavit, the defendant states that out of advice from counsel then on record, it failed to call a qualified surveyor in support of the defence and adduce his report on whether the properties claimed to have been trespassed upon are actually the correct parcels of land and the acreage trespassed upon which is crucial for the determination of the suit and further that the defence failed to address the public interest impact of the construction of Maua Road and the likely implications of the decision vis a vis – public interest question.

4. Additionally, the defendant avers should judgment be entered without the court getting an opportunity to interrogate the crucial witnesses and documents, the economic impact of the decision will not only cripple the defendant but will also render it incapable of completing the work hence negatively impact on the general public.

5. The defendant further states, the counsel on record failed to call a qualified surveyor to adduce evidence on the quantity marram excavated and an officer from NEMA to provide an environmental impact assessment report of the alleged trespass on the suit premises.

6. The defendant avers errors and failures of counsel then on record to properly prepare the defendant and considering its limited understanding of Kenyan laws, should not be visited on it so as to hinder its rights to fair hearing.

7. The defendant maintains that in order to facilitate the collection and preparation of requisite reports alluded to above and based on the fact that there exists a lot of hostility between the plaintiff and the defendant, there is need for the intended witnesses to be provided with requisite security as they visit the **locus in quo**.

B. AFFIDAVIT

8. The application is opposed through a replying affidavit sworn by the plaintiff on 18.1.2022.

9. The 1st ground is that since the commencement of the suit, this is the 4th application to be made to derail the conclusion of the suit.

10. Secondly, the plaintiff avers the alleged evidence is new evidence which is not before the court and the applicant is using the court as a fishing ground for additional evidence with the sole aim of plugging in gaps following the closure of the suit and the filing of the final

submissions so as to embarrass and prejudice her case.

11. Thirdly, the plaintiff avers the application is an afterthought, brought after inordinate delay since pretrial directions were taken in November 2018 and the closure of the defence testimony on 27.10.2021 which is an attempt to scuttle the delivery of the judgment, delay the determination of the suit and or attempt to produce fabricated and tailor-made evidence to fill in gaps left in the defence case.

12. Fourthly, the plaintiff avers the application as filed is against **Sections 1A, 1B of the Civil Procedure Act** and **Article 159 of the Constitution** as read together with **Sections 3 and 8 of the Environment and Land Court Act** since litigation must come to an end. She insists there are no compelling reasons given and that the court should guard against those abusing the cardinal tenets of the aforesaid provisions.

13. The plaintiff further avers that since the commencement of the suit, there has been consistent trend not to obey court directives including the failure to file a defence leading to the hearing of the suit *ex parte* and the delivery of judgment on 25.9.2019 which was eventually set aside by consent of parties.

14. Eventually on the eve of taking of her evidence **debene esse**, a preliminary objection was filed on 10.11.2020 but was eventually dismissed on 26.6.2021.

15. As regards the alleged limited understanding of Kenyan laws, the plaintiff states the defendant is incorporated in Kenya, carries on business in Kenya and is deemed to know and adhere to Kenyan laws. Needless to say there is no disclosure of which laws they could not understand.

16. Further, the plaintiff insists the issue of not calling crucial witnesses and the production of documents is not only baseless but a red herring; that the defendant can only blame itself. In any event, the recourse against counsel on record is elsewhere and before this court.

17. The plaintiff avers the alleged issue of public interest is not only unfounded, misguided, baseless and but also aimed at hoodwinking the court given the issue before the court is based on the tort of trespass to private land and damages occasioned thereof but not a public interest suit.

18. The plaintiff continues to state the defendant had more than 3 years since the suit was filed to prepare and call evidence, take the appropriate directions and organize its witnesses which duty belongs to a party and not its lawyers on record. Needless to say, the expert witnesses' reports were supplied to the defendant for over two years. They cross-examined them otherwise they are seeking merely time and leave to plug in gaps in their case which would be prejudicial and occasion grave injustice to her.

19. The plaintiff further avers the defendant was ably represented contrary to the assertion that the lawyers on record gave improper advice and hence if the defendant slept on its rights, the reasons are not valid or good enough to cause her grave prejudice and injustice by re-opening the case.

C. WRITTEN SUBMISSIONS

20. With leave of court, parties were ordered to file written submissions by 14.2.2022. The plaintiff did not file on time.

21. The applicant submits they intend to call two experts in their field of practice to assist the court in arriving at a just determination of the dispute before it which the advocates on record then and for unknown reason failed to call to establish the quantity of the murrum excavated from the plaintiff's 44 acres as opposed to 70 acres which information is crucial to the assessment of damages awardable to the plaintiff.

22. The defendant relies on ***Raindrops Limited –vs- County Government of Kilifi [2020] eKLR*** on the principles applicable on whether to re-open a case being a good cause, that there is need to establish the degree of trespass for purposes of ascertaining the damages quantity and value of murrum excavated, since the issue of the assertion of trespass is not contested.

23. The second criteria submitted is whether the court and the party against whom it is offered would be prejudiced.

24. The applicant submits the evidence to be called will not give undue emphasis on its case but will instead clarify before the court on the damages awardable since the degree of trespass and the degree of damage suffered have not yet been ascertained from the evidence tendered before the court hence placing the court at a disadvantage.

25. It is submitted the applicant is not trying to derail the course of justice but the application is aimed at ensuring that when the court delivers its determination, it has been afforded an opportunity at accessing all the evidence material to the determination of the dispute and that no prejudice will be suffered by the plaintiff if the case is re-opened, that is incapable of being compensated by way of costs.

26. The third criteria submitted is whether the evidence is controversial in nature. It is submitted that the evidence to be introduced will only assist the court in arriving at a just determination of the dispute before it and will further not change the nature of the dispute before the court.

27. As to the criteria whether the additional evidence is new or merely to collaborate and clarify the earlier evidence, the defendant submits the need to re-open the case was informed by information that was discovered by the applicant after the substantive case was heard; where it has acknowledged it trespassed into the plaintiff's land though unintentionally.

28. The defendant however contests if the trespass was wholly on the entire land or not hence the need to establish the degree, value and quantity of the murrum excavated from the suit land which due to the hostility, it is virtually impossible to establish without a court order. Reliance is placed on *Susan Wavinya Mutavi –vs- Isaac Njoroge & Another [2020] eKLR*. The applicant submits there has been no inordinate delay which is not explained given there was a change of advocates on 15.12.2021 and immediately this application was filed.

29. Submitting on the criteria if the evidence is apparently credible though it need not be incontrovertible, the applicant states the same would be compiled by experts in their field of practice namely a land surveyor to ascertain the acreage, and a quantity surveyor to assess the quantity of value of murrum excavated.

30. The applicant submits the court in exercising its discretion should find the applicant shall stand to suffer grave injustice if the suit is determined without allowing the intended evidence. Reliance is placed on *Techbiz Ltd. –vs- Royal Media Services Ltd [2021] eKLR*, on the proposition that the discretion should be exercised judiciously to ensure the re-opening does not embarrass or prejudice the opposite party and or fill in gaps in the evidence of the applicant and that such a prayer would be defeated by inordinate and unexplained delay.

31. In the instant case, the applicant submits there would be no manner of prejudice and the evidence sought to be adduced does not seek to fill any gaps but seeks to shed light on material facts necessary for the just determination of the dispute and which request has been brought before court in a timely fashion.

32. As regards mistakes of counsel, the applicant submits there was failure to call the two crucial witnesses which should not be visited upon the defendant or occasion an injustice and or cripple it and hence it is in the interest of justice that the application be allowed. Reliance is placed on *Richard Ncharpi Leiyagu –vs- IEBC & 2 Others as cited in Belinda Murai & Others –vs- Amos Wainaina [1978] KLR 278* on the proposition that since the courts main aim is to dispense justice, by failing to grant the orders sought, the court would be perpetuating an injustice by punishing the applicant out of mistakes of its former lawyers on record.

33. It is submitted that, the evidence will not change the character of the case since it will only address the degree of trespass , quantity and value of the murrum excavated, which evidence will directly touch on the issues pleaded and will generally be short and precise.

34. It is submitted further that the two expert witnesses can hardly take a half day in court so the inconvenience of one day out-weighs the disadvantage that may be caused by the failure of the court to dispense justice as justice must not only be done but must be seen to be done since the claim is for a whopping sum of **Kshs. 164,800,500/=**.

35. The applicant submits parties ought to be given a fair hearing under **Article 159 (2) of the Constitution** and the failure to re-open the defence may not only infringe on its constitutional rights but shall offend the oxygen principles under **Sections 1A and 1B of the Civil Procedure Act**.

36. Touching on the public interest, the applicant from China submits it trespassed unknowingly upon the respondent's parcel of land for purposes of excavating material for use in the construction of a public road along Maua for use by the public and not for any private gain that hence public interest out-weights the private gain: that in the regard a claim of **Kshs. 164,800,500/=** was a huge sum likely to adversely affect the applicant's operations, its cash flow and should it be made, it should be based on clear and abundant evidence fairly produced in court through a fair hearing based on the interest of justice as per the Construction, **Civil Procedure Act and Rules** made thereunder.

D. BRIEF HISTORY OF THE SUIT

37. The history of this case started with the filing of a plaint dated 13.8.2018 claiming that the defendant had IN April, 2018 trespassed into her **Parcel No's 245, 2394, 2397, 2403, 2398, 2399, 2400, 2401, 2396, 2453 and 2252 Kirindine – B while constructing Athi–Kimongoro–Nkija– Ugoti Katithine – Auki Thii-Gaiti and Kijiji Thii-Gaiti road in Meru County**, whereof they excavated soil murrum and rocks reducing the area into a quarry and dumping or depositing waste and useless materials into her land.

38. She prayed for general and special damages and an order to carry out an environmental restoration and the rehabilitation of the suit premises to the satisfaction of the plaintiff.

39. The plaintiff also sought for and was granted an interim order of injunction on 15.8.2018 against the defendant which orders were eventually confirmed on 2.10.2018 to last for a year.

40. The plaintiff filed an amended plaint dated 17.10.2018, following which the defendant entered appearance through *Mulondo, Oundo, Muriuki & Co. Advocates by a notice of appointment dated 27.11.2018*.

41. The plaintiff complied with **Order 11** by filing a list of documents dated 14.5.2019.

42. The defendant failed to file a defence on time or at all and the suit proceeded through formal proof on 15.5.2019. submissions were filed on 23.5.2019 and a judgment delivered on 25.8.2019. A decree was issued on 6.11.2019, together with a certificate of costs. Thereafter, warrants of execution and attachment were issued on 8.11.2019.

43. Through a notice of motion dated 18.11.2019, by Sichangi A, Nyongesa & Associates, the defendant sought for a stay of execution and the setting aside of the exparte judgment, all subsequent orders and leave to file a defence out of time blaming the mistake on the former lawyers on record for lack of action and communication.

44. The court on 18.11.2019 issued an interim stay with inter partes hearing on 10.12.2019.

45. The plaintiff filed a response and a preliminary objection dated 2.12.2019.
46. Through a consent dated 28.1.2020, the judgment was set aside and the defendant ordered to file a defence within 14 days. A pretrial conference was set for 25.2.2020.
47. Meantime plaintiff filed a further amended plaint dated 10.3.2020 raising the special damages to **Kshs. 134,180,500**.
48. The defendant filed a statement of defence dated 17.3.2020 denying the alleged trespass at paragraph 3 but instead averred it had engaged members of the public and the local administration to get permission to enter into contracts with the respective land owners for use of their land to get raw materials for the road construction and that the persons who agreed to lease out their parcels of land were fully compensated as per the terms of the agreements signed to that effect, which subject parcels of land were part of an adjudication scheme which was subject to allotment letters as no title deeds had been issued.
49. Specifically the defendant averred it entered into an agreement with one Mr. Mwiti Nyaga Niato as the physical occupier of the alleged parcels of land and the local administration confirmed he was the one who had occupied the suit land since 1997. He was therefore fully paid for the sued parcels of land. The defendant denied the contents of the further amended plaint since it had prior blessings of the aforesaid owner(s) for **L. R. Parcel No's 2451, 2354, 2397, 2339, 2396, 2453 and 2452** when they entered, used and utilized the aforesaid parcels as per the terms of the lease agreements to excavate and level them back to the original form after use.
50. Further, the defendant averred at paragraph 5 of the defence that, it was its tradition to return the used parcels of land to its original state since it is always an express term of the lease agreement to fill up the man-made excavations, levelise the ground and replace and or dispose of the waste in order to make the used parcels of land capable of being productive again.
51. The defendant averred that the used parcels of land had since been filled up, levelised and made useful, profitable and productive at the time of the filing of the defence.
52. Additionally, the defendant averred at the time of carrying out and purchasing the raw materials in the area, the market price of an acre was below **Kshs. 450,000/=** and that the value of the materials used was subject to the agreement of the parties and was not based on any form of valuation hence the particulars of both special damages contained in the further amended plaint was a mere guesswork not founded on any concrete valuation or proof but was meant to mislead the court.
53. Further, the defendant averred it took a good background survey and sensitization through the local administration whose parcels of land were deemed as useful and proceeded to enter into agreements with them, processed payments as per the lease agreements hence it was wrongly sued as the dispute was on ownership and that the plaintiff should have raises her claim against the person who occupied or possessed the sued parcels and who had leased the parcels of land out to it for excavation.
54. At paragraph 7 of the defence, the defendant averred the claim was overly exaggerated with the intention of misleading the court to overestimate the damages and ignore the positive side of the project and other developments by the defendant in the area.
55. The plaintiff filed a reply to defence dated 21.9.2021 together with a supplementary list of documents and witness statements dated 21.9.2020.
56. By an application dated 18.9.2020, the plaintiff sought to give her evidence **debene esse** due to her advanced age. Her evidence was taken eventually on 17.10.2020.
57. The defendant filed a preliminary objection dated 10.11.2020 on the basis that the court lacked jurisdiction for want of consent to sue under **Sections 8 and 13 of Land Consolidation Act Cap 283** and **Section 30 of the Land Adjudication Act**. At the same time, the defendant filed a list of witnesses dated and filed on 16.11.2020.
58. Meantime the parties were directed to file written submissions to the preliminary objection. By a ruling dated 26.5.2021, the court dismissed preliminary objection on the basis that vide a letter dated 7.8.2018, the Land Adjudication Officer had confirmed that the adjudication register for the area was complete.
59. Parties by consent took a hearing date for 27.10.2021 with directions that the defence be amended by 26.6.2021 and a reply to it be filed by 26.7.2021.
60. On 27.10.2021, the parties appeared and by consent directions were given for the matter to proceed from where the former presiding judge had reached.
61. PW2 and PW3 testified and the DW1 and DW2 testified and closed their case with directions were issued to put in written submissions by 20.12.2021.

E. ISSUES FOR DETERMINATION

62. The issues commending themselves for determination are:

1) If the applicant has made a basis for arresting the court judgment.

2) If the applicant has made a basis of re-opening the defence.

3) If the applicant has made a basis for seeking to introduce further evidence in support of its cases.

4) If the respondent will be prejudiced if the court were to decide issues (1) (2) and (3) in favour of the applicant.

5) What directions the applicant should make.

63. The court has given the procedural history in this matter from the filing upon to the date that the matter was heard and both parties closed their evidence 27.10.2021.

64. Thereafter and by consent of parties, a date to confirm the filing of written final submissions was taken.

65. The applicant did not comply. Instead the instant application was filed on 20.12.2021 after the plaintiff had filed and served written submissions dated 8.12.2021.

66. The court order made on 27.10.2021 had directed that each of the parties to file and serve written submissions within 21 days from the date thereof.

67. The defendant as per the directives should have filed and served its written submissions by latest 29.11.2021. That was not done and no explanations was ever given.

68. The appellant waited until the morning the court was to fix a judgment date to file and serve the application herein. By the time the application was certified urgent, the court had already fixed a judgment date for 9.3.2022 in line with **Order 17 Rule 4**.

69. Whereas the applicant has a right to change legal representation under **Order 9 Rule 5 and 17 of the Civil Procedure Rules** and to fair hearing, the same has to be balanced against the interests of the other party and the wider interest to do justice including expeditious, efficient and timely disposal of the Constitution as read together with **Sections 1A, 1B of the Civil Procedure Act**.

F. OVERRIDING OBJECTIVES

70. The overriding objective of this court under **Section 3 of Environment and Land Court Act** is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes. The court has to give effect to this objective.

71. **Section 19 of the Environment and Land Court Act** provides the court shall act expeditiously and shall be bound by the **Civil Procedure Act**.

72. Similarly, **Section 3 (3) of the Act** provides parties and their duly authorized representatives shall assist the court to further the overriding objective and participate in the proceedings of the court.

73. The court under **Section 18** of the **Environment and Land Court Act** is to be guided by inter alia the principles of:

a) Land policy under Article 60 (1) of the Constitution.

b) Judicial authority under Article 159 and national values and principles of public service under Article 232 (1) of the Constitution.

74. Under **Section 22 of the Environment and Land Court Act**, a party to the proceedings may act in person or be represented by a duly authorized representative. In undertaking its activities, the court is governed by both substantive and procedural laws.

75. In this case, parties were ordered to comply with **Order 11 of the Civil Procedure Rules** with a view of effecting the expeditious disposal of the case and case management after the close of pleadings. The purpose of case conference is inter alia, to consider compliance with **Order 3 Rule 2** and **Order 7 Rule 5** as regards documents and witness statements supposed to accompany both the plaint and the defence.

76. Starting from **Section 1A, 3** and **Section 25 of the Civil Procedure Act**, it is provided that the court SHALL after the case has been heard pronounce judgment.

77. **Section 146(4) of the Evidence Act, Cap 60 Laws of Kenya** provides a court may permit a witness to be re-called either for further examination in chief or for further cross-examination.

78. **Article 50 of the Constitution** states, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

79. **Order 18 Rule 10 of the Civil Procedure Rules** provides that the court may at any stage of the suit recall a witness and subject to law of evidence put any questions to him.

80. The issue before the court is novel in the sense that the reason of arresting of the judgment is pegged on the applicant's request to seek for the re-opening of the defence case, not for the purposes of recalling witnesses as provided under **Section 146 (c) of the Evidence Act as read together with Order 18 Rule 10**, but to be given an opportunity to go and look for that evidence, at the locus in quo, extract it, prepare reports and subsequently file the same before court and eventually to testify before the court and call those witnesses as expert witnesses.

G. CONSTITUTIONAL BASIS OF THE REQUEST

81. As indicated above, the golden line running through **Articles 47, 48, 50 and 159, Sections 1A, 1B of the Civil Procedure Acts, Sections 3 and 18 of the Environment and Land Court Act** is that the overriding objective of the court is that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

82. **Article 50 Rule 4** of the Constitution provides states:

“that evidence obtained in manner that violates any right or fundamental freedoms in the Bill of Rights shall be excluded if the administration of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.”

83. The court in determining this application is mandated by Constitution to safeguard and uphold the rights and freedoms of the litigants even as they file and prosecute disputes before it.

84. **Article 47 of the Constitution** as read together with the **Fair Administrative Action Act** provides that every person has the right to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

85. The court has to facilitate the access to justice for all persons. In order to do so and uphold the dispensation of justice, both procedural and substantive laws have been set up so that whoever comes to court follows the rules, regulations, systems and structures as established for the orderly, efficient, expeditious, just and proportionate disposal of disputes in a timely manner.

86. The applicant seeks to be allowed to reopen the defence so as to produce crucial evidence inadvertently left out by the former advocates on record.

87. It submits that the said evidence will not bring in a new cause of action and or be incontrovertible but will help the court make a just determination of the suit.

88. This court has not come across any provisions which specifically provides for the scenario at hand. Whereas there is no dispute the court has constitutional and inherent mandate to ensure that a trial will be fair, just, efficient, timely, affordable, promote access to justice, that justice is not delayed, unnecessarily or unreasonably or fettered by procedural technicalities on one hand, the court must also guard against abuse of the process of the court by parties by making orders as may be necessary for the ends of justice to be attained.

89. The **Civil Procedure Act and the Rules** made thereunder as read together with the **Evidence Act** are the hallmarks of procedural rules through which the parties coming to court are assured that their rights and freedoms as to procedural justice are guarded, enforced, ensured and or implemented.

90. Under **Order 3 Rule 2** as read together with **Order 7 Rule 5** of the **Civil Procedure Rules**, every party filing a civil suit must disclose at the filing all its evidence at the inception of the claim. These are not mere words but are put there so as to ensure that the opposite party's constitutional rights to access to information under **Article 35 of the Constitution** is guaranteed.

91. In the instant case, each of the pleaded information against the other in the plaint and the defence form the bedrock of the party's claim and or defence respectively.

92. It is trite law that parties are bound by their pleadings and the issues for determination to be drawn by parties and the court under **Order 15 of the Civil Procedure Rules** flow from the pleadings.

93. The applicant has submitted extensively on the basis of the intended witnesses and the proposed evidence and its overall implications on the just determination to be made by this court. The applicant has through written submissions tried very hard to draw the nexus between the defendant's defence, evidence so far tendered and the proposed evidence on the determination of the same to the extent that if the same is not allowed, its rights and freedoms as enshrined under **Article 50** would be gravely prejudiced and by extension the court will have failed to uphold **Article 159 of the Constitution**.

H. DETERMINATION

94. The application before the court can only be determined in the context of the suit from the time of its inception up to present. The court in doing so must not only look at one aspect as urged by the applicant namely the **“just determination of the dispute”**, but all the parameters as set out under **Article 159, the Bill of Rights, Sections 1A, 1B, 3A and Section 25 of the Civil Procedure Act, Orders 3 (2), 7 (5), 16 (1), 17, 18 (10), 21 Rule (1)** on 60 days to deliver judgment, **Rules 16, 25, 27, 28, 31, 34, 36 and 43 of Practice Directions of the Environment and Land Court 2014 and Sections 3, 13, 18, 19, 22, 24 and 27 of the Environment and Land Court Act 2011**.

95. It is trite law that the court retains the power to disallow one party from tabling evidence that was not supplied to the other party as provided by the above Rules and Laws at the time it was supposed to be provided. See **Johana Kipkemei Too –vs- Hellen Tum [2014] eKLR**.

96. In *Raila Odinga & 5 Others –vs- IEBC & 3 Others [2013] eKLR*, the Supreme Court of Kenya in a presidential petition upheld this proposition and declined to allow additional evidence filed outside the stipulated timelines. See also *Raila Amollo Odinga & another –vs- Independent Electoral and Boundaries Commission Chairman (IEBC) & another [2017]eKLR*.

97. The court Under **Section 146 (4) of the Evidence Act as read together with Order 18 Rule 10 Civil Procedure Rules** has made powers to allow for the re-opening of a case and for recall of witnesses notwithstanding that the evidence was not furnished to the other side on time or at all so long as the evidence is relevant, crucial, controvertible, the application is brought within reasonable time, or, if outside timelines the delay is explained and that the inclusion shall not unduly prejudice the opposite party or interfere with the ends of justice. See *Ahmed Mohamad & another –vs- Mohamed Abdi Mohamed & 2 others [2018] eKLR* and *James Kimathi Muthui –vs- Ntibuka M'Mburugu & 2 Others [2021] eKLR*.

98. In the instant case and as stated earlier on in this ruling, the applicant is not seeking to re-open the case in order to recall some witnesses and or produce some documents already filed and or in its possession.

99. On the contrary, the applicant in essence is simply seeking to reopen the case, to be granted security and unlimited access to enter into the plaintiff's premises in dispute and procure evidence which shall be converted as expert evidence. Eventually, the evidence once procured is to be filed in court and used against the plaintiff in support of the defendant's case.

100. As it were my understanding of the application before court is that the applicant does not possess the alleged evidence as at now and can only access it if granted the orders sought and the plaintiff is compelled to grant the applicant unrestricted access to her premises for an undisclosed period of time so that evidence can be collected as to the parcels, acreage, degree of interference, quality and quantity of the materials allegedly extracted by the defendant from her suit parcels in 2018 and lastly to be produced before the court.

101. The applicant whole clarion call is that unless the orders sought are granted, there would be grave injustice on their part as to fair hearing and that the court would not be in a position to determine the suit in a just manner since no such evidence so far has been tendered in court for or against the suit.

102. In my considered view, the orders sought are not only wide in scope but also will have drastic implications beyond what the applicant has contemplated and or disclosed.

103. The applicant must lay a basis, the reasons why the evidence was not procured on time or at all and if the court has powers to compel a party against whom a suit is made and in this context who has exhausted and or disclosed her entire case and evidence to be subjected to such a process notwithstanding the constitutional and statutory rights enjoyed by such a party.

104. Further, the applicant must also satisfy the court that if the issuance of the orders and the prejudice likely to occur to it on one hand and to the plaintiff and the administration of justice on the other hand favours the granting of the orders sought.

105. The defence case all along has been that the suit parcels have never belonged to the plaintiff but one Ntoiti who they dwelt with by entering into a lease agreement and which they fully compensated him for the extracted materials and hence they insisted both in its pleading and defence testimony that they had nothing to do with the plaintiff who ought to have directed her claim against the person who was at the time physically in occupation and purported to be the genuine owner of the parcels of land.

106. The court granted leave to the defendant to amend the defence but they opted not to do so. The supporting affidavit to the application herein as looked at alongside the written submissions are completely at variance with each other and by extension the defence. See *Karmali Tarmohammed & Another –vs- I.H Lakhani & Company [1958] EA 567, Benard Kabeu Kiriu –vs- Francis Waitthaka Kiriu [2021] eKLR, Bwana Mohamed Bwana –vs- Silvano Buko Bonaya & 2 others [2015] eKLR, Jackton Nyanungo Ranguma –vs- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR.*

107. Even though written submissions however powerful, detailed and reasoned are not evidence, a party coming to court must make full disclosure in a supporting affidavits which as it were is taken as evidence under **Order 10 Civil Procedure Rules**, and be consistent and not dishonest especially while seeking discretionary orders of this court. See *CMC Aviation Ltd –vs- Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR , James Nyoro Kibutiri –vs- Eliud Njau Kibutiri [1983] 1 IAR 60, Lehmann's (E.A.) Ltd. –vs- R Lehmanns & Another Co. Ltd [1973] E.A 167.*

108. There is nowhere in the pleadings the defendant admitted ever innocently and unceremoniously ever trespassed into the plaintiff's parcel of land. So to make a submission that by granting the orders sought the court would be allowing for the extraction and bringing on board evidence to assist the court to determine only the damages payable since the issue of liability is admitted and or undisputed is not only untrue but also misleading. See *Erastus Wade Opande –vs- Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007, Nancy Wambui Gatheru –vs- Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993, Ng'ang'a & Another –vs- George Owiti & Another [2008] 1 KLR (EP) 749, Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & another. [2014] eKLR, Avenue Car Hire & Another –vs- Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997.*

109. The court in determining whether or not to allow for adduction of new evidence has to consider its relevance, reliability, credibility and circumstances of the delay. See *Munyao Sila J in Joseph Muya Njuru –vs- Stephen Njoroge Kunda & 4 Others [2019] eKLR.*

110. In the instant application, the evidence and whoever is to procure it and or submit it before the court is not only unknown but the alleged evidence remains speculative in nature.

111. The applicant does not say why he did not expect the evidence to be relevant or useful in the first instance. It does not state why since 2018, they did not see the need of collecting and or availing before the court the evidence especially by the time the defence was filed yet the

law required that all witness statements, list of witnesses and list of documents be filed alongside the defence and if not so 15 days before pretrial conference. See *Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & another [2015] eKLR, Standard Chartered Financial Services & 2 Others –vs- Manchester Outfitters Ltd & 2 Others [2016] eKLR.*

112. The defendant does not explain why they did not exploit the widow of opportunity between the pretrial conference and the hearing especially when leave was sought and granted to amend the defence after the further amendment plaintiff was filed together with the supplementary list of documents including expert evidence which ideally covers the nature, degree, value and quantity of the extracted materials from plaintiff's parcel of land.

113. It cannot be said that defendant came to know the contents of the claim and the documents in support thereof after the conclusion of the defendant's case on 21.10.2021. The plaintiff's list of documents were availed before court at the earliest opportunity possible yet the applicant did not seek for access rights to the **locus in quo** for the collection of the aforesaid evidence it at all it wanted to counter that evidence. This court is also alive to the fact that the plaintiff could not have undertaken a project of such a magnitude without compliance with the **Environment Management and Coordination Act**.

114. The applicant lays blame to his ester-while advocates on record. The right to choose legal representation belongs to the party hiring the services. The case however belongs to the party who instructs counsel. It is not the other way round. It is the party who procures documents and witnesses in support of its case. It is not the duty of the advocate on record to bring witnesses and or produce documentation.

115. The applicant does not up to the moment possess the evidence and the witnesses to produce the same. If three years down the line after the suit was filed and served to it, it does not know the nature of the evidence and the names of the experts to procure it, the court is left wondering on what basis and circumstances it should assess whether the applicant deserves the orders sought or not.

116. Under **Order 21 Rule 1 of the Civil Procedure Rules**, the plaintiff is entitled as of right to delivery of the judgment within 60 days from the date of completion of the hearing otherwise, there are implications to the court which has to be accountable to Kenyans for the expeditious delivery of justice in a timely, efficient, proportionate and affordable manner. See *Boniface Kivindyo Mutisya –vs- Alfred Kavila Kivindyo & 2 others [2020], Mary Igoki Mutuaruchi –vs- Johnson Rwigi [2019] eKLR.*

117. It is in the public interest that cases should not be unduly delayed and justice delayed is justice denied. It cannot therefore be true for the applicant to stick only and submit only on one parameter and urge the court to ignore or overlook the rest of the other parameter under the governing procedural and substantive law whose imprimatur is **Article 10, the Bill of Rights and Articles 159 and 165 2 (b) of the Constitution**. See *Charles Omanga & Others –vs- Attorney General [2004] eKLR, Andrew Omtatah Okoiti –vs- Attorney General & Another [2011] eKLR.*

118. In interpreting constitutional provisions, the canons require it in interpreted wholesomely, holistically and liberally. See *Council of County Governors –vs- Attorney General & Another [2017] eKLR.*

119. In the instant came the onus is on the applicant to establish why the rights of the plaintiff as to fair hearing and access to justice should be overlooked in favour of its rights to gather the evidence and attend court especially when all had a level playing field, time, resources and opportunities to assemble evidence, disclose it to each other prior to the commencement of the trial.

120. In my considered view, the applicant had the opportunity to procure the evidence on time but did not exploit the opportunity so as to facilitate the expeditious disposal of the suit.

121. Similarly, to allow the application would grossly be unfair, prejudicial and amount to the infringement of the rights of the plaintiff in being compelled to allow for access of her suit premises for undisclosed period of time by undisclosed persons and for undisclosed mission for unknown evidence which once extracted would be used against her. See *Mutua & 51 others –vs- Eveready Batteries Kenya Ltd [2005] eKLR, Ahmed Abdullahi Abdille –vs- Abdille Nur Abdi & 3 others [2019] eKLR, Prof Njuguna S, Ndungu –vs- EACC & Others [2014] eKLR, Charles Omanga & Another –vs- Attorney General and Another [2004] eKLR.*

122. Even if the court were to allow the application, the plaintiff has already closed her case and there would be no opportunity other than cross examination to rebut the evidence likely to be brought before court which is likely to fundamentally alter the character of her case which she had not contemplated at the time she closed her case.

123. In a similar scenario, *Munyao Sila J in Johana Kipkemei Too –vs- Hellen Tum [2014] eKLR* held to allow such an application will make the trial unfair to the plaintiff and violate the provisions of **Article 50(1) of the Constitution**.

124. In *Cyrus Shakhhalaga Khwa Jirongo –vs- Soy Developers Limited & 9 others [2020] eKLR* Supreme Court of Kenya held a court faced with an application of this nature must consider all the prevailing circumstances and make such an order that it would deem fit in the interest of justice.

125. The court held that a party must show that the additional new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within its knowledge or could not have been produced at the time of the suit.

126. The court held a party seeking such orders should not appear as if abusing the court process or rather dubiously and or ingenuously seeking to reconstruct or reconstitute its case or make correction to its case by seeking to introduce supposedly new and fresh evidence. The applicant has not shown any exercise of due diligence in this matter so as to be entitled to the orders sought.

127. In sum, my finding is that the application lacks merit, the same is dismissed with costs.

128. Time is hereby extended to the applicant to file its written submission by close of business on 28.2.2022.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF FEBRUARY, 2022

In presence of:

C. Kirunda with Miss Matu for defendant/applicant – present

Muthomi for plaintiff/respondent – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE