Hamed v Kenya National Highways Authority & 2 others; Lead Property Developers & 2 others (Third party) (Environment & Land Case 333 of 2013) [2022] KEELC 15346 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15346 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 333 OF 2013

JO MBOYA, J

DECEMBER 5, 2022

BETWEEN

TARIQ NAZIR HAMED ..... PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

NATIONAL LAND COMMISSION ..... 3RD DEFENDANT

AND

LEAD PROPERTY DEVELOPERS ..... THIRD PARTY

STEPHEN KIPKEMEI KIPKEBUT ..... THIRD PARTY

NAIROBI CITY GOVERNMENT ..... THIRD PARTY

RULING

Introduction and Background

1. Vide Application dated the 31st of October, 2022, the Plaintiff Applicant has sought for the following orders:

    i. .....(spent)

    ii. This Honorable Court be pleased to grant Leave to the Plaintiff/ Applicant to Re-open his case limited to the production of the valuation Report dated the 31st of June, 2016.

    iii. This Honorable Court be pleased to allow the Plaintiff /Applicant to call a Valuer as an Additional Witness to adduce additional evidence before this Honorable Court.

iv. Cost of this Application be provided for.

2. The Instant Application is premised and anchored on the various, albeit numerous grounds which have been enumerated at the foot of the Application. Besides, the Application is supported by the Affidavit of the Plaintiff/ Applicant sworn on even date.

3. Upon being served with this subject Application, the 1st Defendant/Respondent filed a Replying Affidavit sworn on the 11th of November 2022, wherein same raised and ventilated a plethora of issues, inter-alia, that the subject application and the intended production of the valuation Report, are meant to fill-in the gaps that were exposed during the cross examination of the Plaintiff/ Applicant.

4. On the other hand, the 2nd Defendant Respondent filed Grounds of opposition (sic) dated the 3rd of October, 2022. However, it is inconceivable that the Grounds of opposition could be dated the 3rd of October 2022, yet the instant application is dated the 31st of October, 2022.

5. Be that as it may, the Grounds of opposition alluded to in the preceding paragraph state in the preamble thereof that same are in respect of and in opposition to the current Application.

6. Other than the foregoing, the 3rd Defendant did not file any response to the Application. For clarity, neither a Replying Affidavit nor Grounds of opposition was filed.

7. In respect of the 3rd Parties, it is sufficient to state and underscore that none of them filed any Response to the instant Application. In any event, during the scheduled Hearing of the Application, Counsel appearing for the 3rd Parties pointed out that same were not averse to the Application.

8. Suffice it to point out that the instant Application came up for hearing on the 17th of November 2022, whereupon the Advocates for the Parties agreed to canvass and dispose off the Application by way of oral Submissions.

Submissions By The Parties

Plaintiff's/Applicant's submission

9. Counsel for the Plaintiff/ Applicant identified, isolated and highlighted Four (4) pertinent issues for consideration by the Honorable Court.

10. Firstly, Counsel for the Plaintiff/ Applicant submitted that the subject suit touches on and concerns ownership of the suit Property and by extension compensation for loss of the Suit property arising from the offensive activities caused and occasioned by the Defendants'/ Respondents.

11. Premised on the nature of the Claim, Counsel pointed out that it would therefore be critical and essential for the Honorable Court to allow the Plaintiff /Applicant to tender and produce before the Honorable Court a copy of the Valuation Report dated the 30th of June, 2016.

12. In any event, Counsel for the Plaintiff Applicant added that the said Valuation Report would enable the Honorable Court to appreciate the true compensatory value of the Suit Property.

13. Secondly, Counsel for the Plaintiff/ Applicant contended that though the Plaintiff Applicant duly mentioned and made reference to a Valuation of the Suit property in the sum of Kshs. 300,000,000 only, the Plaintiff /Applicant omitted and failed to produce the Valuation Report. Nevertheless, Counsel pointed out that the omission and failure was neither deliberate nor intentional.

14. Additionally, Counsel for the Plaintiff stated that the failure and omission to produce and tender before the Honorable Court a copy of the Valuation Report arose as a result of inadvertence and honest mistake on the part of the Plaintiff Applicant.

15. For coherence, learned Counsel for the Plaintiff submitted that though the Plaintiff Applicant had engaged and instructed a Valuer, the fact that a valuation Report was indeed prepared escaped his attention and hence same was not privy to the preparation and thus availability of the Valuation Report.

16. Further, Counsel added that the Plaintiff / Applicant only discovered and was made aware of the Report when same interacted/met the nominated Valuer, who confirmed to the Plaintiff/ Applicant that same had indeed prepared the requisite Valuation report over and in respect of the Suit property.

17. In the premises, Counsel for the Plaintiff/ Applicant has contended that the fact pertaining to the preparation of the Valuation Report was essentially brought to the attention of the Plaintiff Applicant on the 20th of September 2022.

18. Thirdly, learned Counsel for the Plaintiff submitted that upon the discovery or being made aware of the existence of the Valuation Report, the Plaintiff Applicant duly issued the requisite instructions to Counsel to prepare and mount the instant Application.

19. Consequently, it was the submissions of Counsel for the Plaintiff that the instant Application has been made, filed and lodged without unreasonable delay.

20. Lastly, learned Counsel for the Plaintiff Applicant has submitted that the Honorable court does not exist to mete out punishment and discipline to the Parties and in respect of the instant case, to the Plaintiff Applicant, on the basis of an inadvertent failure and honest mistake.

21. Counsel has contended that a mistake like the one beforehand ought not to be punished, but the Honorable Court should endeavor to ensure that Justice is served to all Parties without undue regard to procedural lapses and technically.

22. Premised on the foregoing, Counsel for the Applicant has therefore invited the Honourable Court to find and hold that the reopening of the Plaintiff's/ Applicant's Case and granting of liberty to produce the Valuation Report, will serve the interest of justice and ensure equality of arms.

23. To vindicate the foregoing submissions, Counsel for the Plaintiff /Applicant has cited and quoted inter-alia, the decision in the case of *Wavinya Mutavi Versus Isaac Njoroge* [202] eKLR, *Simba Telkom Limited Versus Karuhanga and Fredrick Laibuni versus County Government Of Kajiado* [2021]eKLR respectively.

1st Defendant's/Respondent's submissions

24. On behalf of the 1st Defendant/ Respondent, learned Counsel Mr. Elvis Obok, identified, isolated and highlighted a total of Four Issues for due consideration by the Honourable Court.

25. First and foremost, learned Counsel relied on the Replying Affidavit sworn on November 2022 and submitted that the Valuation Report that is sought to be produced was well within the knowledge of the Plaintiff/ Applicant by the time same tendered his evidence before the Honourable Court.

26. For clarity, it was pointed out that the impugned Valuation Report is dated the 30th of June 2016 yet the Plaintiff/ Applicant testified and tendered his evidence before the Honorable Court on the 21st of October, 2021, (sic)long after the preparation of the Valuation Report.

27. Based on the foregoing, learned Counsel therefore submitted that to the extent that the Valuation Report was within the knowledge and was prepared on the instructions of the Plaintiff/ Applicant, the failure to produce and tender same before the Honorable Court was a deliberate act or omission born out of negligence and hence such conduct ought not to be excused by the Honorable Court.

28. Secondly, Counsel has submitted that the issue pertaining to the non- production of the Valuation Report was the subject of cross examination of the Plaintiff Applicant during the course of his testimony before the Court.

29. In this regard, Counsel for the 1st Defendant Respondent has therefore submitted that the intended production of the impugned Valuation Report is therefore meant to help the Plaintiff/Applicant to fill-in the gaps and loopholes that were exposed during the cross examination of the Plaintiff /Applicant.

30. Premised on the foregoing, Counsel has invited the Honourable Court to take cognizance of various decisions, including the Case of *Samuel Kiti Lewa versus Housing Finance Company Of Kenya Limited* [2015]eKLR, which decision delineates the scope and ingredients that ought to be considered by the Court before granting an Application for re-opening of a Party's case.

31. Thirdly, Learned Counsel for the 1st Defendant submitted that the grant of the subject Application, will unduly prejudice the 1st Defendant's/ Respondent's case. For clarity, Counsel added that the grant of the instant Application will effectively destroy a critical limb/ perspective of the 1st Defendant's Respondent's cross examination.

32. Finally, Counsel for the 1st Defendant/ Respondent submitted that the Instant Application has been made with undue and inordinate Delay, which delay has neither been explained nor accounted for by the Plaintiff Applicant.

33. In view of the foregoing, Counsel for the 1ST Defendant/ Respondent has thus contended that the Plaintiff / Applicant has neither met nor satisfied the requisite threshold for the Grant of the subject Application.

34. In a nutshell, Counsel has therefore invited the Honourable Court to dismiss the instant Application.

2nd Defendant's /Respondent's submission:

35. Learned Counsel for the 2nd Defendant/ Respondent relied on the Grounds of opposition which were dated (sic) the 3rd of October 2022 and contended that the instant Application does not meet or satisfy the requisite conditions to warrant the Grant of the Reliefs sought.

36. Secondly, Counsel has added that the current Application is meant to help the current Applicant to fill-in the gaps that became evident and apparent during the cross examination of the Plaintiff/ Applicant. In this regard, Counsel contended that where an Applicant is keen to fill-in the gaps exposed during the cross examination, then such an Application ought to be declined.

37. Thirdly, Counsel added that the issue pertaining to the monetary value of the Suit Property, was well within the knowledge of the Plaintiff/ Applicant right from the inception/ onset of the Case as well as the amendment of the Plaint.

38. Nevertheless, Counsel has pointed out that despite being aware that a Valuation Report would be necessary, the Plaintiff /Applicant did not make and take diligent efforts to avail the impugned Valuation Report.

39. In the premises, Counsel has pointed out that it is evident and apparent that the Plaintiff/ Applicant was neither intent nor keen to produce the Valuation Report as part of his evidence.

40. Essentially, Counsel has therefore contended that the current Application and the intended production of the Valuation Report is therefore an afterthought which this Honorable ought not to sanction, countenance or allow.

41. On the other hand, Learned Counsel for the 2nd Defendant/ Respondent has also pointed out that the current Application shall occasion and cause extreme prejudice and detriment to the 2nd Defendant / Respondent.

42. In support of the foregoing submission Learned Counsel for the 2nd Defendant/ Respondents has invited the Honourable Court to take cognizance of the various Decisions and decided cases.

43. For coherence, Learned Counsel has cited and quoted inter-alia, the case of *David Kipkosgei Kimeli versus Titus Barmasai* [2017]eKLR and *Gulf Energy Limited versus East Africa Air Safaris Limited* [2020]eKLR, respectively.

3rd Defendant's/Respondent's Submissions:

44. On behalf of the 3rd Defendant/ Respondent, Learned Counsel Ms. Masinde duly associated herself with the submissions ventilated by the 1st and 2nd Defendants/Respondents.

45. For the avoidance of doubt, having associated herself with the submissions made by and on behalf of the 1st and 2nd Defendants/ Respondents, Counsel for the 3rd Defendant/ Respondents stated that she had nothing useful to be add.

Third Parties' submissionS:

46. During the scheduled Hearing of the Application, the named Advocates for the 3rd Parties informed the Honourable Court that same shall not be opposing the instant Application. Consequently, the 3rd Parties conceded the terms of the instant Application.

Issues for Determination:

47. Having reviewed and evaluated the Application dated 31st October 2021, the Supporting Affidavit thereof and the Responses thereto; and having similarly considered the Oral submissions which were ventilated on behalf of the Parties, the following issues are pertinent and thus deserving of determination:

    i. Whether the Plaintiff /Applicant has established and satisfied the requisite threshold to warrant the Re-opening of his case, in the manner sought or at all.

    ii. Whether the Defendants/Respondents shall suffer any prejudice or detriment if the instant Application is granted or otherwise.

Analysis And Determination

Whether the Plaintiff/ Applicant has established and satisfied the requisite threshold to warrant the Re-opening of his case, in the manner sought or otherwise.

48. It is common ground that the Plaintiff /Applicant herein duly testified and tendered his evidence before the Honorable Court on the 21st of October 2021 and thereafter on the 1st of February, 2022. Besides, the Plaintiff/ Applicant's Case was thereafter closed on the 27th of July, 2022.

49. Be that as it may, during the time when the Plaintiff/ Applicant herein tendered and adduced his evidence before the Honorable Court, same did not mention or allude to any Valuation Report having been duly prepared by or on his behalf.

50. Notwithstanding the foregoing, there is no gainsaying that the Plaintiff Applicant herein alluded to and mentioned that the Suit property had been valued in the sum of Kshs. 300,000,000 Only. However, no Valuation Report was specifically referred to or pointed out to vindicate the alleged value of the Suit property.

51. Be that as it may, after the close of the Plaintiff's Case, the Plaintiff Applicant herein contends that same discovered and was duly appraised of the preparation and existence of a Valuation report by the nominated Valuer.

52. For clarity, the Plaintiff/ Applicant contends that the information pertaining to the preparation and existence of a valuation report was brought to his attention/ knowledge on the 20th of September, 2022.

53. Upon being appraised or becoming aware of the existence of the Valuation report, the Plaintiff/ Applicant filed the instant Application and same is now seeking to be allowed to re-open his Case and to produce a copy of the Valuation Report.

54. To this extent, the Plaintiff/Applicant has contended that the failure or omission to produce the impugned Valuation Report arose out of an inadvertent lapse and honest mistake on his part.

55. In any event, the Plaintiff/Applicant has further contended that the inadvertent lapse, which underline the failure to produce and tender in evidence the Valuation Report, should not be used and utilized to exclude an otherwise critical evidence that would assist the Honorable Court in arriving at a just and fair determination of the subject dispute.

56. Before endeavoring to address and resolve the issue as to whether or not the Plaintiff/Applicant has met and satisfied the threshold for re-opening of his case, it is imperative to state and underscore that the re-opening of a Party's Case hinges and rests on the discretion of the Court.

57. Additionally, I beg to add that the re-opening of a Case that has already been closed and adduction of additional evidence, is also premised and predicated on the Inherent and Residual Jurisdiction of the Honourable Court.

58. For clarity, such Jurisdiction, vests/ Inheres in the Honorable Court to ensure that the Court of law endeavors to do and administer Justice to the Parties, taking into account the obtaining circumstances and the general need to facilitate fair Hearing at all times.

59. On the other hand, it is also imperative to point out that there is no express statutory provision, either in the *Evidence Act*, Chapter 80 Laws of Kenya or in the *Civil Procedure Rules*, 2010, that expressly provides or covers for reopening of a case and production of additional Evidence.

60. Be that as it may, the provisions of Section 146 (4) of the *Evidence Act*, Chapter 80 Laws of Kenya, have variously been invoked and relied upon in such like Applications.

61. In this regard, it is appropriate to reproduce the foregoing section/provisions of the *Evidence Act*.

62. For convenience, same are reproduced as hereunder:

> " Section 146(4) of the *Evidence Act* generally grants the court powers to recall a witness. It provides thus:
>
> (4) 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"

63. My understanding of the foregoing provisions is to the effect that same is restricted to and touches on the limited aspect where the reopening relates to or is meant for purposes of recall of a Witness who has hitherto testified before the Honorable Court.

64. In such situation, the existing jurisprudence underscores that such a previous Witness can be recalled either by a Party to the Case or by the Honorable Court (*Suo motto*), for purposes of clarifying an issue that arose or any other arising perspective.

65. Other than the provisions of Section 146 (4) of the *Evidence Act*, which has been highlighted in the previous paragraph, there is also the provisions of Order 18 Rule 10 of the *Civil Procedure Rules* [2010], which replicates and resembles the provisions of the *Evidence Act*.

66. To this end, it is also appropriate to reproduce the provisions of Order 18 rule 10 of the *Civil Procedure Rules*. For coherence, same are reproduced as hereunder:

> " 10. 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."

67. Similarly, the text emanating from the foregoing provisions of the *Civil Procedure Rules* also underscore that same deals with and addresses a limited aspect of reopening a case. For clarity, it also speaks to the recall of a witness that has hitherto testified in respect of the subject matter.

68. Premised on the forgoing, there is therefore no gainsaying that the Jurisdiction to deal with the current Application, which relates to re-opening of the Plaintiff/Applicant's Case, calling of a completely new witness and adduction of an additional Evidence, falls for determination on the basis of the Inherent Jurisdiction of the Court as well as equitable discretion of the Honorable Court.

69. Suffice it to point out that even when exercising its inherent/residual Jurisdiction, the Honorable Court is still called upon to ensure that such exercise is undertaken and carried out in a manner that fosters, inspires and promotes the rule of Law and essentially fair Hearing.

70. Additionally, it is also important to underscore that the exercise of such inherent Jurisdiction must also be done Judiciously and in a manner that accords with the Provisions of Section 1 A and 1B of the Civil Procedure Laws of Kenya, as read together with Section 3 (1) of the *Environment and Land Court Act* [2011] together with Article 159 (2) of the *Constitution* 2010.

71. Having alluded to the foregoing provisions, it is now appropriate to revert to and consider whether the request at the foot of the instant Application merits being granted, or allowed in the manner sought.

72. Notwithstanding the foregoing, I also beg to state that the Issues pertaining to reopening of Cases that have been closed, with a view to affording a Party or Parties thereto an opportunity to tender additional Evidence, have previously been considered by various Courts.

73. Consequently, it is imperative to observe and state that same is not a virgin ground. In this regard, it suffices to mention the holding in the case of *Susan Wavinya versus Isaac Njoroge* [2020]eKLR where the Honourable Court stated and observed as hereunder:

> " Over the years, Kenya's superior courts and courts in the commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial. First, the jurisdiction is a discretionary one and it 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. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant.
>
> Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, evidence must be such that, if admitted, it would probably have an important influence on the result of the case, although it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. See (i) *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamud and Others* [2018] eKLR; (ii) *Samuel Kiti Lewa v Housing Findance Company of Kenya Ltd* [2015] eKLR. (iii) *Ladd v Marshall* [1954] 3 ALL 745; *Reid v Brett* [2005] VCS 18; (v) *Smith v New South Wales Bar Association* (1992) 176 CLR 256; and *EB v CT* (No. 2) [2008 QSC 306"

74. Similarly, the Scope and circumstances to be considered while dealing with and addressing whether or not to re-open a Case was also dealt with Vide the Case of *Samwel Kiti Lewa Versus Housing Finance Company Of Kenya Limited* [2015]eKLR respectively, as hereunder:

> " 17. Uganda High Court, Commercial Division in the case *Simba Telecom –v- Karuhanga & Anor* (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting 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 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."

18. 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."

75. Suffice it to point out that the decisions alluded to in the preceding paragraphs, have ably underscored and espoused the requisite conditions to be met and satisfied before the Honorable Court can exercise discretion on whether or not to reopen a Case and allow for production of Additional/ further Evidence.

76. Consequently, I am minded to adopt and endorse the numerous conditions and ingredients that have been alluded in the fore cited decisions. Nevertheless, it is imperative to underscore that the said conditions/ingredients are neither exhaustive nor the only ones to be considered.

77 . Further, it is also common ground to state and underline that while exercising the discretion on whether or not to reopen a Case and allow production fresh Evidence, the Court is obliged to take into Account the obtaining circumstances and the impact of the decision on the Rule of Law and the general administration of justice.

78. In the premises, where the intended Evidence to be produced is of a decisive nature, which is likely to impact on the Case either way, the Honorable Court should be more inclined towards granting the impugned Application.

79. To my mind, where Evidence of a decisive nature, is excluded, merely on the basis of a Procedural Lapse or default on the Part of a Litigant, there is a likelihood that such Litigant who is barred from producing such kind of Evidence would feel that same has been deprived or better still denied a fair Hearing.

80. In any event, the Plaintiff/Applicant has deponed and averred that the failure or omission to tender and produce in Evidence the impugned Valuation Report was because same forgot that a Valuation report has indeed been commissioned and prepared.

81. It may not sound very convincing, but allow me to point out that the averment/deposition that the Plaintiff/Applicant forgot about the existence of the said Valuation Report is not only reasonable, but also human.

82. In the premises, I am minded to find and hold that the Plaintiff/Applicant has not only laid a credible and sufficient basis for the failure and omission, but has also satisfied the Court that the impugned Evidence, namely, the Valuation Report which is sought to be produced is of a decisive character.

83. To my mind, I come to the conclusion that the Plaintiff/Applicant has met and satisfied the requisite conditions to warrant the Grant of the instant Application.

84. Before departing from the Issue herein, it is appropriate to recall and underscore that this Honorable Court does not exist to mete out punishment and discipline on Parties and Litigants merely because there has been a lapse, failure or mistake on the Part of the Litigant.

85. Clearly, the Honourable Court must weigh/calibrate on the Gravity of the Lapse and mistake and the explanation, if any, proffered by the Applicant.

86. In any event, the fact that a mistake and/or blunder has been made does not mean the Honorable Court must shut the Door of Justice on the face of a Party and drive same away from the Seat of Justice.

87. To underscore the foregoing observation, it is imperative to take cognizance of the words of wisdom enunciated Vide the Case of *Philip Keipto Chemwolo & another versus Augustine Kubende* [1986] eKLR where, it was held and observed as hereunder:

> "I recorded counsel as saying that a court's discretion should not be exercised in favour of a negligent applicant. I think the charge that the appellants were negligent is one that can be questioned. But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.
>
> I think a distinguished equity judge has said:
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> > "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

88. In my humble view, the words enumerated in the preceding paragraph apply with equal force and relevance to the circumstances obtaining in the instant matter/Case. For clarity, the Dictum resonates well with the grant of the subject Application.

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

89. The Defendants/ Respondents have contended that the reopening of the Plaintiff's/Applicant's and the adduction of the fresh Evidence, namely the Valuation Report, would occasion undue prejudice and detriment to same.

90. In particular, the Defendants/Respondents submitted that allowing the reopening and by extension the production of the Valuation Report shall negate and neutralize an aspect of the cross examination that was undertaken by the Defendants.

91. Premised on the foregoing, Counsel for the Defendants/ Respondents therefore contended that the extent of prejudice and detriment to be suffered and outways and militates against the Grant of the instant Application.

92. Be that as it may, I do agree that allowing the instant Application and in particular, the production of the fresh Evidence, would occasion some prejudice and detriment to the Defendants/Respondents.

93. However, the Prejudice and detriment to be suffered by the Defendants/Respondents must be balanced against the Injustice, if any, to be meted upon the Plaintiff/Applicant, if same is deprived of the Opportunity to tender and produce in evidence the impugned Valuation report.

94. Similarly, it is also important to underscore that the Prejudice to be suffered by the Defendants/Respondents must be weighed and calibrated against the Right to Justice, Fair Hearing and Right to Fair trial. In this regard, the provisions of Articles 25 (C), 48 and 50 (1) of the *Constitution*, 2010 are paramount and significant.

95. To be able to appreciate the scope and tenor of the foregoing provisions, it is appropriate to reproduce same.

96. Consequently, the cited provisions of the *Constitution* 2010, are reproduced as hereunder;

> 25. Fundamental Rights and freedoms that may not be limited
>
> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial; and
>
> (d) the right to an order of habeas corpus.
>
> 48. Access to justice
>
> The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
>
> 50. Fair hearing
>
> (1) 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.

97. In my humble view, the Prejudice and detriment to be suffered by the Defendants/Respondents, which essentially relates to the rollback of time and the need to cross examine another witness, hitherto not anticipated can very well be atoned for by payment of costs.

98. On the other hand, it is also important to remind the Defendants/Respondents that when the Witness is called to the stand and upon the production of the impugned Valuation Report, the Defendants/Respondents shall be accorded the requisite opportunity to cross examine same and discredit, if at all, the impugned Valuation report.

99. To this end, it behooves me to state and underscore that the prejudice to be suffered by the Defendants/Respondents, which essentially touches on costs, is outweighed by the level of Injustice that shall be suffered by the Plaintiff/Applicant.

100. Consequently and in the Premises, the balance of convenience weighed on the Pendulum scale, tills in favor of allowing the instant Application, albeit on terms.

101. Put differently, to refuse to grant the subject application merely on the basis that the Defendants/Respondents shall suffer prejudice, would in the circumstance of this Case, be tantamount to placing a fetter or clog on the Plaintiff's right of access to Justice. Clearly, such an action shall be inimical to the provisions of Article 48 of the *Constitution* (2010)

102. In a nutshell, it is my finding and holding that though the Defendants/Respondents shall suffer some level of prejudice, such prejudice is however, compensable by an award of Cost, to be borne and settled by the Plaintiff/Applicant.

Final Disposition:

103. Having evaluated and analyzed the named Issues, which were highlighted and amplified in the body of the Ruling, it must have become evident and apparent that the Application is meritorious.

104. Nevertheless, it is appropriate to point out that Parties/Litigants, the Plaintiff/Applicant not excepted, ought to exercise due diligence and to ensure that the documentation to be relied on by the Parties are all put together at the onset of the Case, to mitigate a back and forth, once the Hearing of a matter commences.

105. Be that as it may, I come to the conclusion that the instant Application, ought to be allowed. Consequently and in the premises, I now make the following Orders:

i. The Application dated 31st October, 2022 be and is hereby Allowed.

ii. The Plaintiff/Applicant be and is hereby Granted Liberty to file Supplementary list of Witnesses, Witness Statement, albeit relating to intended Witness being the Nominated Valuer and not Otherwise.

iii. Further, the Plaintiff/Applicant shall also file Supplementary list of documents and bundle of documents and same shall Be limited to only the Valuation Report dated the 30th of June 2016 and not otherwise.

iv. For completeness, the Documents alluded to in CLAUSE (ii and iii) hereof, shall be filed and served within 14 days from the date hereof.

v. The Defendants/Respondents shall be at Liberty to file and serve further List of Witnesses, Witness Statement, List and bundle of Documents, albeit related to and in answer to the Limited scope attendant to the Valuation Report dated the 30th of June, 2016.

vi. For coherence, the Documents alluded to in terms of Clause (v) hereof shall be filed and Served Within 14 Days From Date Of Service By The Pliantiff/applicant

vii. The Plaintiff's intended Witness shall Attend Court on the date to be named/fixed by the Honorable Court upon the delivery of the Subject Ruling.

viii. The Plaintiff/Applicant shall pay costs of the Application to the 1st Defendant/Respondent and same are assessed and certified in the sum of Kshs. 30,000 Only and same to be paid within 14 days from the date hereof.

ix. In default to pay/settle the cost within the stipulated timeline, the Plaintiff shall have no Right of Audience before the Honorable Court on the resumed Hearing of the Subject Matter.

x. It is So Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Ms Asli Osman for the Plaintiff/Applicant.

Mr Elvis Obok for the 1st Defendant/Respondent.

Mr Motari for the 2nd Defendnat/Respondent.

Ms Masinde for the 3rd Defendant/Respondent.

Mr Paul Mungla for the 1st Third Party.

Mr Bundotich for the 2nd Third Party.

Mr Nyakoe for the 3rd Third Party.