



Mayfair Holdings Limited v County Commissioner Kisumu & 3 others; Ethics and Anti-Corruption Commission & another (Interested Parties) (Constitutional Petition 2 of 2019) [2024] KEELC 456 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELC 456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CONSTITUTIONAL PETITION 2 OF 2019
SO OKONG'O, J
FEBRUARY 1, 2024**

BETWEEN

MAYFAIR HOLDINGS LIMITED PETITIONER

AND

THE COUNTY COMMISSIONER KISUMU 1ST RESPONDENT

THE REGIONAL CO-ORDINATOR NYANZA 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

KENYA RAILWAYS CORPORATION 4TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

PROF. BETHWEL OGOT INTERESTED PARTY

RULING

1. The Petitioner brought this petition against the 1st, 2nd and 3rd Respondents on 25th March 2019. The Petitioner contended that it was the registered proprietor of the property known as Kisumu Municipality Bock 11100 (hereinafter referred to as “the suit property”). The Petitioner contended that in breach of its right to property, the 1st and 2nd Respondents invaded the suit property and were using the same without its consent. The Petitioner filed several documents in support of its claim. The 1st, 2nd and 3rd Respondents filed a response to the petition and contended that the suit property was public land and that the same had not been lawfully alienated to the Petitioner. The 4th Respondent and the 1st Interested Party were added to the suit on 9th March 2021 while the 2nd Interested Party was added to the suit on 24th January 2022.



2. The 1st Interested Party filed a defence and a counter-claim against the Petitioner on 4th March 2021. The 1st Interested Party contended that Kisumu MunicipalityBlock 1199 and Kisumu MunicipalityBlock 11100 (the suit property) which were being claimed by the Petitioner belonged to the 4th Respondent. The 1st Interested Party contended that Kisumu MunicipalityBlock 11187 also claimed by the Petitioner did not exist in that it was created on a road reserve. Kisumu MunicipalityBlock 1199, 100 and 187 are hereinafter together referred to as “the suit properties”. The 1st Interested Party averred that the purported titles held by the Petitioner for the suit properties were fraudulent and illegal. The 1st Interested Party averred that no consent was obtained from the 4th Respondent before Kisumu MunicipalityBlock 1199 and Kisumu MunicipalityBlock 11100 (the suit property) were allocated to the Petitioner. The 1st Interested Party contended further that the Petitioner never applied for the properties and that there were parallel titles in respect of the said properties. In its counter-claim, the 1st Interested Party sought among others, a declaration that the registration of the Petitioner as the proprietor of the leasehold interest in the suit properties was null and void and that the same should be cancelled. The 1st Interested Party filed several documents in support of its case.
3. The 4th Respondent filed a response to the petition and a cross-petition against the Petitioner on 28th June 2021. The 4th Respondent contended that the suit property was registered in its name as the leasehold proprietor thereof and that the same had been subleased to the 2nd Interested Party. The 4th Respondent averred that the suit property and land parcel No. Kisumu Municipality Block 1199 were subdivisions of land parcel No. Kisumu Municipality Block 113 and that land parcel No. Kisumu Municipality Block 1199 was subleased to George Okungu. The 4th Respondent averred that the Petitioner purportedly acquired title to the suit property while there was another lawful title for the property existing. The 4th Respondent contended that the purported title issued to the petitioner in respect of the suit property was fraudulent and illegal. The 4th Respondent filed an affidavit in response to the petition and in support of its cross-petition on 28th June 2021. The 4th Respondent also filed a list and bundle of documents on 28th June 2021 in its defence and support of the cross-petition. George Okungu and Professor Bethwel Ogot filed affidavits through the 1st Interested Party urging the Court to dismiss the petition. The Petitioner filed a response to the 4th Respondent’s cross-petition on 19th October 2021 and further affidavit in support of the petition on the same date.
4. The hearing of the petition commenced on 12th October 2022. The Petitioner called one witness, the 4th Respondent one witness and the 1st Interested Party two witnesses. The affidavit of the 2nd Interested Party sworn on 24th March 2021 and filed on the same date was adopted as his evidence in the petition. The 1st, 2nd and 3rd Respondents did not tender evidence at the trial. After the close of evidence on 13th July 2023, the court gave timelines for the filling of written submissions and thereafter visited the site. A report on the site visit is on record. The Petitioner was to file its submissions within 30 days from 13th July 2023 while the Respondents and the Interested Parties were to file their submissions within 30 days from the date of service of the Petitioner’s submissions. The matter was to be mentioned on 31st October 2023 for a judgment date. The 4th Respondent filed its submissions on 26th October 2023 while the 1st Interested Party filed its submissions on 30th October 2023. The Petitioner did not file submissions.
5. In the morning of 31st October 2023 when the petition was to come up for fixing a judgment date, the Petitioner filed an application by way of a Notice of Motion dated 31st October 2023 brought under Article 159 of the *Constitution* of Kenya, 2010, Section 1A,1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and Order 16 Rule 1, Order 19 Rule 2 and Order 51 of the *Civil Procedure Rules*, 2010. This is the application which is the subject of this judgment. In the application, the Petitioner sought for the following orders;



1. That pending hearing and determination of the application inter partes, the court be pleased to vacate the directions issued on 13th July 2023 and allow the Petitioner Applicant to re-open its case.
 2. That the court be pleased to grant leave to the Petitioner Applicant to re-open its case for the purpose of filing additional evidence being a Surveyor's Report which contains additional information relating to the suit properties herein being Kisumu Municipality Block 1199, Kisumu Municipality Block 11100 and Kisumu Municipality Block 11187.
 3. That the court be pleased to grant leave to the Petitioner Applicant to re-open its case for the purpose of issuing a witness summons to Mr. George Okungu and Mr. P.A. Opiyo to tender evidence relating to the suit properties herein being Kisumu Municipality Block 1199, Kisumu Municipality Block 11100 and Kisumu Municipality Block 11187.
 4. That the Respondents and the Interested Parties be at liberty to cross-examine the Petitioner's witnesses on the additional evidence to be adduced.
 5. That the court be pleased to grant any other orders as it may deem fit to further the ends of justice.
 6. That the costs of and incidental to the application be in the cause.
6. The application was brought on the grounds set out on the face thereof and on the supporting affidavit and further affidavit of Amin Mohamed Gilani sworn on 31st October 2023 and 14th November 2023. The Petitioner averred that the petition was fixed for hearing on 12th October 2022 when the Petitioner's witness testified and the Petitioner closed its case. The Petitioner averred that the witnesses for the Respondents and Interested Parties were heard subsequently and the parties closed their respective cases on 7th June 2023. The Petitioner averred that on 13th July 2023, the court conducted a site visit of land parcels, Kisumu Municipality Block 1199, Kisumu Municipality Block 11100 and Kisumu Municipality Block 11187 (the suit properties). The Petitioner averred that on the same day, the court directed the parties to file written submissions and fixed the suit for mention on 31st October 2023 for the purpose of fixing a judgment date.
7. The Petitioner averred that during the site visit, the Petitioner came across additional evidence relating to the suit properties which was not brought to the attention of the court during the hearing of the petition. The Petitioner averred that it thereafter engaged a surveyor to conduct investigation on the new evidence and prepare a report on his findings. The Petitioner averred that it was seeking to re-open its case to enable it to tender the said additional evidence in the form of a Surveyor's Report, as well as to call Mr. George Okungu and Mr. P.A. Opiyo to appear in court and give evidence on its behalf in the matter. The Petitioner averred that the said additional evidence was relevant and important to the Petitioner because;
- a. Concerning the Surveyor's Report, the court heard the evidence tendered by Wilson Kibichii (DW2), a principal cartographer, who testified on 12th October 2022 on behalf of the 1st Interested Party. The Petitioner wished to tender a Surveyor's Report to furnish the court with additional information relating to the suit Properties, which was not tendered during the hearing of the case by the parties.
 - b. The 1st Interested Party filed an affidavit sworn by Mr. George Okungu on 24th March 2021. However, Mr. George Okungu did not tender oral evidence and as such he was not cross-examined on matters relating to land parcel, Kisumu Municipality Block 1199. The evidence of Mr. Okungu is critical in the matter as it touches on his involvement in the transaction relating



to the said property. It is therefore necessary to re-open the Petitioner's case for the purpose of summoning Mr. Okungu and appear and give evidence in the matter.

- c. The 1st Interested Party produced a document titled "Cadastral Checking Office Report" bearing the stamp of Survey of Kenya dated 22nd January 2021 relating to Kisumu Municipality Block 11187. In the course of the evidence tendered by Wilson Kibichii (DW2), he confirmed to the court that he knew one, Mr. P.A. Opiyo, who signed the said document as the Final Checker. The evidence of the said Mr. Opiyo is critical in the matter as it touches on his involvement in the transaction concerning the said property. It is therefore necessary to re-open the Petitioner's case for the purpose of summoning the said Mr. Opiyo to appear in court and give evidence.
8. The Petitioner averred that it came across the additional evidence during the site visit to the suit properties after the parties had closed their cases. The Petitioner averred that failure to produce the additional evidence at the trial was not deliberate. The Petitioner averred that the Respondents and the Interested Parties would not suffer any unfair prejudice if the court were to allow the application. The Petitioner averred that the application had been brought without unreasonable delay. The Petitioner averred that the re-opening of the Petitioner's case was not meant to embarrass or prejudice the Respondents and the Interested Parties nor was it meant to fill the gaps in the evidence adduced by the Petitioner. The Petitioner averred that the additional evidence sought to be produced by the Petitioner was meant to place all the evidence before the court to enable the court to determine the suit on its merit and the same would greatly assist the court in adjudicating and conclusively determining all issues in contention in this matter.
9. In its further affidavit, the Petitioner reiterated the contents of the supporting affidavit and elaborated on why it needed to produce a Survey Report and adduce additional evidence through its proposed new witnesses. The Petitioner also laid the legal foundation for its application. The Petitioner contended that it had met the threshold for adducing additional evidence. The Petitioner averred that it would suffer prejudice if the orders sought were not granted since it would be prevented from bringing all its evidence before the court and that would impact on its constitutional right to be heard. The Petitioner urged the court to allow the application in the interest of justice and equity.
10. The 1st to 3rd Respondents opposed the application through Grounds of Opposition dated 6th November 2023. The 1st to 3rd Respondents averred that the Petitioner slept on its rights and should not be granted further opportunity to delay the delivery of justice. The 1st to 3rd Respondents contended that the Petitioner intended to fill in the gaps in its evidence which was unacceptable at the stage of the proceedings when judgement was about to be delivered. On this point, the 1st to 3rd Respondents cited *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR.
11. The 1st to 3rd Respondents averred that the delay in the filing of the application was unjustifiable, inordinate and unexplained. The 1st to 3rd Respondents averred that the Petitioner had not proved that the additional evidence sought to be adduced could not have been discovered earlier by reasonable diligence. The 1st to 3rd Respondents averred that the application was likely to prejudice the Respondents because of the late admission of further evidence. The 1st to 3rd Respondents averred that there was no basis laid for calling Mr. George Okungu and Mr. P.A. Opiyo to give evidence in the matter. The 1st and 3rd Respondents termed the application a gross abuse of the court process and urged the court to dismiss the same.
12. The 4th Respondent opposed the application through the affidavit sworn by Justine Omoke on 3rd November 2023. The 4th Respondent contended that the application had been made in bad faith, was a waste of the court's time and the same ought to be dismissed with costs. The 4th Respondent averred



- that upon being added to the petition, it filed and served its answer to the petition and cross-petition together with a replying affidavit. The 4th Respondent averred that the 1st Interested Party equally filed and served its response which contained several affidavits and documents. The 4th Respondent averred the documents served upon the parties by the 1st Interested Party included an affidavit sworn by Mr. Wilson Kibichii (DW2) which contained several documents including the Cadastral Checking Office Report and relevant survey plans.
13. The 4th Respondent averred that the matter was heard on various dates. The 4th Respondent averred that Mr. George Okungu did not attend court during the hearing for cross-examination and for that reason, his statement was not adopted by the court as evidence. The 4th Respondent averred that upon the closing of the respective cases for the parties, the 1st Interested Party requested for a site visit to be undertaken in respect of Kisumu Municipality Block 11187. The 4th Respondent averred that no application for a site visit was made concerning Kisumu Municipality Block 1199 and Kisumu Municipality Block 11100 and that the site visit conducted on 13th July 2023 did not involve them.
 14. The 4th Respondent averred that the fact that Mr. P.A. Opiyo had signed the Cadastral Checking Office Report was not new information. The 4th Respondent averred that the information was available to all the parties before the hearing and the Petitioner saw no need to call Mr. P.A. Opiyo as its witness during the hearing. With regard to Mr. George Okungu who was said to have sold Kisumu Municipality Block 1199 to the Petitioner, the 4th Respondent averred that the Petitioner did not call him as a witness despite the Petitioner's case being founded on an agreement for sale between it and Mr. George Okungu.
 15. The 4th Respondent contended that equity aids the vigilant and not the indolent. The 4th Respondent averred that the Petitioner brought the present application close to 5 years after filing the petition and elected not to call the proposed new witnesses during the hearing despite being privy to the documents relied on by the other parties. The 4th Respondent averred that the court could not come to the aid of the Petitioner in the circumstances. The 4th Respondent averred that the petitioner had equally approached the court with unclean hands as the basis for seeking to re-open the case had not been demonstrated.
 16. The 4th Respondent averred that it would be prejudiced should the application be allowed as the same was designed to further delay the matter in violation of its right to a fair hearing considering that the suit was commenced close to 5 years ago. The 4th Respondent averred that it was in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. The 4th Respondent averred that the application was brought in a bid to delay the course of justice contrary to the overriding objectives set out in the *Constitution* and the *Civil Procedure Act* and Rules made thereunder. The 4th Respondent averred that it was in the interest of justice that the application be dismissed with costs.
 17. The Petitioner's application was argued by way of written submissions.

The Petitioner's submission

18. The Petitioner filed submissions dated 14th November 2023 in which it framed two issues for determination namely; whether the court has power to allow additional evidence, and whether the Petitioner had mustered the threshold for re-opening of the case. On the first issue, the Petitioner submitted that the *Constitution* of Kenya as well as the overriding objective of the *Civil Procedure Act* enjoins the court to promote just and efficient resolution of disputes on their merits, and this entails considering all the facts and evidence available concerning a dispute before it. In support of this



submission, the Petitioner relied on *Raila Odinga & 3 Others v Independent Electoral and Boundaries Commission* [2013] eKLR and *Nuru Ruga Ali & another v Commodity House Limited & 3 others* [2021] eKLR. The Petitioner submitted that its application invoked the jurisdiction of the court to allow additional evidence which will assist the court in determining the present suit on its merits. The Petitioner submitted that additional evidence may be adduced at any stage of the proceedings even at the appellate stage. In support of this submission, reliance was placed on *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR. The Petitioner submitted that the court had the power and discretion to allow additional evidence at any stage before determination of a case, to facilitate the just and fair determination of a dispute.

19. On the second issue, the Petitioner submitted that it had met the threshold to warrant the exercise of the court's discretion in its favour. The Petitioner submitted that this court had the absolute discretion to allow a party to re-open its case and adduce additional evidence. The Petitioner submitted that the court had a duty to find out the truth. The Petitioner submitted that the fact that the truth was shrouded in mystery and that the parties had allowed it to remain so should not prevent the court from playing its part in guiding the parties to take such steps as may be necessary to unearth the mystery and ascertain the truth. The Petitioner submitted that the application was not meant to embarrass or prejudice the Respondents and the Interested Parties, but the same was meant to aid the court in considering all the evidence relating to the suit properties and enable it to reach a fair and just determination of the matter.

The 4th Respondent's submissions

20. The 4th Respondent filed submissions dated 3rd November 2023 in which it reiterated most of what is contained in its affidavit in opposition to the application. The 4th Respondent averred that the Petitioner was undeserving of the court's discretion. The 4th Respondent submitted that during the hearing and the site visit, the 1st Respondent relied on documents which were filed and served upon the other parties before the matter was set down for hearing including the Cadastral Checking Office Report. The 4th Respondent submitted that the Petitioner had not denied service of these documents which included the said Cadastral Checking Office Report that bore the name of Mr. P.A. Opiyo. The 4th Respondent submitted that Wilson Kibichii (DW2) was extensively examined by the Petitioner's advocate on the said documents during the hearing and the site visit.
21. With respect to the limb of the application seeking the summoning Mr. George Okungu to appear and give evidence, the 4th Respondent submitted that the Petitioner had the option of calling George Okungu as its witness in light of the sale agreement between them in respect of Kisumu Municipality Block 1199 which it claimed to have bought from him. The 4th Respondent submitted that the Petitioner also had the option of applying for summons to cross-examine him considering the list of witnesses and documents served upon the Petitioner by the 1st Interested Party before pleadings closed which included his affidavit. The 4th Respondent cited Order 16 Rule 1 and Order 19 Rule 2 of the *Civil Procedure Rules* and argued that having been served with the 1st Interested Party's documents in advance in preparation for the trial, the Petitioner waived its right to call the said George Okungu and P.A. Opiyo as witnesses. In support of this submission, the 4th Respondent cited *Raila Odinga & 5 others v IEBC & 3 others* [2013] eKLR and *Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & another (Interested Parties); International Commission of Jurists (Kenya Section)* (Amicus Curiae) [2021] eKLR.
22. The 4th Respondent submitted that the Petitioner's application was aimed at filling gaps in its case. The 4th Respondent contended further that the application was not brought in good faith the same



having been made more than 4 years since the Petitioner brought the petition and more than 2 years after being served with the 1st Interested Party's documents. The 4th Respondent cited Samuel Kiti Lewa v Housing Finance Company Limited & another(*supra*) and [Stephen Kibiwott Cheruiyot v Luka Chemweno & 3 others; Commissioner of Lands County Lands Registrar \(3rd Party\)](#) [2021] eKLR in support of the submission.

23. The 4th Respondent submitted further that the court had not been informed of the nature of the evidence the Petitioner intended to introduce through its new witnesses to warrant the exercise of discretion in its favour. The 4th Respondent submitted that even the report that the Petitioner had referred to was not disclosed if at all any exists. In support of this submission, reliance was placed on [Fredrick Mutonyi Gitonga v Isaiab Mutonyi Wambugu & another](#) [2015] eKLR. The 4th Respondent submitted that the application was an afterthought meant to prejudice the other parties' right to a fair hearing guaranteed under Article 50(1) as read with Article 159 (2) of the *Constitution*.

The 1st Interested Party's submissions

24. The 1st Interested Party filed submissions dated 8th November 2023. The 1st Interested Party submitted that the *Constitution* of Kenya, 2010 provides under Article 50 (2) (e) that an accused person has a right to have the trial begin and concluded without unreasonable delay. The 1st Interested Party submitted that the court heard this suit and closed the hearing on 13th July 2023 after which it directed the parties to file submissions which directions the parties had complied with. The 1st Interested Party submitted that there must be an end to litigation.
25. The 1st Interested Party submitted that the Petitioner had alleged that there was new evidence that emerged during the site visit. The 1st Interested Party submitted that the purpose of the site visit that was undertaken on 13th July 2023 was to confirm the location of the suit properties. The 1st Interested Party submitted that no new evidence was adduced during the site visit. The 1st Interested Party submitted that the Petitioner was not clear in his application as to the new evidence it wished to adduce and why the same was not adduced earlier during the trial. In support of this submission, the Petitioner cited [Attorney General v Torino Enterprises Limited](#) [2019]eKLR.
26. On the issue of whether George Okungu should be summoned to give evidence in the matter on behalf of the Petitioner, the 1st Interested Party submitted that George Okungu was the 1st Interested Party's witness and had recorded a statement with the 1st Interested Party on 20th March 2021 in support of the 1st Interested Party's case. The 1st Interested Party submitted that the said statement was filed and served upon the other parties on 24th March 2021. The 1st Interested Party submitted that it invited George Okungu to attend court and give evidence but he did not turn up during the hearing. The 1st Interested Party submitted that George Okungu's statement was not adopted by the court as evidence. Concerning the summoning of P. A. Opiyo to give evidence for the Petitioner regarding the document referred to as "Cadastral Checking Office Report", the 1st Interested Party submitted that it included the said Cadastral Checking Office Report in its bundle of documents filed and served on all the parties including the Petitioner on 6th April 2021 before the hearing commenced. The 1st Interested Party submitted that the Petitioner had all the time to summon P.A. Opiyo to testify in the matter but failed to do so. The 1st Interested Party submitted that the document was produced in evidence by the 1st Interested Party's witness Mr.Kibichii (PW2) who was cross-examined by the advocate for the Petitioner on the same. The 1st Interested Party submitted that there was no fresh evidence disclosed. The 1st Interested Party submitted that the conditions outlined by the court in [Mobamed Abdi Mobamed v Abdullabi Mobamed and 3 others](#) [2018]eKLR had not been satisfied. The 1st Interested Party submitted that the Petitioner intended to reopen the case to fill the gaps which



it may have identified after the parties filed their submissions and hence the application was brought in bad faith.

Analysis and Determination

27. I have considered the application and the response thereto by the 4th Respondent and the 1st Interested Party. I have also considered the submissions filed by the advocates for the parties. The only issue arising for determination in the application is whether the Petitioner should be allowed to re-open its case to adduce additional evidence. In *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR (Ruling delivered on 28th September 2018) the Supreme Court stated as follows on an application to adduce additional evidence:

(79) 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 on 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 trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful 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 hisher 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.

[80] 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...

[90] We are convinced that disallowing the additional evidence would deny the Appellant a fair trial, which is a non-derogable right under our Constitution. In addition, we are satisfied that allowing the additional evidence is not prejudicial to any party and will be in the interests of justice as the evidence is necessary and crucial in making of a proper judicial finding as to whether the Appellant had the requisite academic credentials to vie for governor of Wajir County which are core issues before the Court.”

28. In *Wanjie & others v Sakwa & others* [1984] KLR 275 the court (Chesoni Ag JA) stated as follows:

...the principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

- (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
- (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

29. In *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* (*supra*), the court stated that:

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

30. In *Raindrops Ltd. v County Government of Kilifi* [2020] eKLR, the court cited the *Canadian Encyclopedia Digest Evidence* (V) 12, (a), in which the authors stated as follows:

Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered while some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.

- (1) Whether the evidence; if it had been properly tendered would probably have altered the judgment, and



- (2) whether the evidence could have been discovered sooner had the party applied reasonable diligence.

Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger, the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel."

31. From the case law cited above, whether to reopen a case and admit additional evidence is at the discretion of the court. Being a discretionary power, it must be exercised judiciously. The cited cases provide the principles upon which the court exercises its discretion in applications seeking the production of additional evidence. Applying those principles to this case, I am not satisfied from the material before me that a proper basis has been laid by the Petitioner to warrant the grant of the orders sought. At the time the Petitioner brought the application before the court all the parties had closed their cases, and the 4th Respondent and the 1st Interested Party had filed their closing submissions. The matter was pending the fixing of a date for judgment. The Petitioner has sought the reopening of its case so that it can adduce additional evidence in the form of a Surveyor's Report. The Petitioner has not placed a copy of the said report before the court to enable the court to appreciate its relevance and importance to the dispute between the parties. A party seeking the exercise of the court's discretion to be allowed to adduce additional evidence owes a duty to give full disclosure of the intended evidence. It is not only the court that needs to know the nature of the new evidence sought to be adduced but also the other parties to the suit who have a right to know the evidence that they would be confronted with if the application is allowed. In my view, such disclosure is also a sign of good faith. Failure to make the disclosure is fatal in my view as it leaves the court without any basis to exercise discretion. As things stand, I am unable to determine the relevance and importance of the purported Surveyor's Report that the Petitioner wishes to produce as additional evidence in support of the Petitioner's case. It is not sufficient in my view for the Petitioner to state that the said report contains additional information relating to the suit properties. If I may ask; which information, how relevant is it and why is it not being disclosed? The Petitioner claimed that during the site visit by the court on 13th July 2023, "the Petitioner Applicant came across additional evidence relating to the suit properties". Why has the Petitioner failed to disclose this evidence?
32. The Petitioner has also sought to call additional witnesses namely; George Okungu and P.A.Opiyo to give evidence on its behalf concerning the suit properties. As I have stated with regard to the alleged Surveyor's Report, the Petitioner had a duty to prepare and attach to the affidavit in the support of the application witness statements of these additional witnesses to inform the court of the nature and importance of their evidence. I believe that the Petitioner does not intend to call witnesses whose evidence is unknown to the Petitioner otherwise how has it concluded that such evidence would be relevant and important to its case? Where parties have closed their cases and some of the parties have already filed closing submissions, the court must be given sufficient reason to open the case for one of the parties. The court is only able to determine whether or not such sufficient reason exists upon considering the additional evidence sought to be adduced. In any event, the Petitioner was all along aware of the position taken by George Okungu in the matter. The Petitioner's case is that George Okungu sold one of the suit properties namely, Kisumu Municipality Block 1199 to the Petitioner. The Petitioner did not find it necessary to summon him to give evidence on its behalf. George Okungu



swore an affidavit which was filed in these proceedings by the 1st Interested Party although it did not form part of the evidence adduced by the 1st Interested Party since he did not appear in court to give evidence. Even if the Petitioner did not find it necessary at the initial stage to call George Okungu as a witness, this affidavit filed on 24th March 2021 in which George Okungu disowned the Petitioner's claim to Kisumu Municipality Block 1199 should have prompted the Petitioner to action. The Petitioner has not explained why it did not apply to the court to summon George Okungu to give evidence on its behalf before the close of evidence. The Petitioner has also not pointed out any new development in the case that has made it necessary to call George Okungu as a witness.

33. With regard to P.A. Opiyo, again the Petitioner knew by 4th March 2021 when the 1st Interested Party filed its defence and counter-claim that P.A. Opiyo had signed the Cadastral Checking Office Report in respect of registration of Survey FR No. 316123 relating to Parcel No. 187 as the final checker. The Petitioner interacted with the document as part of the bundle of documents that was filed together with the said defence and counter-claim. The Petitioner also interacted with the document during the testimony of PW2 who was cross-examined on the document by the Petitioner's advocate. The Petitioner has not explained why it did not take the earliest opportunity to call P.A. Opiyo as a witness. As I have mentioned earlier, the Petitioner has also not told the court the nature of the evidence that P.A. Opiyo would give upon being summoned.

Conclusion

34. Due to the foregoing, I find no merit in the Petitioner's application. The Petitioner has failed to meet the threshold for granting leave to adduce additional evidence. I agree with the 4th Respondent and the 1st Interested Party that the orders sought are intended to assist the Petitioner in filling the gaps in its case rather than assisting the court in arriving at a just decision in the matter. The court cannot aid the Petitioner in that endeavour. The application is dismissed with costs to the 4th Respondent and the 1st Interested Party.

DELIVERED AND DATED AT KISUMU ON THIS 1ST DAY OF FEBRUARY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Yogo, and Ms. Obure hb for Mr. Kanjama SC, for the Petitioner

Ms. Jumaa hb for Ms. Essendi for the 1st, 2nd and 3rd Respondents

Ms. Moraa for the 4th Respondent

Ms. Kakuvi for the 1st Interested Party

Mr. R. Odhiambo for the 2nd Interested Party

Ms. J. Omondi-Court Assistant

