



**PROPERTY PRIORITY LIMITED v EMBAKASI PROPERTIES LIMITED & 5 others
(Environment and Land Case 233 of 2009) [2025] KEELC 6977 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6977 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 233 OF 2009**

OA ANGOTE, J

OCTOBER 9, 2025

EMBAKASI PROPERTIES LIMITED PLAINTIFF

VERSUS

KUEHNE & NAGEL (K) LIMITED 1ST DEFENDANT

PROPERTY PRIORITY LIMITED 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

BY WAY OF COUNTERCLAIM

BETWEEN

PROPERTY PRIORITY LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

**EMBAKASI PROPERTIES LIMITED 1ST DEFENDANT TO THE
COUNTERCLAIM**

CHIEF LAND REGISTRAR 2ND DEFENDANT TO THE COUNTERCLAIM

**NATIONAL LAND COMMISSION 3RD DEFENDANT TO THE
COUNTERCLAIM**

ATTORNEY GENERAL 4TH DEFENDANT TO THE COUNTERCLAIM

ELIJAH K. LAGAT 5TH DEFENDANT TO THE COUNTERCLAIM

GORDON O. WAYUMBA 6TH DEFENDANT TO THE COUNTERCLAIM



RULING

1. Vide a Notice of Motion dated 18th August 2025, the 3rd and 4th Defendants herein, represented by the Attorney General, have moved this Court under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 11 Rule 7 and Order 51 of the Civil Procedure Rules, as well as Article 159 of the Constitution, seeking the following orders:
 - a. That the 3rd and 4th Defendants in the original suit and the 2nd and 4th Defendants in the suit by way of Counterclaim be granted leave to file additional witness statements and supplementary list of witnesses together with supplementary bundle of documents in support of their defence to the main suit and to the counterclaim to wit:-
 - i. Further witness statement of Wilfred Muchae dated 24th March 2025.
 - ii. 3rd and 4th Defendants' Further List and Bundle of Documents dated 24th March, 2025.
 - iii. 3rd and 4th Defendants' Notice of Objection to Production dated 10th March, 2025.
 - iv. 3rd and 4th Defendants' Supplementary List of Witnesses dated 10th March 2025.
 - v. 3rd and 4th Defendants' Supplementary List and Bundle of Documents dated 10th March 2025.
 - vi. 2nd and 4th Defendants in the Counterclaim's Further List and Bundle of Documents dated 18th August 2025.
 - vii. Witness Statement of Josias Mugendi Njagi dated 3rd July 2025.
 - b. That the Application has been filed without unreasonable delay noting that the Document Examiner's Report and documents from the Registrar of Companies were only submitted to the Office of the Attorney General in the month of July 2025.
 - c. That any other orders the court considers necessary to ensure the ends of justice are served.
 - d. That the costs of this application be in the cause.
2. The grounds in support of the application are set out on the face of the Motion and are further amplified in the affidavit of Wilfred Muchae Kabue, the Deputy Director of Surveys in the Ministry of Lands, Public Works, Housing and Urban Development.
3. Mr. Muchae deponed that the matter is part-heard before this Court, having last been mentioned on 26th March 2025 when the Plaintiff's first witness testified. He further deponed that the matter stands scheduled for further hearing of the Plaintiff's case on 15th October, 29th October and 3rd November 2025, and that by directions issued on 28th October 2024, this Court directed that all parties file any further documents and statements within sixty days and further ordered that no additional documents or statements were to be filed after the said sixty days.
4. Mr. Kabue deponed that the 3rd and 4th Defendants in the main suit have since come into possession of crucial documents and materials sourced from various government offices that will be indispensable to their defence and that on that account, the 3rd and 4th Defendants now seek the leave of this court to file and serve supplementary witness statements and a supplementary bundle of documents, which are:
 - a. Further Witness Statement of Wilfred Muchae dated 24th March 2025.



- b. 3rd and 4th Defendants' Further List and Bundle of Documents dated 24th March, 2025.
 - c. 3rd and 4th Defendants' Notice of Objection to Production dated 10th March, 2025.
 - d. 3rd and 4th Defendants' Supplementary List of Witnesses dated 10th March 2025.
 - e. 3rd and 4th Defendants' Supplementary List and Bundle of Documents dated 10th March 2025.
 - f. 2nd and 4th Defendants in the Counterclaim's further list and bundle of documents dated 18th August 2025.
 - g. Witness Statement of Josias Mugendi Njagi dated 3rd July 2025.
5. The deponent further averred that this court is vested with the discretion to allow the variation of the directions it issued on 28th October 2024, pursuant to the overriding objective set out under Section 3 of the *Environment and Land Court Act*. He deponed that this court equally retains the power to enlarge time for the filing of additional documents and witness statements under Section 95 of the *Civil Procedure Act*.
 6. It was his contention that the reasons advanced by the 3rd and 4th Defendants amount to sufficient cause warranting the favourable exercise of this court's discretion. He urged that unless the orders sought are granted, 3rd and 4th Defendants' right to fair hearing, as guaranteed under Article 50 of the *Constitution* will stand grossly prejudiced.
 7. In support of the application, the deponent placed reliance on the decisions in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others[2013] eKLR; Attorney General vs Zinj Limited [2021] eKLR; the Supreme Court of India decision in Sangraham Singh vs Election Tribunal, AIR 1955 SC 664 at 711; and Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR.
 8. The 2nd Defendant opposed the application vide Grounds of Opposition dated 19th September 2025. It was contended that the Applicants guilty of inordinate delay, having failed to file the impugned documents and statements for a period exceeding ten (10) months, contrary to this Court's order of 28th October 2024, which expressly directed all parties to file their documents within sixty (60) days, by 27th December 2024, and further barred the admission of any additional documents thereafter.
 9. The 2nd Defendant further asserted that the Plaintiff has already testified and undergone extensive cross-examination on the basis of documents that were properly filed within the prescribed timelines and that the Applicant's attempt to introduce new documents and statements at this stage undermines the integrity of the proceedings and gravely prejudices the 2nd Defendant's right to a fair trial.
 10. It was contended that the delay in filing of the documents is not inadvertent but tactical and that no cogent explanation has been offered to justify this delay, rendering the application fatally defective.
 11. The 2nd Defendant further deponed that the present application amounts to an abuse of the process of this Court. It was argued that the applicants deliberately withheld the proposed documents until after the 2nd Defendant had filed secondary documents which revealed material contradictions in the Plaintiff's testimony and raised questions concerning the authenticity of the Plaintiff's title.
 12. It was deposed that the timing of the application, being midway through the hearing, was a calculated effort to reconcile inconsistencies and sanitize prior misrepresentations.
 13. It was further contended that the proposed Notice of Objection dated 10th March 2025 is itself filed out of time and is procedurally defective. The 2nd Defendant averred that the objections raised therein



are devoid of merit in view of the fact that the 2nd Defendant's Notices to Produce were filed within the prescribed timelines.

14. According to the 2nd Defendant, the Applicant's refusal to produce the originals while simultaneously objecting to reliance on secondary evidence amounts to a double standard that is procedurally barred and prejudicial. For those reasons, the 2nd Defendant urged this Court to dismiss the application together with the annexed documents with costs.

Submissions

15. The Honourable Attorney General placed reliance on the decision in *Moses Mwigigi & Others vs Independent Electoral and Boundaries Commission* [2016] eKLR as well as *Frank Logistics Limited vs Golden Lion Real Estate Company & 6 Others* [2025] KECA 1471 (KLR), where the courts underscored the overarching principle that disputes ought, as far as possible, to be determined on their merits and that justice ought not to be sacrificed at the altar of procedural technicalities.
16. It was further submitted that one Wilfred Muchae Kabue, through his affidavit, set out the reasons for the delay in filing the first set of documents. According to him, the delay was occasioned by the late receipt of the Survey Report from the Director of Surveys, which was prepared in response to the 2nd Defendant's Counterclaim and filed on 27th December 2024.
17. Regarding the second set of documents filed on 18th August 2025, together with the witness statement of one Josiah Mugendi Njagi, it was explained that the said documents were generated following the preparation of a Forensic Report and reference materials by the 2nd Defendant, which were filed by the 2nd Defendant on or about 27th December 2024.
18. On the basis of the foregoing, the Honourable Attorney General urged this Court to exercise its discretionary powers in favour of the Applicant. In support of this proposition, counsel cited *Njoroge vs Kimani* [2022] KECA 1188 (KLR), *Patriotic Guards Limited vs James Kipchirchi Sambu* [2018] eKLR, *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & others* Civil Appeal No. 146 of 2006, *Wachira Karani vs Bildad Wachira* [2016] eKLR; *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others*[2013] eKLR; and *Sangram Singh vs Election Tribunal Koteh*, AIR 1955 SC 664 at 711.
19. Counsel argued that this Court is clothed with power to enlarge time within which to file documents and witness statements pursuant to Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules.
20. To buttress this argument, reliance was placed on the decision of the Supreme Court in *Attorney General vs Zinj Limited* [2021] eKLR which elaborated the principles applicable where leave is sought to adduce additional evidence. Counsel also drew the Court's attention to the Court of Appeal's pronouncement in *Philip Keipto Chemwolo & Another vs Augustine Kubende* [1986] KECA 87 (KLR) wherein the Court affirmed the principle that a party should not suffer the penalty of being locked out from being heard on the merits of their case by reason of an excusable mistake.
21. Learned Counsel for the 2nd Defendant submitted that the proposed documents and statement offend the orders of this court issued on 28th October 2024, and that the delay in filing the present application is inordinate.
22. It was argued that none of the provisions of law cited by the Applicants provide a legal basis for the grant of the prayers sought. Counsel contended that the purported reliance on Order 11 Rule 7 of the Civil Procedure Rules is misplaced, as no such provision exists. Without prejudice, Counsel referred



- to Order 11 Rule 5 of the Civil Procedure Rules, which provides that the Judge shall record orders or directions and allocate timelines within which parties are to comply.
23. Counsel submitted that the Court, by its Order dated 28th October 2024, parties were directed to file all their documents by 27th December 2024, and that it was expressly ordered that no further documents or statements would be filed or admitted after sixty (60) days. Counsel submitted that this order has neither been varied nor any application filed to vary it. It was noted that the Order carried a penal notice to the effect that disobedience or non-observance would attract penal consequences to the parties concerned.
 24. It was submitted that whereas the 2nd Defendant complied with the said Order in light of the attendant penal notice, the Applicants blatantly failed to do so, and are now in clear disobedience of both the Order and the penal notice.
 25. Counsel further submitted that the hearing of the matter commenced on 26th March 2025, during which the Plaintiff testified and was extensively cross-examined on the basis of the documents properly on record. Counsel pointed out that the present application was filed more than ten months after this court's order and barely a month to the next hearing date.
 26. It was argued that apart from the Forensic Document Examination Report allegedly dated 14th May 2025, no explanation has been given for the delay in filing the rest of the documents and statements which, by their very dates, were always available.
 27. Counsel submitted that the application has been filed midway through the hearing without any cogent justification, save for the vague assertion that some documents were received from Government offices in July 2025. It was argued that the Applicants have always been aware of the case they were facing, and no sufficient reason has been advanced for the inordinate delay in obtaining or presenting the Forensic Report. Reliance was placed on the case of *Odney Osodo vs Rael Obara Ojuok & 4 others* [2017] KEHC 7632 (KLR).
 28. It was Counsel's further submission that the introduction of new documents and the proposed testimony of additional witnesses, who have not been subjected to interrogation and scrutiny by the Court or the 2nd Defendant, is only intended to prejudice the proceedings, fill evidentiary gaps in the Plaintiff's case, and sanitize the irregularities in the Plaintiffs' documents. In support of this contention, reliance was placed on the decision of the Supreme Court in *Attorney General vs Zinj Limited* [2021] eKLR.
 29. It was argued that the Applicants have failed to demonstrate any legal or factual foundation for introducing the Notice of Objection dated 10th March 2025. Counsel contended that the said notice is neither evidence nor a crucial document, and that it was required to be filed by 27th December 2024, pursuant to the Court's Order of 28th October 2024. It was submitted that the objections now sought to be filed are moot, procedurally barred, and of no probative value.
 30. Counsel further contended that it is untenable for the Applicants to demand primary evidence while at the same time withholding the originals in their custody, contrary to the objection they have raised. It was submitted that several certified copies produced by the Plaintiffs and Applicants are illegible and therefore of no evidential value.
 31. In any event, Counsel argued, the originals in question are public documents held by Government offices represented by the Attorney General, who has not offered any justification for their non-production. It was submitted that Section 68(iv) of the *Evidence Act*, relied upon in the objection, is



inapplicable, as it relates to exceptions permitting secondary evidence without prior notice before trial, whereas the 2nd Defendant issued its notice more than ten months ago.

32. Counsel therefore urged the Court to find that the Applicants' refusal to produce the originals, coupled with the belated objection, renders their application defective, prejudicial to the 2nd Defendant, and wholly unmeritorious.

Analysis and Determination

33. Having carefully considered the application together with the Grounds of Opposition, two issues arise for determination:

- i. Whether the 2nd Defendant's Notice to Produce was properly invoked and the attendant objection by the 3rd and 4th Defendants is merited;
- ii. Whether this Court should exercise its discretion to grant the 4th Defendant leave to file supplementary witness statements and three bundles of documents out of time.

34. This court shall address the preliminary issue on the Notice to Produce at the outset, as it has a bearing on evidentiary management at trial.

35. By the Notice to Produce dated 25th October 2024, the 2nd Defendant sought production by the Chief Land Registrar and the Attorney-General specified public records, namely:

- i. The Business Register showing entries between 18th March 1980 and 20th March 1980
- ii. Official and complete documentation/ file relating to the business name registered under number 82579
- iii. The Business Register showing whether there was business name in the style of Embakasi Properties prior to its alleged incorporation.
- iv. A complete and official plan covering the area quoted as Nairobi & District Sheet NE 6.
- v. The Part Development Plan covering the area quoted in Plan No. 51776/VI/179A.
- vi. The topo-cadastral map covering the map quoted as Nairobi & District Sheet SE 6
- vii. The certified Certificate of Registration of Collect Handling Services registered on 19th March 1980.
- viii. A Register of Licensed Surveyors in Kenya confirming whether Mr. Dennis Malembeka is a Licensed Surveyor.

36. The Notice was accompanied by documents already sourced, including the certified Certificate of Registration of Collect Handling Services registered on 19th March 1980; a letter from the Land Surveyors Board dated 6th May 2024 confirming that Dennis Malembeka Katuga is registered as survey assistant; a letter from the Ministry of Lands dated 2nd August 2023 indicating that they did not have the PDP Plan No. 51776/VI/179A in their records; a complete and official plan covering the area quoted as Nairobi & District Sheet NE 6 and the topo-cadastral map covering the map quoted as Nairobi & District Sheet SE 6.

37. The 3rd and 4th Defendants objected to the Notice, contending that any Notice to Produce ought to have been raised and disposed of at pre-trial, not during the substantive hearing. They relied on Order 11 (3)(d) of the Civil Procedure Rules which provides that one of the purposes of the case management conference is to determine any other matter relating to the management and disposal of the case.



38. Reliance was also placed on Direction 28(g) of the 2014 Practice Directions on Proceedings in the Environment and Land Courts, which empowers the Court, during pre-trial, to give directions on objections to production of specific documents.
39. When the Notice to Produce issued dated 25th October 2024 was filed, the Court had directed that Order 11 should be complied with by all the parties by 1st November 2024. The Notice thus fell within the case-management window, whereas the current Notice to Produce by the AG was filed three months later. In any event, and in keeping with the overriding objective, this court shall determine the objection on its merits.
40. Section 69 of the *Evidence Act* provides the statutory basis for a Notice to Produce. Its purpose is to enable a party in possession of secondary evidence to rely upon them, where the originals are in the custody or control of the opposite party. The section recognises specific exceptions where notice is not even required. Section 69 of the *Evidence Act* provides:
- “Secondary evidence of the contents of the documents referred to in Section 68[1][a] shall not be given unless the party proposing to give such secondary evidence has previously given to the other party in whose possession the document is, or to his advocate, such notice to produce it as required by law or such notice as the court considers reasonable in the circumstances of the case:
- Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases; i. When the document to be proved is itself a notice; ii. When, from the nature of the case, the adverse party must know that it will be required to produce it; iii. When it appears or is proved that the adverse party has obtained possession of the original by fraud or force; iv. When the adverse party or his agent has the original in court; v. When the adverse party or his agent has admitted the loss of the document; vi. When the person in possession of the document is out of reach of, or not subject to, the process of the court”
41. In *Concord Insurance Company Limited (Under Statutory Management) vs NIC Bank Limited* [2020] KEHC 8086 (KLR), the Court held that Section 69 is intended to permit reliance on secondary evidence as an exception to Section 67, which requires documents to be proved by primary evidence.
42. The provision presupposes that the party issuing the notice has secondary evidence, while the recipient has custody of the primary documents. Once notice is given, the recipient cannot ordinarily resist the production of secondary evidence.
43. Turning to the matter at hand, this suit was filed on 7th May 2009. Vide an Amended Plaintiff dated 11th March 2013, the Plaintiff seeks, inter alia, orders of eviction against the 1st Defendant from LR no. 9042/224 (IR No. 48936/1) which the Plaintiff claims to own, as well as a declaration that the excision of the Plaintiff’s property and the issuance of Grant Number IR 59610 in favour of the 2nd Defendant was unlawful, null and void.
44. The 2nd Defendant, in its Counterclaim dated 9th June 2023, seeks, among other reliefs, a declaration that the grant relied upon by the Plaintiff is null and void having been acquired fraudulently, and a further declaration that Grant No. 59610 was lawfully allotted to the 2nd Defendant.
45. The documents sought in this case are public documents, ordinarily in the custody of public offices such as the Registrar of Companies, the Director of Surveys, and the Chief Land Registrar, who fall



under the mandate of the Attorney General as the principal legal adviser to Government. Production of copies of these documents cannot prejudice either the Attorney General or the Chief Land Registrar.

46. Indeed, if the said documents do not exist in the government's records, the Attorney General will have an opportunity to call witnesses to rebut the existence or otherwise of the said documents.
47. In the premises, this court upholds the 2nd Defendant's Notice to Produce and dismisses the 3rd and 4th Defendant's objection to the said notice.
48. Having disposed of the preliminary question of the Notice to Produce and the attendant objection, the Court now turns to the substantive issue in this application, namely, whether the 3rd and 4th Defendants should be granted leave, at this stage of the proceedings, to file supplementary witness statements together with additional bundles of documents. This question calls for an examination of the principles governing the reception of additional evidence after close of pleadings and during trial, the timeliness of the application, the explanation for the delay, and the prejudice, if any, that may be occasioned to the opposite parties.

ii. Leave to adduce additional witness statements and bundles of documents out of time

49. It is trite that this court retains the power to enlarge time upon expiry of an appointed time fixed for the doing of any act under the *Civil Procedure Act* and the Civil Procedure Rules. Section 95 of the *Civil Procedure Act* on enlargement of time stipulates as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

50. Order 50 rule 6 of the Civil Procedure Rules on the power to enlarge time provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

51. The combined effect of these provisions is that the Court has discretion to enlarge time, though it must be exercised judicially and in accordance with the interests of justice.
52. The Supreme Court in *Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2014] KESC 12 (KLR) stipulated the principles that a court should consider in exercising its discretion in an application for extension of time:

“It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

53. From the decision in *Salat*, it is clear that extension of time is not a right but a discretionary remedy, only available where the delay has been reasonably explained and where no prejudice will be suffered by the other party.

54. The Supreme Court in the case of *Odinga & 7 Others vs Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 1 (KLR) articulated the following legal position where the court has to consider whether to admit or reject additional evidence filed outside the stipulated statutory timelines:

“The parties in the petition had a duty to ensure that they complied with their respective timelines, and the court ought to adhere to its own. There must be a fair and level playing field so that no party or the court lost the time that they were entitled to and no extra burden should be imposed on any party or the court as a result of omissions or inadvertence which were foreseeable or could have been avoided. If the further affidavit was small or limited so that the other party was able to respond to it, then the court would be considerate, taking into account all aspects of the matter. However, where the new material introduced was so substantial involving not only a further affidavit but massive additional evidence so as to make it difficult or impossible for the other party to respond effectively, the court would exercise caution and care in the exercise of its discretion to grant leave for the filing of the further affidavit and admission of additional evidence..” (emphasis added)

55. The Apex Court in *Attorney General vs Zinj Limited* [2021] eKLR also articulated the principles a court should consider in an application to produce additional evidence, which principles flow from an interpretation of Rule 26 of the Supreme Court Rules 2020 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 his/her case;
 - k. the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
56. In the case of *Kanyarkwat Group Ranch & 4 others vs Joseph & 3 others* [2022] KEELC 15037 (KLR) Justice Nyagaka opined on the practice of parties exchanging documents in piecemeal and seeking leaking leave to file additional documents as follows:
- “Such practice not only occasions injustice to the other parties in the case but defeats the whole overriding objective of the law, of both Section 3(1) and (2) of the ELC Act and Section 1A (1) and (2) of the *Civil Procedure Act*, of just, expeditious, proportionate and efficient resolution of disputes, and Article 159(2)(b) of the *Constitution* that justice shall not be delayed. The law does not envisage such a situation. The practice ought to stop. Courts not to encourage this practice. A party has to show that he could not, with all due diligence, access the evidence at the time of filing the suit or his Defence or Counterclaim. To file witness statements in ‘instalments’ is nothing but a travesty of justice and a practice of unleashing secret weapons when met with strong cases or keeping cards under the table for mischievous ends other than those of justice. A party should endeavor by all means to present his case or evidence at once. Absent of that, the burden is higher for him to satisfy the Court why he did not avail the evidence at the first time he presented his case before the Court.” (emphasis added)
57. The cumulative effect of these authorities is that this Court must assess whether the 3rd and 4th Defendants have provided a reasonable and satisfactory explanation for the delay, whether the additional evidence was unavailable with due diligence, and whether its admission would cause undue prejudice or amount to filling gaps in the case.



58. The record of this matter reveals that the 3rd and 4th Defendants have been accorded multiple opportunities to file further documents at various points in the course of this trial. Notably, pre-trial conferences were conducted on 15th May 2017 and 11th July 2017, eight years before this application was filed.
59. On 2nd June 2022, this court directed that hearing proceeds de novo, taking into account that additional documents had been filed by both the Plaintiff and the 2nd Defendant after two of the Plaintiffs' witnesses had testified. Thereafter, on 29th May 2023, by consent of the parties, the Court granted leave to the 2nd Defendant to file an Amended Defence and Counterclaim within fourteen (14) days.
60. Correspondingly, the Plaintiff and the other Defendants were accorded leave to file their responses within fourteen (14) days of service. The Court further directed the parties to comply with Order 11 on pre-trial procedures before 1st November 2023. When the matter was mentioned on that date, the court scheduled the hearing on 23rd and 24th April 2024 and directed parties to exchange all documents within thirty (30) days before the hearing date. The hearing thereafter commenced on 23rd April 2024 and continued on 28th October 2024.
61. On 28th October 2024, the 3rd and 4th Defendants filed a bundle of documents, which included the Attorney General's response to the Counterclaim. The Court admitted the said documents and granted liberty to all parties to file any further documents and witness statements within sixty (60) days, with the express direction that no additional documents or statements would be filed after the lapse of that period. The Court also fixed the matter for hearing on 26th March, 2025 on which date the testimony of PW1 resumed.
62. It is against the foregoing background that the 3rd and 4th Defendants moved this Court through the present application dated 18th August 2025. The said application comes eight months after the lapse of the period granted for the filing of additional documents and witness statements.
63. In the application, the 3rd and 4th Defendants seek leave to place on record various documents, some of which had initially been filed on 10th March 2025, four months prior to the lodging of the present application.
64. The Honourable Attorney General, appearing for the 3rd and 4th Defendants, proffered two explanations for the delay in filing the impugned documents. As regards the documents filed in March 2025, it was contended that the delay was attributable to the belated receipt of a Survey Report from the Director of Surveys.
65. That Report, counsel submitted, had been prepared in response to the Counterclaim by the 2nd Defendant and was filed on 27th December 2024. Concerning the second tranche of documents filed on 18th August 2025, together with the witness statement of one Josiah Mugendi Njagi, it was explained that the same were generated following the preparation of a Forensic Report and reference materials filed by the 2nd Defendant. Counsel submitted that these were filed by the 2nd Defendant on or about 27th December 2024.
66. The record of this Court, however, shows that the Forensic Report was filed on 24th October 2024, and not on 27th December 2024 as submitted. It was further averred that the Forensic Report and certain documents from the Registrar of Companies were only availed to the Office of the Attorney General in July 2025, and that the Attorney General has recently come into possession of additional documents said to be crucial to the defence of this suit.



67. Guided by the principles articulated hereinbefore, the Court now turns to examine the categories of documents sought to be introduced by the 3rd and 4th Defendants.
68. The first documents for this court's consideration are the bundle of documents dated 10th March 2025, which comprises, inter alia, certified copies of registration documents of Embakasi Properties Limited (purportedly) dating back to 1980 and cadastral plans relevant to the suit property (purportedly). These documents appear to go to the root of the dispute and may have a direct bearing on ownership of the suit property.
69. The said bundle is tied to the Further Witness Statement of Wilfred Muchae, a Deputy Director of Surveys at the Ministry of Lands, dated 24th March 2025, which purportedly addresses the survey history and particulars of the suit property. Mr. Muchae also references the Regulation of Wages (General) Order No. 120 of 1982, contained in the Further List and Bundle of Documents dated 24th March 2025.
70. Likewise, the documents in relation to the registration of Embakasi Properties Limited respond to the Notice to Produce issued by the 2nd Defendant. They are the subject of the witness statement of Josias Mugendi Njagi, Senior Clerical Officer at the Business Registration Service.
71. The next category is the the bundle dated 18th August 2025, including, among others, the Document Examiner's Report of 21st May 2025 and an internal memo from the DCI dated 20th March 2025. The accompanying Exhibit Memo Form indicates that the Office of the Attorney General formally requested the DCI to conduct the document examination through a letter dated 6th February 2025.
72. The Attorney General contended that the request to the DCI was prompted by the Forensic Report allegedly filed by the 2nd Defendant on 27th December 2024. This Court has already established that the said report was filed earlier, on 24th October 2024. The Examiner's Report filed by the AG is potentially relevant.
73. Although filed late, these documents and witness statements are necessary for the just determination of the dispute herein. Applying the proportionality test articulated in the Zinj Ltd case (supra), the probative value of these documents and witnesses outweighs any prejudice to the opposing parties, who will in any event be afforded an opportunity to respond.
74. Indeed, for fair trial, the Plaintiff is at liberty to recall the witnesses who have already testified to respond to these documents, and witness statements, and file any further documents, if need be.
75. For those reasons, the application dated 18th August 2025 is allowed as follows:
 - a. That the 3rd and 4th Defendants in the original suit and the 2nd and 4th Defendants in the suit by way of Counterclaim be and are hereby granted leave to file additional witness statements and supplementary list of witnesses together with supplementary bundle of documents in support of their Defence to the main suit and to the counterclaim to wit:-
 - i. Further witness statement of Wilfred Muchae dated 24th March 2025.
 - ii. The 3rd and 4th Defendants' Further List and Bundle of Documents dated 24th March, 2025.
 - iii. The 3rd and 4th Defendants' Supplementary List of Witnesses dated 10th March 2025.
 - iv. The 3rd and 4th Defendants' Supplementary List and Bundle of Documents dated 10th March 2025.



- v. The 2nd and 4th Defendants in the Counterclaim's Further List and Bundle of Documents dated 18th August 2025.
- vi. Witness Statement of Josias Mugendi Njagi dated 3rd July 2025.
- b. The above documents and witness statements, save for those that have already been filed, to be filed and served within three (7) days.
- c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF OCTOBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Sisomo for 1st Defendant

Ms Mangech for Oraro (SC) for 2nd Respondent

Mr. Khasaka for Plaintiff/Respondent

Mr Allan Kamau for Applicant/3rd and 4th Defendants

Court Assistant: Tracy

