

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELC PETITION NO. 824 OF 2012

AS CONSOLIDATED WITH ELC NO 102 OF 2008

BETWEEN

**ST. BENJAMIN MEMORIAL
CLINIC SUPPLIES LIMITED**
PETITIONER/APPLICANT

VERSUS

HON ATTORNEY GENERAL 1ST
RESPONDENT

**THE PERMANENT SECRETARY MINISTRY OF LANDS
HOUSING AND URBAN DEVELOPMENT 2ND**
RESPONDENT

REGISTRAR OF TITLES 3RD
RESPONDENT

CITY COUNCIL OF NAIROBI 4TH
RESPONDENT

**ABDUL WAHEED SHEIKH
ABDUL HAMMED SHEIKH**

**Trustees of the SHEIKH FAZAL ILACHI
NOORDIN CHARITABLE TRUST 5TH**
RESPONDENT

**PRINCIPAL SECRETARY
MINISTRY OF FINANCE 6TH**
RESPONDENT

NATIONAL LAND COMMISSION 7TH
RESPONDENT

AND

DAVID KIHARA CHEGE

JAMES NGUGI IRWA GATHECA(Deceased)

MICHAEL GITHINJI KIMANI

JOSHUA KAHURIA KINGECHE

ANNE WAIRIMU KAKUI

RICHARD KAMAU

JAMES MWAURA

**(Suing on their own behalf and on behalf of Umoja City
Self Help Group Kwa Njoroge Village Residents)**

PLAINTIFFS

VERSUS

COMMISSIONER OF LANDS 1ST

DEFENDANT

MINISTER OF LANDS HOUSING

AND SETTLEMENT 2ND

DEFENDANT

THE ATTORNEY GENERAL 3RD

DEFENDANT

COUNTY COUNCIL OF NAIROBI 4TH

DEFENDANT

THE PERMANENT SECRETARY TO

THE TREASURY OF KENYA 5TH

DEFENDANT

AND

ABDUL WAHEED SHEIKH AND ABDUL HAMEED

SHEIKH AS TRUSTEES OF THE SHEIKH FAZAL ILACHI

NOORDIN

**CHARITABLE TRUST INTERESTED
PARTY**

RULING

1. Before this Court for determination is the Petitioner's/Applicant's Notice of Motion Application dated the 24th September, 2025, brought pursuant to the provisions of **Article 50(1)** and **159(2)(d)** of the **Constitution, Section 1A, 1B** and **3A of the Civil Procedure Act, and Order 51(1)** of the **Civil Procedure Rules** seeking the following reliefs:

- i. ***That this Honourable Court be pleased to re-open the Petitioners case herein and allow production of additional evidence.***
- ii. ***That the Applicant be granted leave to file further witness statements and list and bundle of documents.***
- iii. ***That the Honourable Court be pleased to stay further proceedings in this suit pending the hearing and determination of Constitutional Petition No 15 of 2021.***
- iv. ***That the costs of this Application be provided for.***

2. The Motion is supported by the Affidavit of Meshack Onyango Dihay, the Managing Director of St. Benjamin Memorial Clinic Supplies Limited, the Applicant herein, conversant with the facts in issue herein, and having been

duly authorized by the Board of Directors of the Applicant to swear the same.

3. He deponed that the Applicant had instructed the firm of S. O. Owino & Associates, Advocates to prosecute this matter and it has since learned that the said firm of Advocates closed the Applicant's case without calling all the witnesses, leaving out crucial witnesses and evidence.
4. The Applicant, he asserts, wishes to call as witnesses, the former/current CEO and Chairperson of the National Land Commission, the Director of Surveys of Kenya, Director of Fraud in the Office of DCI, the Head of Forensics and Document Examination and other witnesses with leave of the court.
5. It was deposed by the Petitioner's Director that these witnesses will produce correspondences showing the true ownership of the suit property. Further, that there is crucial evidence in the custody of the Director of Criminal Investigations that would assist the court in making a fair decision and that this case ought to be reopened and the Director of Criminal Investigations summoned and cross examined.
6. According to Mr Onyango, the failure to call all the witnesses was a mistake of Counsel which ought not be visited upon an innocent litigant and that the interests of justice dictate that the Applicant's case be re-opened to allow the calling of the expert witnesses.

7. Mr Onyango stated that there is a pending case before the Constitutional and Human Rights Division of the High Court seeking to set aside and/ or review the Judgment and Decree given on 18th May 2012, in **Abdul Waheed Sheikh & Another vs Commissioner of Lands & 3 others [2012] eKLR** which declared the 5th Respondent herein as the proprietor of the suit property.
8. In the event the suit before the Constitutional and Human Rights Division is determined in favour of the Applicant herein, he urged, it will have a great bearing and effect on the present proceedings, and that in the circumstances, it is logical that these proceedings be stayed pending the outcome of the dispute before the Constitutional and Human Rights Division.
9. In response to the Motion, the Respondents filed Grounds of Opposition dated 9th October, 2025 premised on the grounds that:
 - i. ***They have already filed their final written submissions in accordance with the Court's directions issued on 24th February, 2025. The hearing is therefore deemed closed and the matter is awaiting judgment.***
 - ii. ***The Petitioner/Applicant has not demonstrated any exceptional or sufficient cause that would warrant the reopening of the case at this late stage, contrary to the threshold required under***

Order 18 Rule 10 of the Civil Procedure Rules, 2010.

- iii. Reopening the proceedings at this stage would significantly prejudice the Respondents who has already complied with all procedural requirements, closed their case, and filed final submissions in anticipation of a judgment.***
- iv. Litigation must come to an end. Reopening the hearing after the close of submissions would undermine the principle of finality in litigation and could open the door to unnecessary delay and abuse of court process.***
- v. The Applicant has not provided any credible explanation for failing to bring the new evidence (if any) during the hearing. Any evidence now sought to be introduced could, with due diligence, have been presented earlier.***
- vi. While the Court retains inherent discretion under Section 3A of the Civil Procedure Act to make orders in the interest of justice, that discretion must be exercised sparingly and only where clear injustice would otherwise occur. No such injustice has been demonstrated by the Applicant***

10. The Interested Party/5th Respondent equally filed Grounds of Opposition dated 7th October, 2025 premised on the grounds that:

- i. The concluded hearing of the Petition herein ought not to be re-opened after directions on filing of submissions have been given, and not complied with by the Petitioner.***
- ii. Mr Osodo Opiyo has all along acted for the Petitioner herein interchangeably appearing through the firms of S O Owino & Associates and Osodo Company Advocates.***
- iii. It cannot be said by Mr Osodo Opiyo now through the firm of Osodo Opiyo Advocates that Mr Osodo Opiyo then appearing through the firm of SO Owino & Associates closed the Petitioner's case without calling crucial witnesses or adducing important evidence.***
- iv. The judgment made on 18th May, 2012 in Petition No 15 of 2021 formerly Petition No 1531 of 2005 (OS) was produced at the hearing of the Petition herein.***
- v. Petition No 15 of 2021 formerly Petition No 1531 of 2005 (OS) was heard and determined, and there is no reason to warrant the stay of the Petition herein because the Petitioner has subsequently applied to set aside the judgment made on 18th May, 2012 in Petition No 15 of 2021 formerly Petition No 1531 of 2005 (OS).***
- vi. It has not been shown what evidence or witnesses were omitted at the hearing of the***

Petition herein to warrant the re-opening of the concluded hearing.

vii. The Notice of Motion is an abuse of the process of the Court as it is intended to delay the determination of the Petition herein.

Submissions

- 10.** The parties orally argued the Motion. Mr. Osodo, appearing for the Petitioner/Applicant, submitted that the Applicant's case was closed by previous Counsel without proper instructions, and that upon taking over the conduct of the matter, he discovered that crucial evidence had not been produced during the hearing. He argued that the new evidence is essential to the court's determination of the real issues in dispute.
- 11.** For instance, he stated, no evidence was adduced to show that the title held by the Trust was forged. He further stated that there exists correspondence between the Trust and the Commissioner of Lands which was never disclosed.
- 12.** According to Counsel, these correspondences are critical and will assist the court in reaching a just decision. He pointed out that in Petition E1531 of 2005, the Trust sought allocation of the land before the Constitutional Court and the matter was unopposed and that the Applicant was not joined in those proceedings and seeks to set the same aside. He argued that the present proceedings should be stayed pending the determination of that Petition.

13. Counsel further alleged collusion between the Attorney General and the Trust, asserting that the AG possesses documents from the Ministry of Lands showing the true ownership of the property, including evidence of a forged title. He therefore urged the court to re-open the matter.
14. Counsel for the Interested Parties relied entirely on the Grounds of Opposition filed, adopting them as his submissions.
15. Counsel appearing for the Plaintiffs, also adopted her Grounds of Opposition. She submitted that the ex parte judgment formed the basis for consolidation of the matters herein and any issue in that regard can be addressed in submissions.
16. She argued that there has been no disclosure regarding the nature or substance of Petition 15 of 2021, and that the Petitioner has already filed submissions. Re-opening the matter at this stage, she contended, would occasion prejudice. In this respect she placed reliance on the case of **Orengé t/a Orengé J & Associates vs Nthiga (Miscellaneous Civil Application E368 & E367 of 2019 (Consolidated)) [2025] KEHC 505 (KLR).**
17. Counsel submitted that Mr. Osodo has always been Counsel in this matter. She emphasized that all the attachments have been signed by the AG's client, and that the Land Registrar had testified, giving Counsel a full opportunity to address all relevant issues. Any additional

concerns, she maintained, can be addressed through submissions.

18. Mr. Allan Kamau, appearing for the Attorney General, submitted that his clients had been accused of collusion despite no such allegation being pleaded in the Motion. He stated that they called a Land Registrar who duly testified.
19. Citing *Susan Wavinya Mutavi v Isaac Njoroge & Another [2020] KEELC 8 (KLR)* on the court's power to re-open a case, he argued that the Applicant had not demonstrated that the documents in question were unavailable or could not be produced earlier. He also referred the court to the principles in **Halsbury's Laws of England** on stay of proceedings, noting that a stay requires a serious and well-founded basis, which has not been established here.
20. In rejoinder, Mr. Osodo submitted that Petition 15 of 2021 concerns an application to review and setting aside of the judgment in Petition 1531 of 2005. He argued that a case may be re-opened at any stage to ensure justice is served. He stated that they intend to call an officer from the National Land Commission as a witness and maintained that the evidence previously presented was selective and tainted by collusion.
21. Counsel emphasized that the court retains the power to summon witnesses and that new evidence cannot be introduced through submissions. He therefore urged the

court to grant a stay of these proceedings to prevent conflicting decisions over the same subject matter.

22. He added that the age of the matter should not preclude the pursuit of justice. According to him, the record shows he initially appeared merely holding brief for Mr. Owino with limited instructions and therefore could not directly engage the client or obtain full instructions.

23. Counsel asserted that the documents filed in Pet 15 of 2005 were forged and the relevant file was never consolidated. He stated that they wish to place that file before this court to demonstrate the forgeries. He concluded that the 4th Respondent is relying on the impugned judgment.

Analysis and Determination

24. Having considered the Motion, responses and submissions, the issues that arise for determination are:

- i. Whether the Applicant has demonstrated sufficient grounds to warrant the re-opening of the case and admission of further evidence?*
- ii. Whether the plea for the stay of proceedings is merited?*

25. The **Evidence Act** and the Civil Procedure Rules grant this court the power to recall witnesses. In this respect, **Section 146 (4)** of the **Evidence Act** and **Order 18 Rule 10** of the **Civil Procedure Rules** are pertinent. **Section 146 (4)** 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.”

26. On the other hand, **Order 18 Rule 10** of the **Civil Procedure Rules** provides thus:

“The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of evidence for the time being in force; put such questions to him as the Court thinks fit.”

27. The above provisions do not specifically address the issue of re-opening of cases with a view of calling additional witnesses and as such, the same is discretionary power exercised pursuant to the provisions of **Section 3A** of the **Civil Procedure Act**.

28. It is common ground that where a court is called upon to exercise discretion, the same must be exercised judiciously and in the interest of justice. This was as aptly expressed by the Court of Appeal in **Patriotic Guards Ltd vs James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, (2018)eKLR** as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or

dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

29. The principles that guide the court in exercising its discretion in considering whether to re-open a case and receive evidence were aptly and persuasively expressed by the court in ***Susan Wavinya Mutavi vs Isaac Njoroge & another [2020] eKLR***, which stated thus:

"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 court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. 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, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”

30. Similarly, the court in *Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & Another [2015] KEHC 3930 (KLR)* persuasively expressed itself as follows:

“7. 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.”

31. In the case of *Raila Odinga & 5 Others vs IEBC and 3 Others (2013) eKLR* the Supreme Court, while dealing with an issue of admission of documents outside the stipulated timeliness stated that:

“The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the

court ought to be considerate, taking into account all aspects of the matter. However, if the new material is 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 must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”

32. The court is so guided.

33. The present suit arises from the consolidation of two suits, all centred on competing claims of ownership over the property known as L.R. No. 209/193, also known as Nairobi Block 37/63 and Nairobi Block 37/62.

34. The Petitioner/Applicant asserts ownership through an allotment issued by the Government contending that upon being allocated the land, it duly paid the requisite sums and is entitled to have the title to the property issued in its names. On the other hand, the Plaintiffs in ELC No. 102 of 2008 claim the property by way of adverse possession. The 5th Respondent/Interested Parties also claim ownership of the suit property.

35. The court has considered the record. The hearing commenced on 6th June 2022 and proceeded over various dates, with the last witness concluding his testimony on

30th October 2024. From the record, the Petitioner's case was presented through PW5, Joseph Bongeji on 22nd January 2024, after which Counsel on record, Mr Osodo, closed the Petitioner's case. The matter is now at the stage of filing final submissions.

- 36.** The Petitioner/Applicant now asks the court to re-open its case and allow it to adduce additional evidence. It avers that Counsel closed its case without instructions, leaving out other witnesses and excluding crucial evidence that would assist the court in resolving the real issues in controversy. The Respondents and the Interested Party have opposed the Motion, contending that no sufficient cause has been demonstrated to justify re-opening the matter.
- 37.** As earlier noted, the Petitioner's case was presented through PW5 and thereafter closed by Counsel. The Applicant now contends that Counsel closed the case without instructions. However, the record reflects that the same Advocate who closed the Applicant's case is the very one now appearing for the Applicant.
- 38.** The said counsel has argued that he previously appeared while holding brief for another counsel, and is now properly instructed. Even if the court were to accept this explanation, it has not been substantiated. No correspondence, or any supporting material has been tendered to show what the Applicant alleges.

- 39.** Whereas indeed courts have held that mistakes of counsel should not be visited upon the client, this principle does not operate in a vacuum. It must be anchored in evidence, not bare assertions.
- 40.** It is also noted that on 22nd January 2024, Counsel sought the issuance of summons to officers from the Commissioner of Lands and the Director of Surveys to produce particular correspondence. The court declined the request on the basis that the Petitioner's documents in this regard were undisputed. One of those letters, the one dated 19th October 1998, now forms part of the materials adduced in support of the Motion.
- 41.** The Applicant further asserts that it now possesses correspondence from the Ministry of Lands and other agencies confirming the "true ownership" of the suit property. It also makes a general allusion to unspecified information allegedly held by the DCI. The particulars of this information have not been provided.
- 42.** The documents sought to be introduced span a wide timeframe. letters from 1995, 1998, and 2000; correspondence from the National Land Commission done in 2016; and a letter from the Director of Surveys of 2019. These letters not only long pre-date the hearing but, in some instances, even precede the filing of the suits in 2008 and 2012.
- 43.** The Petitioner has neither offered a basis to suggest that these documents are newly discovered, nor has it shown

that they could not, with reasonable diligence, have been obtained and presented at any earlier stage of the proceedings. Equally, and as aforesaid, the claim that the failure to tender the documents resulted from a mistake by previous Counsel was not established.

44. This matter has been in court for over a decade. The parties have closed their respective cases and the matter awaits final submissions and thereafter judgment. Re-opening the case at this advanced stage, without demonstrable cause would undoubtedly prejudice the Respondents, disrupt the orderly progression of the matter, and prolong litigation unnecessarily.
45. The nature and timing of the plea also reveals that the Motion is an attempt to bolster aspects of the Petitioner's case that were either weak or insufficiently addressed during trial. The law does not permit a party to use a re-opening application to remedy evidentiary gaps after the close of their case, or upon appreciating the strength of the opposing side's evidence.
46. In view of the above, the court finds that the Petitioner's plea to re-open the case is wholly unwarranted. The final issue to consider is whether the plea for the stay of proceedings is merited. Black's Law Dictionary, Ninth Edition, defines a proceeding as:

“(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of

judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or step that is part of a larger action; (4) the business conducted by a Court or other official body, a hearing.”

47. The general principles which guide the courts whenever they are invited to exercise jurisdiction to stay proceedings are best summarized in **Halsbury’s Law of England, 4th Edition, Vol 37 at pages 330 and 332** as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

48. Speaking to the same, the court in **Ferdinand Ndung’u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR** persuasively stated thus:

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies

that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion."

49. Similarly, in the case of *Church Road Development CO. LTD vs Barclays Bank OF Kenya Ltd, David Mutuku & Samuel Njihia (Civil Suit 296 of 2006) [2007] KEHC 352 (KLR)*

Ochieng, J held thus:

"Black's Law Dictionary defines 'stay of proceedings in the manner following;

'The temporary suspension of the regular order of proceedings in a cause, by direction or order of the Court, usually to await the action of one of the parties in regard to some omitted step or some act which the Court has required him to perform as incidental to the suit; as where a non-resident plaintiff has been ruled to give some security for costs. It is similar to an injunction with which a Court freezes its proceedings at a particular point. It can be used to stop the prosecution altogether, or to hold up some phase of it, such as an execution about to be levied on a judgment.'

Evidently, the scope of an order for stay of proceedings is wide as it is varied. It could relate to a specific action, such as taxation or execution; and it could also relate to the prosecution of the suit altogether.”

50. It is apparent from the foregoing that the order for stay of proceedings is discretionary in nature and may be sought in exercise of the court’s inherent jurisdiction.
51. The Petitioner seeks to have these proceedings stayed on account of **Petition No. 15 of 2021, Abdul Waheed Sheikh vs Commissioner of Lands & Another**. According to the Petitioner, the Petition seeks to set aside and/or review the judgment delivered on 18th May 2012 in **Abdul Waheed Sheikh & Another vs Commissioner of Lands & 3 Others [2012] eKLR**, which affirmed the 5th Respondent as the lawful proprietor of the suit property.
52. The Respondents oppose the request, noting that the 2012 judgment in **Abdul Waheed Sheikh & Another v Commissioner of Lands & 3 Others** has already been brought to the attention of this court, and that the court has always been aware of the same. As such, the Applicant’s reliance on it as a basis for stay is baseless and misconceived.
53. The court does indeed affirm that it has at all times been privy to **Abdul Waheed Sheikh & Another v Commissioner of Lands & 3 Others [2012] eKLR**. While the Petitioner insists that Petition No. 15 of 2021

seeks a review of the said decision, nothing has been placed before this court to substantiate that assertion. Neither the Petition itself nor any motion for review has been produced. No pleadings, supporting affidavits, draft orders, or any description of the issues said to be pending before the Constitutional and Human Rights Division have been provided.

- 54.** The only document tendered is a CTS extract, which merely indicates that the matter has come up on several occasions for mention and that directions have periodically been issued. The extract discloses nothing about the nature of the pleadings, the substance of the dispute, or the progress made.
- 55.** Additionally, it is apparent that Petition No. 15 of 2021 was filed four years ago. The Petitioner has not offered any explanation whatsoever why it not raise the issue earlier. The hearing of this matter has long been concluded, and the suit now awaits final submissions.
- 56.** Bringing an application for stay at this extremely advanced stage, without particulars or supporting documentation, is not only procedurally improper but also grossly prejudicial to the orderly conduct of these proceedings. This plea also fails.
- 57.** The upshot of the foregoing is that the application dated 24th September, 2025 is found to be unmerited. The same is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 27th day of November, 2025.

O. A. Angote
Judge

In the presence of;

Mr. Ashioya for Havi for Interested Party

Ms Kerio for Plaintiff in 102 of 2008

Mr. Osodo for Petition in 824 of 2012

Mr. Allan Kamau for 1st, 2nd, 3rd and 5th Defendants

Court Assistant: Tracy

ORIGINAL