

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 528 OF 2011

JOHN NJUGUNA NDUATI & ANR.....PLAINTIFFS/ RESPONDENTS

VS

DINNAH B MAKINI..... 1ST DEFENDANT/ APPLICANT

MARK NGARU.....2ND DEFENDANT/ RESPONDENT

RULING

1. The 1st Defendant/Applicant filed the Notice of Motion application dated 19th September 2025, supported by an affidavit and a supplementary affidavit both sworn by Dinna Bhoke Makini on 19th September 2025 and 28th October 2025 respectively. She seeks the following;

- 1. That this honourable Court be pleased to re-open the Defendant's/Applicant's case for purposes of admitting and considering new evidence in the form of the original handwriting expert document now in the possession of the Applicant.**

2. That the said document be admitted on record and the Applicant be granted leave to recall the relevant witness for purposes of production and cross examination of the said evidence.

3. That this honourable Court makes such further or other orders as it may deem fit in the interests of justice.

4. That costs of this application be in the suit.

2. The Applicant/1st Defendant in this matter states that the hearing of the case was closed on 13th June 2025 after both parties tendered their evidence and filed submissions. She further states that at the time of the defence hearing, despite due diligence, she was unable to trace the original handwriting expert report and had only photocopies and secondary evidence. She avers that she has now obtained the original report, which directly relates to the issues in controversy, goes to the root of the case, and is annexed and marked as “DBM 1”.

3. She deposes that the report is material and critical to the just determination of the suit, and that the Respondents will suffer no prejudice, as they will have a full opportunity to test the new evidence through cross-examination. Failure to admit it will cause her irreparable harm. She further explains that she filed an application dated 19th September 2025 to permit DW2 (the handwriting expert) to produce the report, but the exhibits marked 1–13 were inadvertently omitted from the filing, necessitating this supplementary affidavit to attach them. She urges the Court to

exercise its discretion in the interests of justice under Articles 10, 20, 25(c), 50(1) and 159(2) of the Constitution.

4. In opposition, the Plaintiff filed a replying affidavit sworn on 22nd October 2025 by Andrew Ombwayo, its Advocate. Counsel contended that the 1st Defendant's application is misconceived and made in bad faith solely to delay the proceedings. They state that the 1st Defendant was given several time bound opportunities to recall her witness, Emmanuel Kenga, to produce the complete document examination report but failed to do so, previously citing the witness's unavailability. They argue that the new explanation that the original report had been missing and has now been found is an afterthought, noting that the 1st Defendant closed her case without indicating that the document was misplaced and thereafter fully participated in the 2nd Defendant's case up to the stage of submissions.
5. The Plaintiffs further state that reopening the 1st Defendant's case at this stage would be prejudicial, as the Plaintiffs have already exhausted their challenge to the defence through comprehensive cross-examination and rebuttal, leaving no opportunity to adduce further evidence. They add that reopening the matter would allow both Defendants to fill gaps in their cases to the Plaintiffs' detriment. They further state that the annexed document examination report remains incomplete and unsigned, with exhibits A2–A13 missing.

6. *No submissions were filed.*

Analysis and Determination:

7. The application before the Court seeks the reopening of the 1st Defendant's case at a stage when the parties had already closed their cases and were awaiting the filing of closing submissions. It is therefore an application for the Court to exercise its discretionary power to admit additional evidence after the close of trial. It is trite that discretion must be exercised sparingly and only where sufficient cause is shown, the evidence could not with reasonable diligence have been obtained earlier, the evidence is material, and the opposite party will not suffer prejudice that cannot be remedied by costs or further opportunity to respond.
8. In **Odinga v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 2 (KLR)**, the Supreme Court held that additional evidence will be admitted only if it was not available despite the exercise of due diligence, is relevant and credible, and its admission will not prejudice the other party. Similarly, in **Attorney General v Torino Enterprises Limited [2019] KECA 934 (KLR)** the Court of Appeal emphasized that a party who has closed its case cannot be allowed to reopen it merely to fill gaps or repair weaknesses in its evidence.
9. In the present matter, the record shows that the 1st Defendant had been granted several opportunities to recall DW2, Emmanuel Kenga, to produce the complete examination report, but failed to do so. The explanation now advanced, that the

original report was missing and has only now been traced, contradicts the earlier position that the witness was unavailable.

10. The Plaintiff deposed that the documents that were missing when the DW2 gave evidence have not been attached to the affidavit in support of the application. In rebuttal, the 1st Defendant Applicant stated that the documents have since been introduced through the supplementary affidavit. I have perused the annexed documents in the supplementary affidavit which includes the signed report of the handwriting expert.
11. In the report, under the heading “examination and findings”, the witness identifies the documents he examined. He stated that he examined the signatures indicated by red arrows on exhibits marked A2-A13, and compared them with the standard signatures on exhibits marked B1-B2. The supplementary affidavit has annexed the documents with the mark B1-B2. However, none of the documents following the B1-B2 had the identification markings of A2-A13. Additionally, there are no arrows pointing at the signatures on these documents.
12. Taking note that these documents had earlier been produced in evidence, the court can exercise discretion in favour of the Applicant only if she clearly distinguished the annexed documents as the ones which were examined by the witness from the exhibits earlier produced. In this instance, I am not persuaded that the Applicant

has made a case for the court to reopen her defence to call additional evidence, which has not been annexed/shown.

13. Moreover, the Plaintiffs have already closed their case and exhausted their right to challenge the defence evidence through cross-examination and rebuttal. Reopening the defence case at this stage would occasion substantial prejudice to the Plaintiffs, who would have no equal opportunity to adduce further rebuttal evidence. As held by Court of Appeal in **Samuru Gaturo Farmers Co-operative Society Limited v Chief Magistrate's Court at Thika & 15 others [2016] KECA 435 (KLR)** citing **Mzee Wanjie & 93 Others V A.K. Saikwa & 2 Others, (1982-88) 1 KAR 462**, a court should not permit a party to reopen its case where the effect would be to enable it to fill omissions or repair defects in its evidence to the detriment of the other party.

14. Consequently, I hold that the Applicant has not demonstrated sufficient cause to warrant the exceptional remedy of reopening her case. Therefore, I find no merit in the application and proceed to dismiss it with costs.

Dated, Signed & Delivered at Nairobi virtually, this 22nd Day of January, 2026

**A. OMOLLO
JUDGE**