

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC CASE NO. 119 OF 2007

KIPLANGAT NGENO BARTEGAN

T/A TAPTOWON AGENCIES.....
....PLAINTIFF

VERSUS

EUNICE NYASUGUTA MAKORI.....
.....DEFENDANT

(IN THE MAIN SUIT)

EUNICE NYASUGUTA MAKORI

(Suing as the administratrix of the estate of the late
JOHNSTONE MAKORI ONDUKO).....
PLAINTIFF

VERSUS

KIPLANGAT NGENO BARTEGAN

T/A TAPTOWON AGENCIES1ST
DEFENDANT

KCB BANK KENYA LIMITED.....2ND
DEFENDANT

SOLAI AGENCIES.....3RD
DEFENDANT

(IN THE COUNTERCLAIM)

RULING.

Introduction.

1. This ruling is in respect of the 1st Defendant/Applicant's Notice of Motion application dated 13th August, 2025. It is expressed to be brought under **Sections 1A, 1B & 3A** of the **Civil Procedure Act, Order 18 Rule 10, Order 45** and **Order 51 Rule 1** of the **Civil Procedure Rules**.

2. The application seeks the following prayers;

1. Spent

2. That this Honourable Court be pleased to reopen the 1st Defendant's case to allow the 1st Defendant to call an essential witness to testify specifically on the Counterclaim against the 2nd Defendant.

3. Spent

4. That the costs of this application be provided for.

3. The application is based on the grounds on its face and the supporting affidavit of **Lucy Momanyi** sworn on 13th August, 2025.

Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 31st October, 2007 wherein he seeks the following prayers;

a. An Eviction order against the Defendant and/or any other persons occupying Plot No. LR. 631/341 within Kericho Township under authority of the Defendant.

b. A permanent injunction restraining the Defendant and/or any other persons occupying Plot No. L.R. 631/341 within Kericho Municipality under authority of the Defendant from trespassing into, entering and/or in any other way interfering with the Plaintiff's occupation, use, possession and/or quiet enjoyment of the suit premises Plot No. L.R. 631/341 within Kericho Township.

c. Costs of this suit.

d. Interests on (c) above.

e. Any other relief deemed apt by this Honourable Court.

5. The 1st Defendant/Applicant filed a Statement of Defence and Counterclaim dated 12th November, 2007 which Statement of Defence was amended on 23rd October, 2014. The 1st Defendant/Applicant seeks the following prayers in the Counterclaim;

a. A declaration that the purported auction of LR 631/341 situate within Kericho Town is illegal, unlawful and fraudulent, un-procedural and irregular which process was/is null and void, was incapable of vesting a good title of the said parcel of land upon the 1st Defendant.

b. A mandatory order compelling the 1st Defendant to surrender his title to the Registrar of lands in Kericho for cancellation in respect to Plot No. LR 631/341 situate within Kericho Township.

c. That upon cancellation of the title in (b) above the Court do issue a mandatory order to the Registrar of Lands in Kericho

to revert back the title to the late Johnson Makori Onduko.

d. Costs of this suit.

e. Interest on (d) above.

f. Any other relief that this Honourable Court may deem fit to grant.

- 6.** The 2nd Defendant/Respondent in the Counterclaim filed a Defence to the Counterclaim dated 9th October, 2015 which was subsequently amended on 8th March, 2017. It denies the averments in the Counterclaim and seeks that the 1st Defendant/Applicant's Counterclaim be dismissed with costs.
- 7.** The 3rd Defendant/Respondent in the Counterclaim filed a Statement of Defence dated 11th September, 2017 wherein it denies the averments in the Counterclaim and seeks that it be dismissed with costs.
- 8.** The application under consideration first came up for hearing on 18th August, 2025 when the Court directed that it be served upon the Respondents.

9. On 17th September, 2025, the Court directed that the application be canvassed by way of written submissions.
10. After parties filed their submissions, counsel for the 1st Defendant/Applicant sought and was granted opportunity to orally highlight the 1st Defendant/Applicant's submissions. The application was then reserved for ruling.

The 1st Defendant/Applicant's Contention.

11. The affidavit in support of the application is sworn by one **Lucy Momanyi.**
12. She contends that the suit was scheduled for mention to confirm filing of submissions.
13. She also contends that during the hearing, she was unable to call a vital witness to give evidence.

- 14.** She further contends that the said witness had travelled outside the jurisdiction of the Court at the time of the hearing of the Counterclaim.
- 15.** She contends that the said witness eventually returned and testified in her defence but due to time limitations, the witness was not examined on the critical aspects of the Counterclaim. She goes on to state that she filed the Counterclaim against the 2nd Defendant/Respondent and that the counterclaim challenges the unlawful sale of the suit property.
- 16.** She also contends that unless the application under consideration is heard, she will suffer grave prejudice as the Court will deliver judgement without the benefit of crucial evidence in support of the counterclaim.
- 17.** She further contends that the other parties in the present proceedings will not suffer prejudice which cannot be remedied with costs if the application is heard.

18. She ends her deposition by stating that the application has been filed in good faith and that it is in the interest of justice that it be allowed.

The Plaintiff/Respondent's Response.

19. In response to the 1st Defendant/Applicant's application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 1st September, 2025.

20. He deposes that on 19th June, 2000, he participated in a public auction where LR No. 631/341, the suit parcel of land, was being sold.

21. He also deposes that he was the highest bidder and he was subsequently registered as the owner of the suit parcel of land.

- 22.** He further deposes that he filed the present suit against the 1st Defendant/Applicant as she is in occupation of the suit parcel of land.
- 23.** It is his deposition that the suit has been pending in Court for eighteen years during which time there have been mysterious disappearances of the Court file and several adjournments that have significantly hindered the suit's timely and just determination.
- 24.** It is also his deposition that he gave evidence on 22nd January, 2019 and closed his case. He goes on to state that since then, the Defence hearing proceedings have been plagued with a series of adjournments.
- 25.** It is further his deposition that this Court addressed the 1st Defendant/Applicant's unwillingness to proceed with the hearing on 21st February, 2022 and on 20th March, 2023.

26. He deposes that on 20th March, 2023, the 1st Defendant/Applicant's case commenced and she called one **George Onyancha Makori** who testified as **DW1**.

27. He also deposes that on 17th July, 2023, one **Lucy Nyamoita Momanyi Makori**, the Applicant herein gave evidence as **DW2** in support of the 1st Defendant/Applicant's Defence and Counterclaim.

28. He further deposes that **DW2**'s evidence was anchored on her

witness statement dated 21st April, 2022 and she was cross examined on issues raised in the Counterclaim.

29. It is his deposition that on 17th July, 2023, in the interest of justice, the Court granted leave to the 1st Defendant/Applicant to recall **DW1** for purposes of producing documents in support of the Defence and Counterclaim.

- 30.** It is also his deposition that on 17th July, 2023, the 1st Defendant/Applicant's case was closed.
- 31.** It is further his deposition that from the foregoing it is clear that the 1st Defendant/Applicant was given opportunity to give evidence on the Counterclaim.
- 32.** He deposes that the 1st Defendant/Applicant is attempting to derail the proceedings by seeking to re-open her case two years after she closed it.
- 33.** He also deposes that the 1st Defendant/Applicant was given ample opportunity to present her case including leave to recall a witness and she cannot therefore now claim procedural unfairness and/or lack of opportunity to be heard.
- 34.** He further deposes that the Counterclaim which forms the basis of the application under consideration was fully prosecuted.

35. It is his deposition that the 1st Defendant/Applicant has not demonstrated any compelling grounds that would justify the reopening of proceedings or the granting of any further orders by the Court.

36. It is also his deposition that the 1st Defendant/Applicant's application is an abuse of the Court process and it is an attempt to circumvent the procedural safeguards and finality of litigation.

37. He ends his deposition by urging the Court to dismiss the 1st Defendant/Applicant's application with costs.

The 2nd Defendant/Respondent in the Counterclaim's Response

38. In response to the 1st Defendant/Applicant's application, the 2nd

Defendant/Respondent in the Counterclaim filed a Replying Affidavit sworn by **Fred Ntabo Orora**, its counsel, on 28th August, 2025 and Grounds of Opposition that are not dated.

39. The Grounds of Opposition are as follows;

a. That the Applicant herein was accorded time and opportunity by this Honourable Court on the 17th July, 2023 to prosecute her case as a witness for the defence and the counterclaim.

b. That this application is vexatious, frivolous and an abuse of the Court process and it is meant to delay the disposal of this case which has been in Court since the year 2007.

c. That this application be struck out and dismissed with costs.

40. In the replying affidavit, Counsel for the 2nd Defendant/Respondent in the Counterclaim deposes that he has attended all the proceedings and hearings in the present suit.

41. He also deposes that on 17th July, 2023, the Applicant herein attended Court and testified. He goes on to state that she

relied on her witness statement dated 21st April, 2022 that was filed in Court on 4th May, 2022 in support of her defence and Counterclaim.

42. He further deposes that there is no written statement that has been filed by the Applicant for the Counterclaim (sic).

43. It is his deposition that on 17th July, 2023 he extensively cross examined the Applicant on the contents of the Counterclaim.

44. He ends his deposition by stating that the Applicant is therefore misleading the Court that she was not accorded the time and opportunity to prosecute the counterclaim.

The 3rd Defendant/Respondent in the Counterclaim's Response.

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45. In response to the 1st Defendant/Applicant's application, the 3rd Defendant/Respondent in the Counterclaim filed Grounds

of Opposition dated 10th September, 2025. They are as follows;

- a. That no draft further statement has been filed alongside the application hence the same does not disclose what the 1st Defendant's witness intends to prove which is not already on record.**
- b. That there is no new and important evidence which has been adduced which after exercise of due diligence was not within the knowledge of the Applicant.**
- c. That in the said application it is evident that the said witness had already testified. (See paragraph "C" on the grounds in the application).**
- d. That the said application for reopening is intended to fill gaps in evidence.**
- e. That the 1st Defendant was accorded a chance to prove his (sic) case by this Honourable Court.**
- f. That this is fairly an old matter that was filed 18 years ago and the same is yet to be determined.**
- g. That the 1st Defendant has had possession of the suit property since the**

commencement of the suit and the instant application is a ploy to maintain the status quo to the detriment of the Plaintiff herein.

h. That while the Applicant has the right to be heard, the same should not be used unscrupulously to the detriment of other parties.

i. That there should be an end to litigation and that the application herein intends to further delay this matter.

j. That in all fairness this application offends judicial authority as enshrined in Article 159 of the Constitution that justice should not be delayed.

k. That in the premise, the Notice of Motion is fatally defective, misconceived, frivolous, vexatious, and constitutes a flagrant abuse of the Court process thus ought to be dismissed with costs.

The 1st Defendant/Applicant's Supplementary Affidavit

46. The 1st Defendant/Applicant filed a Supplementary Affidavit sworn on 22nd September, 2025. The Supplementary Affidavit is sworn by **Lucy Momanyi**.

47. She deposes that **Johnson Makori Onduko** (deceased) and **Eunice Nyasuguta Makori** were directors of **GTT Development Company Limited**. She goes on to state that the said company ran a transport business and it obtained an overdraft facility from the 2nd Defendant/Respondent in the Counterclaim.

48. She also deposes that **Johnson Makori Onduso** (deceased) personally guaranteed the repayment of Kshs. 290,000/=. She goes on to state that the said amount was secured by the title deeds for land parcel No's **Kericho Municipality/631/341 (sic), Kisii Block 1/123 West Mugirango Bonyamatuta/631 (sic) and LR 631/285** which is the suit parcel of land.

49. She further deposes that **GTT Development Company**

Limited's principal customer **KCC** collapsed and **Johnson Makori Onduso** (deceased) defaulted in the repayment of the loan.

- 50.** It is her deposition that the 2nd Defendant/Respondent in the Counterclaim instructed the 3rd Defendant/Respondent in the Counterclaim to auction the parcels of land that were given as security.
- 51.** It is also her deposition that **Johnson Makori Onduso** (deceased) sought for an injunction to stop the sale which injunction was granted by the Court on 14th June, 2000.
- 52.** It is further her deposition that the said order of injunction was acknowledged by the Bank and the auctioneers.
- 53.** She deposes that **Johnson Makori Onduso** (deceased) thereafter repaid the loan and the bank discharged two titles but unreasonably retained the title of the suit parcel of land while citing advocate legal fees.

54. She also deposes that initially the suit was filed in Mombasa before it was transferred to Kisumu.
55. It is her deposition that orders that stopped dealings over the suit property were first issued on 14th May, 2000.
56. It is also her deposition that **Johnson Makori Onduso** (deceased) unfortunately died in the year 2007 and his widow, one **Eunice Nyasuguta Makori** was appointed as an administrator of his estate.
57. It is further her deposition that **Eunice Nyasuguta Makori** paid the sum of Kshs. 2,800,000/= that was meant to settle the advocates fees.
58. She deposes that after the said payment was made, **Eunice Nyasuguta Makori** was shocked to discover that the suit parcel of land was sold at a public auction at a gross undervalue. She goes on to state that the suit parcel of land was sold contrary to subsisting Court orders.

59. She also deposes that this suit was then filed in the year 2007.

60. She further deposes that **Eunice Nyasuguta Makori** developed dementia and new administrators were appointed. She goes on to state that the new administrators were **Lucy Momanyi, Kepha Makori, George Makori** and **Damaris Makori**.

61. It is her deposition that on 21st July, 2015, they filed the Counterclaim against the Plaintiff/Respondent and the 2nd and 3rd Defendants/Respondents.

62. It is also her deposition that on 15th February, 2022, **George Makori** was substituted in place of **Eunice Nyasuguta Makori** while she withdrew from representing the 1st Defendant/Applicant and opted to give evidence instead.

63. It is further her deposition that she has annexed the following documents to the Supplementary Affidavit;

- a. A copy of the Discharge Voucher issued by the 2nd Defendant/Respondent in the Counterclaim.**
- b. A copy of a letter dated 26th June, 2000 from the 3rd Defendant/Respondent in the Counterclaim.**
- c. A copy of a letter dated 3rd April, 2007 from the 2nd Defendant/Respondent in the Counterclaim to the 3rd Defendant/Respondent.**
- d. A copy of a letter dated 14th April, 2000 from Johnson Makori Onduko to the 2nd Defendant/Respondent.**
- e. A copy of a Supporting Affidavit sworn by Johnson Makori Onduko.**
- f. A copy of a letter dated 2nd December, 2008 written by the 2nd Defendant/Respondent to the 1st Defendant/Applicant.**
- g. A copy of the ruling delivered in Civil Suit No. 18 of 2000 Johnson Makori Onduko vs Kenya Commercial Bank Ltd.**

h. A copy of a letter dated 12th August, 2006 from the 2nd Defendant/Respondent to the 1st Defendant/Applicant.

i. A copy of a letter dated 18th September, 2007 written by the 2nd Defendant/Respondent to the 1st Defendant/Applicant.

j. A copy of a letter dated 6th July, 2007 from the 2nd Defendant/Respondent to the 1st Defendant/Applicant.

64. She deposes that the attached documents demonstrate the illegality of the auction and underscores the necessity of reopening the 1st Defendant/Applicant's case to allow the said evidence to be properly adduced.

65. She also deposes that the Discharge Voucher confirms that two securities were released and it is proof that the debt was substantially satisfied.

- 66.** She further deposes that in the letter dated 26th June, 2000, the 3rd Defendant/Respondent falsely alleged that it sold two properties. She goes on to state that the said letter is misleading and supports the 1st Defendant/Applicant's Counterclaim.
- 67.** She reiterates that her firm was allowed to cease acting for the 1st Defendant/Applicant and she recorded a witness statement.
- 68.** She also deposes that the facts she has deposed to underscore the need for this Court to allow the critical witness to testify on the Counterclaim.
- 69.** She ends her deposition by contending that unless the 1st Defendant/Applicant's suit is reopened, the 1st Defendant/Applicant will suffer prejudice.

Issues for Determination.

- 70.** The 1st Defendant/Applicant filed submissions dated 8th October, 2025, the Plaintiff/Respondent filed submissions

dated 16th January, 2026, the 2nd Defendant/Respondent in the Counterclaim filed submissions dated 16th January, 2026 while the 3rd Defendant/Respondent filed submissions dated 13th January, 2026.

The 1st Defendant/Applicant's Submissions

- 71.** The 1st Defendant/Applicant submits on the following issues;
- a. *What is the threshold for arresting judgment and reopening a case after close of hearing?***
 - b. *Whether this Honourable Court has jurisdiction and discretion to reopen the 1st Defendant's case and recall a witness.***
 - c. *Whether sufficient cause has been shown to justify exercise of the discretion.***
 - d. *Whether reopening will occasion prejudice to the opposing parties and, if so, whether that prejudice is curable.***

e. Whether a limited stay of proceedings is warranted.

f. What orders on costs are appropriate?

72. The 1st Defendant/Applicant relies on **Section 146 (4)** of the Evidence Act, **Sections 1A, 1B & 3A** of the **Civil Procedure Act, Order 18 Rule 10** of the **Civil Procedure Rules** and while reiterating the averments in the affidavit in support of the application, submits that reopening of a party's case is an exceptional remedy that is reserved for cases where there is fresh material evidence that was not produced and refusal to produce the said evidence will result in a miscarriage of justice.

73. The 1st Defendant/Applicant submits that the Court should take into consideration the following elements in determining whether her case should be reopened;

a. Whether there exists new and important evidence which was not

available at the time of trial despite exercising due diligence.

b. Whether the omission to produce such evidence was not due to inexcusable negligence or deliberate inaction.

c. Whether failure to reopen the matter will result in a miscarriage of justice.

74. The 1st Defendant/Applicant relies on the judicial decisions of **Patel vs East African Cargo Handling Services Ltd [1974] EA 75, Benjoh Amalgamated Ltd & another vs Kenya Commercial Bank Limited [2014] eKLR, Shah vs Mbogo & another [1967] EA 116** and submits that all the three elements have been met.

75. The 1st Defendant/Applicant also submits that the evidence sought to be adduced through the witness to be recalled are documents that go to the core of the Counterclaim that were not produced.

76. The 1st Defendant/Applicant further submits that the said evidence was not available at the relevant time because the witness was outside the jurisdiction of the Court.
77. It is the 1st Defendant/Applicant's submissions that the application under consideration was filed promptly after the witness returned.
78. The 1st Defendant/Applicant relies on the judicial decision of **Mwangi vs Mwangi [1986] KLR 328** in support of her submissions.
79. In response to the 2nd Defendant/Respondent's Grounds of Opposition, the 1st Defendant/Applicant reiterates that her key witness was not in the country and that is why certain documents were not produced.
80. The 1st Defendant/Applicant relies on **Article 50 (1)** of the Constitution of Kenya and the judicial decision of **Susan Mutavi vs Isaac Njoroge & another [2019] eKLR**.

- 81.** The 1st Defendant/Applicant reiterates that she has given a credible explanation for the omission and relies on the judicial decisions of **Benjoh Amalgamated Ltd & another vs Kenya Commercial Bank Limited [2014] eKLR, CMC Holdings Ltd vs Nzioki [2004] 1 KLR** in support of her submissions.
- 82.** In response to the 3rd Defendant/Respondent's Grounds of Opposition, the 1st Defendant/Applicant submits that the affidavit in support of the application and supplementary affidavits have disclosed the nature, relevance and scope of the additional evidence which is sought to be introduced.
- 83.** The 1st Defendant/Applicant submits that the said affidavits have identified the factual events surrounding the alleged sale, her compliance with the Court orders and the documents that were omitted.
- 84.** The 1st Defendant/Applicant also submits that the absence of a draft witness statement is not fatal. She relies on the judicial decision of **Stephen Githua Kimani vs Nancy**

**Wanjira Waruingi t/a Providence Auctioneers [2016]
eKLR.**

- 85.** The 1st Defendant/Applicant reiterates the averments in the Supplementary Affidavit and submits that the witness who is to be recalled partially testified during the hearing and the evidence to be adduced concerns matters which were not within the witness's reach at that time.
- 86.** It is the 1st Defendant/Applicant's submissions that contrary to the assertions by the 3rd Defendant/Respondent, she is intending to produce material evidence which was earlier unavailable and which is essential to the determination of the issues in dispute.
- 87.** It is also the 1st Defendant/Applicant's submissions that while the delay of eighteen years is regrettable, the said delay cannot override the Constitutional right to a fair hearing that is provided for under **Article 50(1)** of the Constitution of

Kenya and the Court's obligation under **Article 159(2)(d)** of the Constitution to administer justice without undue delay.

88. It is further the 1st Defendant/Applicant's submissions that the limited reopening of her case will not prejudice the 3rd Defendant/Respondent.

89. The 1st Defendant/Applicant reiterates that she will be prejudiced if the Court does not allow her application.

90. The 1st Defendant/Applicants submits that any prejudice that is likely to be suffered by the 2nd and 3rd Defendants/Respondents can be cured by;

a. Limited recall solely to the identified issues relevant to the Counterclaim. (sic)

b. Requiring the Applicant to serve the witness statement and full bundle of documents in advance of recall.

c. Imposing strict timetabling directions and short, fixed hearing windows for further examination.

d. Awarding costs for any inconvenience occasioned.

91. The 1st Defendant/Applicant relies on the judicial decisions of **Global Tours & Travels Ltd vs Five Continents Travel Ltd [2000] eKLR, Kenya Power & Lighting Co. Ltd vs Esther Wanjoru Wokabi [2014] eKLR** and submits that the Court should stay the present proceedings pending the recalling of the witness.

92. The 1st Defendant/Applicant concludes her submissions by urging the Court to issue the following orders;

a. That the Notice of Motion dated 13th September, 2025 be allowed.

b. That the 1st Defendant's case be reopened, limited solely to the Counterclaim against the 2nd Defendant.

- c. That the identified witness be recalled to give evidence only on the specified issues and to produce the omitted documents.**
- d. That the Court stay such steps as would render the recall nugatory pending compliance with these orders.**
- e. That strict directions be given as to the service of the witness statement and documents, time-limits for testimony, and liberty for all parties to cross-examine and, if necessary, recall witnesses for clarification.**
- f. That costs of this application be in the cause, or in the alternative be awarded to the 1st Defendant/Respondent (sic).**
- g. The 1st Defendant/Respondent (sic) prays for any further or alternative relief the Court may deem fit in the interests of justice.**

The Plaintiff/Respondent's Submissions

93. The Plaintiff/Respondent reiterates the averments in his Repeating Affidavit and submits on the following issues;

a. Whether the Applicant was duly accorded an opportunity to be heard in the proceedings.

b. Whether the Applicant has satisfied the requisite threshold for reopening a case after the hearing has been concluded.

94. On the first issue, the Plaintiff/Respondent reiterates that the 1st Defendant/Applicant called as witnesses one **George Onyancha Makori** who testified as **DW1** and **Lucy Nyamoita Momanyi Makori** who testified as **DW2**.

95. The Plaintiff/Respondent relies on the judicial decisions of **Kebande vs Arasa (Environment and Land Originating Summons E004 OF 2022) [2024] KEELC 7103 (KLR)**, **Re Estate of the Late Philip Chumba Sirma alias Sirma S/O Chumba (Deceased) [2025] KEHC 1891 (KLR)** and

submits that the 1st Defendant/Applicant was given an ample opportunity to present her case and produce documents.

- 96.** The Plaintiff/Respondent also submits that the 1st Defendant/Applicant cannot now claim procedural unfairness or lack of opportunity to be heard.
- 97.** On the second issue, the Plaintiff/Respondent relies on the judicial decision of **Kebande vs Arasa (Environment and Land Originating Summons E004 OF 2022) [2024] KEELC 7103 (KLR)** and submits that the application under consideration is an afterthought as it was filed two years after the 1st Defendant/Applicant closed her case.
- 98.** It is the Plaintiff/Respondent's submissions that the 1st Defendant/Applicant has not demonstrated that the documents she seeks to produce were not within her possession at the time of hearing of the suit.

99. It is also the Plaintiff/Respondent's submissions that the 1st Defendant/Applicant is intent on producing new evidence which will prejudice the other parties to the suit.

100. The Plaintiff/Respondent relies on the judicial decisions of **Michael Kiplangat Cheruiyot vs Joseph Kipkoech Korir [2019] eKLR, Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & another [2015] eKLR** and submits that the 1st Defendant/Applicant is only seeking to seal the loopholes in her case.

101. The Plaintiff/Respondent concludes his submissions by urging the Court to dismiss the 1st Defendant/Applicant's application.

The 2nd Defendant/Respondent's Submissions.

102. The 2nd Defendant/Respondent submits that it relies on its Grounds of Opposition dated 28th August, 2025 and the 3rd Defendant/Respondent's submissions.

103. The 2nd Defendant/Respondent also submits that the documents listed in the Supplementary Affidavit have no relevance to the present suit and are not listed in the list of documents filed by the 1st Defendant/Applicant.

104. The 2nd Defendant/Respondent further submits that the 1st Defendant/Applicant's witness was accorded sufficient time to give evidence in support of the Counterclaim and at no time were the documents attached to the Supplementary Affidavit produced in Court.

105. The 2nd Defendant/Respondent in the Counterclaim concludes its submissions by urging the Court to dismiss the 1st Defendant/Applicant's application.

The 3rd Defendant/Respondent's Submissions.

106. The 3rd Defendant/Respondent in the Counterclaim submits on the following issues;

a. Whether the Applicant testified.

b. Whether there is new evidence.

c. Whether there was inordinate delay.

d. Whether the Court should stay the proceedings.

107. On the first issue, the 3rd Defendant/Respondent submits that the 1st Defendant/Applicant seeks to reopen her case on the grounds that one, she did not testify and that secondly, she intends to produce new evidence.

108. The 3rd Defendant/Respondent relies on the judicial decision of **Paan v Kariuki & 16 others (Environment & Land Case 80 of 2019) [2024] KEELC 5337 (KLR) (11 July 2024)** and submits that it is apparent that the 1st Defendant/Applicant intends to testify on the alleged unlawful sale of the suit property.

109. It is the 3rd Defendant/Respondent's submissions that the 1st Defendant/Applicant's case has always been anchored on the alleged unlawful sale and therefore the alleged new

evidence will not offer fresh insights and/or material facts that have not been already raised.

110. On the third issue, the 3rd Defendant/Respondent submits that the 1st Defendant/Applicant closed her case on 17th July, 2023.

111. The 3rd Defendant/Respondent also submits that the application under consideration has been filed two years after her case was closed.

112. The 3rd Defendant/Respondent relies on the Australian judicial decision of **Smith Versus New South Wales HCA 36; (1992) 176 CLR 256** as was cited in the Ugandan Judicial decision of **Simba Telecom Vs Karuhanga & Anor(2014) UGHC 98** in support of its submissions.

113. The 3rd Defendant/Respondent submits that the suit has been pending in Court for eighteen years and during which

period, the 1st Defendant/Applicant was granted numerous adjournments.

114. The 3rd Defendant/Respondent also submits that the 1st Defendant/Applicant only intends to fill the gaps in her evidence and the orders ought should therefore not be granted.

115. On the fourth issue, the 3rd Defendant/Respondent relies on the judicial decision of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** and submits that the 1st Defendant/Applicant has not demonstrated why the proceedings in this matter should be stayed.

116. The 3rd Defendant/Respondent concludes its submissions by urging the Court to dismiss the 1st Defendant/Applicant's application.

117. During the oral highlighting of submissions, Counsel for the 1st Defendant/Applicant submitted that the Court has

discretion which should be exercised judiciously to ensure that justice is done.

118. Counsel also submitted that the Court's hands should not be tied by technicalities when it is exercising its discretion.

119. Counsel relied on the Constitution of Kenya, 2010 and the 1st Defendant/Applicant's submissions dated 8th October, 2025.

120. Counsel for the Plaintiff/Respondent informed the court that rather than orally highlight submissions, they would be relying on the submissions dated 16th January, 2026. Counsel for the 2nd Defendant/Respondent in the Counterclaim also chose to rely on the submissions filed and opted out of orally highlighting them.

121. Counsel for the 3rd Defendant/Respondent in the Counterclaim also chose to rely on the submissions filed and opted out of oral highlighting.

Analysis and Determination.

122. I have considered the 1st Defendant/Applicant's application, the

responses thereto and the rival submissions. It is my view that the following issues arise for determination;

a. *Whether leave should be granted to the 1st Defendant/Applicant to re-open her case and recall a witness to testify on the Counterclaim.*

b. *Who should bear costs of the application.*

A. Whether leave should be granted to the 1st Defendant/Applicant to re-open her case and recall a witness to testify on the Counterclaim.

123. The 1st Defendant/Applicant is seeking leave to reopen her case so that she can recall a crucial witness who was outside the Country at the time of hearing of the counterclaim to produce further evidence.

124. The 1st Defendant/Applicant contends that the said witness is the only one who can render vital evidence in support of her Counterclaim and specifically on the alleged unlawful sale of the suit property.

125. The 1st Defendant/Applicant filed a Supplementary Affidavit wherein she sets out a list of documents that the intended witness will produce.

126. In response, the Plaintiff/Respondent contends that the 1st Defendant/Applicant was given an opportunity to give evidence and she called two witnesses.

127. The Plaintiff/Respondent also contends that the 1st Defendant/Applicant was given opportunity to recall **DW1** and she later closed her case.

128. The Plaintiff/Respondent further contends that a period of two years has lapsed since the 1st Defendant/Applicant

closed her case and the application under consideration is therefore an afterthought.

129. The 2nd Defendant/Respondent in the Counterclaim also contends that the 1st Defendant/Applicant was given an opportunity to call witnesses and give evidence.

130. The 2nd Defendant/Respondent in the Counterclaim submits that the documents attached to the Supplementary Affidavit have no relevance to the present suit and neither were they filed by the 1st Defendant/Applicant.

131. The 3rd Defendant/Respondent in the Counterclaim on the other hand contends that the 1st Defendant/Applicant intends to seal the loopholes in her case and there is no new evidence to be adduced.

132. Section 146(4) of the Evidence Act provides as follows;

***“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.”

133. Order 18 Rule 10 of the **Civil Procedure Rules** provides as follows;

“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.”

134. In the judicial decision of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] KEHC 3930 (KLR)**, the Learned Judge referred to a Ugandan High Court, Commercial Division case of **Simba Telecom -versus- Karuhanga & Anor (2014) UGHC 98** which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred to an Australian case **Smith -versus- New**

South Wales [1992] HCA 36; (1992) 176 CLR 256

where it was held that:

“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.” It should be noted that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened

as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be exercised in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative, then the discretion should not be exercised in the applicant's favour. (Emphasis mine)

135. Further in **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another (Supra)** the Court held as follows;

“20. The Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the 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.”

(Emphasis mine)

136. In **Wavinya Mutavi - Versus - Isaac Njoroge & another (2020) eKLR**” the Learned judge observed and

held as follows

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. [Emphasis mine)

137. At paragraph 3 of the affidavit in support of the application, the deponent contends that she was unable to call “a *vital witness*” who had travelled outside the jurisdiction of the Court at the time of the hearing of the Counterclaim to give evidence.

138. At paragraph 4 of the affidavit in support of the application, the deponent contends that the said witness eventually returned and gave evidence but due to time constraints, was not examined on crucial aspects of the Counterclaim.

139. It is important to note that the identity of the alleged “*vital witness*” has not been disclosed but we now know that this witness gave evidence and was not allegedly examined on crucial aspects of the of the counterclaim due to time constraints. The logical question that follows is “who was constrained for time?”

140.A perusal of the Court record shows that the 1st Defendant/Applicant's case came up for hearing on 20th March, 2023. On the said date one **George Onyancha Makori** testified as **DW1**. He gave evidence and was cross examined.

141.A further perusal of the Court record shows that on 17th July, 2023, one **Lucy Nyamoita Momanyi Makori** testified as **DW2**. She gave her evidence, was cross examined and after she was re-examined, Counsel for the 1st Defendant/Applicant sought and was granted leave to recall **DW1**.

142.**DW1** was recalled, he gave evidence, was cross examined and re-examined before Counsel closed the 1st Defendant/Applicant's Case.

143.From the Court record it is evident that the 1st Defendant/Applicant called as witnesses one **George**

Onyancha Makori who testified as **DW1** and **Lucy Nyamoita Momanyi Makori** who testified as **DW2**.

144. It is worth emphasizing that it is not clear who between the two witnesses the 1st Defendant/Applicant is seeking to be recalled and why the Applicant is not keen on disclosing which of the two she seeks to recall. What is clear is that the witnesses to be recalled is either **DW1** (who was already recalled after he testified) or **DW2**.

145. I must mention that from the court record, there is no record of the court being constrained for time and therefore denying the 1st Defendant/Applicant opportunity to conduct its defence. The allegation of time constraint is unfounded

146. As was observed in Smith -versus- New South Wales [1992] HCA 36; (1992) 176 CLR 256 an enquiry as to why evidence proposed to be adduced was not called during the hearing is relevant. It was further observed that if a reason is not

recorded, that will be a ground for deciding against the application.

147. I find that no plausible explanation has been given as to why the evidence proposed to be adduced was not tendered during the hearing even after recall of **DW1**. The fact of travel out of the country and “*time constraints*” cannot be a reason for failure to adduce evidence when opportunity to do was given during hearing and given a second time by allowing recall of **DW1**.

148. Further and as submitted by the Plaintiff/Respondent and the 3rd Defendant/Respondent, the 1st Defendant/Applicant’s case was closed on 17th July, 2023. A period of two years lapsed since their cases were closed and the application under consideration was filed. I find that this delay by the 1st Defendant/Applicant is inordinate and unexplained.

149. The 1st Defendant/Applicant also submits that the evidence the *vital witness* is to produce was not available at the

relevant time as the said witness was outside the jurisdiction of the Court.

150. In the Supplementary Affidavit, the 1st Defendant/Applicant has set out a list of documents that she is seeking leave to be produced.

151. Some of the said documents are copies of letters written in the year 2000, 2006, 2007 & 2008, a copy of a ruling delivered in Civil suit No. 18 of 2000 and a copy of a Discharge Voucher.

152. The said documents were issued and/or written between the year 2000 and the year 2008.

153. It is my view that the 1st Defendant/Applicant has not given a sufficient explanation on where the documents were and/or who was holding them so much so that their availability and production in court in the year 2023 when her case was heard in court was impossible.

154. Further, no evidence has been adduced to show that the alleged vital witness was outside the Country and also no evidence on their return to the country.

155. At best, the 1st Defendant'/Applicant is withholding information from this court which information would be useful to the court in deciding whether or not the 1st Defendant/Applicant is deserving of this court's discretion. The 1st Defendant/Applicant has failed to demonstrate that the evidence she seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of her case

156. As was held in **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another** (supra) and **Wavinya Mutavi - Versus - Isaac Njoroge & another (Supra)** the Court has the discretion to allow the reopening of a case but that discretion has to be exercised judiciously and in so doing the

court shall ensure that the re-opening does not embarrass or prejudice the opposite party.

157. The Plaintiff/Respondent submits that this suit has been pending in Court for eighteen years during which time there have been mysterious disappearances of the Court file and several adjournments that have significantly hindered the suit's timely and just determination and also submits that he gave evidence on 22nd January, 2019 and closed his case. He goes on to state that since then, the Defence hearing proceedings have been plagued with a series of adjournments and cites 21st February, 2022 and on 20th March, 2023 as the dates when this Court addressed the 1st Defendant/Applicant's unwillingness to proceed with the hearing.

158. Delayed justice is denied justice and there cannot be greater prejudice than delaying justice for any Party to a trial.

159. I agree with submissions of the 3rd Defendant/Respondent that the 1st Defendant's/Applicant's proposed re-opening is

intended to fill gaps in their evidence. The court record shows that after **DW2** testifies, the defence applied and were granted orders to recall **DW1**. Two years after **DW2** testified and the 1st Defendant's case was closed, all other defendant's cases also closed and the suit pending submissions and judgment, this court is faced with another application to recall a witness who had already testified. This is either **DW1** again or **DW2**. It would not be farfetched to find that this application is intended to fill gaps in their evidence and I so find.

160. Lastly the 1st Defendant/ Applicant has attempted to convince this court that the documents proposed to be tendered in evidence, if admitted, have an important influence on the result of the case but their case as observed by the 3rd Defendant/Respondent has always been anchored on the alleged unlawful sale. Therefore, the alleged new evidence will not offer fresh insights and/or material facts that have not been already raised.

161. Taking into consideration the foregoing, it is my view that the 1st Defendant/Applicant has not demonstrated sufficient cause for this Court to exercise its discretion and allow her to re-open her case.

162. Before penning off, I note that the parties herein have extensively submitted on whether the proceedings herein should be stayed.

163. Prayer (3) of the 1st Defendant/Applicant's application seeks the following prayer;

“a. That the proceedings be stayed pending the hearing and determination of this application.”

164. It is important to note that the said prayer has been sought pending the hearing and determination of the application under consideration. The effect of making a merit determination of the application under consideration is that these suit has

invariably had to be stayed. The court does not grant orders in vain and it shall, therefore, not be necessary to grant this prayer.

B. Who should bear costs of the application.

165. The general rule is that costs shall follow the event in accordance with the provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

166. Taking the foregoing into consideration, I find that the 1st Defendant/Applicant's Notice of Motion application dated 13th August, 2025 lacks merit and it is hereby dismissed with costs.

167. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 23RD DAY OF APRIL, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

**Mr. Kirui Evanson for Plaintiff in main suit and 1st
Defendant in Counter Claim**

**Miss Miriti for Orora for 2nd Defendant in Counter
Claim.**

**Miss Cherono for Langat for 3rd Defendant in Counter
Claim**

**Mr. Khaminwa for Defendant in main suit and Plaintiff
in counter claim.**

Court Assistant; Mr. Joseph Makori.