

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ELC LAND CASE NO. E018 OF 2025**

**KENYA PIPELINE CORPORATION.....
PLAINTIFF**

VERSUS

**MARULA ESTATES LIMITED.....
DEFENDANT**

**MOREDANT LIMITED.....1ST THIRD
PARTY**

**PIUS NGUGI.....2ND THIRD
PARTY**

RULING.

1. The Third Parties, through a Notice of Motion dated 19th December 2025, brought under the provisions of Section 22 of the Civil Procedure Act, Order 7 Rule 5 (d), Order 11 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, seek the following orders:

i. That the Honourable Court be pleased to order the Defendant to produce, file and serve upon the Third Parties Advocate the following documents referred to, at paragraphs 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 & 20 of its Statement of Defence dated 3rd June 2025 and at paragraphs 1, 2, 5, 6, 7, 8 & 13 of their Notice of Claim against 1st & 2nd Defendants dated 3rd June 2025 and in the letters dated 12th August 2003 and 21st April 2008 in the Defendant's list of documents 14th July 2025, which are;

a. The Original legible Title for LR No.11367/2, together with the original attached deed plan, or, in the alternative, the certified legible copies of the Original Title for LR No.11367/2 with the attached deed plan.

- b. The Original Title for LR No.11367/3 and/or Official Search confirming the existence of the said title, or in the alternative, the certified legible copies of the Original Title for LR No.11367/3 with the attached deed plan.
- c. The Original Title for LR No.11367/4 and/or Official Search confirming the existence of the said title, or in the alternative, the certified legible copies of the Original Title for LR No.11367/4 with the attached deed plan.
- d. Valuation Report done by the Government Valuer for stamp duty for Kshs.860,065/= done on 21st October 2003.
- e. Valuation Report done by the Government Valuer for stamp duty done on 16th November 2004.
- f. Professional Undertaking letter dated 6th March 2001 addressed to Ramesh Manek Advocates.
- g. The consent letter addressed to the Deputy Registrar in Nairobi HCC No.2264 of 1985 requesting reinstatement of the prohibitory orders against the titles of all three properties including LR No.11367/2.
- h. Proof that Kaplan & Stratton returned all the documents listed in paragraph (iv) of Kaplan & Stratton's letter dated 12th August 2003.
- i. Copy of Kaplan & Stratton's letter dated 5th October 2004, addressed to the Principal/Chief Land Registrar, referred to in Kaplan & Stratton's letter dated 21st April 2008.
- j. Copy of Kaplan & Stratton's letter dated 19th November 2004 addressed to Morendat Limited.

- k. Proof that the Commissioner of Land issued the Defendant/Kaplan & Stratton with the title of LR No.11367/3.
 - ii. That the costs of this application be provided for.
 2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal date, sworn by Counsel for the Third Parties/Applicants herein, who asserted that the 2nd Third Party was currently out of the country and that he was duly authorized to represent their interests and was conversant with the facts of the case. In summary, he cited Section 22 of the Civil Procedure Act and Order 7 Rule 5 of the Civil Procedure Rules, arguing that the Court has the power to order the production of documents at any time. That the Defendant had failed to serve its documentary evidence alongside its Defence as required by law, having only provided an incomplete bundle on 14th July 2025 following a court direction.
 3. That the Defendant was being frivolous, evasive, and obstructive by concealing vital information that would likely exonerate the Third Parties. He deposed that the Third Parties were entitled to all documents held by the Defendant that relate to the baseless allegations" made against them.
 4. He highlighted several missing or illegible documents regarding the subdivision of LR No. 11367, deposing that while the Defendant claims the property known as LR No. 11367 was subdivided to create five other properties namely LR No.11367/1, 11367/2, 11367/3, 11367/4 and LR No.11367/5 which was the one that was supposed to be transferred to the Plaintiff, they had failed to provide official searches or copies of the titles for the said subdivisions to confirm their existence. That the copies of the original title and deed plan provided by the Defendant were illegible, and therefore they sought to gain sight of the originals to make clear copies.
 5. They sought to verify how the Defendant was able to subdivide the land despite the alleged existence of prohibitory orders and caveats. They sought specific documents relating to the excise of 4,000 acres in favour

of Morendat Limited, and documents as listed herein above including records of Stamp Duty payments (specifically the jump from Kshs 860,065 to Kshs 6,920,000) and correspondence from 2003 and 2004 involving the late Ramesh Manek, Advocate, and the firm Kaplan & Stratton.

6. The deponent noted that since the Defendant joined them to a suit 22 years after these events, it was essential, for the interest of justice, that these historical documents be produced. They thus beseeched the court to compel the Defendant to file and furnish all the above-listed documents, and to allow for the inspection of the original titles to ensure a fair and just determination of the matter.
7. In response and in opposition to the Third Parties' Application, the Defendant filed via their Grounds of Opposition dated 20th January 2026 stated as herein summarized;
8. They contended that the application was bad in law, an abuse of the court process, and should be dismissed. They argued that the Supporting Affidavit was fatally flawed because it was sworn by the Advocate on record rather than the parties themselves. They asserted that the Advocate had included argumentative and contentious facts which are improper for an affidavit.
9. That the Court lacked Jurisdiction to order discovery under Section 22 of the Civil Procedure Act because the Third Parties had not filed formal pleadings, meaning that there was no legal basis to determine the relevance of the documents.
10. The Defendant described the third party's application as a fishing expedition that sought documents without a proven nexus to the case. They maintained that the burden of proof rested on them to establish their claim, and that any perceived shortcoming in their evidence was for the Court to decide at the main hearing, not via an interlocutory application.
11. They insisted that all relevant documents necessary for the Third Parties to defend the claim were already served in the bundle dated 14th

July 2025. The Third Parties were already in possession of (or ought to be in possession of) many of the requested documents (items 1a, 1d, 1e, 1f, 1g, and 1j) because they were active participants in the original transactions and legal proceedings.

12. That regarding LR Nos. 11367/3 and 11367/4, they never claimed that these titles currently existed or are in their custody; the pleadings only mention an intention to have titles issued eventually. They pointed out that they are not the issuer of official searches and if the Third Parties wanted searches or land registers, they should procure them from the Land Registry or summon the Land Registrar.
13. The Defendant expressed willingness to produce the original title for LR No. 11367/2 for inspection, but only at the substantive hearing of the suit and emphasized that disputes regarding the existence of documents or the veracity of evidence should be tested during cross-examination at trial, not interpreted by Counsel through an application.
14. Parties took directions to dispose of the Third Parties' Application, by way of written submissions as herein under summarised.

Third Parties' Submissions

15. Vide their submissions dated 3rd March 2026, the Third Parties summarized the factual background of the matter before framing their issues for determination as follows:
 - i. Whether the Honourable Court has jurisdiction to order for production of the documents sought by the Third Parties.
 - ii. Whether the application is bad in law, an abuse of court process and incompetent
 - iii. Whether the prayers sought in the application should be granted
16. The Third Party's submission is that their application is necessary because the Defendant provided an incomplete and illegible bundle of documents on 14th July 2025. They noted that they were joined to the suit

orally by the Defendant, who bypassed the strict requirements of Order 1 Rule 15 (which requires a formal application via Chamber Summons).

17. Their submissions cite Section 22 of the Civil Procedure Act and Order 11 Rule 3, asserting that the Court has the absolute power to order discovery at any time to ensure a fair trial. They relied on the decision in **ABN Amro Bank N.V v Kenya Pipeline Company Limited, [2014] eKLR** to argue that discovery levels the litigation field and prevents parties from being surprised by evidence at trial. They argued that under Order 7 Rule 5 of the Civil Procedure Rules, the Defendant was legally obligated to serve all documents at the time of filing their Defence, which they failed to do.
18. They defended the affidavit sworn by their Advocate, Anthony Thuo Kanai, noting that under Rule 9 of the Advocates (Practice) Rules, an Advocate is allowed to swear on formal and uncontested facts which are within his knowledge and that all the contents of the said Supporting Affidavit were formal uncontested issues of fact and law that were well within the knowledge of the Advocates conducting the matter on behalf of the Third Parties. Reliance was placed in the Court of Appeal's decision in the case of **Salama Beach Hotel-Vs-Mario Rossi [2015] eKLR**.
19. They also faulted the Defendant for having filed only Grounds of Opposition and no Replying Affidavit. Citing the case in **Kennedy Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Ltd [2010] eKLR**, they argued that failing to file a Replying Affidavit meant the facts deponed by the Third Parties remained uncontroverted and were effectively admitted.
20. In the same breath, they cited the provisions of Article 159(2)(d) of the Constitution, which prioritises substantive justice over procedural technicalities, to urge the Court to favour substantive justice. As was held in **Regina Waithera Mwangi Gitau-Vs-Boniface Nthenge[2015] eKLR**.

21. The Third Parties argued that the requested documents were essential to expose deceit and misrepresentation by the Defendant who claimed that the land was subdivided into five parcels (LR Nos. 11367/1-5). They argued that if the Defendant claimed that the said subdivisions exist, then they must have the titles or official searches. They questioned how subdivision could occur given the 1975 prohibitory orders.
22. That they also sought valuation reports and stamp duty records from 2003 and 2004 to verify the Defendant's claim regarding the Kshs 6.9 million payment increase and reiterated that the Defendant had provided illegible copies of the original title and deed plan for LR No. 11367, thus making physical inspection of the originals necessary.
23. The Third Parties focused on the specific missing correspondences of 2001-2003; they argued that the Defendant's bundle of documents dated 14th July 2025 made reference to several critical documents that were never actually produced. They specifically demanded:
 - a) Professional Undertaking: A letter dated 6th March 2001, addressed to the late Ramesh Manek, Advocate.
 - b) Consent Letter (HCC No. 2264 of 1985): A letter seeking to reinstate prohibitory orders against various titles, including LR No. 11367/2.
 - c) Proof of Return: Evidence that the firm Kaplan & Stratton returned documents listed in their correspondence of August 2003.
24. The Third Parties emphasized that because Ramesh Manek passed away years ago, the Defendant could not claim that they have custody of these documents; therefore, the burden lay on the Defendant to produce them.
25. A central pillar of the Third Parties' argument was the demand for a letter dated 5th October 2004, from Kaplan & Stratton to the Principal/Chief Land Registrar, asserting that this letter was the smoking

gun because it allegedly contradicted the Defendant's claim that they were unable to honour obligations due to caveats.

26. Secondly, although they (Third Parties) had conditionally lifted prohibitory orders to allow for the registration of LR No. 11367/3, the Defendant secretly wrote to the Land Registrar to recall the documents, effectively stopping the registration. That the Defendant has concealed the reason for this recall for 22 years, keeping both the Plaintiff and the Third Parties in the dark.
27. They contended that the Defendant was hell-bent on concealing the truth and argued that joining them to the suit two decades after these events, while simultaneously withholding the documents that explain why the transaction failed, was a move intended to obstruct justice and protect its (Defendant's) nefarious scheme. That the Defendant was intentionally concealing information to support false allegations.
28. They thus requested that the Court grant the orders for production to enable a fair adjudication of a matter involving transactions and correspondence dating back more than 22 years.

Defendant's Submissions.

29. The Defendant, vide its submission dated 10th February 2026, summed up the case before framing its issues for determination as follows:
 - i. Whether the application is bad in law, an abuse of the Court process and therefore incompetent.
 - ii. Whether the Defendant ought to be compelled to produce the documents sought by the Third Parties.
30. The Defendant argues that the Third Party's application is a deliberate attempt to delay the substantive dispute. They highlight that the Court previously struck out the Third Parties' Notice to Produce on 11th December 2025, for being fatally defective. The Third Parties have shown little inclination to proceed with the main case, instead opting to vex the Defendant with repetitive interlocutory applications.

31. They cited the Supreme Court's holding in **Charo v Mwashetani & 3 others (Civil Application 14 of 2014) [2014] KESC 41 (5 May 2014) (Ruling)** and Black's Law Dictionary to define abuse of process, as the improper use of court procedures to obtain results beyond the scope of legitimate litigation.
32. The major pillar of the Defendant's opposition was that the Supporting Affidavit was sworn by Counsel on record (Mr. Thuo) rather than the parties themselves. The Defendant argued that Counsel deponed to evidentiary and contentious facts at paragraphs 1, 3, 5-8, 10, 12, 13, which he could not prove of his own knowledge. That by swearing to these facts, the Advocate risked becoming a witness, which creates an absurdity, where he cannot fulfil his duty as Counsel. Reliance was placed on the decisions in **Mbugua & 3 others v Turi Garden Limited (Environment and Land Case Civil Suit E363 of 2024) [2025] KEELC 34 (KLR) (16 January 2025) (Ruling)** where the Court had cited the case of **Kisya Investment Limited & others v Kenya Finance Corporation Ltd HCCC No. 3504 of 1993 (Unreported)**, and the Supreme Court's decision in the case of **Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26th September 2022) (Judgement)** to urged the Court to strike out the averments at paragraphs 1, 3, 5, 6, 7, 8, 10, 12 and 13 of the Third Parties' Supporting Affidavit.
33. The Defendant contended that because the Third Parties had not filed any formal pleadings (a Defence to the Notice of Claim), there was no legal basis to determine what was relevant. That, without pleadings, the request was a fishing expedition and or search for a cause of action rather than discovery for a known issue. Reliance was placed on the decision in **Safaricom Plc v East Africa Data Handlers Limited (Civil Case E127 of 2019) [2022] KEHC 12979 (KLR) (Commercial and Tax) (14**

September 2022) (Ruling) where the Court had cited the case of **Concord Insurance Co. Ltd v Nic Bank Ltd [2013] KEHC 3571 (KLR)** which cases establish that discovery is limited to the parameters of filed pleadings to submit that the court cannot permit discovery to enable a party to make out a case.

34. The Defendant further asserted that the Third Parties had participated in the original transactions and already possess (or ought to possess) most of the requested documents.

35. Regarding LR Nos. 11367/3 and 11367/4, the Defendant's position was that their Defence only mentioned an **intention** to subdivide; they did not claim the titles currently exist or are in their custody. That they were not the issuer of official searches, and under the law, the Third Parties could procure these from the Land Registry or summon the Land Registrar.

36. The Defendant cited the case in **Crescent Distribution Services Limited v Unite Technologies Limited [2013] eKLR** to argue that a party has the liberty to present its case as it deems fit wherein the Court or opposing parties cannot dictate how the Defendant seeks to prove its claim. In conclusion, the Defendant maintained that they had already served all the intended evidence in their bundle dated 14th July 2025, that they were willing to produce the original title for LR No. 11367/2 during the substantive hearing, not via an interlocutory application, the application was incompetent and lacked merit, and therefore the same should be dismissed with costs.

Determination.

37. I have given due consideration to the Third party's application dated the 19th December 2025, the response by the Defendant, the rival arguments and the authorities cited, as well as the applicable law. In summary, the Third Party is seeking a court order to compel the Defendant to produce, file, and serve several specific categories of documents that they claim are being intentionally withheld. The Third

Party wants the Defendant to prove the existence of the subdivided parcels of land mentioned in the Statement of Defence, being LR Nos. 11367/1 through 11367/5, and specifically, they also seek original titles and official searches to confirm the existence of these titles, legible documents of the original title and deed plan for LR No. 11367, missing historical correspondences referenced in the Defendant's own records but not provided in the bundle, including the 2004 recall letter from the Defendant's lawyers to the Land Registrar allegedly recalling the transfer of the property, professional undertaking Letters from 2001 and 2003 involving a deceased advocate Ramesh Mane, financial and Government valuation Records from 2003 and 2004, as well as proof of stamp duty payments specifically relating to an increase in duty from approximately Kshs 860,000 to Kshs 6.9 million.

38. The Third Party's ultimate goal is to expose what they call a false narrative. They believe these documents will prove that the Defendant's inability to transfer the land to the Plaintiff was not caused by caveats or the Third Parties' actions, but by the Defendant's own internal decisions and deceitful conduct over the last 22 years.
39. In response, the Defendants' position is that the Third Parties' application is a frivolous delay tactic and a legal fishing expedition designed to avoid the actual trial. They argue that they have already fulfilled their disclosure obligations and that the current request is procedurally flawed. That the Third Parties' Supporting Affidavit was sworn by their Advocate rather than the clients themselves. They argue that an advocate cannot depone to contentious facts or evidentiary matters. By doing so, the advocate risks becoming a witness, which is a breach of legal practice rules and prevents the Defendant from cross-examining the actual parties on their claims.
40. The Defendant points out that the Third Parties have not yet filed a formal Statement of Defence to the Notice of Claim. They argue that discovery (the production of documents) must flow from the issues raised

in the pleadings. Since the Third Parties have not officially stated their case, the court cannot determine whether the requested documents are actually relevant or necessary. They maintain that they have already acted in good faith by providing a list and bundle of documents on 14th July 2025, containing all the evidence they intend to rely on at trial. They argue that the Third Parties were involved in the original transactions 22 years ago and therefore already possess or have knowledge of the documents they are now demanding.

41. The Defendant clarifies that they never claimed that there had been a subdivision of titles No. LR 11367/3 and 11367/4, but only pleaded an *intention* to subdivide. They argue that they are not the issuer of land searches; if the Third Parties want official searches or registry records, they should obtain them directly from the Land Registry. Finally, they were willing to produce the original title for inspection, but only during the main hearing, not at this preliminary stage.
42. Given this summary, I find the issue arising for determination as being
 - i. Whether the Third party's Supporting Affidavit is fatally defective.
 - ii. Whether the court can order the production of documents before the Third Parties have filed their formal Statement of Defence?
43. It is not in dispute that after the Plaintiff in this matter filed suit against the Defendant, vide a Plaint dated 11th March 2025, the Defendant filed its Statement of Defence dated 3rd June 2025 and successfully sought leave of the Court to join the 1st and 2nd Third Parties to the suit herein. The Defendant then served its "Third-Party Notices", "Notice of Claim", together with all its pleadings, list and bundle of documents, upon the Third Parties, who then filed a "Notice to Produce" stating inadequacy of the documents filed and served upon them by the Defendant.
44. On the first issue for determination as to whether the Third parties' Supporting Affidavit is fatally defective, the Court must balance the

Advocates (Practice) Rules against the Rules of Evidence regarding contentious facts. The Third Party's argument was that the affidavit was valid because it did not depone to the truth of the historical transaction, but rather to the status of the pleadings and the law. The Defendant's argument, on the other hand, was that the affidavit was defective because it was deponed by an Advocate who lacked personal knowledge of the underlying transactions from 22 years ago.

45. Whereas the provisions of Rule 9 of the Advocates (Practice) Rules stipulate that;

"No advocate shall appear before any court or tribunal in any matter in which he has reason to believe that he will be required as a witness to give evidence... Provided that this rule shall not apply to an advocate giving evidence on formal or non-contentious matter."

46. Order 19, Rule 3(1) of the Civil Procedure Rules provides that;
*"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."*

47. In **Mbugua & 3 others v Turi Gardens Limited (Environment and Land Case Civil Suit E363 of 2024) [2025] KEELC 34 (KLR) (16 January 2025) (Ruling) (persuasive)**, the court had at paragraphs 43 and 44 observed as follows:

"43. Put differently, it is trite and established that an advocate cannot swear an affidavit and depone to contentious matters. For good measure, where an advocate swears an affidavit and depones to contentious matters,

there arises a likelihood of the advocate being invited to step down from the privileged position and thereafter be subjected to cross examination. Quite clearly, such a scenario would create an absurdity and thus ought to be eschewed at all costs.

44. To underscore the foregoing position, it suffices to take cognizance of the holding in the case of **Kisya Investment Limited & others v Kenya Finance Corporation Ltd HCCC No 3504 of 1993 (Unreported)**, where Ringera J [as then was] stated thus:

“It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.....”

48. The Supreme Court castigated the practice of advocates swearing affidavits in contentious matters, noting they run the risk of "unknowingly swearing to falsehoods in the case of **Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26th September 2022) (Judgement)**, when it held as follows:

“The court could not countenance that type of conduct on the part of counsel who were officers of the court. Affidavits filed in court had to deal only with facts which a deponent

can prove of his own knowledge and as a general rule, counsel were not permitted to swear affidavits on behalf of their clients in contentious matters, as was the case in the presidential election petition, because they ran the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.”

49. I find the issues raised in Paragraphs 1, 3, and 11 were averments on formal facts as to who was acting for whom, which are formal matters within an advocate's professional knowledge and therefore, on this aspect, the supporting affidavit, I find, was not defective.
50. In relation to the averments at Paras 5, 8, 14, I find these were contentious facts on allegations of deceit, nefarious schemes, or falsehood on the part of the Defence, which allegations went to the heart of the dispute and would therefore require the client (who lived through the events) to depone. On this aspect, I find the Supporting Affidavit was potentially defective.
51. However, a unique twist in this case is that the Defendant did not file a Replying Affidavit to the application but only filed their grounds of opposition. The third party deponed that the Defendant is concealing documents and that the Advocate is authorized to swear the affidavit. The Defendant argued that the Advocate shouldn't have deponed the affidavit, which is a point of law. However, the Defendant could not effectively argue that they lacked the documents or that the documents were irrelevant, because those were questions of fact that required a Replying Affidavit to contradict the Third Party's claims. According to the case in **Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited [2010] KEHC 282 (KLR)**, it was held that:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The

*grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant. In this regard, the court held in **Kipyator Nicholas Kiprono Biwott.v. George Mbuguss and Kalamka Ltd Civil case no. 2143 of 1999** ".....From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit.....having filed no replying affidavit to rebut the averments in the plaintiff's affidavit in support of the application. I therefore have no alternative but to strike out paragraphs 3,4,5,6 and 10 of the defence and enter judgment for the plaintiffs on liability..."*

*Further, the court concluded that failure to file a replying affidavit amounts to an admission of facts on the applicant's application. This was the holding in the case of **Crown Berger Kenya Ltd. v. Kalpech Vasuder Devan and another civil case no. 246 of 2006 (UR).**"*

52. In this case, it was held that the failure to file a replying affidavit amounted to an admission of the facts deponed. The Third Parties argue that even if the Advocate was the wrong person to depone, the Defendant's failure to challenge the facts under oath makes the defect moot. I agree and find that the affidavit is not fatally defective in its entirety, more so regarding the need for documents, as that is a procedural matter handled by the Advocate.
53. On the second issue for determination, whether a court can order discovery (the production of documents) before the filing of a formal

Statement of Defence, touches on the tension between strict procedural timelines and the right to a fair hearing. Indeed, under modern Kenyan jurisprudence, the answer is yes, the court has the discretion to order production even before pleadings are closed, provided the Applicant demonstrates that such documents are necessary to enable them to plead their case or to prevent a trial by ambush.

54. Section 22 of the Civil Procedure Act is the primary source of the court's power, which provides as follows:

"Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

a. make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

b. issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

c. order any fact to be proved by affidavit."

55. The phrase "at any time" is critical because it suggests that the court's power is not strictly tethered to the filing of a Defence. Order 11, Rule 3 of the Civil Procedure Rules also provides for discovery and inspection. While Order 11 of the same Act generally deals with "Pre-Trial Directions and Conferences" (which usually happen after pleadings), the court's inherent power under Sections 1A and 1B (the Oxygen Principle) allows it to override technicalities to ensure the "just, expeditious, and cost-effective" resolution of disputes.

56. The learned authors of **Halsbury's Laws of England Volume 13**, opined that:

"The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."

57. In **ABN Amro Bank N.V** (supra), the Court at paragraphs 13, 14 and 15 had held as follows:

"Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that "the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial." It, therefore, serves a higher objective as the enabler of fair hearing. Needless to state the primary devices of discovery are interrogatories, depositions, request for admissions, inspection of documents and requests for production of documents etc.

I will apply that test on the circumstances of this case. The first prerequisite is fairly straight forward. The Applicant has identified the holder of the information to be the Plaintiff... The Applicant has also identified the information and or documents sought ...

Is this information relevant or necessary to the matters in issue? Relevance entails the nexus between the documents and this case. The documents and or information sought

have been pleaded by the Plaintiff and the Defendant... These averments in the pleadings are relevant and refer expressly to issues arising from transactions leading to the documentation which the Defendant has applied to be produced.

.....If these issues have been pleaded, a just and proportionate determination thereof will support disclosure of full information and documentation which form part of the case before Court. The statutory obligation on parties under the overriding objective would also support an order for discovery in the circumstances of this case. Discovery and other disclosure processes are expected to elicit voluntary response once they are issued by and between the parties. But where a party has failed to make discovery voluntarily, the Court renders its coercive process to compel discovery of information and documents which are relevant and necessary to the resolution of the dispute before the Court."

58. This authority suggests that discovery is an enabler of the right to a fair trial under Article 50(2) of the Constitution. If a Third Party cannot effectively draft a Defence because the Defendant is withholding the very documents that define the claim, the court will intervene. If the litigation field is uneven before the Defence is filed, the court uses discovery to level the playing field.
59. The Defendant's main argument is that discovery before pleadings is a "fishing expedition." The law distinguishes between a party seeking a reason to sue, which is prohibited, and a party seeking specific documents referred to in the opponent's pleadings, which is allowed because if the documents are already referred to in the Plaintiff's Plaint or the Defendant's Notice of Claim, the Third Party has an immediate right to see them under Order 7, Rule 5 of the Civil procedure Rules, which requires copies of all documents to be served alongside the pleading.
60. A pre-trial disclosure is a cardinal requirement, and the function of discovery is to provide parties with material before the trial" to assist them in appraising the strength or weakness of the case. The Third Parties argue that they were joined to a 22-year-old dispute. I find that requiring

a party to plead to allegations from two decades ago, without access to the primary documents mentioned in the defence/Notice of Claim, violates the principle of Substantive Justice under Article 159 of the Constitution.

61. I thus find that the court has jurisdiction under Section 22 of the Civil Procedure Act to order the Defendant to produce those documents, so the Third Parties can file an informed Statement of Defence. To this effect, the Court finds the Third Parties' application dated 19th December 2025 to be meritorious and directs as follows:

- i. The Defendant is hereby ordered to produce, file, and serve upon the Third Parties all documents listed in the Notice of Motion, save for the public documents (the searches), within fourteen (14) days of this Ruling.
- ii. The Defendant shall make available for inspection the original Title Deeds and Deed Plans for LR No. 11367 and its sub-divisions(if any) at the Defendant's Advocate's office, upon giving forty-eight (48) hours' notice, to allow the Third Parties to sight the same and make clear copies.
- iii. The Third Parties are granted leave to file and serve their Statement of Defence to the Notice of Claim within fourteen (14) days of receipt of the said documents.
- iv. The costs of this application shall be in the cause.

Dated and delivered via Microsoft Teams at Naivasha this 23rd day of April 2026.



M.C. OUNDO

ENVIRONMENT & LAND COURT - JUDGE