

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 840 OF 2016**

*(CONSOLIDATED WITH ELC CASE NO. 771 OF 2016 AND ELC CASE NO. 1040 OF 2016)*

**UNITED STATES INTERNATIONAL UNIVERSITY.....1ST  
PLAINTIFF**

**MUTHAIGA LUXURY HOMES LIMITED.....2ND PLAINTIFF**

**MAESTRO CONNECTIONS HEALTH SYSTEMS LIMITED.....3RD PLAINTIFF**

**VERSUS**

**ZEHRABANU JANMOHAMED (S.C) (Suing as the Executrix  
of the Estate of the Late**

**H.E. DANIEL TOROITICH ARAP MOI).....1ST DEFENDANT**

**CHIEF LAND REGISTRAR.....2ND DEFENDANT**

**DIRECTOR OF SURVEY.....3RD  
DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4TH DEFENDANT**

**ICEA LION LIFE ASSURANCE COMPANY LIMITED.....5TH DEFENDANT**

**BALOZI COOPERATIVE SOCIETY LIMITED.....6TH DEFENDANT**

**OMWANZA OMBATI.....7TH DEFENDANT**

**ANDREW SUNKULI.....8TH DEFENDANT**

**TRIPLEOK LAW ADVOCATES LLP.....9TH  
DEFENDANT**

**RILEY SERVICES LIMITED.....10TH  
DEFENDANT**

**DPS INTERNATIONAL LIMITED.....11TH  
DEFENDANT**

**RULING**

*(In respect of the Notice of Motion application dated 6th March 2026 seeking to introduce pleadings, proceedings and judgement from a different case and recall the 2nd Plaintiffs' witnesses for cross-examination)*

### **Introduction**

1. Before this Court for determination is the **Notice of Motion** dated **6th March 2026**, brought by the **1st Defendant**. The Application is expressed to be brought under the canopy of **Articles 50(1) and 159(2)** of the Constitution of Kenya; **Sections 1A, 1B, and 3A** of the Civil Procedure Act; and **Section 146(4)** of the Evidence Act, as well as all other enabling provisions of the law.
2. In the said Motion, the 1st Defendant/Applicant seeks the following orders:
  - a) *THAT this Honourable Court be pleased to grant leave to the 1st Defendant to file and serve a Further/Supplementary List and Bundle of Documents; and*
  - b) *THAT this Honourable Court be pleased to grant leave to the 1st Defendant to recall the 2nd Plaintiff's witnesses namely: Dr. James N. Mwangi and Mrs. Mary Kiarie for further cross-examination on the materials contained in the 1st Defendant's Further/Supplementary List and Bundle of Documents.*
3. The Application is supported by the Affidavit of **Zehrabanu Janmohamed (S.C)**, the Executrix of the Estate of the late H.E. Daniel Toroitich Arap Moi, sworn on **6th March 2026**. The gist of the application is that in the course of the hearing of this case particularly on **5th December 2023**, the 2nd Plaintiff's witness, **Dr. James N. Mwangi**, was cross-examined regarding the purchase of a property in Muthaiga, referred to as the "**Getrude Property**" (L.R. No. 214/832), from the late President Moi. The Applicant contends that Dr. James N. Mwangi was evasive and claimed a lack of recollection regarding the particulars of this transaction, including the purchase price and the professionals involved.

4. The Applicant deposes that subsequent to that testimony, a Judgment was delivered on **23rd October 2025** by the **Hon. Justice Oscar Angote** in **Nairobi ELC Case No. E038 of 2020** (*Mount Pleasant Limited v James Njuguna Mwangi & Others*). According to the Applicant, the pleadings and Judgment in that matter reveal a **Kshs. 300,000,000/=** transaction involving Dr. Mwangi, his wife, and the late President Moi, which took place in **December 2012**. The 1st Defendant argues that this transaction occurred contemporaneously with the alleged transaction in the present suit and involved the same legal and professional agents. It is the Applicant's contention that this evidence is credible, highly relevant to the credibility of the witnesses, and only became available after the conclusion of the *Mount Pleasant* case.
5. The **8th Defendant, Andrew Sunkuli**, filed a **Replying Affidavit** on **30th March 2026** in support of the Motion. He concurs with the 1st Defendant that the introduction of these materials is crucial for a just determination of the dispute over **L.R. No. 12422/19**. The 8th Defendant emphasizes that the documents from the *Mount Pleasant* suit provide a vital nexus to the transactions under scrutiny in this consolidated matter. He maintains that the evidence could not have been produced earlier with due diligence as the Judgment in Case No. E038 of 2020 was only rendered long after the Pre-Trial Conference and the initial testimony of the witnesses in this suit.
6. The **2nd Plaintiff, Muthaiga Luxury Homes Limited**, has filed a robust opposition comprising **Grounds of Opposition** and a **Replying Affidavit** sworn by **Jane Wangui Mundia** on **20th March 2026**. The 2nd Plaintiff's opposition is centered on several thematic pillars:

**Irrelevance and Prejudice:** The 2nd Plaintiff argues that the "Getrude Property" is an entirely distinct parcel of land that is not the subject of the current litigation. They contend that introducing over **500 pages** of external pleadings would serve only to cloud the issues and cause inordinate delay.

**Laches and Delay:** It is asserted that the 1st Defendant was a party to the *Mount Pleasant* suit and was therefore aware of those proceedings for years. The 2nd Plaintiff posits that the Applicant should have sought these documents during the pre-trial phase and that bringing the application now—after the witnesses have been discharged—is an abuse of the court process.

**Finality of Evidence:** The 2nd Plaintiff maintains that **Dr. James N. Mwangi** and **Mrs. Mary Kiarie** have already completed their testimony and that there are no "ambiguities" that warrant a recall under **Section 146(4)** of the Evidence Act. They characterize the application as a "fishing expedition" intended to re-litigate issues already handled in a different forum.

7. The **4th Defendant (The Hon. Attorney General)** filed **Comprehensive Grounds of Opposition** asserting that the application is barred by the doctrine of laches. The Attorney General argues that the documents sought are matters of public record and that the Applicant has failed to provide a cogent explanation as to why they were not introduced earlier. The 4th Defendant further contends that the application does not meet the legal threshold for the admission of additional evidence at this late stage of the proceedings.
8. The **6th Defendant (Balozi Cooperative Society Limited)**, through **Grounds of Opposition** filed on **16th March 2026**, similarly opposes the Motion. They describe the

application as a "delay tactic" designed to derail the conclusion of the consolidated suits. The 6th Defendant argues that the Applicant is attempting to introduce evidence "through the back door" and that granting the orders would be a departure from the overriding objective of the court to ensure timely and proportional resolution of land disputes.

### **Directions**

9. The application was canvassed by way of written submissions, the submissions of which have been duly considered in the writing of this ruling.

### **Issues for determination**

10. Having considered the Motion, the supporting and opposing affidavits, the various sets of Grounds of Opposition and the submissions on record the following issues emerge for this Court's determination:

- i. Whether the Applicant has demonstrated the existence of new and important evidence that was not available at the time of the Pre-Trial Conference or during the witnesses' testimony;*
- ii. Whether the pleadings and Judgment in Nairobi ELC Case No. E038 of 2020 are sufficiently relevant to the issues in the current consolidated suit to warrant their admission; and*
- iii. Whether the 1st Defendant has established a proper basis under Section 146(4) of the Evidence Act to recall discharged witnesses for further cross-examination.*

### **Analysis and Determination.**

11. The 1st Defendant's Motion dated 6th March 2026 invites this Court to exercise its discretionary jurisdiction in favour of reopening a matter that has substantially progressed, by introducing a fresh body of evidence drawn from an entirely separate suit and by recalling witnesses who have long since testified and been discharged.
12. The jurisdiction to admit additional evidence after commencement of trial is not automatic. It is a narrow, exceptional and carefully guarded jurisdiction intended to advance justice, not to permit parties to repair weak points in their cases, re-engineer litigation strategies, or prolong proceedings endlessly. Equally, the power to recall witnesses under **Section 146(4) of the Evidence Act** is not designed to afford dissatisfied litigants a second bite at the cherry after extensive cross-examination has already been undertaken.
13. The starting point is the law governing admission of additional evidence. The Supreme Court in *Mohammed Abdi Mohamud v Ahmed Abdullahi Mohamud & 3 Others [2018] KESC 62 (KLR)*, laid down the guiding principles as follows:
- “We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:*
- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;*
  - (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;*
  - (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not*

*have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;*

*(d) where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;*

*(e) the evidence must be credible in the sense that it is capable of belief;*

*(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;*

*(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;*

*(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;*

*(i) the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence; and*

*(j) a party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.”*

14. Although the foregoing principles were pronounced in the appellate context, they embody the broader jurisprudential safeguards applicable whenever a court is invited to reopen proceedings for purposes of additional evidence.

15. Applying those principles to the present application, the Court finds that the Applicant has failed, fundamentally and fatally, on the twin requirements of diligence and relevance.
16. First, on the issue of diligence, the Applicant's position is internally contradictory. On one hand, the 1st Defendant asserts that the evidence only became available upon delivery of Judgment in Nairobi ELC Case No. E038 of 2020 on 23rd October 2025. On the other hand, the material sought to be introduced comprises pleadings, transactional documents, and allegations arising from litigation in which the Applicant had full knowledge of for several years.
17. The pleadings in ELC Case No. E038 of 2020 were never concealed. The case was openly conducted. They were matters of public record. The transactions referred to therein were equally known to the Applicant long before the testimony of Dr. James N. Mwangi and Mrs. Mary Kiarie. Indeed, the Applicant cross-examined Dr. Mwangi extensively regarding the so-called "Getrude Property" transaction during the hearing conducted on 5th December 2023. The contention therefore that the evidence was somehow unavailable is plainly untenable.
18. This Court agrees entirely with the submissions of the 2nd Plaintiff and the Attorney General that what became available in October 2025 was merely a Judgment — not the underlying facts, pleadings, or transactional history. The Applicant cannot artificially convert old facts into "new evidence" merely because another court subsequently rendered a determination touching on those facts.
19. This Court must state without equivocation that litigation cannot proceed on the basis of tactical ambush. A party cannot consciously elect not to introduce evidence during trial,

await the outcome of collateral proceedings elsewhere, and thereafter seek to reopen the case once a potentially useful judgment emerges. Such conduct is antithetical to the principles of finality, procedural discipline, and orderly adjudication.

20. Secondly, the Court is not persuaded that the proposed evidence bears sufficient relevance to the real issues in controversy in the present consolidated suits. The dispute before this Court concerns ownership and competing claims relating to L.R. No. 12422/19. The material sought to be introduced concerns an entirely separate parcel of land namely L.R. No. 214/832, referred to as the “Getrude Property.”
21. The Applicant attempts to construct relevance on the basis that similar actors, advocates, or professionals may have participated in both transactions. With respect, that argument is dangerously speculative and legally insufficient. The mere fact that the same individuals participated in unrelated land transactions does not establish probative relevance to the ownership dispute presently before this Court.
22. The proposed evidence would inevitably divert the Court into collateral inquiries wholly extraneous to the pleadings in this matter. It would transform these proceedings into a sprawling inquiry into the propriety of unrelated commercial transactions. Courts exist to determine pleaded disputes — not to supervise generalized character examinations of litigants through unrelated proceedings.
23. The Court is persuaded that the intended evidence is directed less toward determination of the ownership issues herein and more toward impugning the character and credibility of the targeted witnesses by reference to unrelated litigation. Such an exercise would serve only to muddy the waters, prolong the proceedings, and prejudice parties who have already closed their respective cases.

24. The Court further notes that the Applicant seeks to introduce over 500 pages of documents at an advanced stage of proceedings. The Supreme Court in **Mohammed Abdi Mohamud v Ahmed Abdullahi Mohamud & 3 Others [2018] KESC 62 (KLR)** expressly cautioned that additional evidence should not be “so voluminous making it difficult or impossible for the other party to respond effectively.” The present application offends that principle directly.
25. Equally significant is the inordinate and unexplained delay attendant to the present Motion. The testimony complained of was taken in December 2023. The present application was only brought in March 2026, long after the witnesses had testified and been discharged.
26. The Court adopts the reasoning in **Susan Wavinya Mutavi v Isaac Njoroge & Another [2020] KEELC 8 (KLR)** where the Court stated that:
- “The discretion to reopen a case and admit further evidence must be exercised sparingly and with abundant caution. The Court must guard against parties seeking to fill gaps in their cases or occasion prejudice through delayed applications.”***
27. That statement reflects the exact vice apparent in the present Motion. The Applicant is plainly dissatisfied with the evidentiary position emerging from the trial and now seeks to reinforce her cross-examination by importing external proceedings. That is impermissible.
28. Turning to the prayer for recall of witnesses, **Section 146(4) of the Evidence Act** provides:

*“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.”*

29. The operative word is “may.” The provision confers discretion, not entitlement. Such discretion must be exercised judicially and only where recall is necessary for clarification of material ambiguities or for the ends of justice. This Court finds no such necessity here.
30. The 2<sup>nd</sup> Plaintiff’s witnesses were extensively cross-examined by all the parties including the Applicant herein. The Applicant had full opportunity to challenge their testimony. No ambiguity has been demonstrated that requires clarification. What the Applicant now seeks is not clarification, but expansion of cross-examination into areas arising from subsequent strategic developments.
31. The Court entirely agrees with the 2nd Plaintiff that the application amounts to a fishing expedition. The intended recall is calculated to reopen completed evidentiary contests and prolong already protracted proceedings.
32. The overriding objective under **Sections 1A and 1B of the Civil Procedure Act** obligates this Court to facilitate **the “just, expeditious, proportionate and affordable resolution of civil disputes.”** Litigation must at some point come to an end. Parties cannot be permitted to perpetually reopen proceedings whenever new tactical angles emerge.
33. **Article 159(2)(b) of the Constitution** expressly commands that “justice shall not be delayed.”

35. The present consolidated suits were instituted in 2016. Nearly a decade later, this Court must be vigilant against procedural maneuvers whose practical effect is to derail the conclusion of the trial.

36. Having carefully considered the Motion, the affidavits both in support and opposition, the Grounds of Opposition, and the rival submissions by counsel, this Court is not persuaded that the Applicant has satisfied the legal threshold for the grant of the orders sought. The Court finds the Applicant's Motion is devoid of merit.

37. Accordingly, the Notice of Motion dated 6th March 2026 is hereby dismissed in its entirety with costs to the 2nd Plaintiff.

Ordered accordingly.

**Dated, Signed and Delivered Virtually this 8<sup>th</sup> Day of May, 2026.**

**M.D. MWANGI**  
**JUDGE**

**In the virtual presence of:**

Mr. Kere for the 1<sup>st</sup> Defendant/Applicant

Mr. Githara for the 2<sup>nd</sup> Plaintiff/Respondent

Mr. Lawson Ondieki for the 5<sup>th</sup> Defendant

Mr. Mark Otieno h/b for Mr. Okach and Kanjama SC for the 3<sup>rd</sup> Plaintiff

Mr. Allan Kamau for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants

Mr. Elkington for the 7<sup>th</sup> & 8<sup>th</sup> Defendants

Mr. Thiga for the 6<sup>th</sup> Defendant

Mr. Ole Ntome with Mr. Kiche for the 9<sup>th</sup> Defendant

N/A for the 1<sup>st</sup> Plaintiff, 10<sup>th</sup> and 11<sup>th</sup> Defendants

Court Assistant: Alex

**M.D. MWANGI**  
**JUDGE**

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