



**Wanguche v Were (Environment and Land Appeal 5 of 2020)  
[2023] KEELC 16906 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16906 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL 5 OF 2020  
DO OHUNGO, J  
APRIL 25, 2023**

**BETWEEN**

**JOSEPH MUNYENDO WANGUCHE ..... APPELLANT**

**AND**

**JUMA KUSINYO WERE ..... RESPONDENT**

*((Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. T A Odera, Senior Principal Magistrate) delivered on 17th January 2020 in Mumias MCELC No. 16 of 2018))*

**RULING**

1. Being aggrieved by the judgment of the Senior Principal Magistrate's Court at Mumias delivered on 17<sup>th</sup> January 2020 by T A Odera, Senior Principal Magistrate (as she then was), the appellant filed this appeal on 10<sup>th</sup> February 2020. Subsequently, the appellant filed Notice of Motion dated 1<sup>st</sup> November 2022, which is the subject of this ruling.
2. The following orders are sought in the application:
  1. That the Applicant be permitted to adduce further evidence in this appeal which evidence could not have been reasonably have been (sic) available at the time of trial at the Lower court.
  2. That the further evidence sought to be introduced be limited to the Land Control Board minutes of Mumias Land Control Board taken on 12/1/1988 marked as J.W.1 and search certificate for the parcel of land No. S.Wanga/Buchifi/3018 marked J.W.4 attached to the affidavit of Joseph Munyendo Wanguche in support of this application.



3. That any other further orders be made as this Honourable court may deem just and expedient.
  4. That the costs of this application be provided for.
3. The application is supported by an affidavit sworn by the appellant. The respondent opposed the application through a replying affidavit which he swore on 14<sup>th</sup> January 2023. The application was canvassed through written submissions, which both parties duly filed.
  4. I have considered the application, affidavits, and the submissions. The Supreme Court distilled principles applicable to an application for admission of additional evidence on appeal in *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR where the court stated thus:

Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. 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 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 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. whether 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;
- j. the Court must find the further evidence needful;
- k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.



5. Thus, the decision whether to allow an application for admission of additional evidence at the appeal stage is one made in exercise of discretion. Among others, the applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial. The route of additional evidence at the appeal stage is not available if the additional evidence is intended to patch up weak points in the applicant's case.
6. The evidence that the applicant now seeks to introduce is Land Control Board minutes of Mumias Land Control Board of 12<sup>th</sup> January 1988 and a certificate of search in respect of land parcel number S.Wanga/Buchifi/3018, issued on 30<sup>th</sup> August 2021. The applicant contends that despite exercising diligence, he could not have secured the evidence so as to produce it at trial. Regarding the minutes of Mumias Land Control Board, he maintains that he did not know that they were preserved at the Kenya National Archives and that he only applied for them after realising that they were available at the archives. The respondent's position is that the applicant was not diligent, that the application has been brought after unreasonable delay and that he will be prejudiced if the additional evidence is admitted.
7. The applicant has not provided anything to show when and how, if at all, he applied for the minutes from the Kenya National Archives. The Kenya National Archives and Documentation Service is a public department established under Section 3 of the [Public Archives and Documentation Service Act](#). It should not be impossible to provide formal evidence of request for and provision of records from the department. As matters stand, the applicant has not demonstrated that he obtained the minutes from the Kenya National Archives, and if so, when?
8. As regards the certificate of search, I note that it was issued on 30<sup>th</sup> August 2021, over one and a half years after the judgment that has been appealed against. A certificate of search is a document that is available on application to the Land Registrar. The applicant has not shown that he applied for the certificate of search prior to trial.
9. The applicant has failed to show that he could not obtain the evidence despite reasonable diligence. On the contrary, it is manifest to me that the proposed additional evidence is intended to patch up the applicant's case. Such an eventuality would be prejudicial to the respondent.
10. In view of the foregoing, Notice of Motion dated 1<sup>st</sup> November 2022 is without merit. I therefore dismiss it with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF APRIL 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The appellant in person

Ms Anono holding brief for Mr Luchivya for the respondent

Court Assistant: E. Juma

