



**Mburu v Wainaina (Environment & Land Case 319 of 2017)
[2025] KEELC 4841 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 4841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 319 OF 2017**

JM ONYANGO, J

APRIL 28, 2025

BETWEEN

LUCIA NYAGAKI MBURU PLAINTIFF

AND

TERESIA WANJIKU WAINAINA DEFENDANT

RULING

1. This court delivered a ruling on 26/2/2025 declining to set aside its orders made on 23/1/25, rejecting the Defendant's request to call an additional witness. The Defendant/Applicant subsequently filed an application dated 11/3/2025 seeking leave to appeal against the ruling rendered on 26/2/2025. The Defendant also sought an order deeming the Notice of Appeal dated 11/3/2025 as properly filed. The application dated 11/3/2025 is the subject of this ruling.
2. The application is predicated on the grounds set out in the Notice of Motion and the Applicant's Supporting Affidavit sworn on 11th March 2025. The Applicant maintains that the additional witness she wished to call at the hearing would have provided vital information on the allocations and surrender of titles of the suit property. She faults this court for dismissing the application on the ground that it was suspect and that it was intended to fill the gaps in her case.
3. She deposes that the *Constitution* of Kenya, 2010 expressly provides that all parties in litigation should be heard. She adds that the doctrine of natural justice prohibits one from being condemned without being fully heard. She further faults this court for denying her an opportunity to fully adjudicate her case by calling an additional witness who has vital information on the suit property.
4. She contends that this court has the mandate to grant her leave to appeal against the ruling issued on 26/2/2025 in furtherance of her right to access justice. She adds that she has lodged the Notice of Appeal, which she urges the court to deem properly filed.



5. The application was opposed by the Plaintiff/Respondent through her Replying Affidavit sworn on 1st April 2025. The Respondent contends that the application to introduce an additional witness and documents, violates the provisions of Article 50 (1) of the Constitution of Kenya, 2010 on fair hearing, therefore this court has the discretion to refuse to grant the Applicant leave to appeal in order to safeguard her rights and the supremacy of the Constitution.
6. The Respondent is of the view that this application is a delaying tactic by the Applicant to further drag the eight-year-old suit, against the principle of timely administration of justice. The Respondent faults the Applicant for seeking to introduce a witness who she claims is a former chairlady of Nyakinyua Investments Limited, yet she intends to call the current chairlady of the company as one of her witnesses. She adds that the current chairlady is well versed with the affairs of the company, therefore she would be better placed to answer any questions or issues regarding transactions of the company that the Applicant might want to bring to the attention of the court.
7. It is her contention that the Applicant will not be prejudiced if this application is not allowed, given that her counsel will have sufficient time to cross-examine the current chairlady of Nyakinyua Investments Limited. She urged the court to exercise its discretion in her favour and dismiss this application. She further urged the court to consider her deteriorating health condition and order that the suit proceed for hearing on 6/5/2025 as previously scheduled.

Analysis and Determination

8. I have considered the application, the replying affidavit and the relevant provisions of the law. The only issue for determination is whether the defendant should be granted leave to file an appeal against the ruling rendered on 26/2/2025.
9. The Applicant relies on Order 43 Rule 2 and Order 51 Rule 1 in bringing this application. Order 43 Rule 2 provides that:

“ An appeal shall lie with the leave of the court from any other order made under these Rules.”
10. Order 51 Rule 1 on the other hand provides that:

“ All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in, chambers or unless the rules expressly provide.”
11. An appeal from a decision of a court declining a request to allow additional witnesses in a suit is not a matter of right. One has to seek leave of the court. The Court of Appeal in Nyutu Agrovet Ltd vs Airtel Networks Limited [2015]eKLR quoted with approval the decision of the court in Nova Chemicals Ltd v Alcon International Ltd HC Misc Appl No. 1124 of 2002, where the learned judge held as follows:

“ The point of departure must be the recognition that the right of appeal with or without leave must be conferred by statute and the same is never to be implied.”
12. This application was filed timeously. I find that there is no sufficient reason to refuse to grant the Applicant leave to institute the appeal. I therefore find that the application is meritorious, hence it is allowed in terms of prayers (2) and (3) of the Notice of Motion. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF APRIL 2025

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J. M ONYANGO

JUDGE

In the presence of:

Miss Kinyanjui for Mr Kinyua for the Plaintiff/Respondent

Mr Odoyo for the Defendant/Applicant

Court Assistant: Hinga

