



Adolwa v Evangelical Lutheran Church in Kenya (Land Case Appeal E074 of 2024) [2025] KEELC 4133 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE APPEAL E074 OF 2024**

**E ASATI, J
MAY 26, 2025**

BETWEEN

PATRICK ADOLWA APPELLANT

AND

EVANGELICAL LUTHERAN CHURCH IN KENYA RESPONDENT

(Being an appeal from the ruling and decree delivered by Hon. Joyce Akinyi Osodo on the 29th day of August 2024 in the Business Premises Rent Tribunal Case No. E016 OF 2024, Kisumu)

RULING

1. Vide the Notice of Motion application dated 5th February, 2025 the Appellant sought for orders that;
 - a. The honourable court be pleased to set aside and stay the execution of the ruling dated 29th August, 2024 in the Business Premises Rent Tribunal case No.E016 of 2024 Kisumu, pending the hearing and determination of the appeal.
 - b. The honourable court be pleased to order the Registrar of Societies to present the official Registration Certificate of the Respondent before the Honourable Court.
 - c. The honourable court be pleased to order the Registrar of Societies to present before the honourable court a certified copy of *the Constitution* of the Respondent.
 - d. That upon presentation of the above requested documents by the Registrar of Societies, the honourable court be pleased to grant leave to the Appellant/Applicant to amend his Memorandum of Appeal dated 16th September, 2024.
 - e. That the honourable court be pleased to order that the Appellant/Applicant's property/ furniture worth approximately Kshs.2,500,000/- being held by the Respondent be used as security during the entire appellate process.



- f. Costs of the application be in the cause.
2. The application was supported by the contents of the Supporting Affidavit of Patrick Adolwa, the applicant and annexures thereto.
 3. In response to the application, the respondent filed 3 documents namely; Grounds of Opposition dated 20th March, 2025, a Replying Affidavit sworn by Sylvester Ochieng Owuondo and a Chamber Summons application of even date. Vide the Chamber Summons, the Respondent sought for orders that;
 - a. Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,14, 15, 16, 18, 20 and 21 of the Appellant/Applicant's Supporting Affidavit herein of Patrick Adolwa sworn on 5th February, 2025 be struck out and expunged from the record.
 - b. The Appellant/Applicant do pay the costs of this application
 - c. Further or other order that this honourable court may deem just in the circumstances.
 4. In a rejoinder to the documents filed by the Respondent, the Applicant filed a Further Affidavit sworn on 9th April, 2025.
 5. Direction were taken on 20th March, 2025 that the two applications be heard together by way of written submission.
 6. Written submissions dated 11th April, 2025 were filed by the firm of Magotsi Law Advocates on behalf of the applicant and on behalf of the Respondent written submission dated 7th May, 2025 were filed by the firm of Otieno Ochich & Associates Advocates.

I have taken the submissions into account.
 7. The Respondent's application that seeks to expunge certain paragraphs from the Appellant's Supporting Affidavit was brought pursuant to the provisions of Order 19 Rules 3, 6 and 9 of the Civil Procedure Rules 2010. Rule 6 empowers the court to strike out from any Affidavit any matter which is scandalous, irrelevant or oppressive. Rule 3 provides for matter to which Affidavits shall be confined to.
 8. According to the Respondent, the paragraphs of the Supporting Affidavit that are sought to be struck out are contrary to the law on Affidavits. That they are argumentative, scandalous, oppressive, speculative and not statements of fact.
 9. That the deponent has suggested without basis that the Appellant is an unlawful entity who does not lawfully pay tax. That the Applicant is not competent or has not demonstrated capacity to depone to matters of law as he has purported to do at paragraphs 3, 4, 5, 17 and 22.
 10. I have perused the Supporting Affidavit and I find that most of the matters deponed to are matters of law and the deponent has not indicated the source of his knowledge – whether he is a lawyer or whether he was informed by the lawyers. Under Order 19 Rule 3 Affidavits are supposed to be confined to the matters specified therein.
 11. I find that the paragraphs containing matter of law are sworn contrary to law and under the provisions of Order 19 Rule 6, hereby strike them out.
 12. The application by the Appellant seeks firstly for an order of stay of execution or setting aside of the orders of the Tribunal. The court record shows that the Appellant had filed an application seeking similar orders in respect of which the ruling was delivered on 14th November, 2024. The prayer for



settling aside or stay of execution of the orders of the tribunal is therefore res judicata and hence unavailable.

13. The other prayers in the appellant's application namely; prayers 3 and 4 are prayers for production of additional evidence. Although Section 78 of the *Civil Procedure Act* empowers the court as an appellate court to order for production of additional evidence, the condition there are conditions that an applicant must satisfy for grant of an order for production of additional evidence.

Under Order 42 Rule 27;

“27(1) The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the court to which the appeal is preferred; but if:-

- a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
- b. the court to which the appeal is preferred requires any documents to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.

(2) Where additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for the admission.”

14. The Supreme Court in the case of Mohammed Abdi Mohammed -vs- Ahmed Abdullahi and 3 Others [2018] eKLR gave guidelines on admission of additional evidence on appeal. The court in paragraph 79 stated;

“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 inform or impact upon the results 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 the trial is an essential consideration to ensure fairness and due process,



- h. where the additional evidence discloses a strong prima facie case of wilful 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 the evidence. The court must find the further evidence needful,
- 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.
- k. the court will consider the proportionality of and prejudice allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

15. The Supreme Court emphasized that it would only allow additional evidence on a case-by case basis and even then, sparingly with abundant caution.

16. In the present case, the proposed additional evidence is not evidence that is with the Applicant but evidence that the applicant is inviting the court to be engaged in the procurement thereof. The court finds that the grounds for grant of the prayer have not been met.

17. As for the prayer for leave to amend the Memorandum of Appeal, the proposed amendment was pegged on the court allowing the prayers for additional evidence. Those prayers having been declined, there is no basis for grant of leave for the amendment.

The application therefore fails and is hereby dismissed.

Costs to the Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 26TH DAY OF MAY, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Magotsi for the Applicant.

Otieno Ochich for the Respondent.

