



Macharia v Wangui (Suing as the Official Donee of the General Power of Attorney of Joseph Muigai Muroki) & 2 others (Environment and Land Appeal E010 of 2024) [2025] KEELC 3635 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E010 OF 2024**

JM ONYANGO, J

MAY 5, 2025

BETWEEN

STEPHEN THAIRU MACHARIA APPELLANT

AND

**ROSEBELL WANGUI (SUING AS THE OFFICIAL DONEE OF THE GENERAL
POWER OF ATTORNEY OF JOSEPH MUIGAI MUROKI) 1ST RESPONDENT**

LAND REGISTRAR, RUIRU 2ND RESPONDENT

EQUITY BANK KENYA LIMITED 3RD RESPONDENT

RULING

1. The matter herein was scheduled for delivery of judgment on 19/12/2024. However, on 11/12/2024, the Appellant/Applicant filed this Notice of Motion dated 10/12/2024 under certificate of urgency seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That the orders given on 22/10/2024 directing that the appeal be heard by way of written submissions be reviewed and/or set aside.
 - iv. Spent.
 - v. That the appeal be reopened and the appellant be granted leave to produce additional evidence, orally and/or documentary.
 - vi. That this court be pleased to issue directions as to hearing of this appeal before pronouncement of its judgment.



- vii. That the costs of this application be provided for.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Appellant/Applicant's Supporting Affidavit sworn on 10/12/2024 and further Affidavit sworn on 10/3/2025. In the said affidavit, he depones that he purchased land parcel No. L. R No 12865/8 from Susan Damaris Nyamu (the registered proprietor) on 14/8/2019 at a price of Kshs 15,000,000.
 3. It is his claim that he applied for a financing facility from the 3rd Respondent through his company, known as Diamond Marine Shipping Company Limited. He states that upon payment of the balance of the purchase price, he entrusted his previous advocates to handle the transfer and registration process. Subsequently, his previous advocates only released to him the certificate of title with no transfer documents.
 4. He states that when he was served with the pleadings in this suit, he instructed his previous advocates with the legitimate expectation that the said counsel would file the necessary documents, exercise due care and or advise him accordingly.
 5. He contends that due to the gross negligence of his previous advocates, he failed to file all the supporting documents in defence of the suit in the trial court and failed to apply for leave to file third-party proceedings against Susan Damaris Nyamu, who was a necessary party to the primary suit.
 6. He further contends that he managed to obtain a copy of the letter of offer for the banking facilities, internal transfer forms and account statements on 26/11/2024, statement of loan account on 4/12/2024 and transfer form on 6/12/2024 from the 3rd Respondent and his previous advocates, respectively. He adds that the said documents are crucial, credible, reliable and relevant to the suit and that they will assist the court in dispensing justice.
 7. He faults his previous advocates on record for grossly mishandling the case and for failing to avail the additional evidence at the trial court or to make an application for additional evidence during the hearing of this appeal. He urges this court not to penalise him for the gross negligence and/or misconduct of his previous advocate. He adds that his previous advocates having drawn the sale agreement and handled the transaction, she ought to have been a witness and not a defence counsel; which action amounted to conflict of interest and led to miscarriage of justice.
 8. Further, he contends that the trial Magistrate lacked pecuniary jurisdiction to hear and determine the suit, being a Principal Magistrate, whose pecuniary jurisdiction was limited to Kshs. 10,000,000 while the value of the subject matter was above Ksh 15,000,000. He further contends that this application is filed without delay.
 9. It is his contention that he stands to suffer serious prejudice, substantial harm, loss and damage unless this court grants him leave to produce additional evidence.
 10. The application is opposed by the 1st Respondent through Replying Affidavits sworn by her on 3/2/2025 and 10/3/2025, in which she depones that the additional evidence that the Applicant seeks to rely on does not meet the criteria set by the Supreme Court in the case of Mohamed Abdi Mohamed vs Ahmed Abdullahi Mohamed & 3 Others [2018]eKLR. She further depones that the Applicant cannot demonstrate that upon exercising due diligence, he was unable to obtain the said evidence during the trial. She contends that the evidence is quite voluminous and was filed late, making it impossible for the 1st Respondent to effectively respond. She states that the evidence does not disclose a prima facie case of willful deception of the court. It is her opinion that the Applicant is cunningly attempting to fill the gaps and patch up the weak points in his case, through the additional evidence. She adds that the Applicant is seeking to make a fresh case on appeal through the said evidence.



11. It is the 1st Respondent's position that the Applicant's attempt to blame the poor conduct of his previous advocate is not sufficient reason to warrant the admission of additional evidence which would alter and fill the gaps in his case to the stage of delivery of judgment to the detriment of the 1st Respondent. In conclusion, she urged the court to dismiss this application together with the appeal.
12. The application was canvassed by way of written submissions. The Applicant filed written submissions dated 11th March 2025, while the 1st Respondent filed written submissions dated 10th March 2025.

Analysis and Determination

13. Having considered the application, Replying Affidavits, Further Affidavit, the parties' rival submissions as well as the authorities cited to me and the relevant law, the only issue for determination is whether the Applicant should be granted leave to produce additional oral or documentary evidence.
14. The suit at the trial court was filed on 13/12/2022. The parties in this appeal were also parties in the suit in the trial court. The Applicant wishes to adduce additional evidence consisting of a copy of the letter of offer for the banking facilities, internal transfer forms, account statements, a statement of loan account and transfer form, which he contends he obtained from the 3rd Respondent and his previous advocates sometime towards the end of 2024. The impugned judgment was delivered on 22/1/2024, while this appeal was filed on 1/2/2024. The Applicant contends that the said evidence was not filed earlier due to the gross negligence of his previous advocates.
15. The Supreme Court in the case of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed & 3 Others (supra) stated as follows:

“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 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. 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 and prejudice of 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.

16. I am constrained to agree with the 1st Respondent that the Applicant has not met the criteria in the above mention case. Suits belong to the parties and not to their advocates. Parties have a duty to follow up on their matters and to even inspect pleadings and confirm evidence being adduced on their behalf. Therefore, the Applicant's explanation that the said evidence was not filed on time due to the negligence of his previous advocates does not hold water. The Applicant has not placed any evidence before this court to demonstrate the efforts he made to obtain the said documents before the appeal was filed. In any case, the Applicant has an avenue to sue the previous advocate for the alleged negligence at the Advocates Disciplinary Tribunal.

17. In the circumstances, I find that the applicant did not satisfy the criteria espoused in the Supreme Court decision of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed & 3 Others (supra). I therefore find no merit in his application and I dismiss it with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5TH DAY OF MAY 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Miss Nkarye for Mr. Morara for the 1st Respondent

Mr Muthomi for the Appellant

Court Assistant: Hinga

