



**Njenga v Ruto (Environment and Land Appeal E023 of 2023)  
[2025] KEELC 5334 (KLR) (14 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

**JA MOGENI, J**

**JULY 14, 2025**

**BETWEEN**

**PETER KAMAU NJENGA ..... APPELLANT**

**AND**

**DR ALICE CHEPKEMOI RUTO ..... RESPONDENT**

**RULING**

1. An order for adduction of additional evidence on appeal can be made in the following circumstances namely:-
  - a. When the Lower Court refuses to admit evidence which ought to have been admitted;
  - b. When the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce Judgement, or
  - c. For any other substantial cause.
2. Order 42 Rule 27 of the Civil Procedure Rules governs the production of additional evidence in Appellate Courts. This rule allows for the introduction of new evidence in certain circumstances, either on the Court's own motion or upon the application of a party, if certain conditions are met.
3. The Notice of Motion Application dated 5/09/2024 seeks the following orders:
  1. That the Appellant be granted leave to adduce/present additional evidence in this Appeal.
  2. That the Court do give directions on how the additional evidence shall be tendered/presented.
  3. That the costs of this application do abide in the results of the appeal.
4. The grounds of the Application are on the face of it and I see no need of repeating them here.



5. The Respondent opposed the application and filed a 51 paragraphed Replying Affidavit sworn on 15/10/2024. The gist of the Replying Affidavit is that all the documents that the Applicant seeks to produce at appeal were documents he had prior to hearing of the case in the lower Court. Further that despite the claim of the Applicant that he was based in Rwanda at the time of the hearing, the Applicant attended Court sessions and was ably represented by his Lawyer.
6. In her averment she referred to the Supreme Court of Kenya case in *Kanyuira vs Kenay Airports Authority (Petition 7 of 2017)* [2021]KESC 7 (KLR) (Civ), *Ocean (EA) Limited vs Commissioner of Domestic Services* [2018]eKLR. Infact she contends that the letter the Appellant seeks to produce dated 19/07/1989 is unsigned, the receipt that the Applicant purports to have been issued on 30/11/1983 confirms that he had access to documents all along and one wonders where the documents dated 1989 would suddenly come from.
7. Further that the Surveyor's report he seeks to produce is neither backed by instructions from the alleged instructing client or even a Surveyor's licence to show the said Surveyor's qualification.
8. The Respondent urged the Court to dismiss the application.
9. The parties chose to canvass the application by way of written submissions and the Court issued directions on disposal by way of written submission on 17/02/2025.
10. The parties filed their submissions which I have considered.

### **Analysis and Determination**

11. The germane issue for determination is whether the Applicant has satisfied the criteria for adducing additional evidence on Appeal.
12. The guiding law in an application of this nature is anchored in Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010.
13. Section 78 of the *Civil Procedure Act* states;
  - “(1) Subject to conditions and limitations as may be prescribed, an Appellate Court shall have power –
    - a. to determine a case finally;
    - b. to remand a case;
    - c. to frame issues and refer them for trial;
    - d. to take additional evidence or to require the evidence to be taken;
    - e. to order a new trial.
  2. Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”
14. Additionally Order 42 Rule 27, 28 and 29 of the Civil Procedure Rules provide;
  - “27. Production of additional evidence in appellate Court [Order 42, rule 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 document to be produced or any witness to be examined to enable it to pronounce Judgment, 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) Wherever additional evidence is allowed to be produced by the Court to which the appeal is preferred the Court shall record the reason for its admission.

28. Mode of taking additional evidence [Order 42, rule 28.]

Wherever additional evidence is allowed to be produced, the Court to which the appeal is preferred may either take such evidence or direct the Court from whose decree the appeal is preferred or any other subordinate Court to take such evidence and to send it when taken to the Court to which the appeal is preferred;

29. Limits to be defined and recorded [Order 42, rule 29.]

Where additional evidence is directed or allowed to be taken the Court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”

15. A reading of Rule 27 above indicates that the adduction of additional evidence on appeal is not automatic. Inter alia the Appellate Court inter alia has to be satisfied that the document is required to enable the Court to pronounce Judgment or any other substantive cause. As rightly submitted by the parties, the Supreme Court in the case of *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR laid down the criteria to be followed by Appellate Courts in determining whether or not to allow additional evidence on appeal as follows;

“79 ...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. In regard to prayers (1) and (2) the Applicant has not submitted that the lower Court declined to admit some particular evidence which was material to his case, nor has this Court intimated it requires production of any document or examination of any witness to enable it pronounce Judgement to bring into play above provisions of the Civil Procedure Rules.

17. As regards the entire application, the provision to allow for additional evidence at Appeal level tend to relate to a situation where evidence emerges relating to the matter in issue and which the party complaining had no knowledge of, after Judgement has been delivered or order made. The submission of Counsel herein relates to production of documentary evidence without saying whether the Applicant became aware of this evidence after the lower Court Judgement or Order (see Dick Vs Koinange [1973] E.A. 165 At P.166). In any case, the grounds upon which this application is based appear to be the same ones as the Grounds of Appeal and that if the Appeal were found to be meritorious one of the orders to be made would be a retrial in which event all the evidence intended to be produced/adduced in paragraph 1 of this application would be adduced. This application is unsustainable and I dismiss it with no order for costs.

18. Mention for directions on the disposal of the Appeal for hearing shall be on 28/07/2025.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 14<sup>TH</sup> DAY OF JULY, 2025 VIA MICROSOFT TEAMS.**



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**MOGENI J**

**JUDGE**

In the presence of:

Appellant – Absent

Ms. Mekoye holding brief for Mr. Ochieng for Respondent

Mr. Melita – Court Assistant

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**MOGENI J**

**JUDGE**

