



**Muasya v Mailu (Environment and Land Appeal E001 of 2023)
[2025] KEELC 6114 (KLR) (23 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E001 OF 2023
AY KOROSS, J
SEPTEMBER 23, 2025**

BETWEEN

JOHN KIOKO MUASYA APPELLANT

AND

NATHAN MUNYAO MAILU RESPONDENT

RULING

1. This is a ruling in respect of a notice of motion dated 7/07/2023 filed by the appellant and expressed to have been moved pursuant to the provisions of Articles 60, 70 and 162 of *the Constitution* of Kenya, Sections 1A, 1B, 3A, 78(1)(c) and (2) of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act* and Orders 42 Rules 27, 28 and 29 & 51 Rule 1, of the Civil Procedure Rules. In it, the appellant seeks the following orders from this court: -
 - a. Spent.
 - b. The honourable court be pleased to take additional documentary evidence identified in the appellant's supporting affidavit, limited to the following documents: -
 - i. Letter to the County Government of Machakos Roads and Transport.
 - ii. County Government of Machakos Roads and Transport Surveyor's Report.
 - c. The honourable court be pleased to grant leave that the additional documentary evidence be adduced by way of an affidavit and filed as a supplementary record of appeal.



- d. The respondent be at liberty to file a replying affidavit, if any, to the supplementary record of appeal.
 - e. Such other order and/or relief as this honourable court may deem to grant.
2. The motion is supported by the grounds set out in the body thereof. The appellant's affidavit, sworn on the instant date, and a summary of the grounds in support of the motion are that a) the appellant is dissatisfied with the judgment and decree of the Hon. E. M. Analo, Senior Resident Magistrate, delivered on 22/12/2022 in the Chief Magistrate's Court at Machakos via CMCC NO. E3 of 2020 and has appealed to this court against the entire decision and, in particular, on the ground of refusal by the trial magistrate to award him special damages, b) the appellant filed his record of appeal on 10/03/2023; and
3. C)The proposed additional evidence to be submitted by the appellant is needful, directly relevant to the matter before the court and does not seek to introduce a new case or fill up omissions or patch up the weak points in appellant's case, d) the additional evidence could not have been obtained with reasonable diligence for use at the lower court trial and was not within the knowledge of, the appellant and could not have been produced at the time of the suit, e) the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the central issue in the suit; and
4. F)His previous advocates on record did not inform him of the legal importance and weight of the intended additional evidence, and had he been reasonably aware of the relevance of the additional evidence, he would have procured it in the course of trial. Finally, g) the respondent will not be prejudiced in any manner.
5. This motion was strenuously opposed by the respondent's replying affidavit deposed on 18/09/2023, where in brief, he stated inter alia; a) the additional evidence proposed to be produced is an attempt by the appellant to patch up his weak points in the case, b)the appellant does not explain how he obtained the additional evidence, c) circumstances have changed on the ground since the lodgment of the primary suit and this evidence is prejudicial to the respondent's case, d) the motion is bad in law and ought to be struck out.
6. The motion is canvassed by the written submissions by the law firms of M. Morgan J. Muinde & Associates Advocates for the appellant, dated 19/01/2024 and P.M. Mutuku & Company Advocates for the respondent, dated 22/11/2023, and this court is indebted to counsels for the illuminating submissions.
7. Having considered the motion, its grounds, affidavits, and rival submissions, the single issue for determination is whether the appellant should be granted leave to adduce additional evidence, and this issue shall shortly be analysed and a determination rendered on it.
8. The legal framework to entertain the motion, as correctly pointed out by the appellant, is found in our Section 78 of the *Civil Procedure Act* and Order 42, Rules 27, 28 and 29 of the Civil Procedure Rules. These provisions of law empower this court to allow the introduction of new evidence on appeal, and they provide thus: -

Section 78 of the *Civil Procedure Act*: -

- “(1) Subject to such 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.”

Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules: -

“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. 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. 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.”

9. However, it is not in every instance that leave is granted to adduce additional evidence; in exercise of its judicious discretion, courts usually grant leave in exceptional circumstances, with abundant caution and on a case-by-case basis. In the case of *Mahamud v Mohamad & 3 others* [2018] KESC 62 (KLR), which has been relied upon by the appellant, the Supreme Court of Kenya comprehensively and authoritatively laid out the principles to be considered in determining whether an appellate court should accept the adduction of additional evidence.

10. It must be noted that the principles outlined in *Mohamed Abdi Mahamud* (Supra) are not conjunctive. Nevertheless, an applicant, in this case the appellant, must meet the criteria substantially. The court



outlined the following guiding principles when an appellate court is exercising its discretion in allowing additional evidence: -

“... 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.”

11. Regarding this case, the court has taken its time to evaluate and consider the documents the appellant intends to submit as additional evidence, in accordance with the criteria outlined by the Supreme Court in the case of Mohamed Abdi Mahamud (Supra). Specifically, the letter from the appellant's current counsel, dated 18/04/2023, addressed to the Chief Officer, Department of Transport and Roads, requests a surveyor's report.



12. In response, a report was tendered which showed the exercise was conducted on 13/06/2023, which was post the impugned judgment, and it revealed that tree stumps were within the boundaries of Iveti/Kaewa/1700, which was and still is the suit property. In this regard, it would appear that these tree stumps were what the appellant identified in his plaint as trees that were cut down by the respondent and were allegedly on the suit property and valued at kshs. 416, 319/-. Thus, without doubt, the additional evidence is directly relevant and will impact the case.
13. Nevertheless, even if the appellant succeeds on the above principle, one of the key deliberations this court considers, as stated in Mohamed Abdi Mahamud (Supra), is the availability of the intended additional evidence. Concerning this, the appellant has to demonstrate that he would reasonably not have been aware of the evidence and that during the trial, he could not have obtained the evidence with reasonable diligence, and the evidence was not within his knowledge and at the time, could not have been produced.
14. This court has scrutinised the pleadings and proceedings as contained in the record of appeal, and the central issue that was raised throughout the entire trial was whether the trees that were cut were within the suit property or on an access road. However, the appellant allegedly failed to substantiate his evidence before the trial court.
15. It therefore arises that the relevance of the additional documents was well within his knowledge. Furthermore, he has not tendered evidence showing he ever sought these additional documents before the judgment, and he was denied or were unavailable to him. Put another way, had he exercised reasonable diligence, these documents would have been within his reach. In this court's view, he was the author of his misfortune for having failed to adduce this additional evidence. In consequence, this court finds that the attempt by the appellant to introduce additional evidence on appeal is made by him as an unsuccessful party to present a new case on appeal, fill in omissions, and patch up weak points in the case.
16. For the foregoing reasons, this court ultimately finds the notice of motion dated 7/07/2023 unmeritorious, and it is hereby dismissed with costs to the respondent. The lower court record is hereby called for, and a mention date shall be scheduled before the deputy registrar. Meanwhile, the parties are to proceed with the appeal by filing written submissions, with the appellant's submission limited to 7 pages, and it is to be filed within 45 days. The respondent is granted leave to respond within 45 days of service.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

23.09.2025

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM**

In the presence of;

Mr. Morgan Muinde for appellant.

N/A for respondent.

Ms Kanja- Court Assistant.

