



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamenju v Kamenju (Environment and Land Appeal  
2 of 2022) [2023] KEELC 17217 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17217 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 2 OF 2022**

**JO OLOLA, J**

**MAY 8, 2023**

**BETWEEN**

**CHRYSOSTOM GICHUHI KAMENJU ..... APPELLANT**

**AND**

**DAVID MATHENGE KAMENJU ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 10<sup>th</sup> August, 2022 Chrysostom Gachuhi Kamenju (the Appellant) prays for an order that this Court be pleased to grant him leave to file additional evidence in support of his case.
2. The application which is supported by an Affidavit sworn by the Appellant is premised on the grounds:
  - (i) That the Record of Appeal has been filed;
  - (ii) That the Appellant wishes to adduce additional evidence in support of his case which evidence will assist the Court to make a fair and just determination of the case;
  - (iii) That the additional evidence is directly relevant to the matter before the Court and is in the interest of justice;
  - (iv) That the evidence if allowed, will influence and impact upon the result or the verdict;
  - (v) That the Applicant could not have obtained (the Evidence) with reasonable diligence for use at the trial;
  - (vi) That the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
  - (vii) That the evidence is credible and is capable of belief; and



- (viii) That it is just that the prayers sought are granted.
3. David Mathenge Kamenju (the Respondent) is opposed to the orders sought. In a Replying Affidavit sworn and filed herein on 11<sup>th</sup> October 2022, on his behalf by his Advocate on record Davidson Warutere Iregi, the Respondent avers that the instant application as filed is mischievous, defective and without merit and that the same should be dismissed for being filed in abuse of the Court process.
  4. The Respondent avers that the proceedings sought to be adduced are those of Criminal case No. 101 of 2018 in which the Appellant was a Party and that he has failed to disclose that fact. The Respondent further avers that the Appellant had reasonable access to the said proceedings for use at the trial and that he had relied on the same in the stated case and hence the same are not additional or fresh evidence.
  5. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
  6. By his application before the Court, the Appellant urges the Court to be pleased to grant him leave to file additional evidence in support of his case. It is the Appellant's case that the additional evidence is directly relevant to the matter before the Court and that he was unable to obtain the same with reasonable diligence for use at the trial.
  7. In respect to the production of additional evidence, Section 78(1) of the [Civil Procedure Act](#) upon which the application is premised provides as follows:

- “(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have the 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; and
  - (e) to order a new trial.”

8. In addition, Order 42 Rule 7 of the [Civil Procedure Rules](#) provides as follows:

- “(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; and 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) Whenever 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.”

9. Considering the issue of submission of additional evidence in *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 others* (2018) eKLR, the Supreme Court offered guidance and observed as follows:

“... Taking into account the practice of various jurisdiction 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 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 prejudices that might arise from the additional evidence on the other ...”



10. In the matter before me, it is apparent from a perusal of Paragraph 6 of the Supporting Affidavit to the application that the Appellant seeks to introduce typed proceedings relating to the Judgment delivered in Nanyuki Criminal Case No. 101 of 2018. It is also apparent that the said case involved the Appellant herein as the accused with the Respondent as the complainant.
11. It is further apparent that those proceedings relate to the parcel of land known as Gakawa/Githima/Block (Waichakehiriri) 217 which is substantially the subject matter of this Appeal. As it were, the Appellant had produced the Judgment at the trial but was yet to obtain the typed proceedings. The Respondent herself asserts in her submissions that the Appellant had relied on the Criminal Case at the trial.
12. In the circumstances, I did not think that the production of the typed proceedings would prejudice the Respondent in any way as both Parties are aware of the same. Given that they are typed copies of Court proceedings, I am of the view that they are credible and consist of official documents which were considered and admitted by a Court of law.
13. The Respondents did not reject the additional evidence on account that they were to be used to bolster the Appellants case and or to fill gaps in the pending Appeal. It was the Respondent's case that the evidence was not new and that it was meant to waste the Court's time and to obstruct justice. Having considered the same, I was persuaded that the proceedings have a direct bearing on the main issue in the pending Appeal.
14. Accordingly, I allow the application dated 10<sup>th</sup> August, 2022 and hereby direct the Appellant to file and serve the additional documents within 21 days from today.
15. The costs of the application shall be in the Appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 8<sup>TH</sup> DAY OF MAY, 2023.**

In the presence of:

Ms Njeri Magua for the Appellant/Applicant

No appearance for the Respondents

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

