



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Njuguna (Environment and Land Appeal E008 of 2021)
[2023] KEELC 20710 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E008 OF 2021**

JG KEMEI, J

OCTOBER 12, 2023

BETWEEN

LEONARD MUNGAI NJOROGE APPELLANT

AND

NANCY MUGURE NJUGUNA RESPONDENT

*(Being an appeal from the Judgement/Decree of Hon. E. Olwande,
SPM in Limuru ELC No 24 OF 2018 delivered on the 25/4/2019)*

RULING

Notice of Motion dated 13/2/2023

1. The Motion is brought pursuant to section 1A, 1B, 3, 3A, 78(1)(4) of the [Civil Procedure Act](#), 2010 seeking the following orders:-
 - a. Spent.
 - b. That this honourable court be pleased to take additional evidence identified in paragraph 4 of the appellant's supporting affidavit or to direct that additional evidence be taken by the trial court or by the registrar in such manner and subject to such conditions as this honourable court deems appropriate to achieve the ends of justice.
 - c. That costs of this application abide by the outcome of the appeal.
 - d. Any other order that the Court may deem fit.
2. The motion is anchored on the grounds annexed thereto and the supporting affidavit of Leonard Mungai Njoroge sworn on 13/2/2023.
3. The applicant explained that he has now obtained the copy of the membership register which indicates the respective parcel of land that each party was allotted by the interested party.



4. That prior to the hearing of the case the document was not available despite efforts to obtain it. He further states that the document was not in reach of the applicant as it ought to have been in the custody of the interested party. The same was not available with the interested party owing to changes in management and the loss of the register. That he finally secured the copy from the sub-county offices that hitherto was unable to access during the trial. That the same could not be obtained even with due diligence.
5. It was explained that the document is crucial in the just determination of the case as it will unravel the question of ownership of the suit land. That the register is directly relevant to the main issue of ownership of the land. That no prejudice will be suffered by the Respondent if the application is allowed.
6. The application is opposed by the 1st respondent *vide* the Grounds of Opposition dated 27/3/2023 on the grounds:-
 - a. That the matter herein was heard and determined by the Lower Court in Environment and Land Cause (Limuru) Case No. 24 of 2018 *Nancy Mugure v Leonard Mungai & 3 others* thus it is *res judicata*.
 - b. That it will be prejudicial to the plaintiff for the appellant to be allowed to produce evidence at this stage of appeal as the respondent will not have a chance of cross examination.
 - c. That the appellant had all the time during the lower court trial to adduce all their evidence in support of its case.
 - d. That this application is an attempt to delay the matter further and is a waste of precious judicial time.
 - e. That the reasons given as to the availability of the register is an attempt at grasping at straws as the interested party who were the 2nd defendants in the lower court are the custodians of such important records.
 - f. That this matter has already been determined by a Court of competent jurisdiction and hence the application is bad in law, vexatious and an abuse of the Court process and as such, it ought to be dismissed with costs.

Written submissions

7. I have read and considered the written submissions filed by the Appellant and the 1st Respondent. The Interested Party failed to file written submissions.
8. The key issue for determination is whether the application is merited.
9. The guiding law with respect to admission of new evidence on appeal is found in section 78 of the [Civil Procedure Act](#) which provides as follows:-
 - “(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 frame issues and refer them to trial;
 - (c) To take additional evidence or to require the evidence to be taken;



(d) 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.”

10. Similarly, order 42 rule 27 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; 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.”

11. In the case of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR the Appeal Court set out the guidance for admission of new evidence 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 would 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 made 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 willful deception of the Court;



- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing the 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 the 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.”
12. It is the case of the applicant that the evidence in form of the copy of the members register could not be availed even by the 2nd respondent whose custody it was. It was also his opinion that the document was crucial in settling the question of the ownership of titles between the parties.
13. The 1st respondent on the other hand has resisted the application on grounds that the applicant has not shown any steps it took to produce the document before the hearing/and that the application is a delaying tactic and ought to be dismissed.
14. I have reviewed the judgment and the lower court file and find that there are 2 plots: the plaintiff lays claim on parcel 2899 while holding title for parcel 3970 while the 2nd defendant holds title to parcel 2899. The court in arriving at its decision decried the failure by the interested party not to produce the register of members in its custody which would have helped it to reach a clear decision. The court agreed with the applicant that the document is crucial in determining who the real owners of the lands as between the contesting parties.
15. The court also finds that the 1st respondent has not explained the prejudice that it is going to suffer if the application is allowed so that the merits of the case are attended to. The court finds that the prejudice if any can be compensable by costs.
16. Going by the dicta in the decision in *Mohamed Abdi Mohamed (supra)* the Court finds that allowing this application fits the principles laid in paragraphs a – g, and (i) of the said decision of the Court. The Court finds that to serve the interest of justice, the application is allowed in terms of prayer (a) of the application.
17. Costs shall be in favour of the Respondent.
18. Further orders and directions
 - a. The court hereby orders the taking of additional evidence inform of the members register of Kiambaa Kawaida Co. Ltd be taken by the trial Court in line with this Ruling.
 - b. The Hon. deputy registrar of this court is directed to forthwith submit the file to the trial court for further orders and directions.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI



JUDGE

Delivered online in the presence of;

Kimata Amuyunzu for the Appellant

Ms. Muthungu HB Kimathi for Respondent

Interested Party - Absent

Court Assistants – Phyllis/Lilian

