



**Muchiri v Mburu & 2 others (Environment and Land Appeal
48B of 2022) [2023] KEELC 21433 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 48B OF 2022**

JG KEMEI, J

NOVEMBER 9, 2023

BETWEEN

JOSEPH GICHAU MUCHIRI APPELLANT

AND

JOSEPH MAINA MBURU 1ST RESPONDENT

RUIRU LAND REGISTRAR 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The subject of this Ruling is the Application is dated the 17/11/22. It seeks leave to adduce new and additional evidence in the appeal. That upon leave being granted the Court to allow the documents being adduced to be filed as a further supplementary Record of Appeal.
2. The Application is premised upon the grounds annexed thereto and the Supporting Affidavit of the Applicant sworn on the 17/11/2022.
3. It was the case of the Applicant in the lower Court that he purchased the suit land from Hannah Nyaikonyo Mbugua in 1999. The Respondent in the trial Court contended that he purchased the land from the son of Hannah who died in 1994 and therefore the point of contention is that Hannah could not have sold the land to the Applicant in 1999 after she was long dead in 1994. In support of this position the 1st Respondent relied on the Death Certificate No xxxx dated the 13/11/2000 of Hannah Nyaikonyo Mbugua.
4. The Applicant stated that on suspicion of forgery of the Death Certificate, he approached the Department of Civil Registration on the authenticity of the said certificate. That by the time the said office made available the information the Plaintiff had testified. He sought leave to file additional documents however the trial Court rejected and dismissed the Application. That the trial Court



delivered a Judgment on the basis of false documents and being aggrieved with the said Judgment the Applicant has proffered an appeal that is pending before this Court. That the appellant seeks the documents to be adduced to assist the Court reach a fair determination of the appeal. Further that the evidence will influence the outcome of the appeal and that the documents are credible and crucial with compelling probative value in the case.

5. That the Applicant exercised reasonable due diligence to acquire the evidence in time but he had no control of the bureaucracy at the Department of Civil Registration. That had the documents been admitted, it could have changed the cause of the Judgment by shedding light on the alleged death of Hannah and the validity of the agreement between the 1st Respondent and the alleged deceased vendor.
6. The Court was urged to allow the adduction of the said additional documents aforesaid.
7. The Application is opposed vide the Replying Affidavit of John Maina Mburu sworn on the 22/2/2023. He termed the Applicant a busy body keen in wasting the Honourable Courts time. That his allegation that he purchased land from the deceased Hannah in 1999 in the face of a Death Certificate issued showing she died in 1994 is unfounded. That there is no evidence adduced by the Applicant to show that the Death Certificate is a forgery as missing documents is not synonymous with forgery. That the evidence the Applicant intends to adduce has already been adduced and the trial Court pronounced itself on them and therefore there is essentially nothing new and that the Application is but a waste of the Court's time. That the Applicant has not come to Court with clean hands. That in total the Application is devoid of merit and the Court was urged to dismiss the same.
8. Parties have filed written submissions which I have read and considered in this Ruling.
9. The key issue is whether the Applicant is entitled to leave to adduce new evidence in the appeal.
10. 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.”

11. 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.”

12. 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.”



13. In this case the issue in controversy is whether the deceased sold the suit land in 1994 or 1999 and the presence of these documents will assist the Court to determine the issue. The Court finds that the admission of the documents has a direct bearing on the outcome of the appeal.
14. In the end the Application is allowed with costs in the cause.
15. The Applicants to file and serve the Supplementary Record of Appeal within fifteen (15) days from today.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Nyamu HB Gachau for Applicant

1st, 2nd and 3rd Respondents – Absent

Court Assistants – Phyllis & Lilian

