



Ekiru v Chepchirchir (Suing as the Legal Representative of the Estate of Christopher Koech Tirieta (Deceased)) (Environment and Land Appeal E024 of 2024) [2025] KEELC 3785 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E024 OF 2024
LN MBUGUA, J
MAY 14, 2025**

BETWEEN

PAUL WANYAMA EKIRU APPELLANT

AND

ESTHER CHEPCHIRCHIR RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
CHRISTOPHER KOECH TIRIETO (DECEASED)**

RULING

1. Before me is the application dated 9.1.2025 in which the appellant is seeking the following orders;

“ a) This honourable court be pleased to grant leave to the appellant at the hearing of this appeal to take additional evidence in form of call of crucial witnesses left out at the trial to testify and cross-examine and their evidence to form part of the record.

Or in the alternative to (a) above

b) That this honourable court be pleased to declare the proceedings and judgment of the trial court as mis-trial and matter be remitted to lower court and heard de novo”.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of the appellant. He contends that he owns plots no. 43 and 45 in Maralal town. That a claim of ownership of plot 46 arose culminating in the proceedings before the trial court where he was wrongly sued. That through his advocates, he filed an application dated 24.6.2024 for joinder of the owner of plot 46, but for reasons unknown to him, his advocate withdrew the said application, thus evidence



- of a crucial witness was left out. He terms the proceedings before the trial court as a mistrial, calling for a re-trial.
3. The application was opposed by the respondent via her replying affidavit dated 29.3.2025 where she asserted her claim of ownership to plot 46 in Maralal Town. She avers that the application to adduce additional evidence has not met the criteria set out in *Mohamud v Mohamed & 3 others (petition 789 of 2018) consolidated* [2018] KESC 62 (KLR) (28th September 2018) Ruling. She avers that the application is only meant to delay the trial.
 4. I have considered all the arguments raised herein including the submissions proffered. The issues falling for determination are whether this court should take additional evidence during the hearing of the appeal or in the alternative, whether the court should declare the proceedings before the trial court as a mistrial.
 5. On the question of allowing new evidence, I make reference to the provisions of Section 78 (1) (d) of the *Civil Procedure Act* which empower this court to take such evidence. However, this is not meant to allow admission of evidence for the purpose of filling up the gaps in evidence, nor to enable a party to make out a fresh case on appeal, See; *Joseph Kingsley Karuri v Housing Finance Co. Ltd & another* [2019] eKLR.
 6. In *Kuwindu Rurinja Co. Ltd v Kuwindu Holdings Ltd & 13 others* [2011] eKLR, the Court stated thus in regard to new evidence on appeal;
 - “(1) The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial. (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) The evidence must be apparently credible, although it need not be incontrovertible.”
 7. A perusal of the record reveals that indeed the application to bring in a new party was filed in June 2024. However, it is noted that the same was filed more than a year after parties closed their cases on 11.4.2023. No cogent explanation was proffered by the appellant as to why he did not join the new party (one Habiba Abdi Ibrahim) during the pre-trial or the hearing of the case or why he did not call this person as a witness during the trial. After all, he did testify that he was aware that plot 46 was occupied by a third party.
 8. It follows that allowing new evidence to be adduced at this stage would be prejudicial to the respondent who closed his case way back on 11.4.2023 when there was no intimation that a third party would be called to testify. I therefore find that the application at hand is meant to fill the gaps left by the appellant in the initial proceedings.
 9. On the question of a re-trial, the same ought to be canvassed in the main appeal as the appellant as the main prayer in the appeal is for the setting aside the judgment of the trial court.
 10. In the end, I find that the application dated 9.1.2025 is not merited, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE



In the presence of:

Appellant - present in person.

Lesikito holding brief for Ngetich for Respondent

Yaru – Court Assistant

