



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gutu v Njururi (Environment and Land Appeal E026 of 2023)  
[2025] KEELC 3604 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3604 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E026 OF 2023**

**JM MUTUNGI, J**

**MAY 8, 2025**

**BETWEEN**

**NAHASHON MANDA GUTU ..... APPLICANT**

**AND**

**ERIC CHOMBA NJURURI ..... RESPONDENT**

**RULING**

1. The Applicant by a Notice of Motion application dated 18<sup>th</sup> July 2024, seeks leave to introduce additional evidence in this appeal. The evidence sought to be introduced includes various documents relating to the registration of land parcel No. Kabare/Mikarara/1625, namely the parcel file, parcel register, old title deed, transfer documents, Land Control Board consent, Letter of Consent, and payment receipts. The Applicant prays for the following orders:
  1. That the honourable court be pleased to issue summons to the Land Registrar – Kirinyaga to attend court and adduce additional evidence which will form part of the Supplementary Record of Appeal, through production of the parcel file, parcel register, old title deed, copy of the transfer, Land Control Board Consent, Letter of Consent, payment receipts and other personal prerequisite documents with regard to the registration of title number Kabare/Mikarara/1625 on 7<sup>th</sup> January 2021.
  2. That the Respondent be at liberty to file a Replying Affidavit on the said additional evidence and/or cross-examine the Land Registrar - Kirinyaga and/or the Applicant on the said additional evidence.
  3. That cost be provided for.
2. The application is premised on the grounds set out on the face of the application and the Applicant's Affidavit, wherein the Applicant avers that the dispute in the lower court concerned the sale and registration of land parcel No. Kabare/Mikarara/1625. He states that the case was initiated by



the Respondent and three others against him and that the Lower Court entered Judgment in his favor on 22<sup>nd</sup> September 2023. He states that the Respondent and Martha Wangui Njururi filed a Memorandum of Appeal on 9<sup>th</sup> October 2023 against the Judgment but the Respondent later Amended the Memorandum of Appeal on 10<sup>th</sup> November 2023, where he omitted Martha Wangui Njururi and added new grounds of Appeal.

3. The Applicant contends that the additional evidence will clarify any ambiguity regarding the registration of the suit land and argues that admission of the additional evidence would be in conformity with the principles laid out by the Supreme Court in the case of *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others* [2018] eKLR on the factors to be considered in admitting additional evidence on Appeal. He maintains that the Respondent will not suffer prejudice, as he will have the opportunity to respond or cross-examine witnesses on the additional evidence.
4. The Respondent opposed the application through his Replying Affidavit dated 4<sup>th</sup> September 2024. He contends that the documents sought to be introduced are public records that the Applicant ought to have had in his possession and/or could have obtained from the Lands Office at the time of the trial. He avers that allowing the application would improperly involve this appellate court in a retrial, which is not the role of an Appellate Court. The Respondent further asserts that the Applicant is attempting to fill gaps in his evidence, which was procedurally improper. The Respondent asserts that the Applicant's application is prejudicial to his case. Though the Applicant argues the application for leave to adduce additional evidence was partly because the Appellant had Amended the Memorandum of Appeal and introduced new grounds the Appellant/Respondent avers that the same grounds were raised by the Applicant in paragraph 14[c] of the original plaint as allegations of fraud. The Appellant/Respondent contends submits that the application lacks merit and should be dismissed with costs.
5. On 14<sup>th</sup> October 2024, the Court directed that the application dated 18<sup>th</sup> July 2024 be canvassed through written submissions. The Applicant filed his submissions on 5<sup>th</sup> November 2024, placing reliance on Section 78[1] of the *Civil Procedure Act*, which grants Appellate Courts discretion to admit additional evidence. Section 78[1] of the *Civil Procedure Act* 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 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.
6. The Applicant cited the Case of *Sharon Mwenda Ndol v Nyangina John & Another* [2022] KEHC 1954 [KLR] and the Case of *EO v COO* [2020] eKLR, to support his submission that where the additional evidence sought to be adduced constituted official public documents whose authenticity was not disputed, they ought to be admitted if the criteria for admission of additional evidence is satisfied.
7. Counsel argued that the Applicant had met all the requirements established by the Supreme Court in the case of *Mohammed Abdi Mahamod versus Ahmed Abdullah Mohamed & 3 Others* [2018] eKLR. He contended that the additional evidence he wished to have admitted was relevant and would significantly impact the outcome of the case. He submitted the evidence was credible, not voluminous,



and would help ensure fairness and due process. He argued it demonstrated a prima facie case and was necessary for addressing any ambiguity regarding the Applicant's status as the registered proprietor of the suit land. He further asserted that no prejudice would be caused to the Respondent by admitting this evidence.

8. The Applicant additionally relied on the Judgment of Justice R.E Aburilli in the Case of *EO v COO* [2020] eKLR, where the Judge stated that:

“I am further satisfied that the additional evidence is credible as it consists of official public documents written, issued, and received in the course of public duty and that they originate from public offices having proper custody thereof. Their authenticity and veracity have not been impugned.”

9. In his written submissions dated 5<sup>th</sup> November 2024, the Respondent argued that the Applicant had ample opportunity to present the documents at the trial but failed to do so. He asserted that the application does not meet the threshold set by the Supreme Court in the Case of *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others* [2018] eKLR, particularly the requirement that the evidence must have been unavailable with reasonable diligence at Trial. The Supreme Court in the case laid the criteria for considering admission of additional evidence in Appeals thus:-

- 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 or 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;[emphasis supplied]
- 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; [Emphasis supplied]
- 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 to remove lacunae and fill gaps in evidence. The Court must find the further evidence needful. [emphasis supplied].
- 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. [emphasis supplied]
- 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.

10. Counsel for the Appellant/Respondent took the position the Land Registrar did not have the capacity to produce the Land Control Board consent, payment receipts, and other undisclosed personal prerequisite documents which ordinarily ought to be in the possession and custody of the Applicant. He urged for the dismissal of the Applicant's application.
11. The issue for determination is whether the Applicant has satisfied the legal threshold to warrant the Court to exercise its discretion to admit additional evidence at the Appellate stage. The Supreme Court Case of *Mohammed Abdi Mohamud -v- Ahmed Abdullahi Mohamed & 3 Others* [supra] clearly established factors to be considered in an application such as the one before the Court where a party wishes to adduce additional evidence at the Appellate stage. The additional evidence sought to be adduced must:-
  - i. Be directly relevant and with the potential to influence and/or impact the outcome of the Appeal.
  - ii. Be demonstrated that the evidence could not have been obtained with exercise of reasonable diligence for use before the Trial Court.
  - iii. Not be evidence required to patch-up and/or fill in gaps in the Applicant's case.
  - iv. Not be such evidence as would prejudice the opposite party and does not compromise the just and expeditious conclusion of the suit.
12. Under Section 78[i][d] of the *Civil Procedure Act*, an Appellate Court has power and discretion to take additional evidence or to require the evidence to be taken. The power and discretion however has to be exercised within the established parameters as relates to the admission of additional evidence.
13. The Applicant contends that the documents in question will eliminate any uncertainties regarding the registration of the disputed land. He argues that these documents were not accessible at the time of the initial proceedings and that their introduction is consistent with the legal principles outlined in *Mohammed Abdi Mahamud Case* [supra] and the Civil Procedure Act. The Applicant further places reliance on the case of *S Sharon Mwenda Ndol v Nyangina John & Another* [2022] KEHC 1954 [KLR] and *EO v COO* [2020] eKLR, where the Court noted that official public records should be accepted when their authenticity is not in dispute.
14. On the other hand, the Appellant/Respondent asserts that the documents the Applicant seeks admission of were, in fact, public records that the Applicant could have presented during the original trial. He argues that permitting the admission of this additional evidence would essentially transform the Appellate process into a retrial, which was inconsistent with established Appellate Principles. The Respondent further asserts that the Applicant's failure to produce the documents in a timely manner stems from a lack of due diligence rather than any genuine unavailability, reinforcing his reliance on the same case of *Mohammed Abdi Muhammad v Ahmed Abdullahi Mohammed & 3 Others* [2018] eKLR which the Applicant equally relies on.
15. In determining whether the Applicant has satisfied the principles upon which an Appellate Court may admit additional evidence, the Court has to consider whether the evidence was relevant, whether the evidence would have been available to the Applicant at the trial had he exercised reasonable diligence; and whether any prejudice would be occasioned to the Respondent by the admission of the evidence. The additional evidence that the Applicant seeks to adduce as per prayer [i] of the Notice of Motion is for the Land Registrar, Kirinyaga to attend Court to produce:



- i. Parcel file;
  - ii. Parcel register;
  - iii. Old title deed;
  - iv. Copy of transfer;
  - v. Letter of consent of the Land Control Board;
  - vi. Payment receipts;
  - vii. Other documents relating to registration of title number Kabare/Mikarara/1625 on 7<sup>th</sup> January 2021.
16. The Court notes that in the suit before the Lower Court there were specific allegations of fraud against the Respondent/Applicant respecting the manner he acquired his title. The Appellant in the Lower Court was the 3<sup>rd</sup> Plaintiff and the Respondent/Applicant was the 4<sup>th</sup> Defendant. Under paragraph 14 the Plaintiffs pleaded particulars of fraud against the Defendants and paragraph 14[c] as against the Respondent/Applicant it was pleaded thus:-
14. That through fraudulent means and through corrupt scheme the Defendants caused the Plaintiff's land parcels to be transferred in their names and/or enjoined in the titles.
- [a] -----
  - [b] -----
  - [c] The 4<sup>th</sup> Defendant caused the whole parcel of the 3<sup>rd</sup> Plaintiff to be transferred in his name whereas the 3<sup>rd</sup> Plaintiff was selling to the 4<sup>th</sup> Defendant ½ [half] share out of his entitlement. The 4<sup>th</sup> Defendant transferred the land without the 3<sup>rd</sup> Plaintiff's consent and without attending Land Control Board for consent to transfer.”
17. Under paragraph 15 of the Plaintiffs pleaded “that all these fraudulent acts took place in January 2021 at a time when there were no Land Control Board meetings due to Covid-19 pandemic”. It was therefore clear the title acquired by the Respondent/Applicant was under challenge and it was incumbent upon the Respondent/Applicant to prove and demonstrate he acquired his title lawfully.
18. The additional evidence that the Respondent/Applicant seeks through the instant application to be allowed to adduce was no doubt available at the time of the trial. The Applicant could easily have obtained minutes of the Land Control Board and could also have obtained records from the Land Registrar and/or could have summoned the Land Registrar to testify as the custodian of the Land Registry Records. I am in the premises not satisfied that the Applicant could not through exercise of diligence not have been able to avail the evidence he now seeks to be permitted to avail. It cannot be ruled out that indeed the Applicant seeks to fill in some gaps or lacunae that he has perceived could be there in the evidence he adduced before the Lower Court.
19. It has been repeatedly emphasized that the Appellate Court's role is to review and determine whether the Trial Court made an error based on the evidence presented. This principle was reinforced in the case of *Republic v Ali Babitu Kololo* [2017] eKLR, where the Court of Appeal highlighted the limited scope of Appellate review. The Court held that:

“This Court, while discussing its power to admit additional evidence under Rule 29 [1] of the Court of Appeal Rules in *Samuel Kungu Kamau v Republic* [2015] eKLR stated:-



“It has been said time and again that the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. In the words of Chesoni Ag JA [as he then was] in *Wanje v Saikwa* [1984] KLR 275:

‘This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The Appellate Court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.’ [Emphasis added].

20. The Applicant has not shown that the additional evidence he seeks to adduce was genuinely unavailable during the Trial. He admitted that the additional documents are public records but has not demonstrated that he was denied access to them. The lack of an explanation as to why they were not produced earlier suggests a lack of diligence rather than true unavailability.
21. Admitting this evidence at this stage risks converting the Appeal into a retrial, which goes against the Appellate principles. The role of the Appellate Court is to review whether the Trial Court erred based on the evidence that is already on record. Allowing additional evidence under these circumstances would be prejudicial to the Appellant/Respondent. I perceive the Applicant’s application to adduce additional evidence as an attempt to booster his case on Appeal and/or to plug any loose ends in his evidence.
22. In light of the foregoing, I find that the Applicant’s application dated 18<sup>th</sup> July 2024 lacks any merit and dismiss the same with costs to the Respondent.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 8<sup>TH</sup> DAY OF MAY 2025.**

**J. M. MUTUNGI**

ELC - JUDGE

