



**Njogu v Mburu & another (Environment and Land Appeal
E060 of 2024) [2025] KEELC 4774 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E060 OF 2024**

**A OMBWAYO, J
JUNE 26, 2025**

BETWEEN

JANE NYAWIRA NJOGU APPELLANT

AND

TABITHA WANJIRU MBURU 1ST RESPONDENT

JACKSON MUIRURI 2ND RESPONDENT

*(An appeal arising from the ruling of Honourable E. S. Soita Senior Resident
Magistrate, Nakuru delivered on 1st October, 2024 in Nakuru CMC ELC E017 of 2023)*

JUDGMENT

1. This is an appeal arising from the ruling of Honourable E. S. Soita Senior Resident Magistrate, Nakuru delivered on 1st October, 2024 in Nakuru CMC ELC E017 of 2023. The Appellant filed a Memorandum of Appeal dated 30th October, 2024 appealing against the said ruling on the following grounds: -
 1. The Learned Magistrate erred in law and fact in allowing the application in violation of the Appellant's right to fair trial under Article 50 of *the Constitution* of Kenya.
 2. The Leamed Magistrate erred in law and fact in failing to consider the response and submissions made by the Appellant and the legal authorities filed therewith.
 3. The Learned Magistrate erred in law and fact by failing to consider that the application to file a supplementary list of documents was made after the hearing had commenced and when counsel for the Appellant had already commenced cross examination.



4. The Learned Magistrate erred in law and fact by failing to consider that the application was in violation of the fair principles of an adversarial process in litigation particularly the right of an opposing party to challenge and rebut evidence.
 5. The Learned Magistrate erred in law and fact by invoking its discretion in allowing the application without appreciating the prejudice that will be suffered by the Appellants in their defence.
 6. The Learned Magistrate erred in law and in fact by failing to consider that the Application was irregularly sworn by the Respondent's counsel and not the Respondent herself.
 7. The Learned Magistrate erred in law and in fact by failing to appreciate that the Respondent's application did not include a prayer for recalling of the Plaintiff for further examination in chief hence creating a legal crisis as the court cannot move itself to do so absent any such prayer from the Respondent.
 8. The Learned Magistrate erred in law and in fact by failing to consider that the basis of the application was for filing of missing receipts but that a total of 34 additional documents were being introduced well after the hearing had already commenced.
 9. The Learned Magistrate misdirected himself in both law and in fact and thereby arrived at the wrong, erroneous and absurd decision.
2. The Appellant seeks orders setting aside the trial court's ruling dated 1st October, 2024, an order directing the trial court to continue to hear and determine the main suit commencing with cross examination of the Respondent. She also prays for costs of the appeal.

Brief Facts

3. Counsel for the 1st Respondent vide an application dated 12th June, 2024 sought for leave to file further pre-trial documents being supplementary list of documents that were to be relied on during trial. Both parties filed their submissions where counsel for the Appellant argued that the application ought to be dismissed as the counsel for the 1st Respondent sought to file multiple additional documents that would prejudice the Appellant. The trial magistrate in his ruling delivered on 1st October, 2024 allowed the application. The above ruling now forms the basis of the present appeal which this court on 1st April, 2025 directed that the same be canvassed by way of written submissions.

Submissions

4. Counsel for the Appellant filed his submissions dated 25th April, 2025 where he identified one issue for determination, whether the appeal dated 30th October 2024 has merit. He relied on Section 146(1) of the *Evidence Act* Cap 80 which allows for a party to present their witness for examination and thereafter the adverse party conducts cross-examination. He also relied on Order 18 Rule 1 to 4 of the Civil Procedure Rules 2010. It was his submission that the import of the trial court's ruling delivered on 1st October 2024 was that the Plaintiff and the 1st Respondent herein, would have an opportunity to conduct examination in chief twice and remedy any inconsistencies and fill in gaps pointed out by the Appellant's counsel on cross examination. It was his submission that the trial court set a bad precedent in allowing a party a second bite of the cherry to remedy their case after rebuttal through cross examination.
5. He submits that the learned trial magistrate erred in allowing the application to file additional documents after the Plaintiff/1st Respondent had already completed her examination in chief since



there was no prayer for the recalling of the said witness for further examination in chief. He further submits that the 1st Respondent's contention in the trial court that the maker of the documents was yet to testify hence no prejudice to the Appellant did not hold water since the sequence of events in the Appellant challenging the 1st Respondent's case started with the Plaintiff's cross examination hence the second Plaintiff's witness could not again introduce new evidence during his own examination in chief. He cited the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/ a Hangover Kaakwacha Hotel* [2022] eKLR.

6. He submits that the 1st Respondent mislead the court in order to file a total of 34 additional documents when the purpose of doing the formal application seeking leave was in order to file the receipts which as alleged had been inadvertently left out of their documents. He argues that this was a clear attempt to embarrass and prejudice the Defendant's case as the Appellant now has to contend with a huge number of additional documents submitted as evidence having already commenced his cross examination of the 1st Respondent herein. He cited the case of *Raila Odinga & others v IEBC & 3 Others* Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR. He urged the court to allow the appeal as prayed.
7. Counsel for the 1st Respondent on the other hand filed his submissions dated 8th May, 2025 where with regard to ground 1 of the memorandum of appeal, he submits that the same is without merit since the trial court considered the totality of the case and allowed filing of the supplementary documents in the exercise of its discretion under Order 11 Rule 3(1)(h) and Order 3 Rule 2 of the Civil Procedure Rules. He relied on the case of *Ganira v Ndoji & Another* (Miscellaneous Civil Application E097 of 2022) [2023] KEHC 346 (KLR) and *Esilaba v Termitterion TCS Limited* (Cause 2157 of 2017) [2023] KEELRC 2109 (KLR).
8. On grounds 2 and 3, it was his submission that Appellant not only filed a replying affidavit but also a further affidavit and submissions which the trial court considered as indicated in the ruling. He argues that the Appellant has not suffered prejudice or injustice as a result of the said ruling. He added that the application was made timeously upon realization of omitted documents and before close of the Plaintiff's case. He also submits that the hearing was yet to be concluded hence no prejudice has been demonstrated.
9. On grounds 4 and 5 counsel submits that the Appellant failed to demonstrate any actual prejudice he'll suffer as a result of the documents being brought on record. He argues that the Appellant was yet to cross-examine the Respondent on the said documents thus no prejudice. On ground 6, he submits that the application was to allow the Plaintiff bring more documents on board. He argues that this was strictly an application that related to whether more documents could be brought on board as opposed to a question of fact which required the Plaintiff to swear an affidavit. He further argues that the factual issue of the impugned documents and their veracity could only be decided at trial when the Plaintiff was being cross-examined on the said documents. He relied on the Court of Appeal case in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1995– 1998] and *Magnolia PvT Limited v Synermed Pharmaceuticals (K) Ltd* [2018] eKLR.
10. On grounds 7 and 8, it was his submission that the application was strictly for filing additional documents, not for recalling of witnesses. He further submits that the number of documents filed was not in itself a bar since the relevance and admissibility of each document remained subject to the trial court's scrutiny during the hearing through the examination in chief and the cross- examination. He argues that the only new documents filed were the copies of land payment receipts and copies of transfer forms which would be produced by the maker who was also a witness in the trial court while the transfer forms were public documents as provided under Section 79 of the *Evidence Act* Cap. 80. He adds that the other documents filed were Certificates of compliance, Land Control Board Consent,



Mutation forms and title deed which are not only public documents but were also relied upon by the Appellant as part of their documents in the trial court hearing. He relied on the case of *Ingosi v Ogutu & 2 others* [2022] KEELC 13296 (KLR)

11. On the final ground, he submits that the Ruling was reasonable, and based on applicable principles and that no evidence was presented to support the claim that it was absurd or erroneous. He relied on Order 11 Rule 3(1) (h) and Order 3 Rule 2 of the Civil Procedure Rules, Sections 1A and 1B of the *Civil Procedure Act* and Article 159(2) (d).
12. In conclusion, he urged the court to dismiss the appeal with costs.

Analysis and Determination

13. This court has carefully considered the record of appeal and the parties' submissions and finds that the main issue for determination is whether the trial court arrived at the correct finding in allowing the Respondent's application for leave to file further bundle of documents. In considering the present appeal, this court appreciates the duty of the first appellate court to re-consider and re-analyze the evidence presented before the trial court in order to arrive at its own conclusions.

14. Section 146(4) of the *Evidence Act* provides as follows:

“The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross examination and re-examination respectively.”

Order 18 rule 10 of the Civil Procedure Rules also provides as follows:

The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit.”

15. I have carefully perused the record of appeal and it is a fact that counsel for the 1st Respondent had only called PW1 who was later stood down before cross examination by counsel for the Appellant. It is not in dispute that counsel for the 1st Respondent at this point sought leave to file and serve further documents which she argued were necessary for their case. The matter was thereafter adjourned.
16. It is noteworthy that at the time the 1st Respondent sought for leave to file and additional documents, the matter had not considerably taken off since PW1 being the first witness was still on his feet just after conclusion of the examination in chief before being stood down to allow hearing and determination of the application dated 12th June, 2024.
17. In the case of *Gichuhi & Another v Gichuhi & 2 Others (Civil Appeal e632 of 2021)* [2022] KECA 818 (KLR), the court held that:

“...It is therefore our finding and holding that denying the appellants the relief sought would be tantamount to impeding the conditions of fair hearing required to be accorded to both parties which, in our view, are within reach of both parties herein considering the nature of the dispute involved.” The documents that the documents sought to be introduced by the 1st Respondent will not cause prejudice to the Appellant since the 1st Respondent was yet to close his case. In view of the same, I find that the trial magistrate did not err in allowing the application to file supplementary documents since there was still room for the Appellant to rebut through cross examination. The Appellant's argument that the said bundle of documents being huge is neither here nor there since he has sufficient time to go



through them prior to proceeding with cross examination by virtue of the witness having been stood down. This court is guided by the overriding objective principle enshrined in Sections 3A and 3B of the [Appellate Jurisdiction Act](#) where for ends of justice to be met to the parties herein especially when it is not in dispute that as at the time they sought the court's intervention to introduce further documentary evidence, only one witness had testified on behalf of the 1st Respondent. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs."

It is so ordered.

SIGNED BY:

HON. JUSTICE ANTONY O. OMBWAYO.

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT ENVIRONMENT AND LAND COURT

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