



**Mborothi & another v Kanya (Environment and Land Appeal  
036 of 2024) [2025] KEELC 6913 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 036 OF 2024  
LC KOMINGOI, J  
OCTOBER 9, 2025**

**BETWEEN**

**JOSEPHAT MURIITHI MBOROTHI ..... 1<sup>ST</sup> APPELLANT**

**DORCAS MUTHONI MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSAN NGINA KANYIA ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 25<sup>th</sup> March 2025 brought;

(Pursuant to sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Laws of Kenya: Under Section 78 of the *Civil Procedure Act*, Order 42 Rule 27, 28 and 29 of the Civil Procedure Rules, Article 50(1) Of *The Constitution* Of Kenya, 2010, Laws of Kenya: And all other Enabling Provisions of the law)

2. It seeks orders;

1. That this Honorable Court be pleased to order that the evidence of the County Land Registrar, Jonathan Oseur, be retaken due to improper recording of the proceedings at the lower court in MCELC 2 of 2018 – Ngong before the Honorable P. Achieng.
2. That this Honorable Court be pleased to allow the County Land Registrar to give fresh evidence and produce the documents in their custody regarding the ownership, registration, and status of the subject parcel of land known as Plot 273.
3. That in the alternative to prayers 1 and 2 above, this Honourable Court do issue an order compelling the Chief Magistrate’s Court at Ngong Law Courts to provide the video recording



of the proceedings held on 18<sup>th</sup> July 2024 before Honourable P. Achieng at 12:30p.m. specifically capturing the testimony of the County Land Registrar, Jonathan Oseur.

4. That upon the issuance of prayer 3, this Honorable Court do direct the transcription of the testimony as adduced by the County Land Registrar, Jonathan Oseur, and that the same be incorporated as the official and accurate record of his proceedings.
5. That this Honorable Court do direct that the retaking of evidence be conducted in open court or as the court may deem appropriate.
6. That cost of this Application to abide the outcome of the appeal.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 10.
4. The Application is supported by the affidavit of Dorcas Muthoni Maina, the 2<sup>nd</sup> Appellant herein sworn on the 25<sup>th</sup> March 2025.
5. The Application is opposed.

There is a Replying Affidavit sworn by Susan Ngina Kanyila, the Respondent herein sworn on the 29<sup>th</sup> April 2025.

6. The Notice of Motion was canvassed by way of oral submissions on the 12<sup>th</sup> June 2025.
7. I have considered the Notice of Motion, the Affidavit in support, the response thereto and the authorities cited. The issue for determination is whether this Application is merited.
8. It is the Appellant's case that they have realized that the testimony of the County Land Registrar, Jonathan Oseur contained omissions. It is their case that they discovered upon receipt of the typed proceedings. That this evidence is crucial for the resolution of this dispute since he is the sole custodian of the land records.
9. The Respondent on the other hand opposes the Application on the ground that the said evidence is not new. That it is meant to fill the evidentiary gaps. Further that it is an attempt to strengthen a weak case. He prays that it be disallowed.
10. Section 78 of the *Civil Procedure Act* provides that;

“ Powers of appellate court

- (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.
- (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. Order 42 rules 27, 28 and 29 of the Civil Procedure Rule provide that;



- 27.(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.
28. Mode of taking additional evidence [Order 42, rule 28.] Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.
29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”
12. The Supreme Court in the Case of Mohammed Abdi Mohamud v Ahmed Abdullahi Mohammed & 3 Others (2018) eKLR laid down the following principles;

“.....We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya 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 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;
- 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;



- h. where the additional evidence disclose 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 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 appeal, fill up omissions or patch up the weak points in his/her case;
- k. the court will consider the proportionally 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. I am persuaded that there is need to have the testimony of the County Land Registrar, Mr. Jonathan Oseur as this will assist the court to determine this dispute to finality.

14. In the case of Florence Akinyi Odula v Akamba Public Road Services Ltd & Another (2014) eKLR it was held;

“The basis of the Motion is said to be Order 42 rule 27 (1) (b) of the Civil Procedure Rules which provide 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-
- (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 judgement, 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.”

The aforesaid provision allows the parties to the appeal to adduce additional evidence if the document to be produced or any witness to be examined to enable the court pronounces judgement or for any other substantial cause. The Court of Appeal has a near similar provision which gives the Court of Appeal the discretion to permit a party to adduce additional evidence vide rule 29 of the Court of Appeal Rules.

The Court of Appeal in *Wanja –Vs- Saikwa* (1984) 275 restated the principles to be considered before granting leave to adduce additional evidence inter alia as follows:

- “2. The principles upon which an appellate court in civil case, will exercise its discretion in deciding whether or not to receive further evidence are:
  - a. It must be shown that the evidence could not be obtained with reasonable diligence for use at the trial;



- b. The evidence must be such that, if given, it would probably have an important influence on the result of the case.
  - c. The evidence is on the face of it credible.
3. The rule governing the admission of additional evidence does not entitle a party applying to bring in contradictory, as opposed to additional evidence, for to do so would mean the case would in effect be re-heard and tried as to the existing facts which cannot have been the intention of the rule.”

I will apply the above principles to this Motion. It is clear in my mind that the discovery of spine injury needed specialized medical personnel and facilities. I am convinced that the Applicant had applied due diligence to obtain the relevant medical document but the later document could not be obtained for the above reason. If the above medical evidence is adduced it will obviously assist this court pronounce the appropriate award.”

15. In conclusion I find merit in this application and grant the orders sought namely;

- i. That an order is hereby issued compelling the Chief Magistrate’s Court at Ngong Law Courts to provide the video recording of the proceedings held on 18<sup>th</sup> July 2024 before Honourable P. Achieng at 12:30pm. specifically capturing the testimony of the County Land Registrar, Jonathan Oseur.
- ii. That upon the issue of (i) above the court does the transcription of the testimony as adduced by the County Land Registrar, Jonathan Oseur, and that the same be incorporated as the official and accurate record of his proceedings.
- iii. That costs do abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9<sup>TH</sup> OCTOBER 2025.**

**L.KOMINGOI**

**JUDGE.**

In The Presence Of:

Mr. Wamae for Ms. Githogori for the Appellant.

Ms. Jeruto for the Respondent.

Peter – Court Assistant.

