



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E006 OF 2024

**LYDIA KANARIO BENSON (*Suing on behalf
of the estate of BENSON MBUURI alias
BENSON M'BUURI M'NCEBERE alias
KATHAKA BENSON
M'MBURI*).....APPELLANT**

=VERSUS=

**M'MWORIA M'MUKANGU1ST
RESPONDENT**

**THE MINISTRY OF LANDS AND
PHYSICAL PLANNING.....2ND
RESPONDENT**

**THE LAND ADJUDICATION &
SETTLEMENT OFFICER, RUIRI/RWARERA,
IMENTI NORTH AND SOUTH CENTRAL IMENTI &
BUURI.....3RD
RESPONDENT**

**ATTORNEY GENERAL.....4TH
RESPONDENT**

***(An Appeal against the Judgment of the Chief Magistrate
Court at Meru [Hon. D W Nyambu - CM] rendered on
30/1/2024 in Meru CMC E & L Case No. 22 of 2019)***

RULING

- 1.** Falling for determination in this ruling is the notice of motion dated 9/7/2025. Through the motion, the appellant seeks: (i) orders granting her leave to adduce additional evidence in this appeal and in the alternative; (ii) an order directing the District Land Adjudication Officer, Buuri, to present a final comprehensive, detailed and conclusive survey report relating to parcel number **130 Ruii Rwarera Adjudication Section**.
- 2.** The application was premised on the grounds outlined in the motion and in the applicant's supporting affidavit sworn on 9/7/2025 and her supplementary affidavit sworn on 1/9/2025. It was canvassed through written submissions dated 7/10/2025, filed by **M/s Thangicia M David & Co Advocates**. The case of the applicant is that the dispute in the trial court related to parcel number **130 Ruii Rwarera Adjudication Section**, measuring approximately 14 acres (*parcel number 130*). The key issue in this appeal is whether parcel number 2107 was illegally excised from parcel number 130 and superimposed. The applicant adds that during trial, the District Land Adjudication Officer in charge of Buuri Adjudication Section failed to tender the adjudication records relating to the suit land.
- 3.** The applicant adds that upon transfer of the said officer, she was able to obtain copies of the said records, detailing the acreage and the neighbouring parcels. She states that she was able to obtain the records through her counsel who wrote to the current District Land Adjudication & Settlement Officer. The applicant contends that the said records were not within her reach during trial.

4. The applicant urges the court to allow her to produce the said records as additional evidence to guide the court in the best interest of justice, adding that the 2nd and 3rd respondents are the only custodians of the records but refused to give her copies or to present them to court during trial. The applicant states that the said documents will clear the confusion created by the trial court, which held that the two parcels are not related. The applicant states that failure to tender the said documents during trial was occasioned by circumstances beyond her control.
5. She states that she brought the application under **Section 78** of the **Civil Procedure Act**, which empowers the court to determine the matter with finality. The applicant adds that the documents will aid the court in discovering the cover-up and deception that led to the dispute before the court. It is her case that unless the prayers sought are granted, the applicant will be deprived her right to a fair hearing and will suffer irreparable loss. It is the applicant's case that the respondents will not suffer any prejudice.
6. The 1st respondent opposed the application through a replying affidavit dated 16/7/2025, sworn by **Moses Munene Kabiti** [*a guardian ad litem of the 1st respondent*] and submissions dated 17/9/2025. The case of the 1st respondent is that the application is incompetent and consists of falsehoods. The 1st respondent states that **annexure "LKB1"** is an uncertified paper without a cover letter or a signature on the purported stamp, hence it is of no probative value. He adds that the annexure resembles the adjudication records of Ruiru/Rwarera in the 1970s.

- 7.** The 1st respondent states that her father bought fourteen (14) acres from Benson M’Buuri Ncebere [*the late husband of the applicant*] on various dates, to wit, 13/12/1988; 9/11/1993 and in 1995/1996, adding that 13.5 acres were excised from land parcel number Ruiru/Rwarera/130 to create parcel number Ruiru/Rwarera/2107 measuring 13.5 acres for which he has a title deed.
- 8.** He states that the applicant deposed that he was unable to access the adjudication records because of an unnamed adjudication officer, adding that the allegation is untrue because no formal request for the records has been exhibited. He adds that no complaint to the court or to any other Government Office has been exhibited. It is his case that the proceedings before the lower court do not reflect the alleged frustration by the applicant.
- 9.** The 1st respondent adds that when the 2nd, 3rd and 4th respondents’ case was closed without their evidence, they applied to set aside the closing order to enable them tender evidence but the applicant opposed the application and the application was rejected by the court. He states that the applicant refused to take advantage of the situation and allow the testimony of the adjudication officer, where he could have raised the issue of the said records. The 1st respondent further states that the issues being raised are meant to patch up the case of the appellant. The 1st respondent contends that exercise of due diligence would have enabled the applicant to call the evidence during trial. He urges the court to reject and dismiss the application.

- 10.** The 2nd, 3rd and 4th respondents opposed the application through a replying affidavit sworn on 23/7/2025 by **Mary W Maina** and written submissions dated 7/10/2025, filed by the Attorney General. They deny the allegation that the District Land Adjudication and Settlement Officer (*the DLASO*) in charge of Buuri Adjudication Section failed to disclose or file adjudication records relating to parcel number 130 Ruiru/Rwarera. It is their case that the District Land Adjudication and Settlement Officer prepared a report dated 15/11/2019 disclosing the history of parcel numbers 130 and 2107, Ruiru/Rwarera, and that the Attorney General filed and served a list of witnesses and a list of documents, both dated 16/10/2020.
- 11.** They add that when the case came up for defence hearing on 5/4/2022, the State Counsel seized of the matter was away attending a funeral and their case was marked “Closed” without them tendering evidence. They subsequently filed an application dated 25/5/2025 seeking to re-open their case and tender evidence. Whereas the 1st respondent was willing to have them tender their evidence, the appellant opposed their application and because of her objection, the evidence of the District Land Adjudication and Settlement Officer was locked out vide a ruling rendered by the trial court on 7/6/2022 and the matter was fixed for judgment. They further state that, aggrieved by the ruling of the trial court, they lodged Meru ELC Appeal No E046 of 2022 which they lost vide this court’s judgment dated 19/7/2023.

- 12.** They point out that the applicant's annexure "**LKB2**" was presented to and received by the Land Adjudication and Settlement Office on 9/7/2025, seven days before the date reserved for judgment in this appeal. They add that the applicant's annexure "**LKB1**" is not an accurate representation of parcel number 130, adding that there are two volumes of demarcation books for Ruiru Rwarera Adjudication Section; an old tattered one and a subsequent one. They state that in the original demarcation book, parcel number 130 is 1.3 acres while parcel number 2107 is 13 acres adding that the assigning of 14 acres to parcel number 130 was an error which has been rectified as reflected in the final area list for Ruiru Rwarera Registration Section.
- 13.** The court has considered the application, the response to the application and the parties' respective submissions. The issue that falls for determination in this ruling is whether the application dated 9/7/2025 satisfies the criteria for granting leave to a party to adduce additional evidence in an appeal.
- 14.** The jurisdiction of this court to admit additional evidence when exercising appellate jurisdiction is donated by **Section 78(1)** of the **Civil Procedure Act** which provides as follows:
"78. (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”

- 15.** The jurisdiction is regulated by the framework in **Order 42 rules 27, 28** and **29** of the **Civil Procedure Rules** which provides as follows:

“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. 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”.

16. The guiding principle of an appellate court’s exercise of jurisdiction to grant leave to a party to adduce additional evidence was outlined by the Supreme Court of Kenya in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR*** 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 nor 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; where the additional evidence discloses a strong prima facie case of wilful deception of the court.

h) The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence.

i) 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.

j) 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”.

- 17.** In ***Attorney General v Paul Kawanga Ssemwongerere & another; Constitutional Appeal No 2 of 2004 [2004] UGSC 3***, the Supreme Court of Uganda outlined the following comparative jurisprudential principles on production of additional evidence by an appellate court:

“...an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances which include:

- (i) Discovery of new and important matters of evidence which, after the exercise of due diligence, 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.***
- (ii) It must be evidence relevant to the issues.***
- (iii) It must be evidence which is credible in the sense that it is capable of belief.***
- (iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive.***
- (v) The affidavit in support of an application to admit additional evidence should have***

attached to it, proof of the evidence sought to be given.

(vi) The application to admit additional evidence must be brought without undue delay”.

- 18.** The overarching rationale in the above principle is that, there would be no end to litigation unless a party is, by law, required to put his full case before the court during trial. Consequently, courts are stringent in their exercise of jurisdiction to allow a party to reopen a case through adducing additional evidence at the appellate stage.
- 19.** Has the above criteria been met? First, the adjudication records which the applicant is waving and urging this court to admit as additional evidence are not new evidence which, on exercise of due diligence, would not have been within the knowledge of the applicant or could not have been reasonably procured and produced by the applicant at the time of trial. Adjudication records are public records that are available to the general public upon formal request and upon payment of the requisite fees. There is no evidence demonstrating that the appellant made any effort to procure adjudication records from the Land Adjudication Officer.
- 20.** Secondly, during trial, counsel for the 2nd - 4th respondents failed to attend court on 5/4/2022 when the case was scheduled for defence hearing. Consequently, the trial court took the evidence of the 1st respondent and closed the defence cases. When the 2nd - 4th respondents made a formal application seeking the re-opening of their case for the purpose of them tendering evidence, the appellant opposed the application and urged the court to lock out their

evidence. By taking that position, the appellant locked out the evidence of the Land Adjudication Officer. It is therefore not true that the Land Adjudication Officer withheld crucial evidence. The appellant blocked the Adjudication Officer's efforts to tender evidence.

- 21.** Thirdly, there is no evidence of any notice to produce, served on the Land Adjudication Officer requiring him to produce specified adjudication records. There is also no evidence of any other form of formal request. The only formal request is the letter dated 26/6/2025 which was served on the Land Adjudication and Settlement Officer on 9/7/2025.
- 22.** Fourthly, the appellant/applicant knew what her claim was and the kind of evidence she needed to prove the claim. She knew that she needed adjudication records. She elected not to procure and tender them. She also elected not to apply for witness summons compelling the custodian of the records to avail them. She now wants to tender the evidence to bolster her case at the appellate stage.
- 23.** Taking the foregoing into account, it is clear that the plea to adduce additional evidence in this appeal is an attempt by the appellant to patch up her case after losing the claim in the trial court. She wants to be given a second opportunity to lead evidence relating to public records that were available during trial. These are not the circumstances under which jurisdiction to admit additional evidence in an appeal is exercised.
- 24.** Consequently, the court comes to the finding that the application under consideration has failed to meet the

criteria for granting leave to a party to adduce additional evidence in an appeal. The result is that the application dated 9/7/2025 is rejected and dismissed with costs for lack of merit.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2025.

**B M EBOSO [MR]
ELC JUDGE**