

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC APPEAL NO. E007 OF 2023**

**DANIEL MWANIKI KOBUTHI.....1<sup>ST</sup>**  
**APPELLANT**

**MOSES MURIITHI KOBUTHI.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**FRANCIS GIKANDI MARETE.....**  
**RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Appellant filed the application dated 14/2/2025 seeking to be allowed to adduce additional evidence in the appeal to enable the court to determine the matters in controversy in the appeal. The application was made on the grounds set out on the face of the application and in the supporting affidavit sworn by the 1<sup>st</sup> Appellant. He deponed that the 2<sup>nd</sup> Appellant is his brother and that together with their families, they have continuously resided on the land known as Gaturi/Nembure/708 (the suit land) since birth, and that that is where they buried their parents. Moreover, that the 2<sup>nd</sup> Appellant died on 20/10/2024 and was also buried on the suit land.
2. He averred that in a judgment delivered on 21/6/2023, in Embu Chief Magistrate's Court ELC Case No. 69 of 2018, filed by the

Respondent, the Learned Magistrate found against them and gave orders for their eviction from the suit land. A decree had been extracted and was pending execution by the Respondent. They successfully applied for stay of execution pending determination of the present appeal. He averred that they did not own any other land and knew no other home besides the life they have made on the suit land.

3. The 1<sup>st</sup> Appellant deponed that they are not persons of much learning or financial means and that they defended the suit in the trial court in person while the Respondent was represented by counsel. He averred that he had come into evidence which he did not have at the time of hearing and which he could not have been obtained before the hearing because of his lack of knowledge or understanding of legal practice and rules of evidence. He added that the evidence sought to be adduced is relevant to the matter before court and will show that the trial court lacked pecuniary jurisdiction to hear the case because the suit land measures 1.21 hectares and is valued at Kshs. 9,000,000/=.
4. He stated that he intends to adduce evidence showing that they have continuously resided on and cultivated tea on the suit land since the 1960s. Further, that documents relating to their tea production and sale to the tea factory will demonstrate their occupation of the land for over 60 years, thereby enabling them to properly raise and argue a defence of adverse possession. He

averred that he also intends to produce documentary evidence that their parents were buried on the suit land.

5. He contended that the evidence sought to be adduced will show that the trial court erred in failing to appreciate that they had raised a defence of adverse possession without specifically knowing the doctrine by name. That unknown to them, the defence was not available to them under the law since the trial court lacked jurisdiction to determine a matter of adverse possession.
6. He contended further that the additional documentary evidence includes the Land Registrar who will be called to produce the records that show how the suit land which they have resided on their whole lives, and which they claim was acquired in 1966 by their father, was transferred to the Respondent in 2010. He averred that there is a high probability that if the new evidence is adduced, it will have a significant impact on the eventual outcome of the case. He contended that the evidence is not voluminous and that the Respondent will not suffer prejudice. He annexed a copy of the valuation report prepared by Agility Valuers Limited.
7. The Respondent did not file a response to the application.
8. The court directed the parties to file and exchange written submissions, which it has considered. The 1<sup>st</sup> Appellant relied on Order 42 Rule 27(1)(b) of the Civil Procedure Rules, which empowers an appellate court to admit additional evidence where necessary to enable it to pronounce judgment or for any other

substantial cause. He also cited Section 78(1)(d) of the Civil Procedure Act which grants the appellate court power to take or require additional evidence to be taken.

9. He submitted that the principles for adduction of new evidence on appeal were set out in **Tarmohamed & Another v Lakhani & Co (1958) EA 567**, which adopted the test in **Ladd v Marshall (1954) 1 WLR 1489**, to the effect that additional evidence may only be admitted if: it could not have been obtained with reasonable diligence for use at trial; it would probably have an important influence on the result of the case; and it is apparently credible, even if not incontrovertible. Further reliance was placed on **Wanjie & Others v Sakwa & Others (1984) KLR 275**, where the Court of Appeal emphasized that the rule on additional evidence should be exercised sparingly, and not to fill up omissions or patch up weak points in their case.
10. He added that this being a first appeal, the court is obligated to re-evaluate, analyze, and assess all evidence afresh and draw its own independent conclusions. The Appellant also cited **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others (2018) eKLR**, where the Supreme Court outlined the conditions for admitting new evidence. The evidence must be necessary, relevant, and was not obtainable with reasonable diligence at trial, must not intended to fill gaps or patch up a weak case. The other requirement is that the opposing party must be given a fair opportunity to respond. The Appellant also relied on **John Kiplangat Barbaret & 8 Others v Isaiah**

**Kiplagat Arap Cheluget [2016] eKLR and Attorney General v Torino Enterprises Ltd [2019] eKLR**, in support of these principles.

11. The 1<sup>st</sup> Appellant elaborated that he seeks to adduce three categories of additional evidence. He wishes to present the valuation report proving that the value of the suit land exceeds the trial court's pecuniary jurisdiction. He Secondly, the history of the sale of tea and farmer registration records to demonstrate uninterrupted possession and use of the suit land for decades supporting a claim for adverse possession. Lastly, the burial permits and evidence of graves on the suit land demonstrating exclusive possession inconsistent with the registered owner's title. The Appellant urged that the above evidence goes to the core issue of jurisdiction of the trial court and its exclusion will impair the truth finding function of this court and legitimize a decision rendered without full appreciation of the facts and the law.
12. On the issue of reasonable diligence, the Appellants submitted that being elderly and semi-literate, without means and being unrepresented during the trial, they did not understand the evidentiary significance of land records or valuation reports. Additionally, that they did not know how to summon witnesses or retrieve public records. That being unfamiliar with pleadings and procedures, they simply narrated their lived reality unknowingly invoking the doctrine of adverse possession without naming it as such.

13. It was urged that this failure was not from negligence or trickery, but from ignorance borne out of poverty and lack of legal knowledge and it would therefore be unjust to hold them to the same standard as a legally represented party. It was also urged that the Respondent who is represented will not suffer prejudice that cannot be cured by leave to respond and that the evidence is not voluminous or fabricated but drawn from official records, public documents and lived facts. The court was invited to be guided by Article 159(2)(d) which requires the court to administer justice without undue regard to procedural technicalities. In addition, that the admission of the additional evidence furthers the objective under Section 1A and 1B of the Civil Procedure Act which requires courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.
14. The Respondent submitted that the law on admission of additional evidence on appeal is outlined in Section 78(1)(d) of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules. That while appellate courts have discretionary power to take additional evidence, that discretion must be exercised sparingly and within strict parameters. Reliance was placed on the Supreme Court decision in **Mahamud v Mohamad & 3 Others (Petition 7 & 9 of 2018 (Consolidated)) [2018] KESC 62 (KLR)**, which laid down the governing principles for admission of additional evidence.

15. It was submitted that the application fails to meet this threshold because the applicant failed to demonstrate that the additional evidence could not have been obtained with reasonable diligence during trial. Further, that the valuation report dated 16/11/2023 was prepared after judgment, which shows an attempt to manufacture evidence to challenge jurisdiction retrospectively. The other point is that the tea production and sale records if they existed, were continuously available during trial, and nothing prevented the Appellants from calling the Land Registrar during trial. It was urged that the claim of lack of legal representation was unfounded because the trial court accorded the Appellants several opportunities to secure counsel and prepare their case, including adjournments on 25/9/2019 and 17/11/2021 hence the court cannot reward disregard of judicial process.
16. The Respondent contended that the application is an attempt to patch up weak points in the Appellants' case, contrary to the holding in **Dutch Flower Group Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E095 of 2022) [2024] KESC 10173 (KLR)** and **Wanjie & Others v Sakwa & Others [1984] KLR 275**.
17. The Respondent urged that the issue of burials on the suit land was ventilated at the trial as indicated in paragraph 14 of the Respondent's replying affidavit. In the Respondent's view, attempting to reintroduce that matter amounts to re-litigating settled issues. It was urged that litigation must end, and that

allowing this application would gravely prejudice the Respondent, who has been deprived of enjoyment of his proprietary rights since 2011.

18. The Respondent argued that the applicant's attempt to introduce a new defence of adverse possession for the first time on appeal should be rejected because the Appellants did not plead adverse possession properly at the trial. That their defence only stated that they had occupied the land since 1960, which does not amount to pleading the doctrine of adverse possession. It was submitted that their testimony during trial was consistent that their father purchased the suit land which contradiction demonstrates the opportunistic nature of their current application.
19. The Respondent contended that the Appellants' plea that they are elderly and lacked legal knowledge is unconvincing, because the Respondent is equally elderly and unlearned yet nothing stopped the Appellant from seeking legal representation. The Respondent emphasised that he holds a valid title deed lawfully transmitted to him through Runyenjes Succession Cause No. 92 of 2010 and confirmed on 7/4/2011.
20. The Respondent maintained that the additional documents sought to be introduced would not establish adverse possession as the Appellants' case before the trial court was based on alleged purchase, not possession. It was urged that allowing this new theory would prejudice the Respondent, who defended the claim of a purchase claim and not adverse possession. Reliance

was placed on **Ochieng v Ahmed & Gargar (ELC Appeal E071 of 2023) [2024] KEELC 3779 (KLR)** where the court held that litigation would never end if parties were allowed to adduce evidence they should have produced in the lower court on appeal.

- a. The issue for determination is whether the 1<sup>st</sup> Appellant has met the threshold for leave to adduce additional evidence. The law governing admission of additional evidence on appeal is found in Section 78(1)(d) of the Civil Procedure Act, and Order 42 Rule 27(1)(b) of the Civil Procedure Rules, 2010. The guiding principles have also been laid down in numerous authorities, including in **Ladd v Marshall [1954] 1 WLR 1489** where it was held that in order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be must be apparently credible, though it need not be incontrovertible.
21. The 1<sup>st</sup> Appellant seeks to adduce a valuation report to demonstrate that the trial court lacked pecuniary jurisdiction to entertain the suit and tea records to show their continuous occupation and use of the suit land to support the claim of adverse possession. He also desires to introduce burial permits

and evidence of graves on the suit land to demonstrate exclusive possession and use of the land.

22. Counsel for the 1<sup>st</sup> Appellant submitted that the Appellants, who represented themselves during the trial, are elderly, uneducated, and of limited financial means. That in light of these circumstances, they did not understand the evidentiary significance of land records or valuation reports. Although the valuation report was procured after the delivery of judgment, it raises a fundamental issue of jurisdiction which, being a matter of law, may be raised at any stage of proceedings. The question of pecuniary jurisdiction goes to the validity of the proceedings before the trial court and cannot be disregarded simply because the evidence supporting it was not produced earlier. The explanation given by the 1<sup>st</sup> Appellant's that failure to obtain the report was due to lack of legal representation and not being aware of its importance is persuasive and not outrageous.
23. Regarding the tea records and burial permits, it was also submitted that the Appellants did not fully appreciate the evidentiary significance of these documents to support their claim of long and uninterrupted occupation of the suit land. It was contended that these documents would substantiate a claim of adverse possession, a defence the Appellants raised in substance although they did not formally plead it as such during the trial. The other important point is that that such a defence should not have been entertained by the trial court for want of jurisdiction. The Respondent argued that admitting this evidence

will be prejudicial, since he defended the claim on a fundamentally different basis that the Appellants' claim was that of purchaser's interest rather than adverse possession.

24. To bring litigation over the suit land to finality and in light of the trial court's lack of jurisdiction to entertain a claim of adverse possession, it is in the interest of justice to allow the introduction of the new evidence and consider the adverse possession claim at this stage.
25. The court directs the Appellants to file and serve the additional documents within 14 days. The Respondent will have corresponding leave to respond and file any additional evidence he wishes to rely on.
26. The application dated 14/2/2025 is allowed. The costs of the application shall abide the outcome of the appeal.

Delivered virtually at Embu this 12<sup>th</sup> day of November 2025.

**K. BOR  
JUDGE**

**In the presence of:**

Mr. Hiram Gachugi for the Appellant

Mr. Walekhwa Barasa for the Respondent

Diana Kemboi-Court Assistant

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