

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC APPEAL NO. E016 OF 2025**

MOSES LORDI LENCHASHO.....APPELLANT

-VERSUS-

LENTAGE OLE SENTILA.....1<sup>ST</sup>

RESPONDENT

KAPAI SENTILA.....2<sup>ND</sup> RESPONDENT

SAMEL SENTILA.....3<sup>RD</sup>

RESPONDENT

MELAN SENTILA.....4<sup>TH</sup> RESPONDENT

**RULING**

***(On the prayer by the appellant that the court be pleased to admit fresh evidence on appeal pursuant to the provisions of Section 78 of the Civil Procedure Act)***

**Introduction.**

1. The appellant's notice of motion dated 23<sup>rd</sup> May 2025 sought a variety of orders which the parties compromised leaving the court to determine only

prayer No. 6 therein. Under prayer number 6, the appellant prays that the Honourable Court be pleased to admit fresh evidence by way of the testimony of the County Surveyor Kajiado County and the testimony of the chairman Lorngusua Group Ranch.

2. The appellant's application is based on the grounds under paragraph 8(a) - (e), on the face of the application, namely;

(a) That the proposed evidence including the testimony of the County Surveyor and the Chairman of Lorngusua Group Ranch is material and could not, with reasonable diligence, have been procured during the trial.

(b) That such evidence will clarify the actual existence, ground acreage and allocation process of the disputed parcels, thereby assisting the appellate court in resolving the factual contradictions evident in the trial Court's judgment;

(c) That the evidence sought to be adduced is not merely corroborative but central to the core issue in the dispute and likely to affect the outcome of the appeal.

(d) That denial of the opportunity to present such evidence would violate the appellant's right to a fair hearing under Article 50(1) of the Constitution, which includes the right to adduce evidence in a meaningful and effective way;

(e) That no prejudice will be occasioned to the respondents by the admission of such evidence, and they will have every opportunity to respond thereto.

3. The appellant asserts that it is in the interest of justice and consistent with the doctrine of finality in litigation, that this court admits the fresh evidence to enable a proper, fair and just resolution of the real issues in controversy.
4. In his supporting affidavit, the appellant deposed that the oral testimony of the current chairman and or secretary of the Lorngusua Group Ranch is necessary to clarify the history, allocation, and ownership of Kjd/Lorngusua/532, and to establish his membership and entitlement thereto. Further that the clarification and interpretation by the County Surveyor and or Land Registrar on the two survey reports dated 2<sup>nd</sup> and 4<sup>th</sup> April 2014, is necessary to ascertain the accurate acreage and boundaries of both parcels.
5. The appellant reiterates that the evidence sought to be adduced was not reasonably available to him during the trial as the officials were either not summoned or were unwilling to testify and that he was not furnished with full records, by the group ranch's leadership at the time.
6. The appellant asserts that the proposed evidence is credible, relevant and material to the issues raised in the appeal and is essential to assist the court to reach a just determination.
7. The application by the appellant was opposed by the respondents vide ground No. 3 in the respondents' grounds of opposition dated 5<sup>th</sup> June 2025.

The respondents asserted that the application by the appellant does not satisfy the stringent requirements prescribed under **Order 42 Rule 27 of Civil Procedure Rules** for introduction of new and or additional evidence.

**Directions by the Court.**

8. The court directed parties to file written submissions. Both sides complied and the court has had occasion to read and consider the submissions in the writing of this ruling.

**Issues for determination.**

9. The sole issue for determination is whether the appellant has met the established threshold for the production of additional evidence on appeal.

**Determination**

10. **Section 78 (1) of the Civil Procedure Act** empowers an appellate court to amongst other issues, take additional evidence or to require the evidence to be taken, whereas **Order 42 Rule 27** stipulates the grounds upon which the appellate court allow the production of additional evidence. The **rule 27** provides that;

***“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.”***

**11.** The scope for the admission of additional evidence, from a reading of **rule 27 of Order 42 of the Civil Procedure Rules**, is clearly narrow and restrictive. The **Court of Appeal** in the case of **Mzee Wanje & 93 others -vs- A.K. Sakwa (1982 - 88) IKAR 462**, while interpreting the rule cautioned that it must be exercised very sparingly and great caution should be exercised in admitting fresh evidence. The court noted that,

***“This rule is not intended to enable a party who has discovered fresh evidence to import it nor 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.”***

12. The Supreme Court of Kenya in the case of **Mohamed Abdi Mahamud -vs- Ahmed Abdullahi Mohammad & 3 Others (2018) eKLR**, also pronounced itself on the issue of the considerations that an appellate court should ponder in an application for admission of additional evidence in the following words;

***“We therefore lay down the governing principles on allowing additional evidence in appellate courts 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) Where a party would have reasonably been aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;**
- (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 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 weak points in his/her case;**
- (k) The court will consider the proportionality and prejudice of allowing 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 swift**

***conduct of litigation together with any prejudice that might arise from the additional evidence on the other hand.”***

13. I find the application before me somehow curious. Whereas the appellant/applicant has invited the court to admit fresh evidence in form of the testimonies of the County Surveyor, Kajiado County and the chairman, Lorngusua Group Ranch, he has not exhibited the proposed evidence in form of draft witness statements or affidavits. How then does he expect the court to appraise the proposed evidence against the laid down principles of allowing additional evidence on appeal? How will this court verify that the proposed additional evidence is directly relevant to the matter before the court? Or, that it is likely to influence or impact upon the result of the verdict or better still that it discloses a strong prima facie case of willful deception of the court.

14. The other critical condition from the reading of the law that the appellant/applicant must establish is that the court from whose decree the appeal is preferred refused to admit the evidence which ought to have been admitted, or that the additional evidence could not have been produced at the time of the trial by the appellant/applicant.

15. The appellant/applicant in his supporting affidavit casually states that the evidence sought to be adduced was not reasonably available to him during the trial as the officials were either not summoned or unwilling to testify. I pose to ask, who the appellant had expected to summon the witnesses. He has not demonstrated any efforts that he made prior to the

close of the case before the trial court to procure the attendance of the witnesses he proposes to call at this stage. The **Civil Procedure Act** and **Rules** and the **Evidence Act** have sufficient mechanisms to compel the attendance of any necessary witness or the production of necessary documents. The appellant/applicant has not stated that he made efforts to use the said legal mechanisms or that the trial court refused him the opportunity to avail the evidence.

16. The application by the appellant strikes me as a fishing expedition. From the dispositions in his supporting affidavit, he is even unsure of who he wishes to call for the purposes of additional evidence. Is it the current Chairman or Secretary of the group ranch? Is it the County Surveyor or the Land Registrar?
17. The clear intention of the appellant is to fill up evidential gaps in his case. I find the application lacking in merits and good faith. It does not meet the threshold for the production of additional evidence on appeal.
18. Consequently, the appellant's prayer Number 6 in the notice of motion dated 23<sup>rd</sup> May 2025 is disallowed. It is dismissed with costs to the respondents.  
It is so ordered.

**Dated Signed and Delivered at Kajiado Virtually this 13<sup>th</sup> Day of November 2025.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Nairi for the Respondents

Mr. Wamae h/b for the Ms. Githongo for the Appellant/Applicant

Courts Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

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