



REPUBLIC OF KENYA



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MWN (Suing as the Guardian Ad Litem of GWN, a Person Suffering from Mental Infirmity) v RWN alias RWM (Civil Appeal (Application) E138 of 2022) [2025] KECA 1985 (KLR) (21 November 2025) (Ruling)

Neutral citation: [2025] KECA 1985 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E138 OF 2022
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
NOVEMBER 21, 2025

BETWEEN

MWN APPLICANT

SUING AS THE GUARDIAN AD LITEM OF GWN, A PERSON SUFFERING FROM MENTAL INFIRMITY

AND

RWN ALIAS RWM RESPONDENT

(Being an application for stay of execution, adduction of additional evidence in Civil Appeal E138 of 2022 under rule 31 (2) of the Court of Appeal Rules 2010 and for leave to amend the memorandum of appeal dated 15th December 2022 from the judgment of the Environment and Land Court of Kenya at Nyahururu (Y. Angima, J.) dated 5th May 2022 in ELC No.62 of 2018)

RULING

1. Margaret Wanja Njoroge (the applicant) has approached this Court by an application dated 18th September 2025 in her capacity as the guardian ad litem of Grace Wangari Njoroge, seeking three substantive reliefs, namely:
 - a. Stay of execution of the Judgment rendered by Angima, J. on 5th May 2022 in Nyahururu ELC No. 62 of 2018 pending hearing and determination of this Appeal;
 - b. Leave to adduce additional evidence, namely, tree age assessment report dated 27th June 2024; medical report dated 18th October 2024; rates receipts and form of statement of rates dated 11th January 2021; rates receipt dated 27th January 2022; letter to Land Adjudication & Settlement dated 28th September 2016; recommendation and the letter of offer dated 23rd February 1996;



letter to Director L.A. & Settlement dated 22nd March 1996; copy of title deed in respect of the suit property, Nyandarua, /OL Joro Orok Saleint/2630; copy of official search and application thereof dated 12th September 2022; photographs in respect of the suit property.

- c. Leave to amend the memorandum of appeal dated 1st December 2024 and leave to file an amended record of appeal.
2. The application is premised on rules 31(2), 33, 44 & 46 of this Court's Rules, 2022. It is supported by grounds listed on the face of the application and the applicant's supporting affidavit sworn on 19th September 2025 and a further affidavit sworn on 3rd October 2025. This is an omnibus application. The applicant seeks a variety of orders that cannot, ordinarily under our Rules, be heard and determined together by a full bench of this Court. Specifically, the prayer seeking leave to amend the memorandum of appeal is not properly before us.
3. The background to the application is that the respondent instituted ELC No. 62 of 2018 (O.S) in the Environment and Land Court at Nyahururu seeking to be registered as the proprietor of the suit property by adverse possession. Vide Judgment delivered on 22nd May 2022, the trial court allowed the respondent's claim for adverse possession. Pursuant to the said verdict, a title deed was issued in the respondent's name on 8th June 2023. By an application dated 12th June 2024, the applicant prayed for orders that she be declared a person incapable of protecting her interests due to her mental infirmity. The applicant also prayed for an order that she be declared Grace Wangari Njoroge's guardian ad litem. A consent was entered into on 24th March 2025 pursuant to which Grace Wangari Njoroge was found to be incapable of protecting her interests due to her mental infirmity. As a consequence, she was appointed as her guardian ad litem. However, the trial court declined to set aside the Judgment delivered on 22nd May 2022 for reasons that the appellant had already preferred an appeal that was pending before this Court and furthermore the trial court could not delve into the question of mental incapacitation of Grace Wangari Njoroge since the same was raised post Judgment.
4. The applicants' plea for leave to adduce new evidence is premised on the grounds that:
 - a. At the time of the impugned Judgment the appellant was suffering from mental infirmity and was incapable of understanding the nature or effectively participate in the proceedings in the Superior Court.
 - b. The condition was never disclosed to the trial court and that a guardian ad litem was only appointed by consent on 24th March 2025 after the Superior Court confirmed through a judicial inquiry that the appellant was incapable of protecting her interests during the pendency of the trial to date.
 - c. The guardian ad litem became aware of the matter when the respondent was in the process of evicting the appellant prompting her to file the application dated 12th June 2024 long after the Judgment had been rendered.
 - d. The new evidence was not within the knowledge of the guardian ad litem nor the appellant at the time of trial and could not with reasonable diligence have been produced at that time since the appellant had mental infirmity.
 - e. There is need to amend the memorandum of appeal to include reliefs that protect the appellant.
 - f. The record as drawn omits the pleadings filed by the parties in the Superior Court and as such leave ought to be granted to the appellant to file a supplementary record of appeal.



5. In opposition to the application, the respondent swore a replying affidavit sworn on 9th October 2022 deponing that:
 - a. The issue of mental infirmity arose post Judgment which issue was not raised in the Superior Court.
 - b. Grace Wangari Njoroge defended herself through various advocates.
 - c. There is no indication of how the appellant came about the additional evidence, or when they discovered the said evidence thus failing to fulfil the requirements for adducing additional evidence.
 - d. There is no indication that the proposed new evidence removes vagueness or doubt on the issues of appeal pending before this Court.
 - e. The respondent will not effectively defend the appeal since she will not have a chance to test the veracity and credibility of the said evidence since the appellant is not the maker of the documents.
 - f. A cursory look at the memorandum of appeal demonstrates that the appeal is against the ruling delivered on 28th May 2025 as the prayers sought are similar to the ones sought in the application dated 12th June 2024.
6. In her submissions in support of the application, the applicant's counsel reiterated the contents of the affidavits in support of the application and submitted that the application satisfies the tests laid down by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR.
7. In opposition to the application, the respondent's counsel reiterated the contents of her replying affidavit and submitted that the applicant has failed to discharge the burden of proof that she could not get the documents while the Superior Court case was ongoing. Counsel further maintained that the appellant could have exercised due diligence during her lucid moments to procure the documents and produce them in Court. Furthermore, the documents to be adduced were never mentioned during the trial and some documents like the tree assessment report is irrelevant to this case. Counsel cited the case of *Gachuki & Another v Njenga & 2 Others (Civil Appeal (Application) 413 of 2019) [2025] KECA 451 (KLR)* in submitting that the appellant had not met the threshold for adducing additional evidence.
8. We have considered the parties' rival pleadings and submissions and the established legal principles that guide the Court in the exercise of its mandate under rule 31 of the Court of Appeal Rules, 2022. This Court in *Mzee Wanje & 83 others v A. K. Saikwa & Another* [1982-88] 1 KLR 462 alluded to the principles to be considered in allowing additional evidence on appeal as follows:

“The principles upon which an appellate Court in Kenya in civil cases will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning L.J. (as he then was) in the case of *Ladd v Marshall* [1984] 1 WLR1489 at 1491 and those principles are:

 - a. It must be shown that the evidence could not have been 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, though it need not be decisive.



- c. The evidence must be such as it presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”
9. As we apply the above principles to the facts of this case, we are alive to the fact that in every case, this Court is required to strike a balance between the significance of the additional evidence on the one hand, and the necessity for expedited litigation, as well as any prejudice that may result from the additional evidence to the other party. It is also instructive that, even with the application of the aforementioned criteria, this Court would only consider additional evidence on a case-by-case basis and, even then, sparingly and with extreme caution.
10. We have considered the peculiar circumstances of this case.

As mentioned earlier, the applicant before us was appointed by consent of the parties as the guardian ad litem for Grace Wangari Njoroge. In our view, the consent is a clear confirmation that both parties appreciated the said Grace Wanjiku Njoroge was suffering from mental infirmity and she was incapable of managing her affairs. Her guardian ad litem maintains that she only became aware of the proceedings when the respondent was evicting the appellant from the suit property pursuant to orders dated 13th May 2024. This fact has not been refuted by the respondent. The applicant has also alluded to the fact that as a result of mental infirmity, the appellant was incapable of understanding the importance of some of the documents in her possession at the material time. This assertion in our view is not far-fetched. The parties also confirmed that that eviction has already taken place a fact we will bear in mind while addressing the prayer for stay.
11. Having considered the totality of the material presented to us, we find that this is a proper case for this Court to exercise its discretion in favour of the applicant. The discretion conferred to a court is to be exercised in conformity with the spirit of the law and in a manner to serve rather than to defeat substantial justice. It should be guided by law and inspired by a desire to promote justice. It should not be arbitrary, vague and fanciful and should not be ruled or governed by humour, recklessness or rash injustice. It must be exercised in accordance with legal principles and not in an arbitrary or capricious manner.
12. In our considered opinion, the new evidence is directly relevant to the matter before this Court, therefore, it is certainly in the interests of justice that it should be allowed on record. We are also unable to detect any likely prejudice that the respondent would suffer if this Court allows the applicant’s additional evidence. As a matter of fact, the respondent is at liberty to respond to any issues (if he so wishes) so that the appeal may be determined with finality after due consideration of all the relevant material. Accordingly, we find that the notice of motion dated 18th September 2025 is merited and allow it as follows:
 - a. The applicant shall file and serve a supplementary record of appeal introducing the additional documentary evidence within 14 days of this ruling. The respondent is at liberty to reply to the documents within 14 days of service.
 - b. Since the eviction has already taken place, we direct that the property shall not be transferred to third parties and the status quo obtaining as at 19th November 2025 shall be maintained.
 - c. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF NOVEMBER, 2025.

M. WARSAME

JUDGE OF APPEAL



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J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

