

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. E065 OF 2024

MUMO MUTISYA MBOLE:.....1ST

APPELLANT

ELIZABETH WAVINYA MUUA:.....2ND

APPELLANT

PHYDILORA SAMBA:.....3RD APPELLANT

VERSUS

WILSON M. MUEMA:.....1ST RESPONDENT

KATELEMBO ATHIANI MUPUTI FARMING &

RANCHING COOPERATIVE SOCIETY:.....2ND RESPONDENT

REUBEN MULI:.....3RD RESPONDENT

LAND REGISTRAR, MACHAKOS:.....4TH RESPONDENT

RULING

The application is dated 6th February 2025 and is brought under Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B and 3A, Civil Procedure Act (Cap 21 Laws of Kenya); Order 42 Rule 1(6), Civil Procedure Rules seeking the following orders;

- i. That the application herein be certified urgent and fit for hearing on priority basis.
- ii. That the Honourable Court be pleased to grant leave to the Appellants to adduce additional evidence.
- iii. That the Honourable Court do issue directions on the manner of adduction of the additional evidence.
- iv. That the costs of the application be in the cause.

It is based on the grounds that during the hearing of the suit at the Chief Magistrate's Court, the husband to the 2nd Appellant had died on 24th February, 2009 and certain crucial documentary evidence was not traceable. After the death, the family of the late Nicholas Muua Kioko started fighting and were unable to agree on the administration of the Estate of their late father. Following the Judgment, the family of the late Nicholas Muua Kioko, agreed to move forward and broke into his personal safe only to find the official receipt issued by the 2nd Respondent to the Appellants in proof of the purchase of the suit property. The lack of the receipt being proof of the payment to the 2nd Respondent was one of the reasons advanced by the Trial Magistrate to deny Appellants' claim. Besides, the Ministry of Lands has also written to the Registrar of Lands, Machakos confirming that the suit property the subject matter thereof be registered in favour of the Appellants herein. With the issue of the ownership of the suit property proved beyond doubt, the basis of the Appellants' Appeal will become self-evident. That

no prejudice will be occasioned to any of the Respondents if the leave sought herein is granted since all of the parties should be seeking to prove the truth and nothing but the truth. All suits before a court of justice ought to be sustained as far as possible and in the interests of justice.

The Respondents submitted that the Applicants have not satisfied the threshold for the application to be granted and the same is an afterthought after the judgement in the lower court. That the admission would be procedurally improper and prejudicial to the Respondents.

This Court has carefully considered the depositions on record and the submissions of therein. This is an application for leave to produce additional evidence on appeal. The powers of this Court on appeal is set out in section 78 of the Civil Procedure Act which provides, *inter alia*, that;

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –

...

(d) to take additional evidence or to require the evidence to be taken;

...”.

9. The issue of additional evidence pursuant to the aforesaid section is prescribed in *Order 42 Rule 27 of the Civil Procedure Rules* which provides: -

“(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”.

From the foregoing, it is clear that the power to admit additional evidence exist and is in the discretion of the Court. However, like all other discretions the same must be exercised judiciously. The only caveat put is that in admitting further evidence, the court must record the reason for allowing such adduction.

I have considered the cases relied on by the Applicant and the Respondents in their submissions. In *Tarmohamed & Another vs Lakhani & Company (1958) EA*

567, the Court of Appeal for Eastern Africa adopted the decision in Ladd vs Marshall (1954) WLR 1489 and stated;

“Except in cases where the application for additional evidence is based on fraud or surprise:

‘to justify 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; secondly, 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; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible’.

In *Wanjie & Others vs Sakwa & Others* (1984) KLR 275, in considering the need for restricting reception of additional evidence under Rule 29 of the Court of Appeal Rules, Chesoni JA observed at pg 280 thus;

“This rule is not intended to enable a party who has discovered fresh evidence to import it nor is 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 authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find it 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 the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given should be exercised very sparingly and great caution should be exercised in admitting fresh evidence”.

From the foregoing, it is clear that the power to admit additional evidence is discretionally. However, it should be exercised restrictively. The evidence sought to be adduced must not have been in the possession of the Applicant or could have been obtained with due diligence. That the evidence should be needful and not meant to patch up an Applicant’s case on appeal. Finally, the power should be exercised sparingly but for the ends of justice.

In the present case, the husband to the 2nd Appellant had died on 24th February, 2009 and certain crucial documentary evidence were not traceable. That after the death, the family of the late Nicholas Muua Kioko started fighting and were unable to agree on the administration of the Estate of their late father. Following the Judgment, the family of the late Nicholas Muua Kioko, agreed to move forward and broke into his personal safe only to find the official receipt issued by the 2nd Respondent to the Appellants in proof of the purchase of the suit property. The

lack of the receipt being proof of the payment to the 2nd Respondent was one of the reasons advanced by the Trial Magistrate to deny Appellants' claim.

The Court is persuaded that, if it be true that the Trial Court's decision was based on the unavailability of the intended evidence and reliance thereon, that piece of evidence would have been crucial to the Applicant's case. There would be no prejudice to be suffered if the said evidence is adduced at this stage. In view of the foregoing, and guided by the authorities cited above, the Court is of the considered view that the Applicant has satisfied the criteria for the grant of the orders sought. The applicant is not seeking to patch up his case or fill any lacunae. I find that the application is merited and I grant the same. The said documents to be filed and served within the next 7 (seven) days. Costs will abide the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF
DECEMBER 2025.**

N.A. MATHEKA

JUDGE

ORIGINAL