

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

ELC CASE NO. E001 OF 2022

KEFA WAFULA KAROLI WERE-----1ST
PLAINTIFF/APPLICANT

BERNARD NYONGESA SIMIYU-----2ND
PLAINTIFF/APPLICANT

EDWARD VEROZA KIDULLAH-----3RD
PLAINTIFF/APPLICANT

VERSUS

**AGRICULTURAL DEVELOPMENT
CORPORATION-----1ST**
DEFENDANT/RESPONDENT

**THE REGISTRAR OF TITLES
NAIROBI-----2ND**
DEFENDANT/RESPONDENT

RULING

- 1.** In an application dated **27/10/2025**, the applicants are seeking leave to file additional documents, which include a police abstract, an affidavit by the 2nd applicant, and an allotment letter for **L.R. No. 11502/1 Kitale Municipality**. The applicants also seek to have the attached documents deemed as duly filed and served.
- 2.** The grounds are that though the hearing was scheduled for **28/10/2025**, the original documents, which are crucial for a just determination, were initially misplaced

and have now been retrieved. The applicants depose that they stand to suffer more prejudice if the documents are not included than the defendant, who will have an opportunity to cross-examine. The documents are annexed as **KWW-1**.

3. The 1st respondent opposes the application through a replying affidavit dated **11/11/2025**. He terms the application as an afterthought and contrary to the law. The 1st respondent deposes that following several pretrial conferences, parties indicated that they were ready to proceed, and the matter was set down for hearing. Further, the 1st respondent deposes that the said documents have not been referred to either in the plaint or their witness statements. Again, the 1st respondent deposes that the applicants have not referred to the payment receipts and the civil society card number **9421848**, yet they were in their possession.
4. In written submissions dated **11/11/2025**, the 1st respondent submits that the courts mandate us to ensure fair trial and disallow parties from relying on documents not in the pleadings as held in **Odinga & 5 others -vs- Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013)**

(Consolidated) [2013] KESC 6 (KLR) (16 April 2013) (Judgment).

5. Further, the 1st respondent relies on **Ongeri -vs- Skytop Technologies Ltd (2019) eKLR**, to submit that the three-part approach that the court ought to consider, namely the relevance of the documents, reasons for the delay in filing, and the prejudice to be occasioned on the other party, has not been demonstrated.
6. The 1st respondent submits that the application was filed late, to frustrate the hearing of the suit; otherwise, there was no indication that the documents were missing and would be filed contrary to **Order 11** and **Order 3 Rule 2** of the Civil Procedure Rules.
7. The 1st respondent submits that, though under **Section 95** of the Civil Procedure Act, the court has discretion to grant the orders sought on the circumstances of each case, and in this case, the applicants are seeking to amend the suit with additional evidence.
8. **Order 11** of the Civil Procedure Rules requires that, before a suit is set down for hearing, parties file their respective documents within certain stipulated timelines. Leave of the Court must be sought and

obtained before filing additional documents outside the set timelines.

9. Under **Order 3 Rule 2** of the Civil Procedure Rules, the plaintiff is required to file a verifying affidavit, a list of witnesses, their statements, as well as copies of the documents to be relied upon during the trial. Similarly, the defendant is obliged under **Order 7 Rule 5** of the Civil Procedure Rules to file the same documents together with his defence and counterclaim, if any.
10. Before the pre-trial conference, statements may be filed with leave of the Court. In **Pinnacle Projects Limited - vs- Africa & Another [2019] eKLR**, it was held that while considering the additional evidence, the court ought to conduct a careful inquiry into the nature of the evidence as to its relevance, material facts in issue, admissibility, and the strength of the evidence sought to be introduced.
11. In **Marcus Kibuku Nimrod & Another -vs- Nessy Kuthii Justus 2017 eKLR**, it was held that before a court can grant or deny leave to a party seeking to file additional documents, it will take into account the reasons why the documents were not filed on time, the stage of the proceedings and the prejudice to be caused to the other party. Where the trial has not commenced,

or it is at its early stages, no prejudice will be caused to the other party.

- 12.** In this application, the reasons given by the applicants are that they had misplaced the affidavit, allotment letter, and the police abstract that they now seek to file. The initial plaint in this suit was filed on **4/1/2022** and later amended on **15/5//2023**. The 1st and 2nd defendants filed an amended statement of defence and defence on **2/6/2022** and **26/7/2023**, respectively.
- 13.** The instant application was filed a day before the hearing scheduled for **28/10/2025**. The 1st respondent avers that there have been several pretrial conferences, and upon compliance, the matter was set down for hearing. Again, the 1st respondent avers that the applicants had never referred to the said documents, and the same have been manufactured.
- 14. Section 95** of the Civil Procedure Act provides that,
“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
- 15. Article 159 (2) (d)** of the Constitution states that justice shall be administered without undue regard to

procedural technicalities. Also, **Article 50 (1)** provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

16. In considering an application for additional evidence at the appeal stage, which is not the case in this matter, the Supreme Court in interpreting **Rule 26** of its Rules in **Mohammed Abdi Mohamud -vs- Ahmed Abdulahi Mohamud & 3 Others, Supreme Court Petition No 7 Of 2018 As Consolidated with No. 9 of 2018 [2018 eKLR]**, laid down the following principles in considering the filing of additional evidence:

- 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 addressed 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 as to make 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 cause of 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 utilised for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful;*
- j) *A party that 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 its/ case.*
- k) *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.

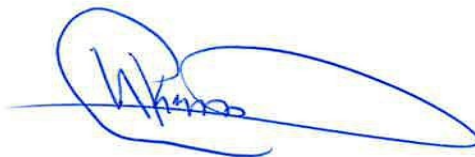
- 17.** From the foregoing caselaw, additional documents to be used at the hearing can be allowed depending on the circumstances of each case. In this suit, the pleadings have closed, but the hearing has yet to commence. The documents sought to be filed meet the principles considered above. Similarly, the respondents will have an opportunity to cross-examine during the trial.
- 18.** Substantive justice to the parties requires a court to lean towards allowing additional evidence, especially in a case such as this one, where the trial has not even commenced and where the other party will have adequate opportunity to rebut such additional evidence.
- 19.** In **Okwara -vs- Ouma (Environment & Land Case 175 of 2017) [2024] KEELC 13392 (KLR) (13 November 2024) (Ruling)**, the court held that the primary duty of any court is to always strive towards allowing the parties to present before it all available and relevant documents and other evidence so that justice is seen to have been served.

- 20.** The upshot is, the application is allowed. The plaintiffs shall file and serve the additional documents within **14** days from the date hereof.
- 21.** Costs to the defendants.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 10th day of December 2025.

In the presence of:

Court Assistant - Dennis
Teti for plaintiffs -present
Auta for 1st defendant -present
Chilaka for 2nd defendant -absent



**HON. C.K. NZILI
JUDGE, ELC KITALE.**