

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: KANTAI, LESIIT & ALI - ARONI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E202 OF

2024 BETWEEN

**MARION NYAKAIRO RUNO.....1ST
APPLICANT ISAIAH GICHOHI RUNO.....
.....2ND APPLICANT**

AND

JASON NDUNGU RUNO.....RESPONDENT

*(Being an application for leave to adduce further evidence from
the Ruling of the Environment and Land Court at delivered on 9th
May, 2024*

in

E.L.C No. 254 of 2013.)

RULING OF THE COURT

The application before this Court is dated 22nd January, 2025 and is brought by the applicants, wherein they pray to be allowed to adduce further evidence in their appeal. The said appeal arises from the ruling dated 9th May, 2024 where the Environment and Land Court (hereinafter “ELC”) dismissed their suit, ELC No.254 of 2013.

The main ground of the application is that the applicants allegedly submitted evidence to their Advocate, who did not file it in court. The said evidence in issue is an alleged will by their late father, Runo Mukuhu Njagi. They term the failure to file the same

at the ELC as an omission by the Advocate, which should not be

visited on them. They state that the new evidence is credible and is not meant to fill a lacuna in evidence. They urge that the new evidence will assist the court in terminating endless litigation and aid the course of justice. The applicants have filed submissions dated 31st March, 2025 in support of their application.

The application is opposed by the respondent who has filed a replying affidavit sworn on 28th January, 2025 as well as written submissions dated 11th February, 2025. The respondent states that the application is frivolous and an abuse of the court process. He states that the applicants have not demonstrated why the evidence could not have been availed earlier or how the evidence may have a direct bearing on the appeal. He accuses the applicants of seeking a fresh trial in this Court as they never produced the will during the trial, while they condoned negligence by their counsel. The respondent urges this Court to dismiss the application with costs.

This application was heard on 19th May, 2025 on the Court's virtual platform. Learned counsel **Mr. Muchangi** appeared for the appellants/applicants while learned counsel **Ms. Njeri Magua** appeared for the respondent.

Counsel for the applicants submitted that the suit property was given as a gift inter vivos to the applicants, as per the wishes of the proprietor, and that the will is not voluminous to prejudice its addition into evidence.

The respondent's counsel opposed the application and stated that the applicants had a duty to ensure all evidence in support of their case was produced. He urged the court to dismiss the application.

We have considered the record of the application, the submissions by counsel and the relevant laws.

This Court is empowered to take additional evidence under Rule 31 (1)(b) of the Court of Appeal Rules, 2022. It provides:

“31. Power to re- appraise evidence and to take additional evidence

(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-

(a) to re-appraise the evidence and to draw inferences of fact; and

(b) in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.”

This Court in **Chege vs. Chege (Civil Appeal (Application) 198 of 2019) [2024] KECA 241 (KLR) (8 March 2024) (Ruling)**

while dealing with an application to adduce additional evidence stated:

"In Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen and Paul Fredrick Nelson [2017] eKLR, it was expressed that under Rule 29(1) (a), additional evidence will be introduced on

appeal in the

***discretion of the Court, “for sufficient reason”.
The Court further stated that:***

“Though what constitutes “sufficient reason” is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible.”

The Supreme Court of Kenya in Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 Others (2018) eKLR, reiterated the above principles and emphasized and stressed that additional evidence at the appellate level should be allowed on a case-by-case basis and even then sparingly and with abundant caution.”

We concur with the above holding by this Court. As affirmed by the Supreme Court additional evidence ought to be allowed sparingly on a case by case basis at the appellate level.

It is our considered view that the applicants herein have not met the threshold to be allowed to adduce additional evidence on appeal, to convince this court to exercise the discretion sought. We say so because the evidence sought to be adduced was always available but was omitted due to negligence. We also fault the applicants for failing to attach the judgment by the ELC. This

failure negatively affected the ability of this Court to appreciate the effect of the will on the proceedings at the ELC.

The result of the foregoing is that the application fails and is dismissed with costs to the respondent.

Dated and delivered in Nyeri this 11th day of December, 2025.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

ALI - ARONI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR