



REPUBLIC OF KENYA



KENYA LAW
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**Karauki & 2 others v Thurania (Environment and Land Appeal
E093 of 2021) [2025] KEELC 5633 (KLR) (28 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E093 OF 2021**

BM EBOSO, J

JULY 28, 2025

BETWEEN

ESTHER KARAUKI 1ST APPELLANT

ROSE MWARI 2ND APPELLANT

SAMUEL GITONGA KITHELA 3RD APPELLANT

AND

MORRIS THURANIRA RESPONDENT

RULING

1. Falling for determination in this ruling is the appellants' notice of motion dated 3/2/2025, through which they seek the following orders:
 - (i) an order granting them leave to amend their memorandum of appeal;
 - (ii) an order granting them leave to adduce additional evidence in this appeal;
 - (iii) an order deeming the exhibited amended memorandum of appeal as duly filed upon payment of the requisite court fees; and
 - (iv) an order providing for costs of the application. The application was expressed as anchored on Sections 78 and 100 of the *Civil Procedure Act*; Order 8 rule 3 and Order 42 rules 27, 28 and 29 of the Civil Procedure Rules. The respondent opposed the application.
2. The grounds upon which the application is based are contained in the motion and in the supporting affidavit sworn on 3/2/2025 by Esther Karauki. The application was canvassed through written submissions dated 28/3/2025, filed by M/s Mbaabu M'Inoti & Co. Advocates. The case of the appellants [hereinafter referred to as "the applicants"] is that, through a honest mistake, the filed memorandum of appeal left out certain important grounds of appeal. They add that they have now



included the said grounds of appeal in the draft amended memorandum of appeal. They argue that the intended amendments are necessary to enable the court determine all the issues raised in the appeal and pronounce itself on the appeal with finality. It is the case of the applicants that the intended amendments will not occasion any prejudice to the respondent.

3. On the plea for leave to adduce additional evidence in the appeal, the applicants' case is that, while preparing the memorandum of appeal, the intended additional evidence

“was inadvertently included in grounds of appeal 2, 3 and 4 without prior leave of this appellate court, which action was procedurally erroneous and became apparent whilst preparing written submissions in this matter”.
4. The applicants add that the additional evidence which they intend to adduce relate to objection proceedings under the Land Adjudication Act contained in Objection No. 2278 of 1997 which revoked letters of subdivision which purported to grant the respondent land parcel number Amwathi/Maua/1386. They contend that they learnt of the decision in the objection proceedings on 13/7/2021, a day after the trial court had rendered the impugned judgment. They urge the court to allow the plea.
5. The respondent opposed the application through a replying affidavit dated 5/3/2021 and written submissions dated 11/4/2025, filed by Ngunjiri Michael & Co. Advocates. The case of the respondent is that the application is frivolous, vexatious, scandalous and a waste of the court's time. He contends that there is no new evidence demonstrated by the applicants to warrant the grant of leave to adduce additional evidence. The respondent terms documents relating to the alleged objection proceedings as part of the forgery committed by the appellants and argue that the appellants had sufficient time to adduce the said fraudulent documents.
6. The respondent states that the alleged evidence which the applicants intend to adduce as additional evidence was available when the trial court was making its decision. He further states that the evidence which the applicants are waving is not relevant at this stage because it relates to proceedings that are alleged to have taken place during the land adjudication exercise and cannot be useful once land has been registered. They add that the evidence the applicants intend to introduce is not reliable because it does not have an accompanying official Government receipt to demonstrate their authenticity.
7. The respondent adds that the applicants seek to reopen a case that has already been heard and determined on merits. He further contends that the case belongs to the litigants and not to the advocate, adding that the applicants should not blame their advocates for mistakes made. He states that he stands to suffer prejudice if the application is allowed because he has been in occupation of the suit land since 1998 and the applicants are trying to steal his land.
8. The court has considered the application, the response to the application and the parties' respective submissions. The two issues that fall for determination in this ruling are: (i) Whether the application satisfies the criteria upon which this court exercises jurisdiction to grant leave to an appellant to amend a memorandum of appeal: and (ii) Whether the application satisfies the criteria for granting leave to adduce additional evidence in an appeal. I will analyse and dispose the two issues sequentially in the above order.
9. The framework on amendment of pleadings is contained in Order 42 rule 3(1) and 2 of the Civil Procedure Rules which provides as follows:
 - (1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.



- (2) After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.
10. The Court of Appeal outlined the general guiding principle on amendment of pleadings in the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR as follows:
- “That a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”
11. This appeal was filed on 11/8/2021. It is not clear why it has taken this long for the appeal to be disposed. What is clear is that the formal plea for leave to amend the memorandum of appeal came at the stage of filing submissions. The applicants contend that through a honest mistake, they omitted certain important grounds of appeal. The exhibited draft amended memorandum of appeal contains three additional grounds. In his replying affidavit, the respondent focused on the plea for leave to adduce additional evidence but did not place much focus on the plea for leave to amend the memorandum of appeal.
12. At this stage, in the absence of grounds of opposition and in the absence of proper grounds for departing from the general principle, the guiding principle dictates that leave to amend the memorandum of appeal be granted. That is the finding of the court on the first issue. I now turn to the second issue.
13. Does the application meet the criteria for granting leave to adduce additional evidence in an appellate court? The jurisdiction of this court to admit additional evidence when exercising appellate jurisdiction is donated by Section 78 (1) of the *Civil Procedure Act* which provides as follows:
- “78. Powers of appellate court
- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.”
14. The jurisdiction to grant leave to a party to adduce additional evidence in an appeal is regulated by the framework in Order 42 rules 27, 28 and 29 of the Civil Procedure Rules which provide as follows:
27. Production of additional evidence in appellate court
- (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.

28. Mode of taking additional evidence

Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Limits to be defined and recorded

Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

15. The guiding principle on an appellate court's exercise of jurisdiction to grant leave to a party to adduce additional evidence were outlined by the Supreme Court of Kenya in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR 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. whether a party would reasonably have been aware of and procured the further evidence in the course 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 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 the weak points in his/her 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.
16. In *Attorney General V. Paul Kawanga Ssemwogerere & another; Constitutional Appeal No. 2 of 2004 [2004] UGSC 3*, the Supreme Court of Uganda outlined the following comparative jurisprudential principles:
- “... an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances which include:
- i. Discovery of new and important matters of evidence which, after the exercise of due diligence, 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;
 - ii. It must be evidence relevant to the issues;
 - iii. It must be evidence which is credible in the sense that it is capable of belief;
 - iv. The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;
 - v. The affidavit in support of an Application to admit additional evidence should have attached to it, proof of the evidence sought to be given;
 - vi. The application to admit additional evidence must be brought without undue delay.”
17. The overarching rationale in the above principle is that there would be no end to litigation unless a party is, by law, required to put his full case before the case during trial. Consequently, courts are stringent to allow a party to reopen a case through adducing of additional evidence at the appellate stage.
18. Has the above criteria been met? The objection proceedings which the appellants are waving and urging this court to admit as additional evidence are expressed as dated 24/6/1998. Trial took place between December 2020 and March 2021. The applicants have not explained to the court the source of the alleged new evidence. They have not explained to the court the reason that prevented them from procuring the said objection proceedings for the purpose of producing them during trial. Put differently, they have not told the court where they got the documents from and why they were not able to procure and produce them during trial. They have not exhibited any official receipt indicating that the documents are authentic records from the Department of Lands.
19. The dispute in the trial court revolved around the allegation of falsification of records. The applicants were reasonably aware of the evidence they needed to procure to counter the allegations. It is therefore clear that the applicants only went fishing for purported new evidence after they lost their counterclaim in the trial court. They have elected to withhold information relating to the source of the alleged evidence.



20. Taking the foregoing into account, the view of the court is that the applicants have failed to demonstrate that the purported new evidence was not within their reach on exercise of reasonable diligence. Consequently, the finding of the court is that the application does not meet the criteria for granting leave to a party to adduce additional evidence in an appeal.
21. In the end, the application dated 3/2/2025 succeeds only partially in the following terms;
- a. The plea for leave to amend the memorandum of appeal is allowed in terms of prayer 2 and the appellants are granted 10 days within which to file and serve their amended memorandum of appeal.
 - b. The plea for leave to adduce additional evidence in this appeal is rejected.
 - c. The appellants/applicants shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF JULY, 2025

B M EBOSO [MR]

JUDGE

In the Presence of

Ms Githinji for the Appellants

Court Assistant - Tupet

