



**Wakhule v Atipole (Environment and Land Appeal E045 of 2024)
[2026] KEELC 1712 (KLR) (11 March 2026) (Ruling)**

Neutral citation: [2026] KEELC 1712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E045 OF 2024**

**A NYUKURI, J
MARCH 11, 2026**

BETWEEN

JAMES WAKHUSAMA WAKHULE APPELLANT

AND

PHILEMON NAMUKURU ATIPOLE RESPONDENT

RULING

1. Before court is application dated 18th July 2025 filed by the appellant seeking the following orders;
 - a. That the Kakamega County Surveyors report dated 28th May 2025 relating to LR NO. E/Wanga.eluche/1956 And E/wanga.eluche/1957 together with the resultant Kakamega County Land Registrar's report dated 25th June 2025 both annexed in the affidavit in support of this application be admitted as evidence in this appeal.
 - b. That costs of this application to abide by the outcome of the appeal.
2. The application is supported by the affidavit sworn by the applicant on 18th July 2025. The applicant's case being that the dispute herein relates to the acreage of his land. That the question before court can be determined by making reference to the survey report on the suit properties. That by the time judgment was delivered by the trial court a survey report could not be procured to enable the court appreciate the dispute and make a determination on the same.
3. Further that he called surveyors to determine a boundary dispute on the two suit properties but that upon visiting the site, they discovered that it was more than a boundary dispute and that he needed to file a claim for land. That the surveyors did not give the actual differences in acreage of the land occupied by parties vis a vis the acreage on the title and that the report sought to be produced clarifies the position. That this court has jurisdiction to admit new evidence.



4. The application was opposed. The respondent filed replying affidavit dated 3rd October 2025. He stated that there is no application in this court seeking for the surveyor and land registrar to visit the suit property. That the report sought to be produced raises fresh issues. That the Land Registrar filed his report in the lower court dated 13th March 2025 after visiting the suit property. That the second report is unnecessary.

Analysis and determination

5. The court has carefully considered the application and response and the only issue that arise for the court's determination is whether the applicant has met the threshold for production of new evidence on appeal.
6. Section 78 (1) (d) of the *Civil Procedure Act* grants the court power to take additional evidence or to require the evidence to be taken. Order 42 Rule 27 of the Civil Procedure Rules grants an appellate court power to admit additional evidence.
7. It is trite that grant of an order for adducing new evidence on appeal is discretionary and should only be allowed in exceptional circumstances where the evidence sought to be produced could not be availed even on exercise of reasonable diligence. Besides, the evidence sought to be produced ought to have an important influence on the outcome of the matter and ought to be apparently credible and necessary. Adducing new evidence should not be used as a tool to fix a weak case.
8. In the case of *Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others* [2018] KESC 62 (KLR) the Supreme Court set out the relevant guidelines an appellate court should consider before granting orders for admission of new evidence in the following terms:
 - 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.”
9. In the instant case, the report sought to be produced was allegedly done by the Land Registrar and surveyor on 28th May 2025. This is 9 months after the delivery of judgment by the trial court. No reason has been given why the appellant did not seek to have the report prepared before judgment or why no court order was sought to have the said evidence availed before judgment.
10. It is clear to me that the report sought to be produced is meant to fix the gaps in the appellant’s case. There is no demonstration that due diligence was applied in securing the evidence before judgment. Therefore, the applicant has no justification whatsoever for his failure to avail the said evidence before the trial court before judgment.
11. In the premises, I find and hold that the application dated 18th July 2025 lacks merit and the same is hereby dismissed with costs.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 11TH DAY OF MARCH 2026

A. NYUKURI

JUDGE

In the presence of

Ms Imbosa for the appellant

The respondent in person

Court Assistant: Delphine

