



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E034 OF 2024

JOHNSON MACHAKO MUTUKUAPPLICANT
VERSUS
SYMON MWANGI KARUGAH.....RESPONDENT

(Being an Appeal against the Judgment of Hon. S. Mwangi in Murang'a C.M.C. ELC Case No. 139 of 2018 delivered on 3.7.2024 – Murang'a CMCC)

RULING

(1) This ruling is on the notice of motion dated 21-7-2025. The motion which is brought under **Section 78 of the Civil Procedure Act, Sections 2A and 3A of the Civil Procedure Act, Orders 42 rules 27 and 28 and 5 rule 1 of the Civil Procedure Rules 2010** seeks three orders.

- (i) The Appellant be allowed to file additional evidence.**
- (ii) The Appellant to be allowed to file a supplementary record of appeal.**
- (iii) That the costs of this application be provided for.**

(2) The motion is based on six (6) grounds and is supported by an affidavit sworn by the Appellant dated 21-7-2025. The essence of the grounds and the affidavit is as follows. One, the Appellant stands to be prejudiced in the appeal if the application is not allowed leading to substantial justice not being done. Two, the Respondent will not be prejudiced or inconvenienced in any way if the application is allowed. Three, the appeal raises issues of fact that can only be rebutted by adducing additional evidence failure to which the appeal will be determined unjustly. This additional evidence addresses the Respondent's claim. Finally, the additional evidence to be adduced shall impact the results of the case and is not voluminous.

(3)The motion is opposed by the Respondent who has sworn a replying affidavit dated 6-8-2025 in which he replies as follows. The application is incompetent and has no basis in law. Secondly, the annexure to the application which looks like a certificate of title is not properly marked, is illegible and faint. Thirdly, from the attached copy of witness statement by Sarah Kamini Tilus, there is no new evidence that arises and the Appellant is just regurgitating the evidence already filed by him and his witnesses. Fourthly, the record of appeal leaves out crucial documents that were presented in evidence. It also leaves out parts of the proceedings before the lower court. Fifthly, the motion fails the threshold in **Ordered 42 rules 27 and 28** of the Civil Procedure Rules which requires the Appellant in an application such as this to prove that he was denied a chance to adduce the evidence now sought to be adduced and that the additional evidence is necessary for the determination of an issue in question.

(4)Counsel for the parties filed written submissions dated 12th and 16th March 2026 respectively. The issues raised by the Respondent's counsel are two.

- (i) **Whether the Applicant has met the conditions for the production of additional evidence on appeal.**
- (ii) **Who bears the costs.**

On the other hand, the Appellants counsel has not identified any issues for determination.

(5)I have carefully considered the motion in its entirety including the grounds, the supporting affidavit, the replying affidavit, the written submissions, the issues raised therein and the law cited.

I find that the failure by the Appellant's counsel to frame any issues for determination creates a gap which is not fully filled by the framing of the issues by the Respondent's counsel. Consequently, the court will frame the issues guided by **Order 15** of the **Civil Procedure Rules** and the grounds on which the motion is based in addition to the issues identified by the Respondents counsel.

Order 15 of the **Civil Procedure Rules** provides as follows.

2. **“ The Court may frame the issues from all or any of the following materials-**

- (a) allegations made on oath by the parties, or by any persons present on their behalf or made by the advocates of such parties;**

- (b) allegations made in the pleading or in answers to interrogatories delivered in the suit,**
- (c) the contents of documents produced by either party.**

The issues that I identify are as follows.

- (i) Whether the Appellant will be prejudiced if the motion is not allowed.**
- (ii) Whether the Respondent will be prejudiced if the application is allowed.**
- (iii) Whether the appeal raises issues that can only be rebutted by adducing additional evidence.**
- (iv) Whether the additional evidence sought to be adduced shall impact the results of the case.**
- (v) Whether the appellant has met the conditions for the production of additional evidence on appeal under Order 42 of the Civil Procedure Rules.**
- (vi) Whether the record of appeal is complete.**

(6) In answer to the first issue, I find that the Appellant will be prejudiced if the motion is not allowed. At the trial, particularly on 23-4-2024, the Appellant did not adduce all the evidence that he wished. His case was closed before all his evidence was adduced. In a case such as this where the Appellant is to be evicted from land that he occupies, it is important that all available evidence be adduced. Neither the lower Court nor the Respondent are to blame for failure of the Appellant's witnesses to testify. There were a number of adjournments between 12-4-2023 and 23-4-2024 caused by both sides and the Court. During this period one of the Appellant's witnesses died and the other because recalcitrant. In such a situation, the Appellant should have been allowed to call evidence in the place of the two witnesses who did not testify.

(7) To answer the second issue, I find that any delay in the case is prejudicial to the Respondent. This is because through he is the registered owner of the suit land, he is not in occupation. It is the Appellant who is in occupation. The Respondent has everything to lose by any delay while the Appellant actually gains by delaying the case. He is enjoying land which legally belongs to another person and he delayed the one in the lower court as the record shows.

(8) Regarding the third issue, I find it prudent not to comment on it because any comment might prejudice the fair hearing of the suit. This finding ties up with the fourth issue because am not

sure that I have seen all the additional evidence to be adduced. I have seen a copy of a document which is not legible. I cannot therefore tell its contents. I cannot therefore tell its impact on the case. I have also seen two (2) witness statements by Samson Wachira Njogu and Sarah Kanini Tilus. I do not know if this is the evidence that the Appellant sought to adduce in the lower court.

(9) On the fifth issue, I find that the Appellant has met the conditions for the production of additional evidence on appeal because the lower court refused to admit evidence which should have been admitted.

(10) On the final issue, I find that the record of appeal is incomplete and that could be one of the reasons why the Appellant seeks to file a supplementary record of appeal. I also find the record so far compiled is cumbersome. It contains material that it should have omitted and omits material that it should have included.

Under Order 42 rule 13, the following material must be included in the record of appeal.

(a) the memorandum of appeal,

(b) the pleadings,

(c) the notes of the trial magistrate made at the hearing,

(d) the transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing,

(e) all affidavits, maps or other documents whatsoever put in evidence before the magistrate,

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving lease to appeal.

The current record of appeal contains notices of motions, supporting affidavits and rulings not relevant to the appeal. Pleadings include the plaint, the defence and counterclaim together with the accompanying documents. They excluded everything else.

For the above stated reasons, I **allow** the notice of motion dated 21-7-2025 in terms of prayers **1** and **2**.

Costs in the cause.

Dated, Signed and Delivered virtually at Murang'a this 13th day of April, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of; -
Court Assistant – Jackline
Appellant’s Counsel – Mr T.M. Njoroge
Respondent’s Counsel – Mr. Jessee Kariuki