



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ELCLA NO. E008 OF 2024

JACKSON KANGOGO
APPELLANT

VERSUS

KIMALEL GROUP RANCH
RESPONDENT

RULING

1. The Judgment in this appeal was scheduled for delivery by **WAITHAKA J.** on 1st February 2026. However, **KIMALEL GROUP RANCH** (the Respondent in this appeal and who are the Applicant in this motion) moved this court vide their Notice of Motion dated 11th November 2025 seeking the following orders:

1. Spent

2. That leave be granted to the Respondent to adduce and file additional documents in this appeal.

3. That this Honourable Court be pleased to grant leave that the new documentary evidence be filed as a supplementary record of appeal.

4. Costs be in the cause.

2. The motion is premised on the provisions of **Section 78 (1)(d)** of the Civil Procedure Act and **Order 42 Rule 27** of the Civil Procedure Rules. It is anchored on the grounds set at therein and supported by the affidavit of **JEREMIAH K. KIPKURERE** the Respondent's chair person.

3. The gravamen of the motion is that the Respondent has now obtained documents crucial to its case and relevant to this appeal but which could not be produced during the trial due to leadership wrangles within the Respondent and which hindered access to records held by the Respondent's secretary. The Respondent seeks the admission of those documents which are the Certificate of Incorporation of the Respondent Ranch and a letter of consent to divide the land parcel **NO. BARINGO/KIMALEL/2** (suit land) which documents have been annexed to the motion. That all efforts were made to obtain the documents prior to and during the hearing but those efforts were unsuccessful due to the wrangles, non-co-operation and non-disclosure which have now been resolved. The said documents are central and material to the issue raised in this appeal and the Respondent's failure to produce them was not due to lack of diligence or wilful omission but was as a result of the wrangles in the Respondent's office. The admission of the said documents will not prejudice the Appellant as he will have

an opportunity to respond, challenge, test their authenticity, credibility and relevance during the hearing of the appeal. That none of the said documents will require the court to re-open matters already determined by the trial court but will only aid this court clarify the Respondent's legal status. That this motion has been brought promptly and in good faith with the sole intention of aiding this court to comprehensively and justly determine the issues between the parties.

4. In response to the motion, the Respondent's counsel **MR. VINCENT KIPTOON** filed a replying affidavit dated 24th November 2025. He has deponed therein, inter alia, that it is not true that this appeal only raises issues of the Respondent's locus standi and legal capacity. Rather, the appeal also raises issues of the jurisdiction of the subordinate court to determine and hear the suit which was before it.
5. That the Respondent's admission that they were unable to access documents to prove its status is proof that the suit in the trial court was incompetent. That the trial court considered the issue of locus and made a finding. Therefore, if there were documents necessary to address the issue of locus which were not available then, that issue should have been raised during the trial. That even if the documents sought to be introduced may be touching on this appeal, relevance alone is not sufficient to warrant that extraordinary step of re-opening the

proceedings. The Respondents have not shown any steps which they took before or during the trial to secure their documents and the alleged leadership wrangles do not meet the threshold for admitting new evidence at this stage.

6. That the sudden urgency to introduce such new evidence after the appellant has filed his submissions is a clear indication that this application is an afterthought designed to fill gaps in the Respondent's case. That the appeal process is not meant to patch up omission, negligence or tactical choices made at the trial stage.
7. The Respondent has not demonstrated that there is sufficient explanation for the long delay or that the documents to be produced are credible or likely to influence the outcome of the appeal. The motion is not supported by affidavits of those persons privy to the record (including the secretary) nor any documentary proof of alleged leadership disputes. Lack of such affidavits fatally undermines the Respondent's application and strengthens the Appellant's position that the Respondent lacked the mandate to file the suit in the trial court. That allowing new evidence will prejudice the Appellant's case and re-open matters which have already been determined by the trial court and undermine the finality of litigation by permitting the Respondent to patch up the gaps in its case.

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8. That although it is trite that this court has the discretion to receive additional evidence under the law, such discretion should only be exercised where a party demonstrates the necessity for such admission. This application is made in bad faith and is an attempt to defeat this appeal and the documents sought to be produced are neither new nor were they un-available and neither has the Respondent explained why they were not produced with due diligence.
 9. This motion is devoid of any merit, is an abuse of the court process and should be dismissed with costs.
 10. The court directed that the motion be canvassed by way of written submissions.
 11. The submissions were subsequently filed both by **MR. KOGO** instructed by the firm of **KOGO KIMUTAI & COMPANY ADVOCATES** for the Respondent and by **MR. KIPTOON** instructed by the firm of **KIPTOON & COMPANY ADVOCATES** for the Appellant.
 12. I have considered the motion, the rival affidavits and annextures thereto and the submissions by counsel.
 13. As stated earlier, **WAITHAKA J** had already listed Judgment in this appeal to come up for delivery on 18th February 2026.

However, upon being confronted with this motion, the Judge directed it be canvassed first.

14. The Judgment was therefore put on hold and this motion fell for me to determine following Judge **WAITHAKA'S** transfer.

15. There is no doubt that this court, exercising its appellate Jurisdiction, has the power to direct that additional evidence be filed even at this stage. **Section 78(1)** of the Civil Procedure Act provides that;

“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.”

16. Further, **Order 42 Rules 27, 28 and 29** of the Civil Procedure Rules provide the following:

27 (1)”: The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the court to which this 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: “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: “ 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 to be specified.”

17. Superior courts have provided guidelines for the admission of new evidence. They include the following which were set out by the **SUPREME COURT OF KENYA** in the case of **HON. MOHAMED ABDI MAHAMUD V. AHMED ABDULLAHI MOHAMAD & 3 OTHERS SUPREME COURT PETITION NO. 7 and 9 of 2018** (Consolidated) **2018 KESC 62 KLR** at paragraph 79 as follows:

1. “the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;”

2. “ it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;”

3. “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;”

4. “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;”

5. “the evidence must be credible in the sense that it is capable of belief;

6. “the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;”

7. “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;”

8. “where the additional evidence discloses a strong prima facie case of willful deception of the Court;

9. “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.”

10. “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.

11. “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.”

18. The court went on to observe that the court will only allow additional evidence on a case - by - case basis and even then, sparingly and with abundant caution.
19. The above guidelines have been followed by other courts including in the case of **NAOMI NJERI GICHUKI & ANOTHER V. JAMES KHUMBA NJENGA & 2 OTHERS C.A CIVIL APPEAL NO. 413 of 2019 [2025 KECA 451 KLR]**. This court will be guided accordingly.
20. I will begin by observing that the response by the Appellant was filed by their counsel **MR. KIPTOON** and not by the Appellant himself. It is not clear why the Appellant did not depone the replying affidavit. While there is no express prohibition against counsel swearing an affidavit - **KAMLESH M. PATTNI V. NASI IBRAHIM & 2 OTHERS C.A. CIVIL**

APPEAL NO. 354 OF 2004 – It was held in the same case that advocates should not swear affidavits in contentious matters. See also **Rule 9** of the **ADVOCATES (PRACTISE) RULES** which provides that.

“ No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required to give evidence, whether verbally or by declaration or affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear; provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter in which he acts appears”

21. Similarly, in the case of **HAKIKA TRANSPORTERS SERVICES LTD .V. ALBERT CHULA WAMIMITAIRE 2016 eKLR**, the **COURT OF APPEAL** citing its own decision in the case of **SALAMA BEACH LTD V MARIO ROSS C.A CIVIL APPEAL NO. 10 of 2015** emphasised that.

“Ordinarily, counsel is obliged to refrain from swearing affidavits on contentious issues particularly where he may have to be subjected to cross examination”

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22. Therefore, where counsel swears an affidavit on contentious issues, the court is entitled to expunge the affidavit (or the offending portions,) or give the affidavit no probative value rendering it useless.
23. Among the issues which **MR. KIPTOON** has deponed on in his replying affidavit include that the Respondents have not provided proof of alleged wrangles among the leadership which made it difficult to avail the documents, that the Respondent should have raised those issues at the trial, issues of locus and jurisdiction etc.
24. Those are the contentious issues which lessen the probative value of the replying affidavit by **MR. KIPTOON**. Only the Appellant would have been best suited to fully rebut the contentious issues averred by **JEREMIAH K. KIPKUIZERE** about the Respondent's inability to access vital documents following the leadership wrangles in their office.
25. All the documents sought to be produced are relevant in this Appeal and will the appellant be prejudiced? Among the issues which arose at the trial was whether the Respondent was registered as a group and if there was any evidence provided. In paragraph 10 of the impugned Judgement, the trial magistrate made a finding that the Respondent's chairman

who had testified as PW1 had not produced evidence of such registration. Among the documents which the Respondent wishes to adduce an additional evidence is the certificate of registration issued on 2nd August 1988 confirming that the Respondent is indeed registered under the Land Group Representatives Act 1968. There is also a copy of the letter of consent to sub-divide the suit land among among the respondents 656 members.

26. The Respondents have not struck me as persons who seek to make a trial case in this appeal or to patch up a weak case. The additional evidence is not voluminous making it difficult for the Appellant to respond and the same is credible and capable of belief. It has a direct bearing on the main issue, is relevant and it is in the interest of justice to all the parties herein that it be admitted so as to remove any vagueness or doubts over the case and as is now clear, the wrangles made it difficult for the Respondents to avail it. The authenticity of the documents sought to be produced has not been doubted. To disallow the Motion will deny the Respondents a fair trial which is guaranteed under **Article 50(1)**, of the constitution and there is nothing to suggest that the Appellant will be prejudiced by the admission of the additional evidence as he will have an opportunity to respond to it.

27. Where a party wishes to adduce evidence in support of his case, the court as the bastion of justice, should facilitate rather than impede the admission of the same unless it is inadmissible or there are other compelling reasons as to why the said evidence should not be allowed.

28. Due to the foregoing reasons, I am persuaded that the Respondent's motion dated 11th November 2025 is merited and is for allowing. I therefore make the following dispositive orders.

1. The Motion is allowed.

2. The Respondent shall file and serve the Appellant by way of affidavit with the additional evidence annexed to the Motion within 14 days from the date of this ruling.

3. The Appellant shall, within 14 days from the date of service respond to the additional evidence also by way of affidavit.

4. Costs of the Motion shall abide by the appeal.

5. As WAITHAKA J had on 2nd December, 2025 vacated the earlier date of Judgment, this appeal will be mentioned on 20th May 2026 to confirm compliance and take a fresh date for Judgment.

BOAZ N. OLAO
JUDGE
17TH APRIL 2026

Ruling dated, signed and delivered on this 17th day of April 2026 by way of electronic mail.

BOAZ N. OLAO
JUDGE
17TH APRIL 2026