

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC APPEAL NO. E057 OF 2024**

**JOSPHAT** **RWIGI**  
**MUCHANJE.....APPELLANT/APPLICANT**  
**VERSUS**  
**WISLON** **NJAGI**  
**NJERU.....RESPONDENT**

**RULING**

1. Vide the Notice of Motion application dated 02/04/2025, the Applicant is seeking the following orders;
  - a. that this Court be pleased to take additional evidence identified in the Applicants supporting affidavit or to direct that additional evidence be taken by the trial Court in such manner and subject to such conditions as this Court deems appropriate to reach the ends of justice;
  - b. that the Applicant be granted leave to file and adduce the additional evidence from the SCCIO Mbeere South under the Directorate of Criminal Investigations, to present and produce in court the final, comprehensive, detailed and conclusive investigation report together with any supporting documents in relation to activities surrounding the fraudulent transfer of land parcel Mbeere/Mbita/2233 by the

Respondent in support of his case as set out in his supporting affidavit;

- c. that leave be granted that the new documentary evidence be adduced by way of an affidavit and filed as a supplementary record of appeal;
- d. that the Court be pleased to grant leave to the Applicant to file together with the above a certified copy of the decree which was erroneously filed as an uncertified copy and further leave to file stamped annexures all in the supplementary record of appeal.

The application is based on grounds on the face of the application supported by the affidavit of the Applicant, Josphat Rwigi Muchanje sworn on 02/04 2025. He deposed he seeks leave to adduce newly discovered evidence from the DCI (SCCIO Mbeere South), which allegedly demonstrates that the Respondent fraudulently acquired the suit land through forged tribunal proceedings and misrepresentation to the court. That he report indicates that the tribunal lacked jurisdiction and that the purported award was fabricated. The Applicant contends that the Respondent further acted fraudulently by initiating proceedings after his father's death and by concealing a prior valid court order in the Applicant's favour. It is argued that the trial court failed to consider material evidence and the Applicant's overriding interest. The Applicant maintained that without the evidence the Court will be deprived of critical proof of fraud resulting in a miscarriage of justice and that together with his children they

stand to lose their only home they have had for over 40 years. He averred that no prejudice will be occasioned to the Respondent if leave is granted as the documents sought to be produced corroborate existing evidence and more so because he will have an opportunity to respond.

He annexed to the supporting affidavit a copy of the death certificate of the Respondents father and the report dated 31/03/2025.

The Respondent in opposition filed a replying affidavit dated 19/05/2025 and deposed that the application lacks merit, is fatally defective and an abuse of the court process. He averred that the Applicant had a fair access to justice and the opportunity to produce any evidence that was relevant to his case and that the trial Court did not deny him an opportunity to adduce any evidence during trial. He averred that the preliminary report by the SCCIO Mbeere South is not conclusive evidence as the report is not based on the SCCIO's knowledge but is purportedly based on other documents and information received by them.

He contended that the documents referred to in the report were always available and accessible to the Applicant. That he had not been charged with any criminal offence nor had he been convicted of any offence that has any bearing to this appeal and that the Applicant was desperately fishing for evidence after losing before the trial Court. He averred that the report is inconclusive and that no offence he had committed had been disclosed. He maintained that the Applicant was unfairly

protracting the matter so as to delay his enjoyment of the fruits of his judgement and that the application did not meet the threshold for adducing additional evidence in an appeal. He urged that the application be dismissed with costs to him.

The Applicant filed a further affidavit and a second further affidavit and deposed that the evidence he seeks to introduce is new and was not within his possession at the time of the proceedings before the lower court. He averred that the said evidence includes official records and documents from relevant public offices which only became available after persistent efforts and formal application before the SCCIO. He stated that the additional documents include an interim police investigation report, a witness statement by Josphat Kiura, the former Chairman of the Gachoka Land Disputes Tribunal, and the finalized tribunal cases report. He maintained that the additional evidence is credible, directly relevant to the issues on appeal and has material bearing on the outcome of the appeal. He averred that the evidence was not intended to bolster his case unfairly or to patch up any weaknesses but rather to clarify and remove any vagueness regarding ownership and possession of the suit property. He annexed to the affidavits a copy of the final police report dated 17/06/2025.

When the application came up for directions, the parties agreed to canvass it by way of written submissions. The Applicant filed submissions dated 12/06/2025 through the firm of Horeria Kamau and Company Advocates.

They submitted that the jurisdiction of this court to admit additional evidence at the appellate stage is anchored in section 78(1) (d) of the Civil Procedure Act and Order 42 Rules 27-29 of the Civil Procedure Rules. He averred that the principles that guide the Court in admitting additional evidence at the appellate stage were laid out in the case of Mohamed Abdi Mohammed versus Ahmed Abdullahi Mohammed and 3 others (2018) Eklr and affirmed in the case of Attorney General versus Torino Enterprises Ltd (2019) Eklr. He averred that the additional evidence sought to be produced herein fully complies with the judicial standard for admissible new evidence as it directly proves fraud without revisiting ancillary issues.

He submitted further that the evidence was relevant and credible as the DCI Report dated 31/03/2025 constitutes official investigative findings from a competent government agency and directly addresses the heart of the dispute by exposing the fraudulent means through which the Respondent allegedly acquired title to the suit property. He averred that on the issue of due diligence, he had demonstrated that despite making numerous attempts to obtain the evidence during the trial proceedings, the DCI investigations were still ongoing and the final report only became available after conclusion of trial. He averred that his application was not an attempt to fill evidentiary gaps but rather to present crucial evidence that conclusively proves allegations of fraud that were already pleaded in the trial court but could not be fully substantiated at the time due to

unavailability of the DCI report. He urged that the application be allowed.

The Respondent filed submissions dated 09/07/2025 through the firm of Duncan Muyodi and Company Advocates where he mainly reiterated the contents of his replying affidavit.

Having considered the application, the responses made thereto and the parties' respective submissions, the singular issue for determination is whether the court should grant leave to the Appellant to adduce additional evidence at the appeal stage.

The law governing the admission of additional evidence on appeal is found in Section 78(1)(d) of the Civil Procedure Act which provides that an appellate court shall have power to take additional evidence or to require the evidence to be taken. And Order 42 Rule 27 of the Civil Procedure Rules, 2010 provides as follows:

- 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.

The guiding principles have also been laid down in numerous authorities, including in **Ladd v Marshall [1954] 1 WLR 1489** where it was held that:

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”.

In the present case, the Applicant seeks to adduce three sets of evidence:

An investigative report from the Directorate of Criminal Investigations (DCI) dated 31/03/2025, purporting to show that the Respondent fraudulently acquired ownership of the suit land; A statement from Josphat Kiura, the Chairman of the Gachoka Land Disputes Tribunal, recorded on 26/03/2025, alleging that the Respondent forged tribunal proceedings to obtain the title to the suit land; and a list of cases heard and determined by the

Gachoka Land Disputes Tribunal to demonstrate that the case referenced by the Respondent to acquire the suit land was not one of them.

The Applicant explained that this evidence was unavailable at the time of trial because the investigations were ongoing. Judgment in the lower court was delivered on 28/11/2024, whereas the DCI report and the accompanying statement of Josephat Kiura were prepared in March 2025, after conclusion of the trial court proceedings. The evidence sought to be introduced therefore postdates the trial, making it, on the face of it, unavailable with reasonable diligence at that time.

The Court is satisfied that the documents in question are prima facie relevant to the issues in dispute on the ownership of the suit land a central issue in the trial Court and in the appeal. The evidence appears credible as it emanates from an official government agency and includes statements from a person who, by office, is presumed to have knowledge of the relevant tribunal proceedings. In addition to that, the evidence in my view are necessary in the eventual determination of the appeal and would have likely been so had it been available to the trial court. This Court is persuaded that it is in the interest of justice to allow the new evidence and consider the issues raised therein at the appellate stage.

Accordingly, and in line with the prayers sought in the Notice of Motion dated 02/04/2025, the Court makes the following orders:

- a. Leave is hereby granted to the Applicant to adduce additional evidence on appeal as identified in the supporting affidavit.
- b. The additional evidence shall be adduced by way of affidavit and filed as part of a supplementary record of appeal.
- c. Leave is granted to the Applicant to file and produce the final, comprehensive, detailed and conclusive investigation report from the SCCIO Mbeere South under the Directorate of Criminal Investigations, together with any supporting documents in relation to the alleged fraudulent transfer of land parcel Mbeere/Mbita/2233 as set out in his supporting affidavit.
- d. Leave is further granted to the Applicant to file a certified copy of the decree, in place of the uncertified copy earlier filed, and to include duly stamped annexures in the supplementary record of appeal.
- e. The Applicant shall file and serve the supplementary record of appeal within fourteen (14) days from the date hereof.
- f. The Respondent is granted corresponding leave to file a response and any additional evidence deemed necessary within fourteen (14) days of service.
- g. Costs of the application shall abide the outcome of the appeal.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY  
OF APRIL, 2026**

**HON. E.C CHERONO  
ELC JUDGE**

In the presence of;

1. Mr. Kamau for the Appellant/Applicant
2. Mr. Okwaro for the Respondent
3. Diana Kemboi C/A