



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E091 OF 2024

DANIEL MWANDIKI

MURUNGIAPPELLANT

=VERSUS=

LAWRENCE GIKUNDA

MWANDIKI.....RESPONDENT

RULING

1. Falling for determination in this ruling is the appellant's application dated 26/11/2025 in which he seeks leave to adduce additional evidence in this appeal. The application was brought under, *inter alia*, **Section 78(1)** of the **Civil Procedure Act**. The respondent opposed the application. The key issue to be determined in the ruling is whether the application meets the criteria for admitting additional evidence at the appellate stage.
2. The application was premised on the grounds outlined in the motion and in the applicant's affidavit dated 26/11/2025. It was canvassed through written submissions dated 14/1/2026, filed by **M/s Murango Mwenda & Company Advocates**. The case of the applicant is that the respondent is his son.

The respondent stole his title relating to land parcel number **Abogeta/Nkachie/625** without his knowledge. Secondly, the respondent initiated fraudulent succession proceedings relating to the applicant's estate in **Meru High Court Succession Cause No 23 of 2014** and caused the land to be transmitted to him [to the respondent] despite the fact that the applicant was alive and kicking. Thirdly, without his knowledge, the respondent used the fraudulently acquired title as security against a loan he [the respondent] obtained from **Times U Sacco Ltd.**

3. The applicant adds that when he discovered the fraudulent transmission of his title through the fraudulent succession cause, he reported the matter to the Police. The respondent was arrested, charged, tried and convicted on all the counts. He adds that, while the criminal case was ongoing, he filed **Nkubu SPMC E & L Case No 29 of 2019** seeking an order annulling the fraudulent registration of the respondent as proprietor of the suit land. The trial court heard the said case and rendered a judgment dated 4/12/2024 in which it dismissed his claim. Aggrieved by the said judgment, he brought the present appeal.
4. The applicant contends that he was unable to tender a copy of the judgment relating to the criminal case [**Nkubu SPMC Criminal Case No 648 of 2018**] because the criminal trial was ongoing at the time he filed the land case. He adds that he could not avail the conveyance documents that were used to procure the transmissions because they could not be traced in the Land Registry. The applicant further blames his

previous advocate for omitting to call the Nkubu Law Courts Executive Officer to produce the court file relating to the criminal case.

5. The applicant itemized the following as the additional evidence which he seeks to be admitted: (i) the charge sheet in Nkubu SPMC Criminal Case No 648 of 2018; (ii) the judgment in Nkubu SPMC Criminal Case No 648 of 2018; (iii) Letter dated 20/11/2025 written by the applicant's advocate; (iv) various documents relating to the fake grant issued in **Meru High Court Succession Cause No 23 of 2014**; (v) the letter dated 20/11/2025 and the transfer/conveyance/transmission documents used to register the respondent as proprietor of the suit land; and (vi) the letter dated 1/10/2018 from the Meru Law Courts Executive Officer and the proceedings in Nkubu SPMC Criminal Case No 648 of 2018.
6. It is the case of the applicant that the above evidence is directly relevant to this appeal and will influence/impact on the verdict of the court. He contends that the respondent will not suffer any prejudice.
7. The respondent opposed the application through a replying affidavit dated 11/12/2025 and written submissions dated 16/1/2026, filed by **M/s Mukuna Eshuchi & Associates Advocates**. The case of the respondent is that the application is misconceived, legally untenable and constitutes an abuse of the court process because it seeks to improperly re-open a matter that was fully heard and

conclusively determined by the trial court. The respondent adds that the application does not meet the strict and settled principles governing admission of additional evidence at the appellate stage as laid down by the Supreme Court of Kenya in ***Mohamud v Muhamad & 3 others [Petition 7 & 9 of 2018 [consolidated] [2018] KESC 62 KLR.***

8. The respondent argues that the additional evidence is not directly relevant to the issues in this appeal because the trial court already fully considered and determined the allegation of fraud based on the evidence that was presented, adding that the applicant has not demonstrated that the proposed evidence would influence or impact the verdict of this appeal. The respondent contends that the proposed evidence was well within the applicants' knowledge and possession during trial and the applicant could have tendered it if he exercised reasonable diligence.
9. The respondent contends that at the time of filing **Nkubu SPMC E & L Case No 29 of 2019**, the criminal case [**Nkubu SPMC Criminal Case No 648 of 2018**] had already been initiated against him and the applicant was privy to this fact, adding that between the date of filing the land case and the date of the impugned judgment, the applicant had approximately 5 years to obtain and tender the additional evidence. He argues that the applicant is attempting to patch up his case. He states that an omission by the applicant's advocate to tender evidence that the applicant desired to be tendered is not a ground for admitting additional evidence at the appellate stage.

- 10.** The respondent argues that admission of the additional evidence will necessitate re-opening of factual inquiry, recalling of witnesses, and re-litigation, thereby offending the principle in ***Mahamud v Mohamad & 3 others*** which provide that the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively. Lastly, the respondent contends that admission of the proposed additional evidence would prejudice him because it will occasion unnecessary delay, expenses and injustice. He adds that the balance of proportionality weighs heavily against admission of the proposed evidence because of the likely prejudice, delay and erosion of the doctrine of certainty in litigation. He urges the court to reject the application.
- 11.** The court has considered the application; the response to the application; and the parties' respective submissions. The court has also considered the relevant legal frameworks and the prevailing jurisprudence on the key question in the application. As pointed out in the opening paragraph of this ruling, the key issue to be determined in the ruling is whether the application dated 26/11/2025 meets the criteria for admitting additional evidence at the appellate stage.
- 12.** 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. (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”

- 13.** The jurisdiction is regulated by the framework in **Order 42 rules 27, 28 and 29** of the **Civil Procedure Rules** which provides as follows:

“27. (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. 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 so specified”.

14. The guiding principle of an appellate court’s exercise of jurisdiction to grant leave to a party to adduce additional evidence was 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

nor 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; where the additional evidence discloses a strong prima facie case of willful deception of the court.

h) The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence.

i) 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.

j) 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”.

15. In ***Attorney General v Paul Kawanga Ssemwongerere & another; Constitutional Appeal No 2 of 2004 [2004] UGSC 3***, the Supreme Court of Uganda outlined the following comparative jurisprudential principles on admission of additional evidence by an appellate court:

“...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”.

- 16.** 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 court during trial. Consequently, courts are stringent in their exercise of jurisdiction to allow a party to reopen a case through admission of additional evidence at the appellate stage.
- 17.** Has the above criteria been met? The court has itemized the specific pieces of evidence which the applicant wishes to adduce as additional evidence. There is no doubt that the evidence was relevant to the issues which the trial court was seized of. There is also no doubt that the evidence is relevant to the key issue in this appeal. I say so because the key issues in the appeal are: (i) Whether registration of the respondent as proprietor of the suit land was procured fraudulently; and (ii) Whether the title held in the name of the respondent should be annulled on the ground that it was procured fraudulently as alleged. What the court needs to evaluate is whether the above evidence was out of the reach of the appellant upon exercising reasonable diligence.

- 18.** Was it impossible to obtain the itemized additional evidence upon exercise of reasonable diligence by the applicant? The first piece of evidence which the applicant seeks to have admitted at the appellate stage is the charge sheet in **Nkubu Criminal Case No 648 of 2018**. At the time the applicant initiated **Nkubu SPMC E & L Case No 29 of 2019**, the charge sheet existed in the criminal case file. At the time trial hearing was conducted in the said land case (civil) in November 2021, the said charge sheet existed. As a complainant and a witness in the criminal case, the applicant was fully aware of existence of the criminal case and existence of the charge sheet. All that the applicant was expected to do was to request the Criminal Court Registry to avail to him a certified copy of the charge sheet. The applicant has not demonstrated that it was impossible to obtain the charge sheet upon exercise of reasonable diligence.
- 19.** The second piece of evidence which the applicant seeks to introduce as additional evidence in this appeal is the judgment in the criminal case. Judgment in the criminal case was rendered on 8th November, 2019. No evidence has been tendered to demonstrate that, as a complainant, the applicant was completely unable to obtain a certified copy of the judgment from the Criminal Court Registry on exercise of reasonable diligence between September 2019 and the date of delivery of the impugned judgment [4/12/2024].
- 20.** The third piece of evidence which the applicant seeks to introduce is copy of the letter dated 20th November, 2025

which the applicant's advocate wrote to the Land Registrar, South Imenti, requesting for copies of the conveyance documents which the Land Registry relied on to register the respondent as proprietor of the suit land. This was a letter written by the applicant's advocate in 2025, long after the impugned judgment had been rendered. Alongside the letter dated 20/11/2025, the applicant seeks to adduce transmission (conveyance) documents relating to the impugned transfer. Again, the applicant has not demonstrated that he tried to but he was completely unable to access the above documents which at all material times were in the criminal case file and in the Land Registry.

- 21.** The fourth piece of evidence which the applicant seeks to introduce consists of various documents relating to **Meru High Court Succession Cause No 23 of 2014**. All that the applicant was required to do was to write to the Deputy Registrar of the court requesting for certified copies of the relevant documents. There is no evidence tendered to demonstrate that any such formal request was made or to show that the applicant exercised some reasonable diligence in seeking to obtain copies of the record relating to the succession case.
- 22.** The last piece of evidence which the applicant seeks to introduce are the proceedings in **Nkubu SPMC Criminal Case No. 648 of 2018**. The applicant has, similarly, not demonstrated that he made formal requests and paid for the proceedings but the Criminal Court Registry failed to avail to him the proceedings. Put differently, the applicant has not

demonstrated that he exercised reasonable diligence in seeking to obtain the proceedings.

23. The totality of the foregoing is that the applicant has failed to meet the criteria upon which an appellate court would allow a party to introduce new evidence at the appellate stage. The result is that the application dated 26/11/2025 fails and is dismissed for lack of merit. In tandem with the general principle in **Section 27** of the **Civil Procedure Act**, the applicant/appellant shall bear costs of the application.
24. Lastly, while considering the now disposed application, it has emerged that there existed [and there may still exist] against the title which is the subject matter of this appeal, a charge in favour of **M/s Times U Sacco Society Limited** for Kshs 1,700,000. Were this appeal to succeed and the appellant is granted the orders that were sought in the suit in the trial court, the court will, in effect, be annulling a title that is held by the said Sacco as security. The court is invited to do so in the absence of the said Sacco.
25. Consequently, the court will give the parties an opportunity to address it on the question as to whether the said Sacco is a necessary party in this appeal. A mutually convenient date will be set by the court when the parties will address the court on this issue.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF APRIL, 2026.

B M EBOSO [MR]
ELC JUDGE

In the Presence of:

Mr. Murango Mwenda for the Appellant

Mr. Tsuma for the Respondent

Mr. Tupet - Court Assistant