



Mudachi v Muthama & another (Environment and Land Appeal E199 of 2025) [2026] KEELC 2501 (KLR) (30 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E199 OF 2025
EK WABWOTO, J
APRIL 30, 2026**

BETWEEN

MARY MUSUKI MUDACHI APPELLANT

AND

JOYCE NZISA MUTHAMA 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

RULING

1. This Ruling is in respect to the Notice of Motion dated 8th December 2025 brought by the Appellant/Applicant pursuant to Articles 50 and 159 of *the Constitution* of Kenya 2010, Sections 1A, 3, 3A, 78(1) (d) & (2) and 100 of the *Civil Procedure Act* (Cap. 21), Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of law.
2. The Applicant prays for the following orders:
 - i. Spent ...
 - ii. That the Honourable Court be pleased to issue orders compelling the 2nd Respondent to produce the original copies of the rental card number 308 for Kariokor Market Stall No. 197 dated 2nd May 1978 issued in the name of Mary M. Mwangela and any other relevant documents.
 - iii. That the Honourable Court be pleased to issue orders permitting the Appellant/Applicant to adduce additional evidence, including the original replacement rental card for Kariokor Market Stall No. 197 and the original document(s) produced pursuant to prayer (ii) above.
 - iv. Any other orders that this Court may deem fit.



3. The application is supported by the grounds on the face of the Motion, and the Supporting Affidavit of the Applicant sworn on 8th December 2025.
4. The 1st and 2nd Respondents did not file any formal response. However, Counsel for the 2nd Respondent made oral submissions in opposition, urging the Court to refer to the proceedings before the trial Magistrate on the status of the documents sought.
5. This appeal arises from Civil Suit No. MCCC No. 1261 of 2005 in the Milimani Commercial Magistrates Court. The suit concerned the tenancy rights over Stall No. 197 at Kariokor Market, Nairobi, originally rented by the defunct Nairobi City Council to the late Mary Nthoki Mwangela (mother of both the Plaintiff/1st Respondent and the 2nd Defendant/Appellant).
6. In the Amended Complaint dated 7th March 2019, the Plaintiff claimed to have taken over the stall after her mother's death on 23rd July 2003, paid rent and permits, and been unlawfully evicted by the 2nd and 3rd Defendants in 2015. She produced as P. Exhibit No. 1 the original rent card dated 17th March 1999 issued to the late mother.
7. The 1st Defendant Nairobi City County/2nd Respondent filed an Amended Defence dated 11th June 2024 denying the Plaintiff's tenancy and asserting that the Appellant was its tenant. Its witness, Joshua Otieno Ondego (DW1 – Market Superintendent), testified that a rental card is proof of tenancy but disputed the Plaintiff's P. Exhibit No. 1 and claimed the stall was rented to the Appellant.
8. The Appellant filed an Amended Defence dated 5th November 2024, asserting she was the lawful tenant, that her rent card had been lost, and that her documents were with the County. She produced limited documents but maintained her entitlement.
9. After a full hearing on 24th April 2025 with cross-examination of witnesses and reference to trial bundles and directions for production of originals – see annexed proceedings MMM-1, the learned Magistrate delivered judgment on 5th September 2025. He held that the original rent card P. Exhibit No. 1 proved the late mother's tenancy; neither daughter held a proprietary interest relying on *Clovers Foods (K) Limited & Another v The City Council of Nairobi & Another* [2009] KEHC 2533 (KLR); the County's claim that the Appellant was tenant lacked documentary support and suggested "fraudulent connivance"; the Plaintiff's suit failed; and each party was to bear its own costs due to the conduct of the County witness and the Appellant.
10. The Appellant lodged this appeal on 3rd October 2025, raising ten grounds, inter alia: that the Magistrate erred in failing to find the Plaintiff's rent card fraudulent/unreliable; shifted the burden of proof; issued a contradictory decision; failed to consider the Appellant's documentary evidence and the issuing authority's witness; and demonstrated bias. The Record of Appeal is now ready and filed. This application seeks to place before this Court critical documentary evidence on the core issue of tenancy rights.
11. The substantive issues for determination are as follows:
 - i. Whether this Court should exercise its discretion to compel production of documents by the 2nd Respondent.
 - ii. Whether leave should be granted to the Appellant to adduce additional evidence in the appeal.
12. Section 78(1)(d) of the *Civil Procedure Act* empowers an appellate court "to take additional evidence or to require evidence to be taken."



13. Order 42 Rule 27(1) of the Civil Procedure Rules 2010 provides:

“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.”

14. The discretion is exercised sparingly and judiciously. The Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR laid down the governing principles:

- (a) The additional evidence must be directly relevant to the matter and in the interest of justice.
- (b) It must be such that, if given, it would influence or impact upon the result of the verdict (though not necessarily decisive).
- (c) It must be 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 by the party seeking to adduce it.

15. These principles have been consistently applied by the Court of Appeal in the case of *Safe Cargo Limited v Embakasi Properties Limited & 2 others* [2019] eKLR; *Dorothy Nelima Wafula v Hellen Nekesa Nielsen & another* [2017] KECA 654 (KLR) and align with the long-standing test in *Tarmohamed & Another v I.H. Lakhani & Co* [1958] EA 567).

16. Additional evidence is not permitted merely to patch up a weak case or fill gaps, but only for substantial cause where justice demands it.

17. In the ELC context, where disputes often turn on documentary proof of rights over public land or market stalls (as in *Clovers Foods* cited by the trial Magistrate), and given the constitutional imperatives of fair hearing (Articles 25 and 50(1) and substantive justice (Article 159), the Court leans towards admission where the evidence is credible, material, and advances resolution without undue prejudice.

18. It is noted that, despite being duly served with the application and having been afforded ample time to file a formal response, the 2nd Respondent elected not to do so and opposed the application solely through oral submissions by reference to the lower court record. While such submissions are permissible, this approach reflects a somewhat casual engagement with the present interlocutory application, particularly as it concerns the production of official records of which the 2nd Respondent is the custodian.

19. It is a well-settled principle of law that where a party fails to file a replying affidavit or otherwise specifically controvert the material averments contained in a supporting affidavit, those facts are deemed to have been admitted. This principle promotes procedural fairness, efficiency, and prevents parties from leaving the Court to speculate on unchallenged evidence. See *Mukisa Biscuit Manufacturing Co. Ltd v West End Bakery Ltd* [1969] EA 696 and the more recent affirmation by the Court of Appeal in *Kenya Ports Authority v Modern Construction Co. Ltd* [2017] eKLR.



20. In the present application, the Applicant's averments regarding the trial court's directions for production of originals, her inability despite reasonable diligence to retrieve the replacement rental card in time for the hearing on 24th April 2025, the loss of her original documents, and the materiality of the proposed evidence therefore stand uncontroverted and are accepted by this Court.
21. The proposed evidence is directly relevant and central to the appeal. The trial Magistrate's judgment turned on the Plaintiff's P. Exhibit No. 1 (rent card in the late mother's name) and the absence of any alternative documentary proof from the Appellant or the County (see judgment pages 6–9). The Magistrate expressly discredited the County witness's testimony that the Appellant was the tenant for lack of supporting documents and noted "fraudulent connivance."
22. The Appellant's appeal grounds 1, 2, 5, and 6 directly challenge this evaluation of evidence, the burden of proof, and the failure to consider her entitlement through documentary evidence endorsed by the issuing entity's witness.
23. The evidence could not reasonably have been procured with diligence at trial.
24. The Applicant depones at paragraphs 3–5 of her Affidavit that:
 - (a) the trial court issued directions for production of original documents;
 - (b) her rent card had been lost/misplaced (consistent with her trial testimony);
 - (c) despite efforts, she could not retrieve the replacement card (No. 170) in time for the 24th April 2025 hearing;
 - (d) she has since retrieved it (MMM-2). Annexure MMM-1 (proceedings) corroborates the context of trial bundle directions and the County's role as custodian.

The 2nd Respondent's witness had already testified to the Appellant's tenancy without producing documents. This is not a case of withholding evidence; it is a documented inability to produce what was directed.

25. The evidence is credible a duplicate replacement rental card issued by the County itself and, if admitted, would probably have an important influence on the outcome. It directly addresses the evidentiary gap the Magistrate himself highlighted and goes to the heart of the tenancy dispute.
26. Admission will enable this Court, as the first appellate court, to re-evaluate the evidence afresh as stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123 and pronounce a just judgment.
27. Substantial cause exists. The 2nd Respondent as successor to the original lessor and custodian of rental records has a duty to produce originals for verification. Compelling production under prayer 2 is necessary to enable this Court properly adjudicate the dispute herein. (See Order 42 Rule 27(1)(b)). Denying the application would undermine the Appellant's right to a fair hearing and the Court's duty to resolve the longstanding family and public-market-stall dispute on its true merits. No fresh case is being made; the issue was live at trial.
28. On prejudice and fairness, it is noteworthy that the Respondents will suffer no prejudice. They will have full opportunity to present their case. The evidence is documentary and does not reopen the entire trial.
29. For the reasons set out above, I find the application dated 8th December 2025 is meritorious. The same is hereby determined as follows;



- i. The 2nd Respondent shall, within 14 days of delivery of this Ruling, produce to this Court and serve on all parties the original rental card No. 308 dated 2nd May 1978 and any other original or relevant documents in its custody relating to the tenancy of Kariokor Market Stall No. 197. In default, the 2nd Respondent shall file an affidavit explaining the reasons and the steps taken to locate the same.
- ii. The Appellant/Applicant is granted leave to adduce additional evidence, namely:
 - (a) the duplicate replacement rental card No. 170 (or original where available) annexed as MMM-2; and
 - (b) any original documents produced by the 2nd Respondent pursuant to order 2 above.
The same shall be filed and served as a Supplementary Record of Appeal within 21 days of this Ruling.
- iii. The Respondents may, if so advised, file any response within 14 days thereafter.
- iv. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL, 2026.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Mary Mudachi the Appellant in person.

N/A for the 1st Respondent.

Mr. Oriaro for the 2nd Respondent.

Court Assistants: Mary Ngoira and David Ngoosa.

