



**Otieno v Developing Africa Limited & another (Civil Appeal (Application)  
E035 of 2024) [2026] KECA 782 (KLR) (24 April 2026) (Ruling)**

Neutral citation: [2026] KECA 782 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E035 OF 2024  
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
APRIL 24, 2026**

**BETWEEN**

**JENNIFER OTIENO ..... APPLICANT**

**AND**

**DEVELOPING AFRICA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NANDI OWUOR YUSTO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to adduce additional evidence from the Judgment and decree of the Environment and Land Court of Kenya at Kisumu (Asati, J) dated 15th November, 2023 in ELC Case No. 15 of 2014)*

**RULING**

1. The applicant moved this Court by notice of motion under Rule 31(1)(b) of the Court of Appeal Rules seeking to be granted leave to adduce additional evidence in the appeal. Specially, the applicant sought to have the affidavit sworn by one Jane Lungatho Ndege and a Green Card for the Land Parcel No. Kisumu/Nyalenda “B”/630 (the suit property) obtained from the Land Registry Kisumu be admitted as additional evidence during the hearing of the appeal. The application is supported by the grounds on its face and the supporting affidavit of Jennifer Otieno, the applicant.
2. The applicant deposed that during the hearing before the trial Court, although she made effort to secure the attendance of Jane Lungatho Ndege and obtain the green card in respect of the suit property from the Lands Registry Kisumu, she was not successful. The hearing proceeded in the absence of the said evidence. After conclusion of the trial and the delivery of Judgment, she managed to trace said Jane Lungatho Ndege. She provided a statement under oath in an affidavit dated 23<sup>rd</sup> May, 2025. It is this affidavit that the applicant desires to be produced before this Court as additional evidence.
3. Further, the applicant deposed that she was not able to obtain the green card in respect of the suit property during the pendency of the hearing of the suit before the trial court. The green card went



missing. She pointed out that the green card in respect of the suit property will show the parcel of land that is land parcel No. Kisumu/Nyalenda”B”/1568 was subdivided from the suit property. She was able to obtain the said green card after the conclusion of hearing before the trial Court. The applicant swore that the said affidavit and the green card are crucial and relevant evidence that will directly affect the outcome of the appeal.

4. The applicant asserted that the said evidence could not be procured in time during hearing before the trial Court despite reasonable diligence. She pleads with the Court to allow her to place the said evidence on record in form of additional evidence before the hearing of the appeal as it contains “credible, relevant and material evidence” that will ensure just and fair determination of the appeal.
5. The application is opposed. The 1<sup>st</sup> respondent’s General Manager Oscar Mori, swore a replying affidavit in opposition to the application. He was not convinced that the applicant laid sufficient basis for this Court to allow the adduction of additional evidence before this Court on appeal. He deponed that the said affidavit and green card could have been procured had the applicant exercised reasonable diligence. He observed a green card is a public document which is always available at the Land Registry if anyone so requested. The deponent of the affidavit had always been available to adduce evidence before the trial Court. The 1<sup>st</sup> respondent was of the view that the request for inclusion of additional evidence at the appellate stage was an afterthought and meant to “seal the gaps and loopholes in the appellant’s evidence at the trial court.”
6. The 1<sup>st</sup> respondent was not convinced that the said additional evidence was sufficient or credible enough to influence the outcome of the appeal. They reiterated that they will be prejudiced if the application is allowed. They urged the court to dismiss the application with costs.
7. The applicant and the 1<sup>st</sup> respondent filed written submission in support of their respective opposing positions before the plenary hearing of the application. During plenary hearing, Ms. Awuor, learned counsel for the applicant and Mr. Bwire, learned counsel for the 1<sup>st</sup> respondent briefly highlighted their respective clients’ written submissions.
8. Both counsel appreciated the principles to be considered by this Court in determining whether or not to allow the applicant to adduce additional evidence on appeal. In *Dorothy Nelima Wafula v. Hellen Nekesa Nielson & another* [2017] KECA 654 (KLR) this Court held thus:

“...before the Court can permit additional evidence to be adduced under Rule 29 (now Rule 31), it must be shown, one, that it could not have been obtained by reasonable diligence before and during the hearing, two, that the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible. It is agreed that these are only general principles and certainly not the only ones.”

9. In *Peninah Nandako Kiliswa v. Independent Elections and Boundaries Commission & 2 others* [2014] KECA. 807 (KLR), this Court stated that:

“As regards the second issue, there are principles that governed determination for adduction of additional evidence on appeals. The policy of the Court is that power to call additional evidence is required to be exercised very sparingly and with great caution. As a general rule an appellate Court will not admit such evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available. However,



there is an exception where the grounds on which adduction of additional evidence on appeal is premised on fraud or surprise.”

10. In the present application, it is the applicant’s argument that she was not able to obtain the two pieces of evidence during the pendency of the hearing before the trial Court. She swore that despite making effort, she could not procure the witness to testify on her behalf at the time. She further stated that the green card at the Land Registry went missing at the time she went to look for it. The 1<sup>st</sup> respondent was not convinced by the reasons given by the applicant for failure to avail the said evidence during trial. In particular, the 1<sup>st</sup> respondent pointed out that obtaining a copy of the green card in respect of the suit parcel of land was not a difficult thing as the said green card is a public document available to anyone who applied for it. The 1<sup>st</sup> respondent was not persuaded that the applicant had exercised due diligence to entitle her to the orders that she was seeking from this Court.
11. Upon evaluation of the facts in the support of the application and the submission made before us, we are satisfied that the applicant has not convinced us that she has made a case for us to exercise our discretion in her favour. From the affidavit in support of the application, it was apparent that the applicant knew the whereabouts of the witness and could have procured her to give her evidence before the trial Court. It was clear to us that she did not exercise due diligence in her effort to procure the said witness to give testimony before the trial Court.
12. Further, we agree with the 1<sup>st</sup> respondent that a green card, being a public document can be obtained from the lands office upon application. The applicant did not place any evidence before us that she made application at the Land Registry Kisumu during the hearing before the trial Court and was informed that the particular green card was missing. What we have on record is her claim in regard to the alleged missing green card without proof that she made effort to procure the same during the pendency of the hearing. We hold that the applicant did not satisfy us that she exercised the required due diligence that entitles her to the order of adduction of additional evidence that she craves for in her application.
13. The application lacks merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF APRIL, 2026.**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

.....

**H.A. OMONDI**

**JUDGE OF APPEAL**

.....

**L. KIMARU**

**JUDGE OF APPEAL**

I certify that this is a true copy of original.

Signed

**DEPUTY REGISTRAR.**

