

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ELC L. APPEAL CASE NO. E028 OF 2024**

**BONIFAS ALIACH OKELLO.....1<sup>ST</sup>**

**APPELLANT**

**KENNETH OMONDI OKELLO.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**GAUDENSIA ACHIENG NYADERO.....1<sup>ST</sup>**

**RESPONDENT**

**ANASTACIA WENDY WAGUNA.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

1 This ruling is the subject of the Notice of Motion dated 26/11/2025 by the appellants seeking leave to file additional evidence in support of their case and upon grant of the order they be allowed to file an amended

Memorandum of Appeal and a Supplementary Record of Appeal.

- 2 The application is supported by the affidavit sworn by the 1<sup>st</sup> Appellant Kenneth Omondi Okello who depones that he filed memorandum of appeal without guidance of counsel and which requires amendment.
- 3 The applicant avers that he has been diligent in producing all evidence it recently came to his knowledge that certain documents were not produced during the trial at the lower court, which documents were and are necessary for the proper adjudication of the present appeal. That the documents were discovered after delivery of the judgement in the trial court. It is his desire this be allowed as additional evidence. The same are not scandalous, vexatious nor unnecessary. He prays that the same may be taken on record and marked as exhibits in their present appeal.
- 4 That he is not guilty of laches or negligence in the additional evidence sought to be brought on record. That no prejudice will be occasioned to the respondents as they

will have every opportunity to cross examine the applicants after their production.

- 5 The documents are given as Declaration over Sale of Land dated 13<sup>th</sup> April 1983, and Letter of Consent dated 23<sup>rd</sup> October, 1986 – copies are annexed.

**RESPONSE:-**

- 6 The application is opposed vide the replying affidavit of Gaudensia Achieng Nyadero the 1<sup>st</sup> respondent sworn on 2/2/2026. It is deponed that no sufficient cause has been adduced as to why the application should be allowed. The application is a misuse of the appellate process. Referring to the three guiding principles set by the Supreme Court of Kenya for adducing additional evidence it is submitted that the same has not been met.
- 7 That it can be inferred from the applicant's deposition that it has recently come to her knowledge that certain documents were not produced to mean that though she had custody of the documents he failed to produce them for reasons best known to him. Referring to paragraph 7 of

the applicants supporting affidavit it is averred that there is no explanation where, how they were discovered and why the same could not have obtained with reasonable diligence for an entire period of over 3 years from the time the suit was filed in March 2021 and delivery of judgement in December 2024.

- 8 It is averred that no explanation is given on efforts made to trace the same during the pendency of the suit bearing in mind that the purported sale was explicitly controverted by the defence pleadings. The applicant adds that with or without the new evidence the applicant's case was of such low standards and was bound to collapse as the applicant told the trial court he had no problem with the respondent's occupation of the suit land. That the documents sought to be adduced fail the credibility test because they bear different signatures, different dates and different sizes.

- 9 The applicant has also referred the court to the cases of **James Kariuki Njoroge Vs. Kenneth Mwaura and James Auma Mitalo Vs. Joseph Okello Okello.**

**SUBMISSIONS: -**

- 10 The application was heard by submissions. The applicants' submissions are dated 6/2/2026. The respondents' submissions were not on record as the time I sat to prepare this ruling on 26/04/2026.

**ANALYSIS AND DETERMINATION:-**

- 11 I have considered the application, supporting affidavit and the response thereto and the submissions on record. The main issues for determination are ;-

1) Whether the Applicant has met the statutory threshold to warrant the grant of leave to adduce additional evidence in appellate court.

2) Whether the grant of such leave will prejudice the Respondent.

12 Section 78 of the Civil Procedure Act Chapter 21 of the Laws of Kenya makes provision on the duties of an appellate court and reads; -Powers of appellate court

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.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

13 Arising from the above provisions therefore an appellate court is vested with power to grant leave for production of additional evidence where appropriate.

14 The matter of additional evidence at appellate stage has also been subject to judicial decisions all the way to the Apex Court of Kenya as follows; -

15 The Supreme Court of Kenya in the case of **Muhammed Abdi Muhammed v Ahmed Abdulahi Muhhamed & 3 Others [2018] eKLR**, stated thus;

**“79. Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya 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 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;**

**(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;**

**(h)where the additional evidence discloses a strong prima facie case of willful deception of the Court;**

**(i)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.**

**(j)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.**

**(k)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.”**

- 16 The Supreme Court re-validated the above principles in the case of [Attorney General v Zinj Limited \(Petition 1 of 2020\) \[2021\] KESC 63 \(KLR\) \(Civ\) \(5 March 2021\) \(Ruling\)](#);
- 17 This court will be guided accordingly.

**Whether the Applicant has met the statutory threshold to warrant the grant of leave to adduce additional evidence in appellate court.**

- 18 I have perused the Record of Appeal and indeed the documents sought to be adduced at this stage were not produced during the trial court proceedings.
- 19 Guided by the principles enunciated by the Supreme Court an applicant must demonstrate to the court that the documents 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 him. My understanding of this requirement is that it calls for full disclosure and candidness on the party seeking such leave and which helps to gauge the

bonafides of the application considering that it is coming after the matter has been heard and determined to avoid abuse by dissatisfied litigants. An applicant approaching equity must do so with honesty and candour.

20 The applicant depones in paragraphs 4 and 5 of her supporting affidavit that she has been diligent in producing all the evidence in her possession and *'it has recently come to my knowledge that certain documents were NOT produced during the trial at the lower court, which documents are necessary for the proper adjudication of the present appeal.'* It is deponed that the said documents were discovered after delivery of the judgement and they seek to file the documents as additional evidence.

21 The applicant's explanation falls short of the test enumerated above as it does not make a disclosure why the same could not be obtained during the pendency of the matter in the trial court. The statement is vague. The applicant knew his case from the time he filed the suit and documents he would have to furnish in support of the case even upon being served with responses thereto

- 22 The court is not told if he knew he would need such evidence and the efforts made to obtain the same and or even why it was not possible to produce them with the other documents which she had diligently produced before the trial court. Even the date of discovery is not disclosed and where they were discovered and how. Vague depositions crafted with a view to concealing the very issues that are required to be brought to the attention of the court will not suffice for purpose of grant of leave to adduce additional evidence.
- 23 Moreover the documents sought to be admitted as new evidence are - a declaration over sale of land and letter of consent. These in my view are documents that *the* applicant as plaintiff would reasonably have been aware of and procured in the course of trial based on the pleadings before court.

**Whether the grant of such leave will prejudice the Respondent.**

24 I will now address whether the production of the same would prejudice the respondent. The Respondent has stated that the sale was controverted. I note that at paragraph 5 and 8 of the Amended Statement of Defence it is pleaded;-

“The plaintiff has to show and confirm to court the original number that produced parcel number 1383,1384 and 1385 opposed to green card of 20<sup>th</sup> day of August 1986 as was recorded in the registry Map sheet No.4. the plaintiff avers that as at the date of filing this suit the said parcel has not been subdivided and at the time of his demise her late husband had neither sold nor subdivided the same to any other party.”

25 At paragraph 8 it is pleaded that the plaintiff has failed to show how the late Michael Okello Musach acquired parcel 1338 from Peter Nyadero Oluoch and was put to strict proof of purchase/sale agreement.

26 Based on my foregoing observations for me I see a party who after reading the judgement promptly decided to file the application and seek to produce documents which she does not explain why she could not procure them during

the proceedings. This is an attempt in my view to now fill in gaps in support of her case which will be prejudicial to the respondents. It is also an abuse of the court process.

27 The upshot of the foregoing is that it is the finding of this court that the application has not met the threshold to warrant the grant of leave to adduce additional evidence in appellate court. It is also the finding of this court that the grant of such leave will prejudice the Respondent.

28 The orders required to file amended Memorandum of Appeal and a Supplementary Record of Appeal in view of the findings of the court must fall on the wayside for the reason that they were hinged and or dependent upon the grant of leave and which has been denied.

29 The costs of the application shall abide the outcome of this appeal.

**DATED** at **SIAYA** this **28<sup>th</sup>** Day of **April, 2026**.

**HON. JUSTICE A. E. DENA**  
**JUDGE**  
**28/04/2026**

**Ruling delivered virtually through Microsoft Teams  
Video Conferencing Platform in the Presence of:**

Mr. Ochanyo for Appellants

No appearance for Respondent

Court assistant: Dorothy Awuor