



REPUBLIC OF KENYA



KENYA LAW
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**Kimundi v Mutua (Environment and Land Appeal E011 of 2021)
[2025] KEELC 5453 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E011 OF 2021**

EO OBAGA, J

JULY 23, 2025

BETWEEN

RHODA MUKONYO KIMUNDI APPELLANT

AND

JANE MUTHOKI MUTUA RESPONDENT

RULING

1. This is a ruling in respect of a Notice of motion dated 24th January, 2025 in which the Appellant/Applicant seeks the following orders:
 1. That this honourable court be pleased to take additional evidence as highlighted in the Appellant's supporting affidavit or to direct that additional evidence be taken by the trial court or by the Registrar in such manner and subject to such conditions as this honourable court deems appropriate to achieve the ends of justice.
 2. That upon granting prayer (1) above, this honourable court be pleased to grant leave to the Appellant herein to file a supplementary record of appeal.
 3. That witness summons do issue to the Director, Kaiti Limited, on Gerald Muia to attend to court to produce the certificate of lease for plot number Sultan Hamud Town/341.
 4. That witness summons do issue to Land Registrar, Makueni County to attend court to produce the green card in respect of plot number Sultan Hamud Town/341.
 5. That costs of this application be in the cause.
2. The Applicant is seeking to adduce additional evidence on appeal on the ground that when her witness Gerald Muia testified before the lower court, he stated that Plot number Sultan Hamud Town/341 which the Respondent is alleging to hold a certificate of lease is as a result of subdivision of plot number Sultan Hamud Town/314 which is registered in the name of Kaiti Limited. He states that as at the time



of the witness giving evidence in court certificate of lease for plot number Sultan Hamud Town/341 had not been processed.

3. The Applicant states that Gerald Muia is a director of Kaiti Limited which was the registered owner of plot number Sultan Hamud Town/314 which was subdivided and resulted into among other plots Sultan Hamud Town/341. The Applicant states that the certificate of lease for plot number Sultan Hamud Town/341 was processed in the year 2021 and that the certificate of lease is in custody of Gerald Muia.
4. The Applicant further stated that at the time the Respondent testified before the lower court, she stated that she was owner of plot number 71 which she was allocated by the Defunct Makueni County Council and that when she processed title, the plot became Sultan Hamud Town/341.
5. The Applicant further stated that due to non availability of the certificate of lease for Sultan Hamud Town/341 the trial magistrate disregarded the evidence tendered by her through Gerald Muia and held that the certificate of lease for Sultan Hamud Town/341 emanated from unsurveyed plot No. 71 Sultan Hamud. The Applicant therefore stated that the certificate of lease for plot number Sultan Hamud Town/341 and the green card thereof will aid this court to determine the ownership and location of plot 71 Sultan Hamud Town. She states that she will stand prejudiced if the application is not allowed and that the Respondent will not suffer any prejudice if the application is allowed.
6. The Applicant's application was opposed by the Respondent based on a replying affidavit sworn on 11th February, 2025. The Respondent contends that the Applicant's application is an abuse of the process of court; is unmeritorious; an afterthought; frivolous and vexations. The Respondent states that she was allocated plot number Sultan Hamud Town/341 formerly known as plot number 71 Sultan Hamud, a commercial plot which she has constructed a building within its boundaries.
7. The Respondent states that the Applicant's application is an afterthought and allowing the same will greatly prejudice her this being an old appeal which should have been determined by now.
8. The parties were directed to file written submissions. The Applicant filed her submissions dated 10th April, 2025. The Respondent filed her submissions dated 9th May, 2025.
9. The Appellant submitted that this court is empowered to take additional evidence on appeal. She submitted that the foundation for this is found in Section 78 (1) and (2) of the [Civil Procedure Act](#) which states as follows:
 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.



10. It was further submitted that Order 42 Rule 27 and 28 of the Civil Procedure Rules are relevant in this regard. Order 42 Rule 27 provides as follows:
- “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”.
11. Order 42 Rule 28 provides as follows:
- “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”.
12. The Applicant submitted that grant of leave to adduce additional evidence on appeal is discretionary and the court has to be cautious as the order should be granted sparingly and in exceptional circumstances.
13. The Applicant relied on the Supreme court case in Mohamed Abdi Mohamed –vs- Ahmed Abdullahi Mohamed and 3 others (2018) eKLR where the Supreme Court laid down the principles which should guide the Appellate courts on admission of additional evidence 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 direct bearing on the main issue in the suit;
 - e. The evidence must be credible in the sense that it is capable of believe;
 - f. The additional evidence must not be so voluminous making it difficult for the other party to respond effectively;
 - g. Whether a party would reasonably have been aware of and procured further evidence in the course of trial is an essential consideration to ensure fairness and due process;
 - h. Where the additional evidence discloses strong prime facie case for wilful 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”.
14. The Respondent on the other hand submitted that allowing the additional evidence will not change anything. She further submits that Gerald Muia testified and was cross examined and that there is nothing new which the Applicant will adduce which was not in her knowledge at time of testifying if due diligence had been applied. It was further submitted that there is nothing vague which came out during the hearing before the lower court which will require to be removed.
15. I have carefully considered the Applicant’s application, the opposition thereto by the Respondent as well as the authorities cited. The only issue for determination is whether the Applicant has met the threshold for leave to adduce additional evidence on appeal to be granted.
16. It is important to note that the Applicant had filed a suit against the Respondent in the lower court on 31st July, 2019. She was seeking to restrain the Respondent from interfering with her plot known as residential plot number 71 Sultan Hamud Town. The Respondent filed a defence on 6th August, 2019 in which she stated that she had been allotted plot 71 Sultan Hamud Town which she proceeded to obtain title number Sultan Hamud Town/341 on 8th December, 2016.
17. The evidence of Gerald Muia who testified on behalf of the Applicant was that he had subdivided his plot number 314 Sultan Hamud Town which resulted into plot numbers Sultan Hamud Town 326 to 343. He further stated that no one had accessed parcel number Sultan Hamud Town 341.
18. It is therefore clear that as at the time Gerald Muia subdivided his plot number 314 in 2018, the Respondent had already obtained a certificate of lease for her plot No. Sultan Hamud Town/341 measuring 0.0500 hectares. Gerald Muia’s plot number Sultan Hamud Town/341 which came out after the Respondent had obtained her certificate of lease measures 0.0438 hectares.
19. The Applicant was aware that the Respondent had certificate of title for parcel number Sultan Hamud Town/341 before she called Gerald Muia to testify on her behalf on 10th December, 2020. Gerald Muia had subdivided his parcel number Sultan Hamud Town/314 in 2018 before the Applicant filed her case the following year. There is nothing which would have prevented the Applicant to ask Gerald Muia to obtain title for parcel number Sultan Hamud Town/341 for use in her evidence. The Applicant has therefore failed the test in the case of Mohamed Abdi Mohamed (Supra) which requires that an Applicant has to show that the evidence could not have been obtained with reasonable diligence for use at the trial or that the evidence was not within the knowledge of the Applicant.
20. It is doubtful that he Land Registrar would have issued title under parcel number Sultan Hamud Town/341 in 2016 in Respondent’s name and two years later register another parcel bearing the same number under Kaiti Limited where Gerald Muia is a director. If there is anything which is doubtful, it is the title for parcel number Sultan Hamud Town/341 in the name of Kaiti Limited as it was created after the Respondent had obtained her title.
21. It is therefore clear that allowing the additional evidence sought to be adduced will not impact on the decision in the appeal and will not in any way assist the court in determining the appeal. I find no merit in the Applicant’s application which is hereby dismissed with costs to the Respondent.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF JULY, 2025.

In the absence of parties who were aware of the date of delivery of ruling.

Court assistant – Steve Musyoki

