



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Wanyoike & 16 others (Civil Appeal (Application)  
E741 of 2021) [2025] KECA 493 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KECA 493 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E741 OF 2021  
SG KAIRU, F TUIYOTT & LA ACHODE, JJA  
MARCH 21, 2025**

**BETWEEN**

**BERNARD GACHIE KAMAU ..... APPLICANT**

**AND**

**LIVINGSTONE KINYANJUI WANYOIKE ..... 1<sup>ST</sup> RESPONDENT**

**FREDRICK NG'ANG'A ..... 2<sup>ND</sup> RESPONDENT**

**JOEL KAMATU KIARIE ..... 3<sup>RD</sup> RESPONDENT**

**GIDEON MARUBUA KIBURU ..... 4<sup>TH</sup> RESPONDENT**

**DAMARIS WACU NDUTI ..... 5<sup>TH</sup> RESPONDENT**

**ESTHER NYAGUTHE GITHAIGA ..... 6<sup>TH</sup> RESPONDENT**

**ANN NJERI KAMAU ..... 7<sup>TH</sup> RESPONDENT**

**MICHAEL KINUTHIA GATOTO ..... 8<sup>TH</sup> RESPONDENT**

**STEPHEN MUTHAMA MATHU ..... 9<sup>TH</sup> RESPONDENT**

**EUSTACE GITHAIGA NDIRANGU ..... 10<sup>TH</sup> RESPONDENT**

**HUMPHREY MALIMU LILECH ..... 11<sup>TH</sup> RESPONDENT**

**MICHAEL NDICHU MBURU ..... 12<sup>TH</sup> RESPONDENT**

**ROBERT RUIGU NJOROGE ..... 13<sup>TH</sup> RESPONDENT**

**STEPHEN MAORE ..... 14<sup>TH</sup> RESPONDENT**

**JAMES WANYOIKE ..... 15<sup>TH</sup> RESPONDENT**

**PETER MUNENE NJOROGE ..... 16<sup>TH</sup> RESPONDENT**

**STEPHEN KIONGORA ..... 17<sup>TH</sup> RESPONDENT**



***(Being an application under Articles 24, 48, 50(1) and 159 of the Constitution of Kenya 2010, Sections 3A and 3B Appellate Jurisdiction Act for leave to adduce additional evidence by way of an affidavit limited to judgment, sentence and Ruling in an appeal arising from the Judgment of the Environment and Land Court of Kenya at Thika (Gacheru, J.) dated 30th September 2021 in ELC Appeal No. E65 of 2019)***

**RULING**

1. The notice of motion dated 19<sup>th</sup> June 2024 seeks leave of this Court to allow adduction of additional evidence by way of affidavit limited to the judgment and ruling on sentence in the Chief Magistrate Court in Thika, Chief Magistrates Court Criminal Case No. 2586 of 2010, Republic vs Edward Samuel Ngugi (the criminal proceedings). The motion is said to be anchored under the provisions of Articles 24, 48, 50(1) and 159 of The Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act.
2. Although the motion had a second ask, that the appeal be consolidated with Nairobi Court of Appeal Civil Appeal No. E041 of 2023, the plea was abandoned by learned counsel Mr. Simiyu who represented the applicant at the plenary hearing.
3. In a nutshell, this appeal emanates from the judgment of Lady Justice Gacheru dated 30<sup>th</sup> September 2021 in ELC Appeal No. E65 of 2019 in which there was a wrangle of ownership of Ruiru/Kiu/block 2/3758. Bernard Gachie Kamau, the applicant, depones, in an affidavit sworn on 15<sup>th</sup> June 2024, that during the pendency of this and the related appeal, a judgment was passed in the criminal proceedings in which the accused person, from whom the respondents' claim to the suit property stems, was found guilty of charges of fraud in the acquisition of the suit property. Neither the judgment nor the ruling on sentence has been challenged. These are the proceedings sought to be adduced as additional evidence.
4. He asserts that the additional evidence he seeks to tender at this stage of the appeal is credible and if allowed would impact upon the result of the verdict of the Court in the pending appeals as they will shed light on the criminal acts that form the basis of the respondents' claim. He contends that Edward Samuel Ngugi, the accused person, is no longer innocent as previously perceived by the trial court in the judgment as the accused person has now been found guilty of fraud in the acquisition of the title to the suit property. He argues that the additional evidence could not have been obtained with reasonable diligence for use at the trial as the impugned judgment was delivered 6 years before the accused person was found guilty.
5. In response Fredrick Nganga Thuo (the 2<sup>nd</sup> respondent) swore an affidavit on 15<sup>th</sup> July 2024. He states that none of the respondents are party to the criminal proceedings. He observes that in the judgment of the criminal matter, the trial court exonerated Livingstone Kinyanjui (the 1<sup>st</sup> respondent), as not being part to the fraudulent transactions. He avers that as per the ruling of the trial court on 10<sup>th</sup> September 2018, and judgment delivered on 30<sup>th</sup> September 2021, ownership of the parcel Ruiru/Kiu/Block 2/3758 as subdivided into Ruiru/Kiu/Block 2/6218 to 6244 (the suit property) is a "reserve" of the respondents who were at all material times the legal and equitable owners. Further, that it was the learned judge's finding that the allegation of fraud against the accused person in the criminal case had nothing to do with any of the respondents. He contends that the two decisions are from two different causes of action under different purviews and jurisdictions. He posits: that the application is scandalous, frivolous, malicious and a waste of the court's time and is merely intended to frustrate the



respondents' from enjoying the fruits of their lawfully obtained judgment; and that the respondents carried out due diligence before purchasing the suit property.

6. Livingstone Wanyoike Kinyanjui (the 1<sup>st</sup> respondent) swore a replying affidavit on 19<sup>th</sup> August 2024. He reiterates what the 2<sup>nd</sup> respondent deposed to and in addition, informed us that the accused person in the criminal case has preferred an appeal against his conviction in Thika High Court Criminal Appeal E003 of 2023.
7. The applicant submits that the governing principles on allowing additional evidence before an appellate court are well set out in the Supreme Court decision in *Mahamud v Mohamad & 3 others* (Petition 7 & 9 of 2018 (Consolidated)) [2018] KESC 62 (KLR) that is; that additional evidence must be directly relevant to the matter before court; the evidence should be of such nature likely to influence the verdict of the court; the evidence could not be obtained with reasonable diligence for use at the trial; the evidence removes vagueness in the matter; the evidence must be credible; the evidence must not be voluminous or impossible for the other parties to respond; the evidence is not meant to fill the gaps in the evidence; and the court must find the further evidence useful. The appellant thus argues that the application satisfies the criteria in that the additional evidence sought to be introduced is the ruling on sentence and judgment in the criminal case to show that the respondents title to the suit property was fraudulently acquired as Edward Samuel Ngugi, the person who sold them the suit property, has been convicted having acquired the suit property fraudulently. The appellant contends that this additional evidence is directly relevant to the matter before court and could not be availed at the trial since the judgment of the trial court predated the conviction of the said Edward Samuel Ngugi.
8. The respondents jointly submit, in response, that the justification for an application under Rule 29 of this Court's Rules 2010 presently Rule 31 in the 2022 Rules was discussed in *Karmali Tarmohammed & Another v I.H Lakhani & Company* [1958] EA 567 where the East African Court of Appeal cited with approval the judgement of Lord Denning in *Ladd v Marshall* [1954] 1WLR, 1489 where the court set out three preconditions for such justification; that first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial court; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case though it need not be decisive; and thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. The respondents thus contend that all the while, all the pieces of evidence used at the trial court in the criminal case were available, known and ready for use by the applicant in prosecution of his case but he chose to ignore and equally waived his right to appeal the decision rejecting his plea to be allowed to file additional evidence during the pendency of the hearing at the trial court.
9. It is pointed out to this court that this is the third attempt made by the applicant to bring fresh documentation/evidence in prosecution of his case through the back door and/or seal loopholes in the trial court's judgment. In addition, the evidence relied on by the criminal court was always available but the applicant deliberately failed to plead and specifically prove any element of fraud, and despite being given an opportunity to appeal the decision of the trial court, he waived such right and proceeded to close his case. Thus, the additional evidence is nothing more than an attempt by the appellant to re-litigate his case on appeal. Cited is the case of *Wanjie & Others v Sakwa & Others* [1984] KLR 275 and *Mahamud* (supra). The respondents contend that the applicant has failed to demonstrate that the judgment and ruling on sentence will bring out a new set of facts as he failed to particularise or prove the same, albeit, having alleged fraud in his defence and counterclaim.



10. Cited by the rival sides, is the decision of the Supreme Court in Mahamud (supra) as setting out the governing principles for allowing additional evidence in an appeal. The apex Court stated:

“(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.



[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

11. In resolving the motion before court, we have found it necessary to trace when the issue of the criminal proceedings was first introduced into this dispute and the journey it has taken. In a notice of motion dated 14<sup>th</sup> January 2019 and filed the next day, the applicant sought to have the subordinate court review its judgment of 10<sup>th</sup> December 2015 on the basis of discovery of new evidence, amongst which, was the criminal proceedings being Thika Criminal Case No. 3105 of 2007 Republic vs James Thendu Gitau and Edward Samuel Ngugi and Milimani Criminal Case No. 1863 of 2017 Republic vs Livingstone Wanyoike Kinyanjui. That said the applicant also attached a copy of the charge sheet to Criminal Case No. 2586 of 2017 (the proceedings sought to be introduced by the motion before us) to his affidavit in support of the review application (see page 239 of the record of appeal). Yet, of importance, as will become apparent shortly, the proceedings in Criminal Case No. 2586 of 2017 was not part of the evidence that was sought to be introduced in the review application before the trial court.

12. In a ruling dated 15<sup>th</sup> October 2019, rejecting the application, the trial court observed:

“I find that all criminal cases referred to by the applicant in his supporting affidavit (Milimani criminal case No. 1863 of 2017, Thika Criminal Case No. 1355 of 2014) were all instituted before this case was fully heard and determined. The applicant gave his evidence in this case (defence hearing) on 20.7.2018 by which time all the cases were existent.”

13. Aggrieved, the applicant filed a first appeal to the Environment and Land Court being Thika ELC Appeal No. 65 of 2019. In upholding the decision of the trial court, Gacheru, J observed:

“The suit was filed in 2010, and first proceeded on the Plaintiffs case on 3<sup>rd</sup> June 2015, and the final witness in this case testified on 20<sup>th</sup> July, 2018. The documents and evidence that the appellant seeks to rely on are documents dated between 2014 and 2017. Further the ground upon which the Review is premised on is that the 1<sup>st</sup> Respondent fraudulently acquired the documents adduced in Court. it is not in doubt that the statements that the Appellant seeks to rely on were recorded on 17<sup>th</sup> May 2011, during the pendency of the suit. It is also not in doubt that on 22<sup>nd</sup> June 2016, the Appellant sought to adduce more evidence and the said Application was dismissed by the trial court. In his Amended Statement of Defence dated 13<sup>th</sup> November 2014, the Appellant averred that the title documents held by the Respondents were obtained by fraudulent misrepresentation and using falsified documents.

The Appellant can therefore not turn around and claim to not have had evidence to show that the alleged documents were fraudulent. The Appellant, in the Court’s considered view did not need the Documents Examiner’s Report from the criminal case, if in his own pleadings he had pleaded that the said documents were falsified. Then he had an obligation to prove fraud to the Court by having the said documents examined. The title deed which the Appellant alleges to have examined was produced in evidence by the Respondent and therefore there was nothing that was stopping the Appellant from comparing the two.”

14. The learned Judge then proceeded to conclude;

“The Court has considered the reasons given by the Appellant for seeking an order for review. The Court finds and holds that the Appellant has not satisfied the requirements for grant



of review. The Court agrees with the trial Court that the Appellant is seeking to bring in new evidence which he ought to have adduced and therefore not entitled to the orders of Review as sought. Therefore, it follows that this Appeal is not merited.”

15. It is that decision, dated 30<sup>th</sup> September 2021, that is the subject of the appeal before this Court within which the motion now before us is made.
16. In so far as what is raised in this appeal is not a merit assessment of the judgment of the trial court but rather the narrow question whether the trial court, as upheld by the first appellate court, was wrong in rejecting the application for review of the judgment on the basis of the additional evidence sought to be introduced then, there may be a doubt that adduction of the judgment and the ruling on sentence in the criminal proceedings as new evidence helps in resolving that issue. That said, both the judgment and the ruling on sentence, as is common ground, had not been delivered at the time of the review application and we might be too quick to conclude with finality that this additional evidence is irrelevant in determining the correctness or otherwise of the decision rejecting the application for review. We would rather leave it to the bench that will hear the substance of the appeal to make that call. It is also that bench that will determine the probative value of the evidence in determining the appeal. For now, we see some nexus between this evidence and the current appeal as part of the journey of the title now held by the respondents has been found to be tainted by fraud by a court of law in criminal proceedings. In finding that this new evidence meets the criteria for adduction of new evidence, we observe that: the evidence being a court judgment and ruling is credible; and that the evidence is straightforward and the respondents would not have any difficulty responding to it. Regarding the concern raised by one of the respondents that the judgment and sentence have been challenged by way of an appeal, the respondents shall have an opportunity to take up that issue and any others as we shall be granting them leave to adduce evidence that challenges the new evidence.
17. Ultimately, the notice of motion dated 19<sup>th</sup> June 2024 is for allowing as we now do. Costs shall be in the appeal. Our further orders are that a supplementary record introducing the judgment and the ruling on sentence in the Chief Magistrate Court at Thika, Chief Magistrates Court Criminal Case No. 2586 of 2010, Republic vs Edward Samuel Ngugi shall be filed and served within 14 days hereof with leave to the respondents to file a further supplementary record limited to responding to the new evidence within 14 days of service.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH 2025.**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....  
**JUDGE OF APPEAL**

**L. ACHODE**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**



**DEPUTY REGISTRAR.**

