



**Kenya Sunny Industries Companies Ltd v Ocharo & 2 others (Civil Application E030 of 2024) [2025] KECA 465 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 465 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E030 OF 2024  
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA  
MARCH 7, 2025**

**BETWEEN**

**KENYA SUNNY INDUSTRIES COMPANIES LTD ..... APPLICANT**

**AND**

**MICHAEL OMOLE OCHARO ..... 1<sup>ST</sup> RESPONDENT**

**KITIGU RESOURCES LTD ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR-VIHIGA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application brought under Rule 31 of the Court of Appeal Rules, to adduce additional evidence in pending appeal against the Judgment of the Environment and Land Court of Kenya at Vihiga (Asati, J.) dated 18th January, 2024 in ELC No. E002 of 2023)*

**RULING**

1. In a notice of motion dated 13<sup>th</sup> February, 2024, the applicant herein seeks leave to adduce additional evidence, as particularized in the application, in support of its appeal against the judgment and decree of the Environment and Land Court at Vihiga, in ELC No. E002 of 2024. The application is brought under Rule 31 of the rules of this Court. The grounds on the face of the application are that: the evidence to be adduced is credible, authentic, and directly relevant to the subject matter, and would have significant impact on the final verdict; the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial; it would be an affront to common sense and justice to deny the application; and that this Court has discretion to allow the application as prayed.
2. The application is supported by an affidavit sworn by Walter Odindo on the same date. The applicant deposed that after the close of the defence's case, and as the parties were awaiting delivery of judgment by the trial court, the Cabinet Secretary, Ministry of Mining, Blue Economy and Maritime Affairs, in a report dated 21<sup>st</sup> September, 2023, presented to the Senate Standing Committee on Land, Environment and Natural Resources, detailed the licensing status of all gold mining companies



in Vihiga County. That the report declared that only two companies were licensed to undertake prospecting of gold in Vihiga County: the applicant and Shanta Gold Kenya Ltd.

That the 2<sup>nd</sup> respondent's illegal activities have been well documented in the report by the Cabinet Secretary, and further by the fact that during the pendency of the suit before the trial court, the 2<sup>nd</sup> respondent's officers were charged and convicted, inter alia, for the offence of operating a gold processing factory on the suit parcels of land Nos. Kakamega/Mbale/328 and Kakamega/Masana/1182 without a license. The applicant deposed further that the report by the Cabinet Secretary was issued after parties had closed their respective case before the trial court, and prior to delivery of judgment by the said court.

3. It was the applicant's case that the 2<sup>nd</sup> respondent is still illegally conducting intermittent mining at the two suit parcels thereby causing the applicant loss of use and business valued at Kshs. 3,000,000,000 (three billion) from 5<sup>th</sup> May 2022 to 5<sup>th</sup> March 2023, and at the rate of ten million Kenya shillings a day for every continued act of illegal mining. The applicant contends that the application meets the requisite threshold for allowing additional evidence set by the Supreme Court in *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR, and by this Court in Eldoret Criminal Appeal (Application) No. 67 of 2017 R v. Janet Nasimiyu and 2 others.
4. The application was unopposed. The respondents did not file any response to the application.
5. The application was canvassed through written submission of the applicants which were orally highlighted during the plenary hearing. No written submissions were filed on behalf of the respondents. Mr. Amondi, counsel for the applicant, reiterated depositions made by the applicant in the affidavit in support of the application.
6. We have considered the application in light of the sole pleadings of the applicants, the authorities cited and the law. The application is grounded on Rule 31 of the *Court of Appeal Rules* which provides as follows:
  1. "On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power:
    - a. to re-appraise the evidence and to draw inferences of fact; and
    - b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.
  2. When additional evidence is taken by the Court, the evidence may be taken orally or by affidavit and the Court may allow the cross-examination of any deponent.
  3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence.
  4. When additional evidence is taken by a commissioner, the commissioner shall certify the evidence to the Court, without any such statements of opinion.
  5. Each party to the appeal shall be entitled to be present when the additional evidence is taken."



7. In essence, leave to adduce additional evidence is a discretionary decision of this Court, and the Court grants such leave on the basis of ‘sufficient reason’. In the case of *Attorney General v Torino Enterprises Limited* [2019] eKLR, this Court observed thus:

“Though what constitutes ‘sufficient reason’ is not explained in the rule, through judicial practice the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing; two, 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.”

8. The Supreme Court in Mohamed *Abdi Mahamud v Ahmed Abdullabi Mobamed* (supra) laid out the guidelines on admission of additional evidence by an appellate Court 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.



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.”

9. The applicant in this case wishes to adduce additional evidence in form of:
  - i. A comprehensive report by the Cabinet Secretary, Ministry of Mining, Blue Economy and Maritime Affairs dated 21<sup>st</sup> September, 2023;
  - ii. Photographic evidence and video stored on a flash disk taken on 8<sup>th</sup> February, 2024, of the 2<sup>nd</sup> respondent’s staff/agents, allegedly carrying out illegal mining activities at suit parcel Nos. Kakamega/Mbale/328 and Kakamega/Masana/1182;
  - iii. A charge sheet dated 27<sup>th</sup> July, 2023; and,
  - iv. Proceedings detailing the conviction and sentence of the 2<sup>nd</sup> respondent’s staff on 11<sup>th</sup> August, 2023.
10. We have considered the items of additional evidence the applicant wishes to adduce and evaluated each of them against the guidelines and criteria laid down by the Supreme Court in Mohamed Abdi Mahamud (supra). In essence, we have queried whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before us, and if allowed, whether it would influence or impact upon the result of the verdict, and whether it could not have been obtained with reasonable diligence for use at the trial, and was not within the knowledge of, or could not have been produced by the applicant at the time of trial.
11. It has been submitted by the applicant that the evidence to be adduced is credible, authentic, and directly relevant to the subject matter, and would have significant impact on the final verdict; and that it could not, with reasonable diligence, have been obtained for use at the trial.
12. We note that the items of additional evidence relate to illegal mining activities allegedly being carried out by the 2<sup>nd</sup> respondent in Vihiga County. The dispute before trial court, on the other hand, was pegged on ownership of suit parcels of land being Nos. Kakamega/Mbale/328 and Kakamega/Masana/1182, whether the applicant had exclusive mining rights over the suit parcels of land, and the fact that the applicant sought compensation for loss of use and business of the suit parcels of land, on account of the 1<sup>st</sup> and 2<sup>nd</sup> respondents illegally utilizing the said suit parcels of land. The additional evidence the applicant seeks leave of this Court to adduce does not make any mention of the suit parcels of land, or speak to whether the applicant has an interest in the suit parcels of land. The additional evidence does not point to whether the applicant had exclusive mining rights with respect to the suit parcels of land or not. To our mind, the introduction of these items of evidence in the appeal before us will only serve to introduce issues not litigated in the suit before the trial court, from which the appeal arises. In fact, it will cloud and confuse the issues that this Court is mandated to consider on appeal.
13. In *Mzee Wanje and 93 others vs A.K. Saikwa* (1982- 88) 1 KAR 463, this Court observed as follows:

“This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out



a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.” (Emphasis ours)

14. We find that the evidence sought to be introduced by the applicant is not relevant to the appeal before us, as it does not touch on the issues in dispute in the judgment sought to be challenged on this appeal. Further, the applicant averred that it procured the evidence before trial court delivered its final verdict in the suit. Nothing precluded the applicant from making an application before the trial court to have the judgment arrested so as to enable additional evidence to be adduced and considered by the trial court before the said judgment was delivered. It is our finding that no exceptional circumstances have been demonstrated by the applicant to warrant the grant of the orders sought.
15. We accordingly dismiss the application as it lacks merit. There shall be no orders as to costs.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF MARCH, 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

