



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onchiri v Omami (Civil Application E081 of 2022)  
[2025] KECA 767 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 767 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E081 OF 2022  
W KARANJA, K M'INOTI & P NYAMWEYA, JJA  
MAY 9, 2025**

**BETWEEN**

**MOSES ONCHIRI & 490 OTHERS ..... APPLICANT**

**AND**

**TOM OMAMI & 11 OTHERS ..... RESPONDENT**

*(Application for leave to adduce further evidence in an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi, (Bor, J.) dated 26th April 2021 in ELCC No. 661 of 2015, formerly Pet. No. 103 of 2011)*

**RULING**

1. In their motion on notice dated 12<sup>th</sup> March 2024, the applicants seek leave to adduce further evidence in an appeal against the judgment of the Environment and Land Court at Nairobi (Bor, J.), dated 26<sup>th</sup> April 2021. They aver that they have come across new and important evidence which was not available to them when their suit was heard by the trial court and, that the new evidence is important to enable this Court arrive at a fair and just decision.
2. Before we consider the merits of the application, we must briefly trace the antecedents of the application for context and insight into whether the new evidence that the applicants wish to adduce in this Court is relevant to the appeal and whether the applicants could have obtained the same by exercise of due diligence, when the matter was before the trial court.
3. Some 15 years ago, on or about 26<sup>th</sup> June 2010, the applicant's filed a petition against the respondents claiming to be the legal and lawful owners of some 13 properties, namely:
  - (i) LR No. 209/11125
  - (ii) LR No. 209/11126



- (iii) LR No. 209/11410
- (iv) LR No. 209 11249 (v) LR No. 209/11250
- (vi) LR No. 209/11254
- vii. LR No. 209/11255
- vii. LR No. 209/11256
- (ix) LR No. 209/11309 (x) LR No. 209/11310
- (xi) LR No. 209/11311 (xii)LR No. 209/11312, and
- (xiii) LR No. 209/12110.

4. The applicants pleaded that they purchased the said properties from the 9<sup>th</sup> respondent, Langata Jua Kali Muungano Self Help Group and took possession in 1992 and constructed permanent dwelling houses and other developments. The applicants however conceded that they did not have titles to the suit properties, which they blamed on the machinations of the respondents. They averred that they had been on the suit properties for over 18 years.
5. The applicants further averred that on 8<sup>th</sup> December 2010 the respondent's, claiming to be the owners of the suit properties, forcefully and unlawfully evicted them from the suit properties, but some of their members were still in occupation of the suit properties. By way of remedies they prayed for a declaration that the respondents were likely to violate their right to property; a declaration that the Government of Kenya had acquired and settled them on the suit properties; a declaration that they were the legal owners of the suit properties; an order directing the Registrar of Titles to cancel the respondents' registration over the suit properties and in lieu thereof to issue certificates of title to the applicants; an order of injunction to restrain the respondents from interfering with the suit properties, or in the alternative, an order compelling the respondents to pay them compensation and damages as determined by the court.
6. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents opposed the petition and averred that they were allocated their parcels of the suit properties before 1992 when the applicants alleged to have purchased the same from a third party and that they held valid titles over their properties. They added that the order for eviction was issued lawfully by the court on 17<sup>th</sup> August 2010 and 11<sup>th</sup> November 2010 after they proved that they were the valid and lawful owners of their respective properties.
7. Similarly, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents opposed the petition on the grounds that the applicants had not demonstrated ownership or occupation of the suit properties and that granting of the orders sought would be in conflict with the decision of the High Court in HCCC No. 520 of 2004 in which the court found the said respondents to be the absolute and indefeasible owners of their respective suit properties.
8. After considering the petition, the responses and the parties' submissions, by a judgment dated 26<sup>th</sup> April 2021, the trial court held that the 9<sup>th</sup> respondent, from whom the applicants claimed to have purchased the suit properties was never the owner and therefore could not have validly sold and transferred the suit properties to them. Secondly, that since the applicants were not the registered owners of the suit properties, they could not sustain a claim for violation of their right to property. Accordingly, the court dismissed the applicants' petition with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.
9. The applicants lodged an appeal in this Court and pending the hearing and determination of the appeal, they filed the application now before us for leave to adduce further evidence.



10. The further or additional evidence that the applicants intend to adduce consists of certificates of search of the various suit properties and copies of titles showing the registered owners of the same. Beyond that, the other evidence consists of copies of correspondence on subdivision and amalgamation of the suit properties and on an Impact Assessment Report concerning construction of a boundary wall between some of the suit properties.
11. In their supporting affidavit sworn by Moses Onchiri on 12<sup>th</sup> March 2024 as well as in their written submission dated 9<sup>th</sup> May 2024, which were highlighted by their learned counsel, Dr. Khaminwa, SC., the applicants contend that after filing the appeal, they received correspondence from the relevant Ministry which shows the real owners of the suit properties. They also state that they have since obtained the current official searches as per the copies of the titles of the suit properties, which the respondents relied upon.
12. It is also the applicants' contention that the evidence we have referred to above was not in their possession at the time of trial and therefore they were not able to produce it. Lastly, they submit that this Court has inherent power to admit the evidence; that the respondents will not suffer any prejudice if their application is allowed; and that the documents are necessary to enable the Court deliver a fair and just decision.
13. In support of the application the applicants relied on several decisions, among them the decision of the East African Court of Justice in *East Africa Law Society v. Attorney General of Uganda & Another*, App No. 12 of 2012 and the decisions of the High Court in *EO v. COO* [2020] eKLR and *Sharon Mwendu Ndolo v. Rahab Nyangima John & Another* [2022] eKLR.
14. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents opposed the application through grounds of objection dated 17<sup>th</sup> May 2024 and written submissions dated 6<sup>th</sup> August 2024, which their learned counsel, Mr. Masinde highlighted. The essence of the response was twofold, firstly, that the applicants had failed to show that the evidence they wished to adduce could not have been obtained by exercise of reasonable diligence and, secondly, that the applicants had not shown that the evidence would have had important influence in the outcome of the case had it been produced before the trial court. It was contended that the evidence sought to be adduced by the applicant's does not support their claim that they are the lawful owners of the suit properties.
15. In support of their submissions the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents relied on the decision of the Supreme Court in *Jirongo v. Soy Developers Ltd. & 9 Others* [2020] KESC 38 (KLR).
16. The other respondents neither filed submissions nor appeared for the hearing of the application, though they were duly served with directions and hearing notice.
17. Turning to the merits of the application, Rule 31(1)(b) of the Court of Appeal Rules, 2022, empowers the Court, at its discretion and for sufficient reason, to admit additional evidence when hearing an appeal from a decision of a superior court acting in the exercise of its original jurisdiction. The rationale of the said rule was explained as follows in *Dorothy Nelima Wafula v. Hellen Nekesa Nielsen & Another*, CA (Application) No. 50 of 2016:

“Although under the provisions of Article 164(3) of *the Constitution* and section 3(1) of the *Appellate Jurisdiction Act* this Court's powers are limited to hearing of appeals, because, in the scheme of our law and procedure, parties are expected to present their evidence before the trial courts, rule 29 (1) (b) (as rule 31(1)(b) was numbered then) aforesaid, however recognises that situations may arise making it imperative for a party to introduce new evidence even at an appeal stage.”



18. The parameters within which an appellate Court may grant leave to a party to adduce further evidence have been clearly set and delineated in several decisions of this Court and of the Supreme Court. Thus, for example, in *Wanje & Others v. Saikwa* [1984] KLR 275 Chesoni, JA. (as he then was) cautioned against misuse of rule 31(1) (b) to patch up appeals, when he held:

“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 authorise 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 the 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.”

19. The Supreme Court, in *Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR, reiterated that additional evidence is to be allowed sparingly, in exceptional circumstances, and on a case-by-case basis. The Supreme Court laid down the following principles to guide applications for adducing further evidence:

- a. the additional evidence must be directly relevant to the matter before the court and be in the interests 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 must be shown that the evidence 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. it must be capable of removing any vagueness or doubt over the case and have 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;
- h. if the evidence discloses a strong prima facie case of willful deception of the Court;
- i. the evidence must be needful and should not be for the purposes of removing lacunae and filling gaps in evidence.
- j. the evidence is not intended to enable an unsuccessful party at the trial to make a fresh case on appeal, fill up omissions or patch up the weak points in his or 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.



- 20. Subsequently in *Jirongo v. Soy Developers Ltd. & 9 Others* (supra), the Supreme Court held that the order to adduce further evidence should not be made whimsically or in haste, but after careful consideration of all the relevant circumstances set out in *Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others* (supra).
- 21. Applying the relevant principles to the application before us, we ask ourselves whether the applicants have demonstrated that they could not have obtained copies of the searches and titles they wish to adduce, after exercise of due diligence. We note that in their petition the applicants pleaded that they were the valid and lawful owners of the suit properties. It must have been pretty obvious to them that, as parties staking claim to ownership of the suit properties, the first thing to do, as diligent persons, was to conduct and produce searches on the titles to confirm their alleged ownership.
- 22. Secondly, in their responses to the petition, the respondents denied that the applicants were the owners of the suit properties and pleaded that they themselves were indeed the lawful owners. The applicants were thus put on sufficient notice that their claimed ownership of the suit properties was disputed and, as diligent persons represented by counsel, they ought to have conducted a search to confirm who truly were the registered owners of the suit properties.
- 23. The Land Registry, where searches are conducted, is a public office accessible to members of the public who which to confirm ownership of parcels of registered land. The applicants have not placed before the court any efforts they made to conduct searches on the title. From the depositions in support of the application, the applicants did not conduct any search before trial, and only did so after they lost their case.
- 24. We are accordingly satisfied that the applicants have totally failed to satisfy the Court that, by exercise of due diligence, they could not have obtained the evidence they seek admitted, for presentation at the trial in the Environment and Land Court.
- 25. More compelling, we are also not satisfied that even if the Court were to admit the evidence, it is directly relevant to the central question in the appeal or that it will influence the outcome of the appeal. This is simply because the searches and titles that the applicants seek to adduce, do not support their claim to ownership of the suit properties as pleaded in the trial court. On the contrary, those documents tend to prove the respondent’s claim that they are indeed the registered proprietors of the suit properties.
- 26. Taking all the foregoing into account, we do not find any merit in the motion dated 12<sup>th</sup> March 2024 and, the same is hereby dismissed with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**



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

Signed

**DEPUTY REGISTRAR .**

