



**Ruaka Development Limited & another v Muthaiga North Residents Association
& another; National Land Commission (Interested Party) (Civil Appeal
(Application) E071 of 2024) [2025] KECA 786 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 786 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E071 OF 2024
FA OCHIENG, AO MUCHELULE & JM NGUGI, JJA
MAY 9, 2025**

BETWEEN

RUAKA DEVELOPMENT LIMITED 1ST APPELLANT

LAVON LAKE LIMITED 2ND APPELLANT

AND

MUTHAIGA NORTH RESIDENTS ASSOCIATION 1ST RESPONDENT

SANJIV SHAH 2ND RESPONDENT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

(An application for leave to take additional evidence in respect of the judgment and decree of the Environment and Land Court at Nairobi (Omollo, J.) dated 19th October, 2023)

RULING

1. Before this Court is the interested party's application dated 5th September 2024, seeking leave to adduce additional evidence during the hearing of the main appeal. The interested party in this matter is the National Land Commission (NLC). The appeal arises from the judgment and decree of the Environment and Land Court (ELC) at Nairobi, delivered on 19th October, 2023, in ELC Petition No. E037 of 2022.
2. The NLC, through Ms. Jacqueline Njuguna, presented submissions in support of their application. The application is purportedly brought under Rule 31 of the Court of Appeal Rules, which empowers this Court, inter alia, to re-appraise evidence and, significantly, in its discretion and for sufficient reason, to take additional evidence or direct that it be taken.



3. The NLC submitted that the evidence they seek to introduce consists of official public documents from the correspondence file at the Ministry of Lands, including maps. They stated that this evidence is directly relevant, and has a direct bearing on the appeal; specifically, on the main issue of whether or not the suit property is a public utility or not.
4. The NLC contended that these documents will explain the original subdivision, trace the title history, and conclusively show that the land is actually private land; belonging to the 2nd appellant. The NLC believes that this evidence will assist the court in rectifying an error made by the ELC, which ordered the cancellation of the 2nd appellant's title and declared the property to be public land. The NLC further submitted that they were unable to comply with the ELC's orders because the property is not and has never been public land.
5. Regarding why the evidence was not produced at the trial court, the NLC explained that these documents were in the possession of the Ministry of Lands and not the NLC. It was only after the ELC judgment, which directed the NLC to cancel the title, that they accessed the correspondence file to establish how the subdivision was carried out. They submitted that since these are public documents, they are credible.
6. The NLC relied on the principles for admitting additional evidence laid down by the Supreme Court in the case of Mohamed Abdi Mohamed vs. Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR. They asserted that their evidence meets all these requirements. They specifically highlighted the principle that the evidence must be directly relevant and in the interest of justice, capable of influencing the outcome, capable of removing vagueness or doubt, and credible.
7. The NLC also cited the case of John Kiplangat Barbaret & 8 Others vs. Isaiah Kiplagat Arap Cheluget, Civil Appeal Application No. 289 Of 2009, in which this Court allowed additional evidence because the party credibly explained they did not know it existed, reasoning that "One cannot obtain what he/she does not know exists". They were of the view that this supported their position regarding documents held by another entity.
8. While acknowledging the principle in the case of Vinayak vs. Singh & 2 Others [2023] KECA 74 (KLR) that additional evidence is allowed sparingly, with caution, and considering proportionality and prejudice, the NLC submitted that this case warrants admission due to the critical nature of the evidence.
9. Mr. Samura Owino, appearing for the appellants, supported the NLC's application. He submitted that the documents sought to be adduced summarize the entire history of the land, and show that the land is actually private, contrary to the ELC's orders.
10. Mr. Owino explained that at the trial court, the appellants presented their title deed, agreement, and transfer, which they believed were sufficient against the respondents' mere claim that the land was public. However, the ELC's determination, particularly its examination of the "root of title" which Mr. Owino argued was not fully raised by the parties, necessitated the need for these additional documents to show the correct position. He contended that these documents would answer the questions required to be determined at the appeal stage. He also stated that sufficient diligence was demonstrated because the need for the documents arose from the determination by the superior court.
11. Ms. Swaka, holding brief for Mr. Njenga for the 1st respondent, vehemently opposed the application. She highlighted that both the NLC and the appellants had served their submissions late, the day before



the hearing at 5 pm, hence their inability to file a timely response. We, therefore, permitted her to make oral submissions before us.

12. The core of the respondents' opposition was that the NLC had not shown that they were unable to obtain this evidence with reasonable diligence at the time of the trial. She submitted that the application was merely an attempt by the appellants and the NLC to fill in the gaps in the evidence that they noted after the unfavorable judgment.
13. She further submitted that allowing the evidence would highly prejudice the respondents, who had proceeded to the conclusion of the trial and should be allowed to enjoy the fruits of the judgment. She relied on the principle that an unsuccessful party must not seek to adduce additional evidence to make a fresh case on appeal, fill up omissions, or patch up weak points.
14. We have carefully considered the application, the affidavits, the submissions of the interested party, the appellants, and the respondents, and have re-appraised the arguments in light of the governing legal principles and the need for the exercise of discretion to be for sufficient reason. The main issue for determination is whether the applicant has demonstrated that the additional evidence sought to be adduced, could not have been obtained with reasonable diligence for use at the trial.
15. In the case of *Wanje vs. A.K. Saikwa* [1984] eKLR, this Court laid down the following principles:

“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

- a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- b. 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;
- c. 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.”

16. Further, the court cautioned that the power to admit additional and fresh evidence should be exercised very sparingly and with great caution. It stated thus:

“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.”

17. This Court rendered itself on the issue in the case of *Republic vs. Ali Babitu Kololo* [2017] eKLR where it stated inter alia:

“It has been said time and again that the



unfettered power of the court to receive

additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.”

18. The NLC's admission that its affidavit contains no evidence of diligence, and that they accessed the documents after the judgment, coupled with the appellants' view that the necessity arose from the judgment, weighs against fulfilling this crucial requirement. The John Kiplangat Barbaret case is distinguishable, as it concerned evidence whose very existence was unknown to the party; here, the existence of land records at the Ministry of Lands was clearly known.
19. Furthermore, the respondents' argument, supported by the principle in the Mohamed Abdi Mohamed case that the application appears to be an attempt to fill in gaps or make a fresh case after the trial judgment, is pertinent. The court must be satisfied that the evidence is not being used for deception or filling lacunae.
20. While the relevance and potential impact of the documents on the central issue are acknowledged, and the documents' nature as official public records suggests credibility, the failure to adequately explain the lack of diligence at trial undermines the application's foundation.
21. The discretion under Rule 31 must be exercised for sufficient reason, and, as the Vinayak case reminds us, sparingly and with caution, balancing significance against procedural fairness and the need for finality. Admitting evidence that was available and could have been produced at trial, without a convincing explanation for the failure to do so, risks prejudicing the successful party at trial and incentivizing incomplete presentation of evidence with a view to patching up weaknesses on appeal.
22. In the case of *Cooley vs. Edwards* [1982] New Law Journal, page 247, the English Court of Appeal, in dealing with the more restrictive provisions of RSC order 59 rule 10(2), said:

“It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court's decision.”
23. We have considered the proportionality of prejudice, and while the appellants may suffer prejudice if the evidence is not admitted, and the ELC judgment stands, admitting evidence that could have been presented at trial potentially prejudices the respondents by re-opening a concluded matter based on available but previously unrepresented material. The principles require a demonstration of diligence and that the evidence is not merely gap-filling.
24. Therefore, we find that the applicant has failed to demonstrate that the additional evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial court. The explanations provided suggest the evidence was sought and deemed necessary after the adverse judgment, rather than diligent preparation for the trial.
25. Consequently, allowing the application would amount to permitting the applicant to fill in gaps in the evidence presented at trial and potentially make a fresh case on appeal, which goes against the established principles governing the admission of additional evidence.
26. For these reasons, the interested party's application dated 5th September 2024 lacks merit, and is hereby dismissed.



27. Costs of the application shall be in the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

F. OCHIENG

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

