



**Attorney General & 3 others v Tott & 8 others (Civil Appeal (Application) 156 of 2019) [2024] KECA 1275 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1275 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL (APPLICATION) 156 OF 2019  
SG KAIRU, FA OCHIENG & WK KORIR, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> APPLICANT  
CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> APPLICANT  
MINISTRY OF LANDS & HOUSING ..... 3<sup>RD</sup> APPLICANT  
MINISTRY OF DEVOLUTION & PLANNING ..... 4<sup>TH</sup> APPLICANT**

**AND**

**PIUS KIBET TOTT ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
UASIN GISHU COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT  
PHILIP KIPRONO ARAP OTIENO ..... 4<sup>TH</sup> RESPONDENT  
PATRICE KIBITOK A. RONO ..... 5<sup>TH</sup> RESPONDENT  
EZEKIEL OMWENGA ..... 6<sup>TH</sup> RESPONDENT  
TITUS GATITU NJAU ..... 7<sup>TH</sup> RESPONDENT  
JOSEPH JOEL METHU ..... 8<sup>TH</sup> RESPONDENT  
JOHN KIGEN KATWA ..... 9<sup>TH</sup> RESPONDENT**

*(An application to adduce additional evidence in the pending appeal against the judgment and decree of the Environment and Land Court of Kenya at Eldoret (A. Ombwayo, J) dated 12th January 2018 in E&LC Petition No. 10 of 2010)*



## RULING

1. The applicants have approached this Court through the notice of motion dated 20<sup>th</sup> December 2023 brought under sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rules 29, 42 and 43 of the Court of Appeal Rules seeking leave to adduce additional evidence in this appeal by means of an affidavit. They also pray that should their application be allowed, they be granted leave to file a supplementary record of appeal. The motion is premised on the grounds on its face and the averments of Allan Kamau found in an affidavit sworn in support of the application.
2. It is the applicants' case that the 1<sup>st</sup> applicant was instructed to represent the 3<sup>rd</sup> applicant at the trial. The applicants averred that after the delivery of the judgment by the Environment and Land Court (E&LC), they commenced the process of the settlement of the decree by instructing the Ethics and Anti-Corruption Commission (EACC) to investigate the history of land parcel number Eldoret Municipality Block 22 (Langas) (the suit property). According to the applicants, it was during the investigations that new and compelling evidence was unearthed, indicating that although the suit property was indeed private property, the 1<sup>st</sup> respondent or his father had no legitimate claim over it. It also emerged that there was previous litigation over the suit property and a court of competent jurisdiction had found that the 1<sup>st</sup> respondent's father had no legitimate claim over the suit property. The applicants deposed that the documents sought to be adduced are critical and the learned Judge of the E&LC would have likely arrived at a different decision had the evidence been adduced at the trial.
3. In the supporting affidavit, Allan Kamau, a Principal State Counsel in the office of the Attorney General, detailed the new evidence by averring that during the investigations, the EACC established that the suit property was purchased in 1964 by Gordon Edward Goby and Lionel Roy who later transferred it to 41 people going by the name Langas Farm Group. The members of Langas Land Group registered the suit property in the names of Joseph Arap Korir and Kiptot Arap Sitienei (the father to the 1<sup>st</sup> respondent) as their trustees. In 1967 Kiptot Arap Sitienei pulled out from Langas Farm Group thereby relinquishing his interest in the property. Mr. Kamau further deposed that through Eldoret HC Succession Cause No. 43 of 2006, the 1<sup>st</sup> respondent took out letters of administration for the estate of his father but the grant was not confirmed as a result of an objection by Langas Farm Group. According to the applicants, the investigations by the EACC established that the occupants of the suit property were either beneficiaries of the original shareholders or were purchasers of portions of the farm from the beneficiaries of the original shareholders. Mr. Kamau averred from the history of the ownership of the suit property, the 1<sup>st</sup> respondent was not entitled to compensation from the applicants. He listed 18 documents that the applicants would produce as additional evidence and sought for the application to be allowed.
4. In opposition to the application, the 1<sup>st</sup> respondent swore a replying affidavit on 19<sup>th</sup> April 2024 through which he averred that the application is incompetent as the supporting affidavit violates Order 19 Rule 3(1) of the Civil Procedure Rules. On the substance of the application, he deposed that the applicants have not demonstrated sufficient and cogent reasons to justify the grant of leave to adduce additional evidence. According to the 1<sup>st</sup> respondent, the applicants have all along participated in the case and they have not demonstrated why they never engaged the EACC so as to acquire the alleged additional evidence at the trial. It was also his averment that the EACC has no mandate in civil matters and the alleged additional evidence can be used in criminal proceedings where it will be tested. He averred that the affidavits by the EACC are made in bad faith and that in any case the documents the applicants intend to adduce are already on the record and were considered by the trial court. The 1<sup>st</sup>



respondent also deposed that he will be greatly prejudiced if the application is allowed because it will allow the applicants to litigate in instalments thus offending the public policy that litigation must come to an end. He consequently asked for the dismissal of the application with costs.

5. When this application came up for hearing on the Court's virtual platform on 24<sup>th</sup> April 2024, learned counsel Mr. Eredi appeared for the applicants whereas learned counsel Mr. Kipnyekwei appeared for the 1<sup>st</sup> respondent. Other advocates present were learned counsel Mr. Ngige for the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents, learned counsel Ms. Awuor for the 3<sup>rd</sup> respondent and learned counsel Ms. Tum for the 4<sup>th</sup> and 5<sup>th</sup> respondents. There was no appearance for the 2<sup>nd</sup> respondent. Mr. Eredi had filed submissions dated 22<sup>nd</sup> March 2024 on behalf of the applicants while Mr. Kipnyekwei had filed submissions dated 20<sup>th</sup> April 2024 for the 1<sup>st</sup> respondent. Ms. Ngige informed us that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents were neutral in regard to the application. On their part, Ms. Awuor and Ms. Tum indicated that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were in support of the application. Mr. Eredi and Mr. Kipnyekwei placed reliance on their respective written submissions and also made oral highlights at the hearing.

6. Urging us to allow the application, Mr. Eredi referred to *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR and *Attorney General v. Torino Enterprises Ltd* [2020] eKLR to highlight the principles underpinning the production of additional evidence on appeal. Counsel also referred to *Dorothy Nelima Wafula v. Hellen Nekesa Nielsen & Another* [2017] eKLR in support of the proposition that rule 29(1)(b) of the Court of Appeal Rules (now rule 31(1)(b)) allows the production of additional evidence. Counsel submitted that they have demonstrated that the evidence they seek to adduce could not be reasonably obtained during the trial as they needed the assistance of EACC to unearth it. Counsel also faulted the decision of the trial court to proceed through affidavit evidence arguing that the procedure limited the volume of the evidence that could be adduced by the parties. According to counsel, the production of additional evidence is the only way of purging that mistake by the trial court.

Counsel relied on the case of *Tana and Athi v. County Government of Tana River* [2018] eKLR to point out that the reason for allowing additional evidence is not to give the parties an opportunity for a fresh hearing but to enable the court reach a proper determination of the dispute. Counsel consequently urged us to allow the application as prayed.

7. In opposition to the application, Mr. Kipnyekwei likewise commenced his submissions by adverting to *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamed & 3 others* (supra) and *Safe Cargo Ltd v. Embakasi Properties Ltd* [2019] eKLR for the principles that guide the production of additional evidence on appeal. Counsel submitted that the instant application should fail because applicants have not provided justification for not producing the new evidence before the trial court. According to counsel, the applicants have not explained why the EACC was not instructed to investigate the case at the trial stage. In counsel's view, the applicants are merely trying to fill evidentiary gaps in their case at the appellate stage. Counsel also argued that what the applicants are seeking to do is to amend their defence to an already determined petition. Additionally, counsel submitted that the EACC had usurped powers not available to it by attempting to investigate a matter which had been heard and determined by a court with competent jurisdiction. Counsel argued that the author of the supporting affidavit was not a competent witness who could be questioned on the contents of his affidavit. Counsel additionally submitted that the proposed additional evidence is voluminous and allowing its production would be prejudicial to the 1<sup>st</sup> respondent who would be required to respond to every allegation in those documents. Counsel therefore urged us to decline the application with costs.



8. Even though the application is premised on rule 29, the correct rule should be rule 31 of the Court of Appeal Rules, 2022, 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.”

9. In *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others* (supra), the Supreme Court established the principles for admission of additional evidence by appellate courts by holding that:

“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.”

10. This Court in *Attorney General v. Torino Enterprises Limited* [2019] eKLR also spoke to the principles underpinning production of additional evidence as follows:

“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.”

11. Guided by the above principles, we will assess the motion before us by considering the following issues; (a) whether there is additional evidence; (b) whether the additional evidence would have influenced or impacted upon the outcome of the case; (c) whether the applicants have demonstrated that they could not, with reasonable diligence, have obtained the evidence for use at the trial; and (d) whether the 1<sup>st</sup> respondent will be prejudiced if the production of the additional evidence is allowed.
12. Starting with the question as to whether there is additional evidence, we observe that the 1<sup>st</sup> respondent in opposing the application contested that some of the alleged new documents were actually produced at the trial. According to Mr. Kipnyekwei, the applicants are now prosecuting the case on behalf of the other respondents. Counsel for the applicants did not respond to this issue. On our part, we have not had the opportunity of reviewing the record of appeal, as it is not before us, so as to ascertain how true the assertion by the 1<sup>st</sup> respondent is. Be that as it may, we have keenly perused the application and the response in respect to annexures marked as MM1 through to MM18 and we are satisfied that the documents contain additional evidence. In any event, no harm would be occasioned by the fact that some of the documents may already be on record as claimed by the 1<sup>st</sup> respondent.

Additionally, whether the trial court considered some of the documents is a matter that can always be taken up at the hearing of the appeal.



13. The next issue is whether the additional evidence would have influenced or impacted upon the judgment of the trial court. Differently put, the question is whether annexures marked MM1 through to MM18 would remove any vagueness or doubt in the case and has a direct bearing on the main issue in the suit. At the centre of the dispute was ownership of the suit property being Eldoret Municipality Block 22 (Langas). Upon review of the annexures MM1 to MM18 we have no doubt that the annexures speak to the history of the ownership of that property. The annexures include transfer documents, court decisions on the ownership of the suit property and documents showing previous transactions on the land. We are also satisfied that had these documents been available at the trial, they would have had a bearing on the outcome of the suit and would have been of assistance on the question of ownership of the suit property, which was crucial in answering the question as to whether the 1<sup>st</sup> respondent was deserving of any compensation from the applicants.
14. The next question is whether the applicants have demonstrated that they could not, with reasonable diligence, have obtained the evidence for use at the trial. According to the applicants, the 1<sup>st</sup> applicant who represented the 3<sup>rd</sup> applicant in the trial could not acquire the evidence, which was only unearthed by the EACC post- judgment. The applicants also decried the mode of trial which was conducted by affidavits and written submissions which they say limited not only the nature but also the quantity of evidence they could adduce. The 1<sup>st</sup> respondent's reply is that the services of the EACC were available during trial and the EACC could have been requested to conduct due diligence at that time. In our view, the perceived new evidence contained in MM1 to MM18 traces back to the pre-independence period. It is appreciated that serious and time-consuming investigation was necessary to unearth the evidence. There is no evidence to show that the existence of the documents was known to the applicants during the trial. Much as the choice of the trial procedures was a matter that could have been taken up by the applicants before the trial court, it remains that the existence of the evidence was not within the knowledge of the applicants during the trial.
15. On the prejudice aspect of the application, it is the 1<sup>st</sup> respondent's assertion that the new evidence is voluminous, and he will be denied an opportunity to respond to it substantively. In our view, the interests of justice would require that the additional evidence be placed before the Court for a just and fair determination of the dispute. Additionally, we wish to point out that Eldoret SRM Civil Suit No. 52 of 1985 and Eldoret HC Civil Appeal No. 60 of 1987 were matters that would ordinarily have been within the knowledge of the 1<sup>st</sup> respondent as his father, in respect of whose estate he took out the letters of administration on 4<sup>th</sup> October 2010, was a party in both suits. We further observe that if the application will be allowed the 1<sup>st</sup> respondent will be given an opportunity to respond to the new evidence. The likelihood of the 1<sup>st</sup> respondent being prejudiced is therefore unforeseeable or minimized in those circumstances.
16. Still on the issue of prejudice, we wish to reiterate and associate ourselves with the view of the Supreme Court in *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others* (supra) that:
  - “(91) We emphasize here that this Court will always undertake a methodical analysis of any issues it is seized of, draw the whole dispute to a meaningful conclusion with directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the Courts below.” In the circumstances, we are satisfied that allowing the additional evidence will not be prejudicial to any of the parties in the appeal.
17. Before we conclude, we wish to point out that we do not find any merit in the 1<sup>st</sup> respondent's complaint that Mr. Allan Kamau was not competent to swear the supporting affidavit to the



application. In the supporting affidavit, Mr. Kamau only speaks to the availability of the new evidence as counsel who took part in the attempt to reach an out-of-court settlement. He was not speaking to and neither are we testing the evidentiary value of the new evidence at this stage.

18. In the end, we find that the notice of motion dated 20<sup>th</sup> December 2023 has merit and we allow as follows:
- i. Leave be and is hereby granted to the applicants to adduce and file additional evidence limited to annexures MM1 to MM18;
  - ii. The additional evidence be adduced by means of affidavit and be filed as supplementary record of appeal within 14 days of the date hereof;
  - iii. The 1<sup>st</sup> respondent and any other party desirous of responding to the additional evidence to file a replying affidavit, if any, to the applicants' supplementary record of appeal within 14 days of service;
  - iv. Costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

