



**Kinungi alias Mary Wangu Mbogo & another v Kariuki (Civil Appeal
(Application) E012 of 2024) [2024] KECA 1536 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1536 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E012 OF 2024
W KARANJA, J MOHAMMED & LK KIMARU, JJA
OCTOBER 25, 2024**

BETWEEN

MARY WANGUI KINUNGI ALIAS MARY WANGU MBOGO ... 1ST APPLICANT

ALICE WANJIRA MIRINGU 2ND APPLICANT

AND

HENRY THERI KARIUKI RESPONDENT

(Being an application from the Judgment of the Environment and Land Court of Kenya at Nyeri (Olola, J.) dated 28th September, 2023 in E. L.C. Case No. 8 of 2012)

RULING

1. The applicants, Mary Wangui Kinungi alias Mary Wangu Mbogo and Alice Wanjira Miringu, have moved this Court by notice of motion seeking leave to “adduce additional evidence being Land Control Board Consent, Agreement of Sale, Application the Land Control Board, Transfer of Land Forms and other receipts thereof”.
2. The grounds in support of the application are stated on the face of the application and the annexed affidavit of Alice Wanjira Miringu. In essence, the applicants state that they were aggrieved by the judgment rendered by the Environment and Land Court, (Olola, J.), Nyeri in Environment and Land Court No. 8 of 2012. They had preferred an appeal to this Court against the said decision.
3. While perusing the proceedings and judgment of the trial court, the applicants realized that crucial documentary evidence that they had availed to their former advocates, being the agreement for sale, the consent of the Land Control Board, the application to the Land Control Board and other receipts “for unknown reasons were not produced in court nor were they put in the bundle of plaintiff’s case for reasons unknown to the applicants/appellants”. The applicants averred that they were not to blame for the failure by their erstwhile advocate to produce the said crucial evidence. It was for that reason that the applicants are pleading with the Court to allow them adduce additional evidence in this appeal.



4. Although the respondent was served, he did not file any replying affidavit in opposition to the application. He did not appear in Court during the hearing of the application despite being notified of the hearing date by the court. Mr. Wandai, learned counsel for the applicants, in his oral submission before Court, urged the Court to consider the application favourably and allow the same.
5. We have considered the application. This Court has jurisdiction under Rule 31 (1) (b) of the Court of Appeal Rules, 2022 to take additional evidence. In *Archer & Another v Archer & 2 Others (Civil Application E058 of 2021)* [2022] KECA 9 (KLR) this Court held thus:

“8. Leave to adduce additional evidence is therefore at the discretion of the Court, and the principles applicable in the exercise of the Court’s discretion under Rule 29 were summarized by Chesoni, Ag. JA. (as he then was) in *Mzee Wanjia and 93 Others vs A. K. Saikwa and Others* (1982 – 88) 1 KAR 462 as follows:

- The principles upon which an appellate court in Kenya in 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.

9. The Supreme Court of Kenya has also set out guidelines for the admission of additional evidence before appellate courts in *Hon. Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 Others* [2018] eKLR, as follows:

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- (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 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 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, on the other hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
6. The Supreme Court in addition stressed that additional evidence at appellate level should be allowed on a case-by-case basis and even then – sparingly with abundant caution.”
7. In the present application, upon our consideration of the facts, it was clear to us that the evidence the applicants wish to adduce as additional evidence was all along within their possession, could be accessed by the applicants at the time of the trial, albeit in possession of their erstwhile advocate, and therefore they cannot claim that they were unaware of the significance of the particular evidence when they presented their case before the trial court. They could have produced the same in court during the course of the trial which took some time.
7. Furthermore, it was evident that the applicants lacked diligence in the preparation and presentation of their case before the trial court. They did not list the said documentary evidence in their bundle of documents prior to the commencement of the hearing. To allow the applicants to produce the particular documents in this appeal would be tantamount to giving the appellant a second bite of cherry to litigate their case afresh before the appellate court. The applicants placed no evidence before this Court to persuade it that they would not be litigating a fresh case or filing up the gaps in the case that was determined against them by the trial court.



8. We are unable to fathom how such critical documents could have been missed or left out in the bundle of documents to be relied on by the applicant during the trial in the superior court yet it formed the basis of their entire case against the respondent. This was clearly a case of inexcusable negligence on the part of the applicants which cannot be countenanced or remedied by allowing the application for adduction of additional evidence before this Court. To do so would negatively impact on the safeguards that have been put in place by the *Civil Procedure Act* particularly Sections 1A (1) and 1B (1) and the Rules made thereunder particularly Order 3 Rule 4, and Order 11 Rules 3 (1) and (2) thereof which are intended to promote fairness of the trial process and not prejudice the respondent.
9. The application lacks merit and is hereby dismissed but with no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

