



REPUBLIC OF KENYA



Thande (Suing as the legal representative of Francis Kiarie (Deceased) v Kahira & another (Civil Appeal (Application) E581 of 2021) [2023] KECA 1213 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1213 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E581 OF 2021
HA OMONDI, KI LAIBUTA & GWN MACHARIA, JJA
OCTOBER 6, 2023**

BETWEEN

LIVINGSTONE WAWERU THANDE (SUING AS THE LEGAL REPRESENTATIVE OF FRANCIS KIARIE (DECEASED)) APPELLANT

AND

JOHN KARANJA KAHIRA 1ST RESPONDENT

NELLIE NGONYO MWAURA 2ND RESPONDENT

(Being an application for leave to introduce new/additional evidence in the pending appeal against the Judgment of the Environment and Land Court (Obaga, J.) delivered on 7th December 2020 in ELC Case No. 894 of 2014)

RULING

1. The application before us is dated 22nd August 2022 and is brought pursuant to article 159(2) (d) of *the Constitution* and rules 20, 21, 31(1) (b) and (2), & 49 of the *Court of Appeal Rules*, seeking leave to adduce new/additional evidence, being Dagoretti Divisional Land Control Board minutes of July 7, 1969 with respect to land reference number Dagoretti/Kangemi/204 (hereafter ‘the suit land’) and leave to file a supplementary record of appeal to produce the additional evidence.
2. The application is supported by the grounds on the face of it and the applicant’s affidavit sworn on even date. The applicant avers that the new evidence became material after the respondents alleged that the suit land was transferred fraudulently without the consent of one Loise Wanjira (deceased). It suffices to state that Loise Wanjira was one of the owners of the suit land, who is alleged to have transferred her portion to the applicant’s father, who is also deceased. On the other hand, the respondents, who are her grandchildren, claimed that no consent from the Land Control Board was ever obtained prior to the transfer and that, therefore, the alleged transfer of the land was fraudulent.



3. With this assertion by the respondents, the applicant commenced the process of looking for the minutes of the Land Control Board, Dagoretti Division, as evidence that the transfer of the land was indeed with the consent of the late Loice Wanjira. According to the applicant, failure to tender the additional evidence was due to the fact that it was in the nature of Land Control Board minutes which were recorded 53 years back, and, although he requested for them in October 2018, they were only obtained on 1st June 2022; that the credibility, veracity and authenticity of the new evidence can easily be verified as the minutes constitute an official document written and prepared in the course of public duty, and originated from a public office; that the new evidence is relevant and needful; that it is not intended to fill in gaps in the case but, rather, it will remove vagueness or doubt over the transfer of the suit property; and that it is in the interest of justice that the application be allowed.
4. The respondents opposed the application vide their replying affidavit sworn on 12th April 2023. They contend that the appellant served the application almost eight months after filing it, which is an indication that he is abusing the court process by withholding the pleadings and applying ambush tactics of introducing new evidence too late in the day; that the Court should not allow the appellant to conduct litigation on a piecemeal basis; that if the intended evidence is admitted, they will not have the opportunity to cross-examine any witness on its contents; and that, evidently, the applicant is trying to fill a lacuna in his case.
5. The respondents further contend that the purported Land Control Board minutes are illegible and would not be of any help to this Court; that the filing of the new evidence will necessitate corresponding leave to file additional evidence by the respondents, consequent to which there shall be a delay in the determination of the appeal; that the appellant is being untruthful by claiming that fraud was discovered in 2018 when, in fact, he had been served with the respondents' counterclaim, which referred to the minutes, and as a consequence to which his father filed a defence and a counterclaim too; that the appellant was not diligent in obtaining the intended evidence in good time; that the intended evidence is not credible or capable of belief in so far as disclosing a strong prima facie case of willful deception goes; that it would not influence or impact upon the Court's verdict; and that it would be undecisive and prejudicial to them and, thus, the application should be dismissed with costs.
6. The respondents also filed grounds of opposition dated April 12, 2023, raising 14 grounds which are a regurgitation of the replying affidavit, and which are not required in interlocutory proceedings before this Court.
7. The applicant's Motion was canvassed by way of written submissions. Those of the applicant are dated November 7, 2022 whilst those of the respondents are dated May 10, 2023.
8. The application came up for hearing before us on May 24, 2023. Learned counsel Ms. Shikali holding brief for Mr. Kiprop appeared for the appellant/applicant and learned counsel Mr. Njoroge Ng'ang'a appeared for the respondent. Both counsel relied on their written submissions with limited oral highlights.
9. Counsel's submissions are a regurgitation of the averments in the affidavit in support of, and in opposition to, the application as well as the grounds of opposition. For this reason, we find no reason to recall them unless for any salient issues. Thus, we add that, the applicant's counsel, urging us to allow the application, placed reliance on the Supreme Court decision in *Mohamed Abdi Mohamed vs. Ahmed Abdullabi Mohamed and 3 others* [2018] eKLR where guidelines were laid down on what a court ought to consider in allowing admission of additional evidence at an appellate stage. We shall address ourselves to the guidelines later in this ruling.



10. On the part of the respondents, it was emphasized that the intended new evidence does not answer the main issue for determination, which is whether there was any transfer signed by the deceased Loice Wanjira to one Francis Thande. The justification attached to this assertion is that the land transfer document contained in the record of appeal was never signed by the deceased Loice Wanjira, and hence a discrepancy in what is intended to be adduced and what is already on record.
11. We have considered the application, the supporting affidavit, the replying affidavit, the respective submissions and the law. We are of the considered view that the sole issue for determination is whether the applicant has made out a case for grant of leave to adduce additional evidence on appeal.
12. Counsel for both parties placed reliance on the Supreme Court decision in the case of *Mohamed Abdi Mabamud vs. Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR which sets out the governing principles to be considered in allowing additional evidence on appeal as follows:

“[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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.”

13. The Supreme Court having set out the foregoing above criteria, our singular task is to grapple with the question as to whether the application herein meets that criteria, and whether it is merited. It is not in dispute that the issue that was and will be settled for determination before the ELC, and in the resultant appeal respectively, is whether one Loice Wanjira signed any transfer of the subject land to Francis Thande. Counsel are also in agreement that the suit was dismissed on account that there was no proof of consent of the Land Control Board prior to the transfer.
14. The applicant has annexed several letters which he addressed to the District Officer, Waithaka Division, requesting to be supplied with the additional evidence of which the first is dated October 4, 2018. Another one is addressed to the Assistant County Commissioner and is dated January 14, 2019. His advocate too wrote letters dated September 15, 2021, November 29, 2021 and May 22, 2022 respectively, all alluding to physical visits to the said offices seeking supply of the minutes of Land Control Board of July 7, 1969. The Assistant Commissioner, vide a letter dated May 27, 2022, informed the advocate that the said minutes had been located. All these correspondences have the stamps of the relevant offices, and there is nothing that would lead us to doubt their authenticity.
15. The impugned judgment was rendered on December 7, 2020 and, as can be seen from the referenced letters, the applicant began his pursuit of the intended additional evidence when the suit was still pending before the trial court. It is evident that despite his diligence, the evidence in issue was only availed after judgment was delivered. What this implies is that it could not have been produced during the trial.
16. We also note that the additional evidence sought to be admitted is not voluminous. It only comprises five pages, and as such, the respondent will have no difficulty in making a response thereto.
17. The respondent questioned the veracity and authenticity of the additional evidence. In our view, as submitted by learned counsel Ms. Shikali, the minutes are said to be from a public office. Consequently, their authentication should not be an issue.
18. We also discount the apprehension that the applicant, in adducing the additional evidence on appeal, will be making a fresh case. We say so because the additional evidence is only advancing a rebuttal to the assertion that one Loice Wanjira did not sign the consent before the Land Control Board. In contrast, the additional document is aimed at removing any vagueness or doubt on the acquisition of the suit property. To this extent, it is relevant and has a direct bearing on the main issue for determination in the pending appeal. In the circumstances, we are satisfied that the additional evidence is not meant to bolster or fill gaps in the applicant’s pending appeal.
19. We are further satisfied that the additional evidence appears to be credible for the reasons that the minutes sought to be adduced originate from a public office which is deemed to have their proper custody. Furthermore, they bear an official stamp from the office they are alleged to have originated



from. We bear in mind that their authenticity and veracity has been impugned by the respondent. However, the respondents will be accorded the opportunity to lay basis for their claim at the hearing of the appeal.

20. Bearing in mind our foregoing observations, we are satisfied that the application is merited. Accordingly, we allow the applicant's motion with the following orders:

- a. Leave be and is hereby granted to the applicant to adduce and file additional evidence, being Dagoretti Divisional Land Control Board minutes of July 7, 1969.
- b. The applicant shall, within 14 days from the date of this ruling, file and serve a supplementary record of appeal annexing the additional evidence set out in prayer No. 2 of Notice of Motion dated August 22, 2022.
- c. The respondent shall file and serve a replying affidavit within 14 days of service of the supplementary record of appeal in response to the additional evidence.
- d. The costs of the application shall abide the outcome of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

