



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fanikiwa Limited v Sirikwa Squatters Group & 95 others (Civil Appeal  
(Application) 45 of 2017) [2021] KECA 307 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 307 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL (APPLICATION) 45 OF 2017  
HM OKWENGU, SG KAIRU & J MOHAMMED, JJA  
DECEMBER 17, 2021**

**BETWEEN**

**FANKIWA LIMITED ..... APPELLANT**

**AND**

**SIRIKWA SQUATTERS GROUP ..... 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF REGISTRAR OF TITLES ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND ADJUDICATION & SETTLEMENT ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 5<sup>TH</sup> RESPONDENT**

**UASIN GISHU DISTRICT ..... 6<sup>TH</sup> RESPONDENT**

**LONRHO AGRI BUSINESS (EA) LTD ..... 7<sup>TH</sup> RESPONDENT**

**MARK KIPTARBEI TOO ..... 8<sup>TH</sup> RESPONDENT**

**DAVID K. KORIR ..... 9<sup>TH</sup> RESPONDENT**

**HIGHLANDS SURVEYOR ..... 10<sup>TH</sup> RESPONDENT**

**KENNEDY KUBASU ..... 11<sup>TH</sup> RESPONDENT**

**AHMED FERREJ ..... 12<sup>TH</sup> RESPONDENT**

**RICHARD KIRUI ..... 13<sup>TH</sup> RESPONDENT**

**STANBIC LIMITED ..... 14<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK ..... 15<sup>TH</sup> RESPONDENT**

**ECO BANK ..... 16<sup>TH</sup> RESPONDENT**

**MILLY CHEBET ..... 17<sup>TH</sup> RESPONDENT**



NATIONAL BANK OF KENYA ..... 18<sup>TH</sup> RESPONDENT  
KENYA WOMEN MICROFINANCE ..... 19<sup>TH</sup> RESPONDENT  
COMMERCIAL BANK OF AFRICA ..... 20<sup>TH</sup> RESPONDENT  
CO-OPERATIVE BANK OF KENYA & 75 OTHERS ..... 21<sup>ST</sup> RESPONDENT

*(Being applications for leave under Rule 29 of the Court of Appeal Rules to adduce additional evidence in Civil Appeal No. 45 of 2017, arising from the Judgment and Decree of the Environment & Land Court at Eldoret (A. Obwayo, J) delivered on 9th February, 2017 in ELDORET ELC PETITION NO. 4 OF 2016)*

## RULING

1. There are three appeals pending for hearing before this Court all arising from the judgment of the Environment and Land Court (ELC) (Obwayo J) delivered on 9th February, 2017. These are Civil Appeal No. 44 of 2017 filed by Lonrho Agri Business (EA) Limited (Lonrho), Civil Appeal No 45 of 2017 in which the appellant is Fanikiwa Limited (Fanikiwa), and Civil Appeal No 68 of 2017 in which Mary Jepkemboi Too and Sophie Jelimo Too who are the joint administrators of the estate of Mark Too, are the appellants.
2. The three appeals have been consolidated by an order made by this Court, Civil Appeal No 45 of 2017 being the lead file. The Court has also made an order joining several persons who were not parties in the trial court as respondents in the consolidated appeals. Several applications are now before us for leave to adduce additional evidence by way of affidavits. This ruling is in regard to these applications.
3. Applications dated 22nd December, 2020 and 23rd December, 2020 have been filed by National Bank of Kenya (NBK) and Kenya Commercial Bank (KCB) respectively. NBK and KCB are the 15th and 18th respondents who were joined in this appeal as affected parties. They are represented before us by Mr. Saina.
4. NBK and KCB wish to adduce new evidence which was not availed to the lower court due to their absence, but which they believe will impact the outcome of the appeal. They point out that they are prejudiced by the order made by the learned Judge cancelling titles as they hold several of the titles as security, for financial facilities extended to their customers. It is therefore in the interest of justice that they be allowed to adduce additional evidence that includes copies of the titles and the securities.
5. Similarly, Kenya Women Finance Trust (KWFT) and Commercial Bank of Africa (CBA), who are represented by Ms. Ndambuki, have filed applications dated 16th December, 2020 seeking to be allowed to introduce additional evidence, which is copies of titles that they are holding as security pursuant to charges in their favour, which titles have been cancelled by the learned Judge.
6. Ms. Odwa who appears for Ahmed Ferej and 60 others (12th respondents) all interested parties in the appeals who were joined at the appeal stage, also seek leave to adduce new evidence.
7. Co-operative Bank of Kenya Limited (Co-op Bank) the 21st respondent, has made an oral application seeking to have the affidavit sworn by Elisha Odemba on 16th October, 2020 admitted in evidence as additional evidence. The affidavit was sworn and filed in support of the successful application made by Co-op Bank to be joined in the appeal.



8. Prof. Ojienda who appears for Fanikiwa has no objection to the applications. He points out that the documents sought to be adduced in evidence are simply charges and documents of title. It is worthy of note that Fanikiwa though not a party to the litigation in the trial Court, filed an appeal against the judgment of the trial court because it was the registered proprietor of several of the titles that were cancelled by the learned Judge.
9. Ms. Ghaiti who appeared for the Attorney General who is on record for the 2nd to 6th respondents, left the matter to the Court.
10. Ms. Chesoo who appeared for Lonrho, 8th respondent (Mark Too), and 9th respondent (David Korir), supported the applications. Mark Too was also the registered owner of a number of parcels which were subdivisions from the suit property that were ordered cancelled by the learned Judge.
11. All the applications were opposed by the 1st respondent Sirikwa Squatters Group (Sirikwa), through their advocates, Mr. Arusei. Sirikwa was the successful petitioner in the trial court. It was Mr. Arusei's submissions that the power to allow adduction of new evidence as provided under Rule 29 of the Court Rules, should be exercised sparingly and cautiously; that in applying for adduction of additional evidence, the applicants are jumping the gun and simply arguing the main appeal before it is heard.
12. He submitted that the applicants do not qualify under Rule 29 of the Court Rules to be allowed to adduce additional evidence because they have nothing useful; that the applicants are financial institutions seeking protection of titles charged to them and that they have their remedy in contract to which Sirikwa is not privy; and that the interest of Sirikwa should not be interfered with. The Court was urged to find that the applicants have not met the threshold required under Rule 29 for adduction of additional evidence as no notice of appeal has been filed by the applicants.
13. We have considered the applications and the contending submissions made before us. Under Rule 29 of the Court Rules, this Court has power:
  - “ 1. (b) In its discretion for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
  2. When additional evidence is taken by the Court it may oral or by affidavit and the Court may allow the cross-examination of any opponent.
  3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a stamen of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court without any such statements of opinion.
  4. The parties to the appeal shall be entitled to be present when such additional evidence is taken.”
14. In *Mohammed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR, the Supreme Court considered the issue of the court entertaining an application for additional evidence, and having considered and analysed the position in comparable jurisdictions, stated as follows:
 

“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. If 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 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 the 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.”

15. Thus, the Supreme Court has clearly laid out the threshold to be used by the Court in exercising its discretion in granting leave to adduce additional evidence. We note that the discretion can only be exercised in exceptional circumstances.

16. In this appeal, all the applicants seeking to adduce additional evidence were not parties in the trial court, but have subsequently been joined by this Court as parties who are likely to be affected by the outcome of the appeal. These include respondents who were registered proprietors of subdivisions from the suit properties and banking institutions who sought to protect their interest having advanced substantial amounts to its clients on the security of some of the cancelled titles.



17. We find that the circumstances before us present an exceptional situation in which persons who were not parties in the trial have been joined at the appellate stage and need to adduce evidence to substantiate their alleged interest. It is clear that the applicants not having been parties in the trial court, had no opportunity to present the evidence which they now want to place before this Court. The evidence relates to their interests in the suit properties that are subject of the appeals before us. It is therefore evidence that is directly relevant to the appeal and will help the Court in the just determination of the issues before it. Moreover, the 1st respondent who is objecting to the applications will not suffer any prejudice as the evidence is basically documentary evidence that can be adduced through affidavit evidence, and the 1st respondent will have the opportunity to respond to the affidavits.
18. The upshot of the above is that we are satisfied that the applicants have met the threshold set by the Supreme Court in *Mohammed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others* (supra). We allow the applications and direct that the applicants shall each file their respective affidavits bringing in the additional evidence within 15 days from the date hereof, and the 1st respondent shall be at liberty to file a replying affidavit within 15 days from the date of service of the applicants' affidavits. Costs of the applications shall be in the appeals.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

