



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamaru v Gikuhi & another (Environment and Land Appeal  
E070 of 2022) [2024] KEELC 4225 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4225 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E070 OF 2022**

**JG KEMEI, J**

**MAY 9, 2024**

**BETWEEN**

**PETER KIMANI KAMARU ..... APPLICANT**

**AND**

**JAMES MAINA GIKUHI ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, RUIRU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Hon C A  
Otieno SPM in ELC No. 124 of 2020, RUIRU delivered on 22/12/2021)*

**RULING**

1. Before Court is the Applicant/Applicant's Notice of Motion dated 23/5/2023 and filed on 22/6/2023 brought under the provisions of Order 42 Rule 27 of the [Civil Procedure Rules](#) and Sections 3A and 78(1) of the [Civil Procedure Act](#) seeking Orders that;
  - a. This Honorable Court be and is hereby pleased to grant leave to the Applicant/Applicant to adduce additional documentary evidence for consideration by the Court when deciding this matter.
  - b. This Honorable Court be and is hereby pleased to admit onto the record the annexed certified copies of the following documents;
    - a. Letter from the Commissioner of Lands dated 17<sup>th</sup> December 1990;
    - b. Memorandum of Registration of Transfer of Lands dated 4<sup>th</sup> January 1991; and
    - c. Lease issued to Emily Njeri Kamaru dated 14<sup>th</sup> December 1990 and signed by Commissioner of Lands.



2. The application is premised on the grounds that the additional documentary evidence is credible, weighty and relevant to the determination of this appeal. That the evidence which was received in the course of public duty was not within the Applicant's knowledge despite due diligence at the time of trial. That it is not voluminous to impede the Respondent's rebuttal and in any case the Respondent will not suffer any prejudice.
3. The Application is supported by the Affidavit of even date of Peter Kimani Kamaru, the Applicant. He averred that the appeal impugns the trial Court Judgment in favor of the Respondent in regard to land Title Number Ruiru West/Block 1/17xx (the suit land) which belonged to Emily Njeru Kamaru (Emily) having obtained it from Githunguri Ranching Co. Limited. That she obtained good title of the suit land after being issued with a lease from the Government of Kenya and paid the registration fees for transfer of documents in 1990. That Emily Njeru Kamaru passed on in 2008 and did not leave behind copies of the certificate of lease and receipts for registration fees annexed as PKK-1. That subsequently the Commissioner of Lands forwarded the said Lease to the Land Registrar Kiambu vide a letter dated 17/12/1990 also forming part of the bundle marked PKK-1. That pursuant to the said Lease and forwarding letter, a Memorandum of Registration of Transfer of Lands dated 4/1/1991 was issued to Emily at page 7 marked "PKK-1" which led to the issuance of Emily's Certificate of Lease dated 4/1/1991 at page 47 of the Record of Appeal. That the said documents are certified as true copies of originals on 18/5/2023 could not be obtained during trial despite due diligence hence the Application.
4. The Respondent James Maina Gikuhi filed his Replying Affidavit sworn on 24/7/2023. He deponed that the Court's power to allow production of additional evidence on appeal is discretionary to be used sparingly. That the instant application is the Applicant's attempt to patch up his case or make a fresh case altogether. That he has not demonstrated any difficulties he encountered to avail the evidence at the trial Court yet he was ably represented by counsel. That the sources of the said evidence have been in existence way before the commencement of the suit in 2020. He urged the Court to dismiss the application as allowing it would occasion him great prejudice and would give the Applicant unfair advantage in the case.
5. On 28/7/2023 directions were taken and parties agreed to canvass the motion by way of written submissions.
6. The firm of Muma Kanjama Advocates filed submissions dated 27/10/2023 on behalf of the Applicant. A singular issue was drawn for determination to wit; whether the Applicant has mustered the threshold for admitting new evidence on appeal. Citing Section 78 *Civil Procedure Act* and Order 42 rule 27 (1)(b) of the *Civil Procedure Rules* and the decision of the Court in *Attorney General v Torino Enterprises Limited* [2019]eKLR, the Applicant urged the Court to determine whether there is new evidence that could not have been obtained by the Applicant after reasonable diligence before and during trial; if there is probability that the additional evidence would have an important influence on the outcome of the case and lastly whether there is prejudice on the Respondents. That with Emily's demise in 2008, the Applicant could not obtain the additional evidence despite due diligence.
7. In rebuttal, the Respondent through the firm of Maina Makome & Company Advocates filed submissions dated 21/2/2024. It was submitted that the trial case came up for pre-trial direction six times meaning the Applicant had ample time to prepare all his documents but at no time did he indicate or express his desire to adduce more documents. Reliance was placed on the Supreme Court case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR where the Court set out principles to consider in an application of this nature by the appellate Courts and notably that the Applicant has not established a case to warrant the orders sought.



8. The germane issue for determination is whether the Applicant has satisfied the criteria for adducing additional evidence on appeal.
9. The guiding law in an application of this nature is anchored in Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules*, 2010.
10. Section 78 of the *Civil Procedure Act* states;

- “(1) Subject to conditions and limitations as may be prescribed, an appellate Court shall have power –
- a) to determine a case finally;
  - b) to remand a case;
  - c) to frame issues and refer them for trial;
  - d) to take additional evidence or to require the evidence to be taken;
  - e) to order a new trial.
2. Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”

11. Additionally Order 42 Rule 27, 28 and 29 of the *Civil Procedure Rules* provide;

- “27. Production of additional evidence in appellate Court [Order 42, rule 27.]
- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court to which the appeal is preferred; but if—
    - (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
    - (b) the Court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
  - (2) Wherever additional evidence is allowed to be produced by the Court to which the appeal is preferred the Court shall record the reason for its admission.

28. Mode of taking additional evidence [Order 42, rule 28.]

Wherever additional evidence is allowed to be produced, the Court to which the appeal is preferred may either take such evidence or direct the Court from



whose decree the appeal is preferred or any other subordinate Court to take such evidence and to send it when taken to the Court to which the appeal is preferred.

29. Limits to be defined and recorded [Order 42, rule 29.]

Where additional evidence is directed or allowed to be taken the Court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”

12. A reading of Rule 27 above indicates that the adduction of additional evidence on appeal is not automatic. Inter alia the appellate Court inter alia has to be satisfied that the document is required to enable the Court to pronounce Judgment or any other substantive cause. As rightly submitted by the parties, the Supreme Court in the case of *Mohammed Abdi Mohamud v Ahmed Abdulabi Mohamad & 3 Others* [2018] eKLR laid down the criteria to be followed by appellate Courts in determining whether or not to allow additional evidence on appeal as follows;

“79. ...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. It is trite that adduction of additional documents on appeal is a matter for the exercise of discretion by the Court. The Court however must exercise the discretion in the confines of the law and not capriciously or callously. The Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, had this to say on exercise of discretion: -

“The sole issue for consideration in this appeal is whether or not the trial Judge judiciously exercised his discretion in refusing to set aside the ex parte judgment. It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will...”

14. It has been explained that Emily Njeri passed away in 2008 and did not leave behind copies of the documents and that they were not within the knowledge of the Applicant and could not obtain them with reasonable diligence hence the documents could not be produced at the trial. The Respondent opposed this argument by stating that the documents are official documents and with little diligence the Applicant could have obtained them and the application is purposed on patching up their case.
15. I have weighed the arguments and counterarguments of the parties and I find as follows; the parties are litigating over the suit land with the key question for determination being ownership of the suit land; the judgment of the trial Court has been impugned on several fronts the centrality of the subject matter being ownership of the suit land. The documents which the Applicant wishes to be adduced on appeal as set out in para 1 of the ruling are relevant to this appeal, the impact that will have on the appeal is left to the appellate Court to consider.
16. On the question of prejudice, I note that the Respondent has not explained the nature of prejudice he shall suffer if the documents are adduced. On the part of the Court I see no prejudice that will be visited upon the Respondent as he will have the opportunity to file additional documents to respond and rebut the documents of the Applicant.
17. I find that the interest of justice shall be served if the application is allowed on terms;
- a. Upon service the Respondents shall have 14 days for file their response by way of affidavit and adduce such documents in rebuttal.
  - b. Costs shall be payable by the Applicant.
18. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF MAY, 2024  
VIA MICROSOFT TEAMS.**

**J G KEMEI**



**JUDGE**

**Delivered online in the presence of;**

**Obure HB Kanjama for Applicant**

**Maina for 1<sup>st</sup> Respondent**

**Makome for 2<sup>nd</sup> Respondent**

**Court Assistant – Phyllis**

