



**Mwangi v Mwangi (Environment and Land Appeal E061 of 2022)
[2024] KEELC 6260 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E061 OF 2022**

JG KEMEI, J

SEPTEMBER 24, 2024

BETWEEN

LUCY WANGARI MWANGI APPELLANT

AND

HENRY J MUGO MWANGI RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion dated 15/8/2023 expressed under the provisions of Article 159 (2) of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules urging this Court to admit new documentary evidence on appeal.
2. The Application is premised on grounds which are reiterated in the Supporting Affidavit of even date of Lucy Wangari Mwangi, the Applicant. She deponed that she filed the trial Court suit Ruiru MC ELC E102 of 2021 against the Respondent seeking vacant possession of the suit property namely land title no. Ruiru Kiu Block 12/397. She avowed that she purchased the suit property from Harun Ngugi Gitau on 14/2/1997 as confirmed by the copies of official search and green card. That at the heart of the trial Court Judgment the Court found that the Applicant failed to prove the root of her title in view of the dispute on the swapping of the property with that of the Respondent. That the said Harun Ngugi had bought the suit land from Ngara Mucokaniria Company limited and the initial documents are now available and ought to be considered by this Court as a Court of justice.
3. Opposing the Application, the Respondent filed Grounds of Opposition dated 15/9/2023. In his RA sworn on 19/9/2023 the Henry J. Mugo, the Respondent deposed that the Applicant's suit in the trial Court was dismissed vide a Judgement delivered on 21/6/2022 and the instant Application is bereft of merit. That the intended additional evidence is an afterthought and an attempt to patch up the Applicant's case on appeal. That the said evidence could be obtained for use at the lower Court had the Applicant exercised due diligence who was ably represented by Counsel. He averred that he is the



registered owner of L.R No. Ruiru/Kiu Block12/398 since 1996 and resides thereon. Copy of the certificate of lease is annexed as “HJM-1”. The Respondent maintained that he stands to suffer great prejudice if the Application is allowed and urged the Court to dismiss it with costs.

4. On 7/11/2022 directions were taken and parties elected to prosecute the Application by way of written submissions.
5. The firm of Prof. Kiama Wangai & Co. Advocates filed the Applicant’s submissions dated 2/4/2024 while the Respondent’s submissions by Kamere & Co. Advocates are dated 17/5/2024.
6. Rehashing his motion, the Applicant posited that she has now traced the documents forming the root of her title and wishes to adduce the same as evidence in this appeal. That if the evidence is not admitted, she stands to suffer great prejudice.
7. Conversely the Respondent pointed out that the Applicant bore the burden of proof in her claim during the trial Court hearing. That having failed to do so, she should not be allowed to fill gaps of her case now on appeal. That no exceptional circumstances have been demonstrated to allow the Application. He urged the Court to dismiss the Application with costs.
8. The sole issue for determination is whether the Appellant 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 (1) (d) of the Civil Procedure Act states;

“(1) Subject to conditions and limitations as may be prescribed, an appellate Court shall have power –

.....

d) to take additional evidence or to require the evidence to be taken.”

11. Moreover 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. The Supreme Court in the case of Mohammed Abdi Mohamud Vs. Ahmed Abdulahi 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 proportionally 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. Applying the test laid down by the Supreme Court to the case at hand, firstly the additional evidence sought to be adduced must be evidence directly relevant to the matter before the Court and be in the interest of justice. What is the matter before the Court? A glean of the trial Court record shows that Applicant’s cause of action was in respect of parcel of land known as Ruiru Kiu Block 12/397 she claims to have bought from Harun Ngugi Gitau on 14/2/1997 and the Applicant was registered as the owner on 27/8/2020. The Applicant accused the Respondent of illegally trespassing and erecting structures on her parcel of land (397). Inter alia the Applicant asked the trial Court for an order of vacant possession of the land, permanent injunction restraining the Respondent from further trespassing on the land and general damages for trespass. To support her claim, the Applicant produced the following documents as listed in the List of Documents dated 26/7/2021 sale agreement dated 14/2/1997; certificate of lease issued on 27/8/2020; official search dated 11/6/2021, official green card dated 17/6/21 and demand letter dated 18/6/21. Later on, vide her Replying affidavit sworn on 14/10/2021, the Applicant produced copy of the surveyor’s report (LWM1) dated 20/11/2020 to demonstrate that the Respondent had encroached on her parcel 397.
14. Denying the Applicant’s suit, the Respondent filed his statement of defence and maintained that he is the registered owner of Plot Ruiru/Kiu Block 12/398 and denied ever occupying parcel 397. In light of the forgoing rival pleading it emerges that the Applicant’s case turned on trespass since the area map she produced, shows that parcel 397 and 398 are indeed adjacent to one another.
15. In the instant Application, the Applicant, save for the copies of receipts issued by Ngara Mucokanirira Co. Ltd in her name and Harun Gitau’s name, seeks to adduce substantially the same documents already produced in the trial Court namely the sale agreement, certificate of lease, green card, official search, surveyor’s report all for parcel 397, area map for both parcels 397 & 398 and official search dated 15/10/2021 for parcel 398 confirming the Respondent’s proprietorship.
16. The rest of the guidelines in the Muhammed case (supra) are considered as follows; The Applicant ought to show that the evidence to be adduced would influence or impact upon the result of the verdict although it need not be decisive. No doubt the aforesaid receipts are impactful, credible and relevant to remove any vagueness or doubt over the suit land in the Court’s mind. This is because the Appellant’s appeal turns on the finding of the trial Court that she failed to prove the root of her title when as discussed above, her cause of action was for trespass and not ownership of land. I will say no more on this noting there is a live appeal touching on the trial Court Judgment findings.



17. Additionally, the new evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively. The aforesaid copies of receipts comprise 10 pages and, in my view, they are therefore not voluminous.
18. The Applicant is also obliged to show that the additional evidence 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. That 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 and not an attempt to make a fresh case on appeal, fill up omissions or patch up the weak points in the Applicant's case. I am satisfied that the copies of the receipts annexed as 'LWM7' are not filed as a lacuna to fill the gaps in the Applicant's case. The Applicant case being civil in nature is determined on a balance of probabilities and since the bulk of her annexures were already produced, I find that the receipts pass the test for adduction of evidence on appeal.
19. On the question of 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. The Respondent opposed the Application as misconceived and a vague attempt by the Applicant to patch up her case on appeal. He averred that he is the registered owner of L.R No. Ruiru/Kiu Block 12/398 since 1996 and resides thereon and annexed copy of the certificate of lease is annexed as "HJM-1". The Respondent has not established any prejudice he stands to suffer by allowing production of those receipts.
20. To ensure the interest of justice is achieved in this appeal, I rely on the case of *Mohammad Abdi (supra)* where the Supreme Court in allowing the Appellant's Application for adducing additional evidence on appeal comprising of academic credentials to prove his qualification to vie for the gubernatorial seat observed as follows;
 - (86) We are also minded that the interests of justice dictate that this Court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the Appellant's right to a fair election as well as the right of the voters to non-interference with their already cast votes, the will of the people, so to speak. It is on this breath that we must consider whether the Appellant's right to a fair hearing and trial will be infringed upon by the denial of admission of new evidence.

.....
 - (90) We are convinced that disallowing the additional evidence would deny the Appellant a fair trial, which is a non-derogable right under our Constitution. In addition, we are satisfied that allowing the additional evidence is not prejudicial to any party and will be in the interests of justice as the evidence is necessary and crucial in making of a proper judicial finding as to whether the Appellant had the requisite academic credentials to vie for Governor of Wajir County which are core issues before the Court."
21. The upshot of the forgoing is that the Application is allowed. The Respondent is at liberty to file additional documents to the Record of Appeal if need be within seven (7) days.
22. Costs shall abide the appeal.
23. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant/Applicant – Absent but served

Ms. Mwangi for the Respondent

Court Assistants – Phyllis/Oliver

