



**Njari v Muturi & 2 others (Environment and Land Appeal  
47 of 2022) [2024] KEELC 6130 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6130 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 47 OF 2022**

**JG KEMEI, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**CATHERINE NJERI NJARI ..... APPELLANT**

**AND**

**NDUNGU NJOROGE MUTURI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MAINA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**RUIRU LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before Court is the Appellant/Applicant's Notice of Motion dated 28/10/2022 brought 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 seeking in the main leave to adduce further evidence on appeal.
2. The application is premised on grounds on the face of it which are reiterated in the Supporting Affidavit of even date of Catherine Njeri Njari, the Applicant. She deponed that she is aware that the instant appeal arises from the Judgment of the trial Court in Ruiru CMCC No E113 of 2020 dated 12/5/2022. That at the time of the hearing of the suit she did not have evidence to show that the 2<sup>nd</sup> Respondent who sold her the land had died on 14/9/2015. That she has since obtained the 2<sup>nd</sup> Respondent's Death Certificate and it is evident that he died before the suit was filed. See copy of Death Certificate marked 'CNN'.
3. That the Applicant's current advocates have informed her that the 2<sup>nd</sup> Respondent's estate was not given a chance to defend the suit against it and in its absence, the trial Court fell into error in its determination. Further that at the time of hearing the suit, the suit property was not valued to determine whether the trial Court had requisite jurisdiction to hear the matter. That the current valuation of the suit land shows it is worth Kshs. 30M with a learning center on it. In addition to that,



- the Applicant averred that she did not avail the loan documentation in the trial Court. That having obtained the documents now, she craves for leave of this Court to adduce the additional evidence on appeal.
4. From the record the Court finds that none of the Respondents filed any response to the application. As at the time of writing this ruling the same remains unopposed. That said the Court will proceed to determine the matter based on its merits or otherwise.
  5. On 7/11/2022 directions were taken and parties elected to prosecute the Application by way of written submissions.
  6. The firm of Ngara Karani & Co. Advocates filed the Applicant's submissions dated 16/1/2023 while the 1<sup>st</sup> Respondent's submissions by Muturi Njoroge & Co. Advocates are dated 20/11/2023. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents elected not to file any submissions. I have read and considered the rival written submissions on record.
  7. The Applicant drew three issues for determination; (a) What are the applicable principles of admission of additional evidence by appellate Courts; (b) Whether the instant application meets the threshold of admission of additional evidence and (c) What is the effect of non-admission of the said evidence.
  8. On the first issue, the Applicant highlighted the principles set down by case law in considering whether or not to allow additional evidence on appeal. Citing the cases on Mzee Wanje and 93 Others Vs. A.K Saikwa and Others (1982-88) 1KAR 462 cited with approval by the Supreme Court in the case of Mohammed Abdi Mahamud Vs. Ahmed Abdullahi & 3 Others [2018] eKLR, the Applicant urged this Court to adopt the principles in this case.
  9. In answering the 2<sup>nd</sup> issue in the affirmative, the Applicant contended that the gist of her application touches on the Applicant as an innocent purchaser for value and impugns the trial Court's jurisdiction to hear the suit and lastly decries that the 2<sup>nd</sup> Respondent's estate was condemned unheard. That the evidence sought to be adduced is credible and not voluminous and it is in no way meant to any fill gaps in the case. That the Applicant having instructed her former counsel in the matter to act for her, she was under the assumption that her counsel had fully implemented the instructions and now implore the Court not to revisit the mistake of counsel upon her.
  10. She added that it was her position that the right to a fair hearing is illimitable and non-derogable. That in the case of Mohamed Abdi (supra) the Court affirmed the need to accord parties a fair hearing to resolve the dispute judiciously. The Court was beseeched to find the application merited and allow it as prayed.
  11. On the other hand, the 1<sup>st</sup> Respondent argued that the Applicant has failed to meet the threshold for grant of the prayers sought. The 1<sup>st</sup> Respondent cited the case of Tarmohamed & Another Vs. Lakhani & Co. (1958) EA 567 where the Court inter alia stated that it must be shown that the evidence could not be obtained despite due diligence for use at the trial. That in this case, the 2<sup>nd</sup> Respondent's demise was well within the Applicant's knowledge and she chose not to enjoin the estate of the deceased 2<sup>nd</sup> Respondent. That the Applicant failed to duly defend the suit, exercise due diligence in presenting documents in support of her defence, and or inform the 2<sup>nd</sup> Respondent's family, which actions militate against granting her application. That the application is an attempt to fill gaps of the trial Court case a move frowned by the cited authorities.
  12. The germane issue for determination is whether the Appellant has satisfied the criteria for adducing additional evidence on appeal.



13. 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.

14. 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.”

15. 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.”

16. A reading of Rule 27 above indicates that the adduction of additional evidence on appeal is not automatic. Inter alia the appellate Court has to be satisfied that the trial Court refused to admit such evidence which ought to have been admitted. In this case the application to adduce new evidence was not made in the trial Court but on appeal.

17. 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 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.”

18. Applying this multi-pronged test laid down by the Supreme Court to the case at hand with special reference to sub-para (j) above, an omission of evidence on its own does not amount to a precondition to allow additional evidence. The Applicant has urged the Court to allow her adduce additional evidence in the form of the 2<sup>nd</sup> Respondent’s Death Certificate, the valuation report and the loan documents annexed as ‘CNN’.
19. With respect to the Death Certificate, the Applicant has not proffered any plausible explanation on any steps she took if at all to obtain this piece of evidence which is a public document under the Registrar of Persons office. I have perused the proceedings and it is clear that the Applicant was aware that the 2<sup>nd</sup> Respondent was deceased when she led evidence that “I was told that John Maina Mwangi died. I do not know when he died”. The Death Certificate sought to be adduced on appeal is dated the 24/5/2022 showing that the 2<sup>nd</sup> Respondent died on the 14/9/2015 way before the filing of the suit in 2020. The Judgment in this case was rendered on the 12/5/2022 and therefore clearly the documents were procured post Judgment. The Applicant has not shown this Court any hindrance that may have impeded her from obtaining the document before and or during the hearing of the suit in the trial Court as she was aware that he had passed away. The Court finds that admitting these documents post Judgement will only serve to fill the gaps in favour of the Applicant. This ground is rejected.
20. The Applicant was a co-defendant in the trial Court with the 2<sup>nd</sup> Respondent. She alleged that she purchased the suit land from the said deceased Respondent. During the trial she led evidence that she did not possess any evidence in form of a sale agreement with the 2<sup>nd</sup> Respondent. See page 4 – para 2 of the Judgment where the Hon trial Magistrate found that she neither produced evidence of a sale agreement, Land Control Board consent nor payment of the suit land to the deceased Respondent. Admitting the documents sought to be adduced will in no way discharge the onus on the part of the Applicant on how she acquired the land and whether she indeed acquired a title free from any taint or fraud for that matter. The relevance of the documents sought to be adduced are doubtful in my view.
21. With respect to the Valuation Report, it is clear that same was procured 12 days after the delivery of the Judgement. It has not been explained the reasons why the same could not be obtained in time for the hearing. In my view, this is an attempt to fill up the gaps of the trial Court case and the same is not permissible.
22. On the question of the trial Court’s jurisdiction to entertain the matter, it is trite that jurisdiction must as of necessity be raised at the earliest possible time. This was not raised in the trial Court and additionally, the Appellant did not place any documents before the Court that would have guided the Court with respect to whether or not it had jurisdiction. I find that the application to adduce the valuation report late in the day is but an afterthought and an attempt to salvage the case of the Applicant. It is rejected.
23. On the allegation that the Applicant was not accorded the right to be heard, the Court has perused the proceedings in the trial Court and find that the Applicant testified in support of her defence, therefore was heard on merits. I find the decision cited by the Applicant in Hosea Kiplagat v John Allan Okomwa irrelevant to the facts and circumstances of this case.



24. There is a more fundamental reason why the application must fail. It is that the Applicant has introduced a new cause of action which is that she was a bonafide purchaser for title without notice. A keen perusal of the defence in the trial Court does not support either a pleading or least of all a counterclaim in that respect. Allowing the adduction of the documents in my view will introduce a new cause of action on appeal which was not available at the trial Court. The case facing the Applicant was that of fraud and she was accorded the opportunity to be heard and ought to have presented her whole defence and not attempt to litigate in installments.
25. On the issue of the loan documents, I note that they are dated the 22/10/2006. These documents having been in the possession of the Mwalimu Sacco, it has not been shown that the Applicant exercised any due diligence or shown that she sought the documents and the same could not be found. I agree with the decision of the Court in Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat [2014] eKLR where the Court of Appeal rejected the introduction of new evidence at the appeal stage when it was apparent that the Applicant had access to the said evidence at the initial trial. It was stated thus;
- “We are of a similar view regarding the letter which the Applicant claims was authored by the deceased. This is a letter that has been in the Applicant’s possession since the death of her husband. She had it all along during the course of the trial. Again, it is unclear why she failed to adduce it if she felt that it would aid her cause. We must reiterate that it is the duty of the Applicant to demonstrate to this Court that the additional evidence sought to be adduced was not available during the trial.”
26. The upshot of the forgoing is that the Application is unmerited.
27. It is hereby dismissed. Each party to bear their costs.
28. 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;

Anyona for Appellant/Applicant

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents – Absent but served

Court Assistants – Phyllis/Oliver

