



**Ikiugu v Mpaka (Suing as the Legal Representative of the Estate of
Gilbert Karagania Miringo - Deceased) (Environment and Land Appeal
E042 of 2024) [2024] KEELC 14137 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 14137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E042 OF 2024
CK NZILI, J
OCTOBER 23, 2024**

BETWEEN

NATHANIEL KITHINJI IKIUGU APPELLANT

AND

PAULINE MPAKA RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GILBERT
KARAGANIA MIRINGO - DECEASED**

RULING

1. The court is asked to allow the appellant adduce additional evidence on appeal that was not available at the lower court. The grounds are contained on the face of the application and in the supporting affidavit of Nathaniel Kithinji Ikiugu, sworn on 20.9.2024. The applicant avers that his claim at the lower court was challenging the proprietorship of L.R No. Ntima/Ntakira/3348, L.R No. Ntima/Ntakira 1806. After the judgment, the applicant avers that the respondent had filed other suits regarding the suit land, such as Meru ELC No. 70 of 2006 claiming trust and Meru CMCC No. 321 of 1992 and CMCC No. 744 of 1999, where eviction orders were issued.
2. The judgment and the rulings are attached as N.K. "1," "2," "3," "4" & "5" respectively. The applicant avers that the said additional evidence involves scenarios whereby the respondent had filed several suits over various neighboring pieces of land claiming either adverse possession or trust, which evidence is directly relevant to the matter herein and will influence or impact the ultimate decision.
3. The applicant avers that the said evidence could not have been obtained with reasonable diligence for use at the trial, since it was not within his knowledge at the time. Furthermore, the applicant avers that the said evidence is credible, for it involves decrees, orders and other court pleadings.



4. Moreover, the applicant avers that the additional evidence will remove any vagueness or doubt over the case, and it has a direct bearing on the issues of trust and res judicata. Lastly, the applicant avers that the evidence is not voluminous, is not aimed at filling in any gaps in his case, will not prejudice any party and shall, in fact, aid the court in arriving at a just decision.
5. The applicant urges the court to find that there are exceptional circumstances to warrant the application being allowed.
6. The application is opposed by a replying affidavit of Pauline Mpaka sworn on 4.10.2024 for misleading the court, an afterthought, unjustified and baseless, since the alleged additional evidence was not new in Meru CM ELC No. 108 of 2018, the 3rd defendant in the suit had disclosed the previous suits in his pleadings. Further, the respondent avers that on pages 3,4 & 17 of the judgment of the trial court, it had noted the existence of those previous matters and exhaustively dwelt with those issues; hence, given that the applicant's co-defendant had raised them, the issues should not be brought before this court.
7. The respondent avers that it is trite law that a judgment for possession of land should be enforced before the expiry of 12 years, the rights of the decree-holder stand extinguished, and the judgment debtor acquires possessory rights over the land under Section 7 of the [Limitation of Actions Act](#).
8. Therefore, the respondent avers that the applicant cannot dwell those allegations and arguments based on some decrees that were not executed and offend Section 4 (4) of the [Limitation of Actions Act](#) and thus have been rendered impotent and wholly unenforceable in law.
9. The respondent avers that the alleged additional evidence was a ploy to delay the quick disposal of this appeal and a travesty of justice, since the applicant was aware of the evidence it would amount to asking the trial court to sit on its appeal, which will prejudice her for justice delayed is justice denied. The respondent avers that she was still in occupation of the suit land, and the decree of the lower court has been implemented with the knowledge of the applicant.
10. The respondent avers that the applicant was not adhering to Section 1A of the [Civil Procedure Act](#) on efficient, cost-effective, timely, and just determination of the matter present before the court by bringing such an application at this late stage, when she has exhausted all her resources prosecuting the matter.
11. The applicant relies on written submissions dated 8.10.2024. It was submitted that all the concluded cases sought to be relied upon at the appellate stage involved the respondent either as the plaintiff or the defendant on the cases based on customary or adverse possession, and on the part of the other parties they had sought and succeeded in obtaining eviction orders against the respondent.
12. Therefore, the applicant submitted that he has laid down the benchmarks for consideration in an application of this nature as set out in the case of Cyrus Shakhalaga Jirongo vs Soy Developers Ltd & others (2020) eKLR. Order 42 Rules 27, 28 & 29 of the [Civil Procedure Act](#), as read together with Section 78 (1) (2) of the [Civil Procedure Act](#) allows an appellate court to admit new evidence.
13. Adduction of fresh or new evidence on appeal is not automatic. A party must meet the parameters set in Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamad & others (2018) eKLR.
14. The evidence must be:-
 - a. Directly relevant to the matter and in the interest of justice.
 - b. It must influence or impact the result of the verdict, although it need not be decisive.



- c. It must be 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 hearing.
 - d. It must be able to remove any vagueness or doubt over the case and must have a direct bearing on the central issue in the suit.
 - e. It must be credible.
 - f. It must not be voluminous.
 - g. Whether the party would have reasonably been aware of and procured it in the course of the trial would be an essential consideration.
 - h. Whereas additional evidence discloses a solid prima facie case of willful deception of the court.
 - i. The court must be satisfied that additional evidence is not utilized for the purpose of removing lacuna and filling gaps in evidence.
 - j. A party who has been unsuccessful should not seek to adduce additional evidence to make a fresh case on appeal or fall in omission or patch up the weak points in his case.
 - k. The court must also consider proportionality and prejudice in allowing the additional evidence.
15. In *Wandaka & others vs Elizabeth Wambui Mwangi* (Civil Appeal 36 of 2019 (2024) KECA 1315 (K.L.R.) 27th September 2024 (Ruling), the court said that the first threshold to be met by an applicant was to demonstrate that evidence sought to be introduced was new, that is to say, it was not introduced at the hearing and it would not have been introduced despite the exercise of due diligence.
 16. The court cited *Chander Kanta Bansal vs Rajinder Singh Anand* (2008) 5 S.C.C 117, that due diligence was showing care and effort in one's work and duties and the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation.
 17. Again, in *Gichuru vs Attorney General* (Civil Application No. 23 of 2020 (2024) KECA 473 (K.L.R.) (9th May 2024) (ruling), the court considered the date of the evidence and whether it was a public document which, with due diligence could have been obtained by the applicant as held in *Safe Cargo Ltd vs Embakasi Properties Ltd and others* (2019) eKLR. The court held that since the applicant had lodged the complaint with the board and was aware of the proceedings; it behooved her to follow up or enquire the progress of the proceedings in her claim, and therefore, had she exercised due diligence she would have obtained the report within a reasonable time and adduced it before the trial.
 18. In *Singh vs Nyanja Holdings Ltd & others* (civil Appeal Application E174 of 2021 (2024) KECA 601 (K.L.R.) (24th May 2024) (Ruling), the Court of Appeal observed that the Supreme Court in *Mohamed* case (supra) stressed that additional evidence at an appellate level should be allowed on a case to case basis and even then, sparingly and with abundant caution. The court found the sale agreement being adduced between the 4th and 5th respondents relevant in the light of the grounds of appeal and, therefore, had no risk to be used to fill in gaps in the appellant's case or to introduce a new case on appeal or prejudice the respondent, since it will have an opportunity to examine and submit on the evidence. The court found it in the interest of justice to allow the evidence produced in so far as it related to the time when the partnership was formed.
 19. Applying the caselaw cited and the guiding principles, the respondent does not dispute the existence of previous judgments and rulings involving the suit property. What I gather the respondent to be saying



is that there was no execution of the decrees in the previous suits within 12 years hence the decrees became stale.

20. The respondent is not saying that the intended evidence will bring a fresh case by the applicant on appeal, prejudice her claim or accrued rights, deny her fair hearing, or help the applicant fill in gaps in his appeal or defense at the lower court. Delay and the expeditious disposal of suits or appeals are not among the primary considerations on whether to admit adduction of more evidence on appeal. The applicant has said that he was not aware of the relevant evidence at the hearing. The respondent, on her part, avers that the co-defendant had mentioned it to the applicant and was also commented on extensively by the trial court.
21. What the respondent is not addressing before this court is whether the intended additional evidence was availed before the trial court and its relevance to the appeal. The court has looked at the claim that was before the trial court; it was about customary trust over L.R No. Ntima/Ntakira/1806 and its resultant subdivision L.R. No. Nitma/Ntakira/3348.
22. From the rival affidavits, I am of the considered view that the additional evidence would have a significant bearing on ground number 3, that is to say, res judicata, which goes to the jurisdiction of the trial court in hearing and determining the suit. The evidence speaks to whether there was willful deception of the trial court. It is therefore credible. The prejudice of locking it out would be more to the applicant than the respondent.
23. The court, in the circumstances, applies the proportionality test to preserve the rights of the appellant in being given an opportunity to avail all the material to ventilate his appeal while balancing it with the right of the respondent to cross-examine on the new evidence and submit on it. The upshot is that I find the application with merits. Leave is granted to include the specific documents attached as N.K. "1 – 5" in the record of appeal. Costs to be in the cause.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 23RD DAY OF OCTOBER, 2024

In presence of

C.A Kananu/Mukami

Ken Muriuki for appellant

Respondent in person

HON. C K NZILI

JUDGE

