



**Kabuku v Githunguri Ranching Company Limited & 2 others (Environment and Land Appeal E051 of 2021) [2023] KEELC 16747 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E051 OF 2021  
BM EBOSO, J  
FEBRUARY 27, 2023**

**BETWEEN**

**REGINA KANYI KABUKU ..... APPELLANT**

**AND**

**GITHUNGURI RANCHING COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MBOGO KURIA ..... 2<sup>ND</sup> RESPONDENT**

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

*(Being an Appeal against the Judgment of Hon C. K Kisiangani, Senior Resident Magistrate, delivered in the Senior Principal Magistrate Court at Ruiru on 19/5/2021 in Ruiru MCEL Case No 159 of 2019)*

**RULING**

1. This appeal challenges the Judgment rendered on May 19, 2021 by Hon C K Kisiangani (SRM) in Ruiru SPMC Environment and Land Case No 159 of 2019. The appellant was the plaintiff in the said case. The three respondents in this appeal were the 1st, 2nd and 3rd defendants respectively. The appellant sought the following reliefs in the subordinate court: (i) a declaration that she was the proprietor of Land Parcel Number Ruiru West/Block 1/881 [hereinafter referred to as “the suit property”]; (ii) an order cancelling the 2nd respondent’s title relating to the suit property; (iii) an order directing the 3rd respondent to register her as proprietor of the suit property.
2. The 2nd respondent, whose title the appellant challenged, did not enter appearance and did not contest the appellant’s claim. Upon conclusion of trial, and upon taking submissions, the trial court found that the appellant had failed to prove her claim to the required standard. The trial court dismissed the appellant’s suit.



3. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing seven (7) grounds of appeal. She urged this court to allow the appeal and enter judgment for her as prayed in the plaint.
4. Subsequent to lodging the appeal, the appellant brought a notice of motion dated January 25, 2022, seeking an order for leave to produce additional evidence in form of records from the 1st respondent. The application was supported by the appellant's affidavit sworn on January 25, 2022.
5. On July 20, 2022, this court directed the appellant to serve the application upon the 1st and 2nd respondents through a prominent notice in either the Daily Nation Newspaper or the Standard Newspaper. An affidavit of service was subsequently filed indicating that the two respondents had been served through a notice published in the Standard Newspaper on September 27, 2022 at page 41. The two respondents did not attend the hearing. The Attorney General attended the hearing through Ms Chesya and informed the court that the 3rd respondent was not opposed to the application. Consequently, the application is unopposed.
6. I have considered the application together with the grounds upon which the application is predicated. Although the application was unopposed, the applicant had the obligation to satisfy the criteria upon which appellate courts exercise jurisdiction to grant leave to parties to adduce additional evidence in appeals. Consequently, the single question to be answered in this ruling is whether the appellant/applicant has satisfied the criteria upon which appellate courts exercise jurisdiction to take or admit additional evidence in appeals.
7. The instant application is basically grounded on section 78 of the *Civil Procedure Act*, cap 21 Laws of Kenya which vests in the High Court and courts of equal status jurisdiction to admit additional evidence when exercising appellate jurisdiction. Section 78 of the *Civil Procedure Act* provides thus:
  - (1) Subject to such 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 charged conferred and imposed by this act on courts of original jurisdiction in respect of suits instituted therein.
8. The above framework is largely similar to the framework in rule 29(1)(b) of the now repealed *Court of Appeal Rules 2010* which provided as follows:
 

“20(1)(b) on any appeal from a decision of a superior court acting in exercise of its original jurisdiction, the court shall have power to:

  - (a) .....
  - (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.”



9. The above framework was re-enacted under Rule 31 of the *Court of Appeal Rules 2022*.
10. The Court of Appeal In *Dorothy Nelima Wafula v Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, observed that Rule 29(1) (a), additional evidence would be admitted in an appeal in the discretion of the Court “for sufficient reason.” The court stated thus:

“Though what constitutes “sufficient reason” is not explained in the rule, through judicial practice, the court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this court can permit additional evidence Under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible.”

11. In *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR, the Supreme Court of Kenya outlined the following guidelines on admission of additional evidence by an appellate court:

“(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, 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) It is shown that it could not have been obtained with reasonable diligence for use at the trial, was 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 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) Whether the additional evidence discloses a strong prima facie case of wilful 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;
- (j) The Court must find the further evidence needful;
- (k) A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.
- (l) 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.

[80] We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then sparingly, with abundant caution.”

12. With the above principles in mind, I now turn to the single question in the application under consideration. The appellant seeks leave to adduce the following documentary evidence: (i) copy of an excerpt from the 1st respondent’s record relating to the suit property; (ii) copy of a resolution authorizing John Maina Mburu to represent the 1st defendant and execute documents on behalf the company; (iii) copy of a search from the Registrar of Companies relating to the 1st respondent; (iv) an affidavit by John Maina Mburu sworn on January 19, 2022; (v) hand written sale agreement dated December 22, 2009; and (iv) sale agreement dated 4/1/2010, drawn by M/s Mukunja & Co Advocates.
13. The applicant has explained that the above documents could not be tendered as evidence during trial because the 1st respondent failed to enter appearance and produce them. I have considered the explanation. The above explanation could be true only in so far as the 1st respondent’s records relating to ownership of the suit property are concerned. No proper explanation has been tendered with regard to the two sale agreements which were in the appellant’s possession. There is therefore no proper basis upon which this court can grant leave to the appellant to produce the two sale agreements.
14. The result is that, in the absence of any opposition to the application dated January 25, 2022, the same is partially allowed in the following terms:
  - a. The appellant is granted leave to tender, as additional evidence in this appeal, the following documents:
    - i. Copy of the excerpt of the record of ownership from the 1st respondent relating to the suit property.
    - ii. The resolution authorizing John Maina Mburu to represent and execute all documents.
    - iii. The affidavit sworn by John Maina Mburu.
    - iv. Copy of the search from the Registrar of Companies.
  - (b) The applicant’s plea to tender the two sale agreements is rejected.
  - (c) Costs of the application shall be in the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF FEBRUARY 2023**



**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Akuno for the 3rd Respondent

Court Assistant: Hinga

