



**Kyenze v Kithini & 3 others (Succession Appeal E001 of 2021)  
[2022] KEHC 10175 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
SUCCESSION APPEAL E001 OF 2021  
GMA DULU, J  
JUNE 29, 2022**

**BETWEEN**

**LOISE MUTIO KYENZE ..... PETITIONER**

**AND**

**DAVID NDOLO KITHINI ..... 1<sup>ST</sup> RESPONDENT**

**MUINDI NDOLO ..... 2<sup>ND</sup> RESPONDENT**

**WILLIAM NDOLO ALIAS IVULU ..... 3<sup>RD</sup> RESPONDENT**

**JULIUS MUNYAO IVULU (DECEASED SURVIVED AND REPRESENTED BY  
HIS WIFE AGNES MUKONYO ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me are two applications. One is dated 25<sup>th</sup> June 2021 and the other dated 21<sup>st</sup> September, 2021.
2. The application dated 25<sup>th</sup> June 2021 was filed under Order (Rule) 50 of the *Law of Succession Act* (Cap.160) and Article 50 of *the Constitution*. It seeks the following orders –
  - 1) The applicant be granted leave to cross-appeal against the appeal of the petitioner.
  - 2) Leave be granted to the applicant to adduce additional evidence which was not available at the hearing of the revocation proceedings which was heard and decided on 09/09/2020 “the said evidence is that Joseph Muindi Ndolo Dw1 who gave evidence in this court lied to court when he said that the objectors were son of one Ndolo and not siblings of Ivulu Kithini. He did not sell his share in plot 193.  
He never chaired meetings of member sons of Ivulu”.



- 3) The said additional evidence is contained in the report of the handwriting examiner attached report reveals that the evidence of Pw2 was incredible, tainted with fraud and which is corner stone of learned magistrate's judgment.
  - 4) The said evidence wholly relied upon by the magistrate and which was the crux of his judgment was incredible, illogical, fraudulent, irrational and could not corroborate evidence of the petitioner.
  - 5) The note book which contains the said evidence could not be reached at the hearing of the revocation of proceedings.
  - 6) Any other order this court may deem just.
  - 7) Costs of this application.
3. The application has grounds on the face of the Notice of Motion and was filed with a supporting affidavit sworn on 25/06/2021 by William Talava Ndolo.
  4. The application dated 21<sup>st</sup> September 2021 on the other hand, is a Notice of Motion brought under Order 51 Rule 7 of the *Civil Procedure Rules*, and seeks the following orders –
    - 1) That this application be declared urgent.
    - 2) Leave granted to file this application be extended and the application be heard urgently.
    - 3) Costs of this application.
  5. The application has grounds on the face of the Notice of Motion and was filed with a supporting affidavit sworn on 22<sup>nd</sup> September 2021 by Paul Kisongo advocate.
  6. In response to both applications, a replying affidavit sworn on 28<sup>th</sup> October 2021 by Loise Mutio Kyenze was filed, in which it was deponed that the applications were frivolous, vexatious and fatally defective and an abuse of court process.
  7. The applications were canvassed through filing of written submissions. Mr. Kisongo for the applicant filed his written submissions on 11<sup>th</sup> November 2021 while B.M. Mungata for the respondents filed written submissions on 4<sup>th</sup> March 2022. I have perused and considered the submissions filed by both counsel for the parties.
  8. I will say straight away that the application dated 21<sup>st</sup> September 2021 has been spent as it seeks orders for urgency and extension of time. I also note that counsel on both sides have not addressed the prayers therein substantively in their written submissions. My finding therefore is that the application dated 21<sup>st</sup> September 2021 has been spent.
  9. I now go to the application dated 25<sup>th</sup> June 2021, which is an application for leave to cross appeal, and for leave to adduce additional evidence on appeal.
  10. With regard to the prayer for leave to adduce additional evidence on appeal, section 78 and Order 42 Rule 27 of the *Civil Procedure Rules* is relevant. It states as follows –



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) Whenever additional evidence is allowed to be produced by the court to which an appeal is preferred the court shall record the reasons for its admission.

11. In the present case, the respondents in the appeal herein David Ndolo Kithini, Muindi Ndolo and Agnes Mukonyo have filed this application against Loice Mutio Kyenze. The application is opposed through a replying affidavit sworn by the said Loise Mutio Kyenze.
12. The issue of admission of additional evidence on appeal has been the subject of consideration in several court cases. In the case of *Wanjie & Others –vs- Sakwa & Others* [1984] KLR 275 - the Court of Appeal stated as follows –

“The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rules were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It

follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence”.

13. From the pleadings and submissions filed, Mr. Kisongo for the applicants seem to be arguing the appeal rather than justifying the need to call additional evidence on appeal. There is no disclosure as to when the alleged additional evidence came to be known, or came into possession of his client. There is no mention on what prevented his clients from having access to the said evidence at the trial. This would be important to this court, as the respondent Loise Mutio Kyenze clearly stated in her affidavit that the applicants participated in the succession proceedings.
14. It is of note in particular that in paragraph 4 and 5 of the replying affidavit, which is not disputed, Loise Mutio Kyenze stated as follows –
  4. That the respondents filed objection which they later withdrew and filed an application for revocation of grant dated 31/10/2019.
  5. That directions on the said application were taken wherein parties agreed to proceed with the application by way of viva voce evidence, parties were directed to file and exchange list of witnesses and documents.



6. That parties appeared in court on 29/01/2020 when they confirmed that they had filed their respective documents and witnesses statements and the matter was certified ready for hearing and hearing date given.
7. That the matter proceeded for hearing on diverse dates wherein I called my witnesses and closed my case, the objector called his witnesses and closed his case.
15. With the above averments, I would expect the applicant to inform this court when and how they became aware or in possession of the additional evidence, and what prevented them from tendering such evidence at the trial. They have not done so, and consequently, I find no basis for exercising this court's discretion to admit additional evidence on appeal, as the applicants just seem eager to reopen the case on appeal without any legal basis. I will decline to allow production of additional evidence on appeal.
16. As for the request for leave for filing a cross appeal out of time, section 50 of the Law of Succession Act (Cap.60) provides as follows –

50(1) An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.
17. In my view, the above provisions cover cross-appeals where affected parties want to file a cross-appeal. I note that Mr. Mungata for the respondents has strongly argued against grant of leave to file a cross-appeal out of time. However, on my part, in line with the provisions of Article 50 and 159 of the Constitution of Kenya 2010, I find no basis for denying the applicants a chance to file their cross appeal and have their day  
  
in court on the basis of the evidence tendered in the magistrates court. I will thus grant leave to file cross-appeal.
18. Consequently, and for the above reasons, I order as follows:-
  1. The application dated 21<sup>st</sup> September 2021 is marked as spent.
  2. With regard to the application dated 25<sup>th</sup> June 2021, I grant leave to the applicants to file a cross appeal on the basis of the evidence on record within 30 days from today. The prayer for adducing additional evidence is disallowed thus prayers 2, 3, 4 and 5 are dismissed.
  3. The costs of application will follow determination of the appeal or appeals.

**DATED SIGNED & DELIVERED, THIS 29TH DAY OF JUNE 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**

