



**Olwanda v Chapa (Environment and Land Appeal 7 of 2021)  
[2023] KEELC 17340 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17340 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL 7 OF 2021**

**E ASATI, J**

**MAY 11, 2023**

**BETWEEN**

**HEZEKIAH OUYA OLWANDA ..... APPELLANT**

**AND**

**JAPHETH ONG'ONGA CHAPA ..... RESPONDENT**

*(Being an appeal from the judgement and decree of Vihiga lower court ELC NO. 52 of 2018  
Hon Magistrate R. M. Ndombi Senior Resident Magistrate delivered on 4th November 2021)*

**RULING**

1. The application before court for determination is the Notice of Motion dated 4<sup>th</sup> March 2023 stated to be brought pursuant to the provisions of sections 1, 3, 3A, 78 (1) (d) of the *Civil procedure Act* and order 42 rule 27 1(b) of the *Civil Procedure Rules* and Article 159 of *the Constitution* of Kenya 2010. It seeks for an order that the appellant be allowed to adduce additional evidence in the nature of an Affidavit by one Moses Arunga Muduwa and that the affidavit of Moses Arunga Muduwa annexed to the application be deemed to be part of the Supplementary Record of appeal.
2. The grounds upon which the application is brought are that as at the time when the lower court proceedings were taking place, the said Moses Arunga Muduwa was incapacitated and hospitalized. That Moses Arunga Muduwa has since regained consciousness and although he cannot withstand long spells of standing is capable of adducing evidence and be examined by court on the contents of the Affidavit. That the additional evidence sought to be adduced is in the nature of genuine explanation of how, the suit property was transferred into the name of the Respondent. That the proposed additional evidence is not voluminous and is credible and directly relevant to the matter before the court and entirely meant to serve the interests of justice. That the evidence is not aimed at filling any gaps in the evidence and is needful.



3. The application was opposed vide the contents of the Replying Affidavit sworn by Japheth Ongóna Chapa, the Respondent on 7<sup>th</sup> March 2023. The Respondent’s case is that there is no evidence to support the allegations in the application. That he holds a genuine title which was given to him lawfully by Moses Arunga Muduwa after succession process. That allowing the application will not serve any interest of justice in light of the provisions of section 93(1) of the Law of Succession Act. That the appellant does not reside on the suit land and that he (the Respondent) is the bona fide purchaser for value of the suit land.
4. I have considered the application and the grounds in opposition thereof. Section 78 of the Civil Procedure Act under which the application was brought provides;

- “(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 conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.”

And Order 42 rule 27 of the Civil Procedure Rules provide that;

“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,
  - (c) 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.
5. I have considered the guidelines set by the Supreme Court on admission of additional evidence on appeal in Mohamed Abdi Mohamed Vs Ahmed Abdullahi Mohamed and 3 others [2018] eKLR, and the decision in the case of Kibos Sugar & Allied Industries Limited & Another v Benson Ambuti Adegga & 6 Others, Civil Appeal (Application) No. 153 of 2019 (unreported) quoted with approval the



English case of The National Guild of Removers & Storers Limited v Bee Moved Limited & Others (2018) EWCA Civ. 1302 that:

“In determining whether an appellate court can admit additional evidence, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result.”

6. I have noted that the additional evidence sought to be produced herein is the affidavit of one Moses Arunga Muduwa who was said to have been incapacitated as at the time of trial in the lower court. It is not denied that the said person was at some point incapacitated. I have considered the circumstances of this case and hereby allow the application. The affidavit sworn by Moses Arunga Muduwa and filed in court on 6/3/2023 is hereby deemed to be part of the Supplementary Record of appeal. Costs of the application to the Respondent.

Orders accordingly.

**RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 11<sup>TH</sup> DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

**Neville- Court Assistant.**

Muhavi holding brief for Chitwah for the Appellant

No appearance for the Respondent

