



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 26 OF 2018

NICHOLAS ODUOR OWUOR APPELLANT

VERSUS

MAURICE ODUOL NYATAYA RESPONDENT

(Being an appeal against the ruling delivered on the 19th day of September, 2018 by Hon. T.M. Olando – SRM in the Principal Magistrate’s Court at Siaya Succession Cause No. 183 of 2017 – In the matter of the estate of Okello Malal, deceased).

RULING ON ADDITIONAL EVIDENCE

1. This Ruling determines the Appellant’s application dated 19th November, 2018 seeking orders:

1). That this Honourable Court be pleased to take additional evidence identified in the Appellant’s supporting affidavit in the form of photographs in respect of the site position on Land Parcel No. Siaya/Kadenge/473 and Siaya/Kadenge/704.

2). That this Court do direct that the additional evidence be taken in the form of joint site visit to Land Numbers Siaya/Kadenge/473 and Siaya Kadenge/704 by a designated Judicial Officer and/or Judicial Staff and the parties herein or their legal representative and the filing of a site visit report by the said designated Judicial Officer or Judicial Staff, or in such manner and subject to such conditions as this Court deems appropriate to achieve the ends of Justice;

3). That such other and/or further relief granted as this Court might deem fit and just to grant in the unique circumstances of this matter.

4). That costs of this application be provided for

2. The application is supported by an affidavit sworn by the appellant/applicant wherein the Appellant claims that the necessity to adduce additional evidence is occasioned by the fact that under **Section 50(1) of the Law of Succession Act**, an appeal from the Magistrate’s Court to this Court arising from the impugned ruling is final; that the additional evidence will enable this Court to get a full view of the situation on the ground in respect of the underlying land dispute between the Appellant/Applicant and the Respondent over Land Parcel Numbers **Siaya Kadenge/473 and Siaya/Kadenge/704**; on account that the trial Court erroneously ruled that the Respondent and his family actually lived on and/or occupied the aforesaid two parcels of land for 50 years; that the additional evidence sought to be adduced will disapprove the said conclusion of the subordinates Court, thus preventing a miscarriage of Justice.

3. Further, that the Respondent stands to suffer little if any, prejudice if the orders sought are granted; and that the Appellant has brought this application promptly as the impugned Ruling was made on 19.9.2018; appeal was filed on 2.10.2018 and the application filed on 20.11.2018. Finally, that the failure to produce the photographs was inadvertent.

4. The application is supported by an affidavit sworn by the Appellant/Applicant Nicholas Oduor Owuor sworn on 19.11.2018, restating the grounds above stated.

5. The Respondent opposed the application and filed a replying affidavit sworn by himself on 10th December 2018 contending that on the 4th day of December, 2017 he learnt that the Applicant NICHOLAS ODUOR OWUOR had taken up Letters of Administration in the estate of his deceased uncle OKELLO MALAL in SIAYA PMCC SUCCESSION CAUSE NO.183 of 2017 and the same was due for confirmation on the 8th December, 2017.

6. That through his advocates on record he immediately filed Grounds of Objection backed up with an affidavit –in-reply giving reasons to the objection (Annexed a copy of the Grounds of Objection and Affidavit – in – reply marked as ‘MON – 1’ and ‘MON – 2’ respectively.

7. That the gist of his Grounds of Objection was premised on non-disclosure of material facts, fraud and ambiguity citing Section 29 and 52

of the Law of Succession Act Cap 160 backed up with Supporting Documents.

8. That the matter was then set up for hearing by way of oral submissions where each party together with their respective witnesses testified and produced supporting documents.
9. That in his view each witness was accorded a fair trial by being accorded time to testify, further to, all documents relied upon by respective parties were duly filed and analysed by the Honourable Magistrate.
10. That he knew of his own knowledge that on the 19th September, 2018 the trial Magistrate read out the ruling of matter in open Court in his favour (Annexed a copy of the ruling marked as “MON – 3”)
11. That he was informed by his advocate on record that the Applicant’s application is misconceived, frivolous and means to delay justice and should thus be dismissed with costs.
12. Parties’ Advocates filed written submission which they also highlighted orally.
13. In the submissions filed by the Appellant/Applicant, he reiterates his grounds and cites **Article 50(1) of the Constitution** on the right to a fair hearing. Further, that **Article 26 (d) of the said Constitution** places fair trial among the 4 non-derogable rights and fundamental freedoms.
14. It was further submitted that **Section 78(1) of the Civil Procedure Act as amplified by Order 42 Rules 27 (1), (2) and 28** empowers this Court as an Appellate Court to take additional evidence or to require the evidence to be taken. Reliance was placed on the case of **Mohamed Abdi Mohammed V. Ahmed Abdullahi Mohammed and 3 Others [2018] eKLR** where the Supreme Court of Kenya held that Courts in Kenya may sparingly and with abundant caution admit additional evidence on a case by case basis, and the said Supreme Court decision laid down 11 governing principles on allowing additional evidence in Appellate Courts.
15. Further reliance was placed on **Animu Shams, Hauliers Ltd VS. Anastacia Ndira Mwasia (Suing as administrators of the Estate of Harrison Mwendwa Kavili [2018])** where the High Court at Makeni persuasively stated that *the purpose of adduction of additional evidence is to advance the interests of Justice by ensuring that no Court of Law is deprived of information which will enable it arrive at a fair and just decision.*
16. The Appellant therefore urged this Court to the interest of substantive justice and fairness to exercise its discretion and allow adduction of additional evidence.
17. In opposing the application, the Respondent relied on the Replying affidavit sworn by the Respondent, and the written submissions filed on 4/2/2019 which were highlighted orally.
18. In his submissions, Counsel for the Respondent contended that the evidence sought to be adduced purports to be photographs that will prove that the Respondent and his family do not occupy the suit land and that this Court to designate a Judicial Officer of the Court to visit the land to ascertain the Respondent’s claim that he and his relatives have occupied the suit land for the last 50 years.
19. On the principles espoused in the **Mohamed Ahmed Mohamed case (supra)** Counsel submitted that the i – iii principles were relevant.
20. That in Paragraph 6 of his affidavit, the Appellant does not explain the nature of the inadvertence that made him not adduce the evidence at the trial or why he did not ask a site visit.
21. That the Respondent and his witness PW2 were never challenged in cross-examination on the evidence that he occupied the suit land hence the application fails the 3rd test set by the Supreme Court in the Mohamed Ahmed (supra) Case; that a party who has been successful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill upon omissions or patch up the weak points in his/her case.
22. It was also submitted that the issue of whether or not the Respondent and family were in occupation of the suit land was not made an issue for determination albeit there was evidence of PW1 and PW2 that the latter’s late husband used to tend the suit land from 1955 when she was married until 1994 when he died and that she and her co-wives continued using it till the year 2014 when she lost her sight and her grandchildren took over.
23. That the issue of the Respondent and family being in possession of the suit land must be presumed to have been admitted by the Appellants. That in any event, the Appellant gave evidence and his witnesses testified in the absence of the Respondent yet they did not think of introducing the evidence they now seek to introduce.
24. That as the Appellant failed to ask the Court to frame as an issue for determination the question of whether the Respondents were in occupation of the suit land for over 50 years; that the Appellant is seeking to remove the *lacunae* and fill up the gaps in the case and that it is not additional but fresh evidence that is sought to be adduced, which fresh evidence, according to the Respondent, is not remotely, let alone directly relevant to the matter before the Court as it was not an issue framed for determination by the Lower Court. Counsel urged the Court to dismiss the Application with costs.
- 25.

DETERMINATION:

26. I have considered the application for adduction of additional evidence and the serious objection thereto.

27. In my humble view, the main issue for determination is whether the application has any merit. There are other ancillary questions which this Court will endeavour to answer in due cause. What is not in dispute is that the Appellant herein petitioned to be administrator of the estate of the deceased Okelo Malal who allegedly died on 8.9.1999 at Koyeyo aged 78 years due to Malaria. This is as per the Death Certificate dated 28th June 2017.

28. The Petition cause No. 183/2017 was accompanied by several documents including letter dated 12.7.2017 written by Mr. J.D. Juma Assistant Chief, Kadenge Sub-Location introducing the Appellant as the grandson to the deceased Okello Malal and next of kin thereof.

29. Further, that the deceased left parcel No.704 registered in his name.

30. There is also a consent Form 38 allegedly signed (***thumb printed***) by Margaret Akoth Jadido daughter aged 54 years old and Mary Adhiambo Owuor a granddaughter aged 30 years allegedly agreeing to the Appellant applying for a grant.

31. The subject parcel as per the search certificate measures 2.56 hectares. The Respondent herein emerged and opposed the same and produced a totally different death certificate showing that the deceased was Syrilus Okello Malal who died at Kadenge sub-location aged 30 years and that Death Certificate is dated 25.5.2016. He claimed that the deceased was his uncle, a brother to his late father Charles Nyataya Malal who died intestate on 10.5.2002 and was survived by his mother Rita Owuor Malal, the Petitioner – nephew and an uncle Bonventure Omondi Malal – as per 200,000 and the liability disclosed is Johnstone Michael Obiero K'owino purchaser thereof.

32. The succession cause was gazetted vide **Gazette Notice No. 56 of 13/10/2017** and on **15th November 2017** a grant was issued to the Appellant.

33. The Appellant then applied for confirmation of the grant vide application dated 4.8.2017 under certificate of urgency seeking for waiver of the requisite 6 months waiting period.

34. Without delving into the merits of the appeal at this stage, the trial Court after hearing the parties by way of oral evidence found that the petition was wrought with fraud and deceit ***ab initio*** and he proceeded to dismiss the application for confirmation of grant. He then upheld the objection filed by the Respondent and proceeded to annul and set aside the grant which had been issued in favour of the Appellant.

35. It is that Ruling dated 19.9.2018 which originated this appeal, and the appellant has now sought to adduce additional evidence of photographs and site visit by the Court to establish whether or not the Respondent's family are in occupation of the suit land.

36. In the evidence of PW1 Page 8 line 18, he stated:

“We were born on that land and we have been living on the land.”

In cross-examination PW1 stated ***inter alia***, that the Petitioner was a distant relative from Koyeyo that is where they were born and that the land in question is Siaya/Kadenge/704 and Siaya/Kadenge/473 registered in the name of Okelo Malal.

37. PW2 in her testimony stated that she was the mother to the deceased and that her husband had land which her and her co-wives were using and when her husband Francis Malal died he left it to her son Syrilus Okelo Malal who also died. That in 2017 she learnt that someone had taken the land. In cross-examination she stated that the land belonged to her late son born in 1972 who was registered as the youngest son. PW3 reiterated what PW2 stated.

38. DW1 testified that the person who presented an interest in the land during land adjudication was an adult who did not have a Christian name and that he was Okello Malal's name that was recorded in the adjudication register produced in evidence as exhibit.

39. DW2 testified that Okello Malal had a home in Uhombo Village, Koyeyo Sub-Location and that he was about 78 years when he died other witnesses for the Petitioner testified in the absence of the Objector's advocate so they were never cross-examined.

40. Rita Owuor Malal PW2 in her witness statement stated that she had been cultivating the land with her co-wife until 2014 when she lost her sight and that from then her elder grandchild had been cultivating it to take care of her and her co-wife. That in 2017, she was shocked to learn that the land had been sold to a person from Koyeyo Sub-Location.

41. From the above testimonies on record, there is material evidence on oath that the Objector's family was living on the subject parcel of land and cultivating it and the trial Magistrate in his impugned ruling stated that there was a family which had been in occupation of the land for over 50 years yet the Appellant/Petitioner herein had allegedly sold it even before confirmation of the grant and that he did not indicate that there were other dependants who should also be considered.

42. From the above evidence and decision, it is clear that albeit no questions/issues were framed for determination, the trial Court found as a fact as per page 27 of the record of appeal that:

“From the evidence it is not in dispute that the Objector and his witness are in actual occupation of the subject land and their

actual occupation has not been challenged by anyone claiming any right to the subject land. 50 years down the lane it is therefore difficult to conclude that they have no interest on the land. ----- ”

43. On the basis of the above record, it is not true to say as the Respondent has put it that no issue concerning occupation of the said land was raised as the trial court made a determination on the same.

44. The only question before me is whether the Appellant/Applicant is entitled to orders to adduce additional evidence of photographs and the Court to visit the site to establish who occupies it.

45. The above if allowed, will obviously raise a further question of when were the photographs taken and by who and when did whoever is occupying the land currently take possession, which, in my humble view, will assist this Court fully and effectually determine all questions involved in the succession dispute. In my humble view, that in itself would not be aiding the Appellant to fill the *lacunae* in his case or filling gaps in evidence as there is an established procedure for adduction of such evidence and the burden will be on the appellant to prove compliance with section 106 of the Evidence Act.

46. There are many more questions and issues which the trial record and the impugned ruling raises and which this Court will have to determine in exercise of its jurisdiction under **Section 78 of the Civil Procedure Act**.

47. In my humble view the question of who was in occupation of the suit land and from when is a question that any Court of Law faced with a case like this ought to determine and therefore I do not agree with the Respondent that, that in itself will prejudice his position. The Supreme Court decision in **Mohamed Abdi Mohamed (supra)** is relevant but it relates to **Election Petition filed before the Supreme Court and was specific as far as Rule 18 of the Supreme Court Rules (2012)** are concerned. The Supreme Court lay down 11 conditions/principles applicable for adduction of additional evidence but it did not state that a party applying must fulfil all the 11 conditions thereof. What the Court cautioned was that the application for additional evidence should not be granted hastily. Citing the Deynes decision, the Supreme Court in the latter case illuminated that **[61] The Court has inherent Jurisdiction to forestall an instance of injustice. Justice, in this on text, requires that all parties are heard freely and fairly, before a matter is concluded.**

48. Therefore, in this case, taking into account the inherent Jurisdiction of this Court and the overriding Objectives of the Law as set out in **Article 159 of the Constitution**, I am persuaded that the question of whether and who was in occupation of the suit land and when such occupation took place will have an important influence on the result of the appeal, though it need not be decisive.

49. Further, such evidence as is sought to be adduced will be subjected to the rules of evidence and therefore subject to cross-examination such that the Respondent will have an opportunity to challenge it at the rehearing.

50. In my view, the evidence sought to be adduced is presumably to be believed and would if believed, be conclusive and removes any vagueness or doubt over this case and has a direct bearing on the main issue in the matter.

51. For the above reasons and in the wider interest of Justice, and in order to accord the Appellant an opportunity to bring before this Court material that will assist the Court effectually and conclusively determine the issues in dispute, I exercise discretion and allow the application for adduction of evidence as sought.

52. Direction on the mode of adduction of the said new evidence shall be given on 16th April 2019.

53. The Respondent shall have costs of this application.

Dated, Signed and Delivered at Siaya this 26th Day of February, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr Oduol h/b for Wasuna for the Respondent

N/A for the appellant/applicant

CA: Brenda and Modestar