



Ura v Okello (sued as the legal representative of the estate of Rubot Okello Ogwangwe) (Environment and Land Appeal 21 of 2021) [2022] KEELC 4888 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 21 OF 2021
GMA ONGONDO, J
SEPTEMBER 21, 2022**

BETWEEN

INVIOLATA LUCY URA APPELLANT

AND

HARRISON NYARIERE OKELLO RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF RUBOT OKELLO OGWANGWE

RULING

1. By a Notice of Motion application dated June 6, 2022 and filed herein on even date, the applicant, HARRISON NYARIERE OKELLO, through Nyauke & Company Advocates, is seeking the following orders;
 - a) The honourable court be pleased to allow new documentary evidence to be adduced with regards to the matters before the court.
 - b) Upon allowing new documentary evidence to be adduced, the honourable court be pleased to allow record filed by the appellant herein in Homa Bay Chief Magistrate's Court citation cause No. E015 of 2021 especially the grant of letters of administration issued to the appellant in Mombasa High Court Succession Cause No. 274 of 2006 to be part of records for consideration by this court.
 - c) The costs of this application be provided for in favour of the applicant/respondent.
2. The application is founded upon the applicant's affidavit of ten paragraphs sworn on even date. It is further supported by documents namely a copy of summons for the revocation or annulment of grant in Succession Cause No. E105 of 2021 at Homa Bay Chief Magistrate's Court, copy of affidavit in support of the said summons sworn by the appellant herein and dated December 2, 2021 and a copy of



grant of letters of administration in Mombasa High Court Succession Cause No. 274 of 2006 issued on August 18, 2006.

3. Briefly, the applicant laments that he filed a citation cause against the appellant herein before the subordinate court over the estate against which the instant appeal relates. That in response to the citation, the appellant brought to court a copy of the grant of letters of administration of her deceased husband's estate together with a supporting affidavit. That one of the grounds of the instant appeal is that the appellant did not have locus standi to be sued in the primary suit as she was not the legal representative of the estate of the deceased. Thus, production of the aforementioned documents will demonstrate to the court that the issue of representation of the estate of the deceased has been settled.
4. On June 21, 2022, the court ordered and directed that the application be heard by way of written submissions pursuant to Order 51 Rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction Number 32 of the *Environment and Land Court Practice Directions, 2014*.
5. On the said date, the respondent sought indulgence of the court to file a Replying Affidavit and submissions in respect of the application. The court granted him twenty-one (21) days to file and serve the same. Be that as it may, the respondent failed to file both the replying affidavit and submissions herein.
6. Also, the applicant's submissions, if any, were not filed in this application.
7. I have duly considered the application. So, are the orders sought in the application merited?
8. The applicable law as regards the admission of additional evidence by an appellate court is Section 78 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya which provides that: -

“(1) Subject to such condition 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;
(Emphasis added)
- (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.”

9. The rules of procedure that are hand maidens to Section 78 of the [Civil Procedure](#) above provide under Order 42 Rule 27 of the [Civil Procedure Rules](#) that:-

“(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) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.”

10. In the case of *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, the Supreme Court of Kenya established guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines are as follows:

“(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 not 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 a 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) where the additional evidence discloses a strong prima facie case of willful 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. The Court must find the further evidence needful.



- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) 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.”

- 11. I am therefore, satisfied that the applicant has met the threshold as laid out in the legal provisions hereinabove and Mohamed Abdi Mahamud case (*supra*).
- 12. It is the considered view of this court that the application is meritorious. The applicant is entitled to the orders sought in the application.
- 13. The upshot is that prayers (a) and (b) sought in the application dated June 6, 2022 and filed on even date and as set out in paragraph 1 (a) and (b) hereinabove respectively, are hereby granted accordingly.
- 14. Costs of the application to abide the appeal herein.
- 15. It is so ordered.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF SEPTEMBER, 2022

G M A ONGONDO

JUDGE

Present

- 1. Mr. Nyauke, learned counsel for the applicant
- 2. Ms. P. Odhiambo, holding brief for G.S. Okoth, learned counsel for the respondent/appellant
- 3. A. Okello, Court Assistant

