



**Bunde v Osoro & 2 others (Environment and Land Appeal  
E017 of 2022) [2025] KEELC 1000 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1000 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E017 OF 2022  
FO NYAGAKA, J  
MARCH 4, 2025**

**BETWEEN**

**JOSEPH ODHIAMBO BUNDE ..... APPELLANT**

**AND**

**JOHN PHELIX OPIYO OSORO ..... 1<sup>ST</sup> RESPONDENT**

**OMONDI OSORO ..... 2<sup>ND</sup> RESPONDENT**

**ODONGO OSORO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. The Appellant filed the instant application dated 6<sup>th</sup> May, 2024 seeking the following orders:
  1. Spent.
  2. Spent.
  3. That the appellant be granted leave to file additional evidence in support of his case.
  4. That the honourable court be pleased to issue further or better orders as shall meet the ends of justice.
  5. The costs of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Joseph Odhiambo Bunde the Appellant herein sworn on 6<sup>th</sup> May, 2024.

He stated that he had appealed against the decision in Homa-Bay Chief Magistrate's court ELC No 5 of 2020 whose decision was pegged on the Grant of Letters obtained in respect of the estate of Bunde Odongo and Omutu Odongo (deceased). He further stated that he had done Succession in



1994 in respect of the said Estate which was an illegality since each Estate would have been administered separately. He went on to state that on 28<sup>th</sup> September, 2023 the court revoked the Grant and directed that land parcel Kanyanda/Kotieno Katuma A/885 reverts to the deceased. He added that the said property was held by Bunde Odongo and Omutu Odongo (deceased) with each having half share.

3. He stated that the property was subdivided which later birthed Kanyanda/Kotieno/Katuma A/2511 the subject matter in the appeal. He stated that during hearing and determination of the main case, the said evidence was not in his possession hence the same could not be produced. He further stated that the subordinate court's decision was based on a grant that had been revoked by the High Court. He added that the order revoking the Grant came after filing of the present appeal thus could not be considered in the subordinate court's judgment. He urged the court to grant him leave to file the additional document relevant to the conclusive determination of the matter.

### **Response**

4. The Respondent through his counsel Ochieng Robert Ochieng filed his Replying Affidavit sworn 18<sup>th</sup> October, 2024. He averred that the Appellant through his former counsel took steps to abuse the court process under the belief that the same would result in nullifying matters already res judicata. He further averred that in HC Succession Cause 3 of 2018, Victor Nyakwamba, the Appellant's former counsel had not ceased from acting for the Respondent. He added that on 5<sup>th</sup> April, 2022 the firm of Nyakwamba & Co. Advocates on behalf of the Appellant and Respondent filed summons for revocation of grant which in the said grant, the firm of was acting as an objector against the said client it was on record for earlier in the same matter being the Appellant herein. He averred that during the appeal, there was no mention by Victor Nyakwamba or the Appellant in person that there were related proceedings that could affect the outcome of the appeal. He also averred that there was collusion to manufacture supposed new evidence during pendency of the appeal.
5. He further averred that the firm of Nyakwamba entered into a consent to revoke a grant substantially in issue. He averred that for a court to allow fresh evidence at an appeal stage, it was a prerequisite for the Applicant to prove that such evidence could not have been obtained by reasonable diligence before and during hearing. He averred that the Respondent would be prejudiced if such an application were to be allowed as the alternative prayer for adverse possession was never adjudicated upon. He added that the doctrine of res judicata would block them out of adjudicating over the same.
6. The Appellant filed a Supplementary Affidavit sworn on 10<sup>th</sup> January, 2025 where he reiterated the contents of his Supporting Affidavit. He stated that the additional evidence sought to be filed will enable the court have a clear picture of the case thus reaching a just determination. He stated that he had the right to a counsel of his own choice and that the Succession matter was in respect to administration of the Estate while the present case was a claim of land. He further stated that the Succession issues in HC 3 of 2018 ought to have been raised in the Succession Cause. He added that the matter at hand was a land claim whose ownership has since changed. He stated that the from the ruling and lack of appeal, the Respondents had no business in the proceedings concerning HC 3 of 2018 where they were ousted by the said ruling delivered on 13<sup>th</sup> June, 2018. He stated that the evidence sought was not available during hearing since the order revoking the grant was made on 12<sup>th</sup> July, 2023, consent entered on 12<sup>th</sup> September, 2023 and subsequently the register rectified on 5<sup>th</sup> October, 2023.

### **Submissions**

7. Counsel for the Respondent filed his submissions dated 5<sup>th</sup> November, 2024 where he identified two issues for determination. The first issue was whether the applicant satisfied the limbs set out by the



Supreme Court of Kenya in Petition No. 7 of 2017. He submits that the case provided for 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 would 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 made aware of and procured the further evidence in the course of the 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 the 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 the 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.”
8. It was counsel’s submission that the trial court in the matter answered an ELC claim. He argued that the cause of action was one of “trust” and the Appellant as held was holding the suit property in trust for the Respondents. He submits that the High Court could not dictate to the ELC Court issues relating to ELC causes of action. He further submits that the evidence sought to be adduced is not relevant to an ELC Court and it has not been demonstrated in what interest of justice it will serve. He also submits that the evidence was not one which would impact the result of the judgment of the court since there was a restriction order in place preserving the suit property and as such, whatever outcome of the succession case, it will have no impact.
9. He argues that parties colluded to manufacture the evidence sought to be adduced to defeat the ends of justice. He further argues that a party cannot have the advocate representing him in one forum act adversely against him in another matter wherein he is also on record for him only to supposedly procure evidence by consent and produce before the former forum. On whether “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”, he submits in the negative and argues that the evidence would cloud the same since there was no question during the trial as to whether succession had been annulled.

10. He further submits that manufactured evidence in the manner demonstrated was not credible. He added that the volume of documents would open a pandoras box whereby the Respondents will seek corresponding leave to adduce additional documents as a matter of right. He argues that the manner in which the evidence was procured was to deceive the court so as to deny the Respondents their fruits of justice. He further argues that the evidence was procured for the purpose of filling gaps. He added that the said evidence will not answer the trial court’s question on whether the suit property was held in trust. It was counsel’s submission that the Appellant and his advocate on record at the appeal and the succession court, entered into a consent where the said advocate supposedly acted against the interest of his then client to procure the evidence now supposedly benefiting the Appellant herein. He submits that the present application is an attempt by the Appellant to make a fresh case or fill up omissions or patch up his case which if granted will prejudice the Respondent.
11. The second issue set out was whether the matter was sub judice considering the application for review before the main High Court. Counsel submits that he succession matter is before a succession court and an ELC Court cannot entertain the same whether the same is pending or concluded. He argues that only the succession court can determine the relevancy of the documents sought to be adduced herein before it.
12. In conclusion, he relied on the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR and urged the court to dismiss the application with costs.

### **Analysis and Determination**

13. This court has considered the application, replying affidavit, supplementary affidavit, Respondent’s submissions and authorities cited and the sole issue for determination is whether the Appellant should be granted leave to adduce additional evidence.

Section 78 of the *Civil Procedure Act* provides that:

“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.”

14. Order 42 of the Civil Procedure Rules 27, 28 and 29 also provide that:

“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 reason for its admission.
28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.
29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”
15. It is trite law that not in every instance is leave granted to adduce additional evidence on appeal. It is usually allowed only in exceptional circumstances. In the case of Mahamud 7 Mohamad & 3 others (Petition 7 & 9 of 2018 (Consolidated)) [2018] KESC 62 (KLR) the court laid out the following guiding principles when an appellate court is exercising its discretion in allowing additional evidence: -
- “.... 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.”
16. In the instant case, the Appellant urges the court to allow him adduce additional evidence being the order of the revoked grant, official search and green card for Kanyanda/Kotieno Katuma A/885. The Appellant claims that the evidence is credible as it would alter the outcome of the appeal. It was also the Appellant’s case that the evidence was obtained post-judgement since it was not in his possession at the time of hearing and therefore the same could not be tendered during trial. The Respondent on the other hand opposes the application on the basis that the evidence is a fresh case on appeal intended to patch up the Appellant’s gaps in the trial case and meant to deny him the fruits of his judgement.
  17. This court has considered the documents the appellant intends to adduce as additional evidence vis a vis the criteria outlined by the Supreme Court in the case of Mohamed Abdi Mahamud (supra). I have also perused the lower court record. It is not in dispute that judgment in CMCELC NO 5 of 2020 was entered on 7<sup>th</sup> April, 2022 and the same touched on the suit property herein by virtue of its subdivision Kanyanda/Kotieno/Katuma/2511. It is not in dispute that the court based its finding on the Succession Cause No. 3 of 2018 which Grant was revoked subsequently vide a ruling on 12<sup>th</sup> July, 2023 months after the judgment. In addition, the implication of the said ruling was that the entries in the register were nullified on 5<sup>th</sup> October, 2023.
  18. Contrary to the argument by the Respondent that the adverse parties colluded to manufacture the evidence, it is this court’s finding that the order revoking the Grant was made by a Court of competent jurisdiction handling a matter within its jurisdiction and no evidence of collusion or other impropriety has been raised in the Succession matter to back the argument from the Bar by learned counsel for the Respondent. Such an argument is nothing but a hollow noise designed to whip emotions in favour of his client and cloud the clear evidence of a Grant set aside.
  19. In view of the above, it is my humble opinion that the said evidence is directly relevant to the appeal at hand as it touches on the suit property in question. Furthermore, the Appellant could not have acquired the same even with due diligence during trial since it came after conclusion of the trial court matter. I therefore find that it would be in the interest of justice for the Appellant to be granted leave to adduce the said documents in evidence on appeal.
  20. The upshot of the foregoing is that the application dated 6<sup>th</sup> May, 2024 is merited and it is hereby allowed as prayed.
  21. The orders for the preparation of the Judgment on appeal are set aside and the judgment arrested. The Appeal is set down for mention on 2<sup>nd</sup> April 2025 to fix a date for the viva voce evidence of the appellant’s testimony, or that of his witness, limited only to the adduction of evidence about the document and/or file allowed herein to be produced, and for cross-examination and re-examination if any on it. Thereafter, further directions will be given regarding supplementary submissions if any.
  22. Each party to bear its own costs of the Application.
  23. It is so ordered.



**RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 4<sup>TH</sup> DAY OF MARCH 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**BETWEEN 11:13 AM AND 11:29 AM**

IN the presence of,

1. Ms Nyarige Advocate for the Appellant
2. Ochieng Advocate for the Respondents (absent)
3. 1<sup>st</sup> Respondent (present online)
4. 3<sup>rd</sup> Respondent (present online)

