



REPUBLIC OF KENYA



KENYA LAW
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Juma (Suing as the Administrator of the Estate of the Late Amos Juma Abelo alias Malowa Abura) v Abura & another (Environment and Land Case E004 of 2022) [2025] KEELC 5028 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E004 OF 2022**

AE DENA, J

JULY 3, 2025

BETWEEN

DANIEL ABURA JUMA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE AMOS JUMA ABELO ALIAS MALOWA ABURA) PLAINTIFF

AND

ROSE ABURA 1ST DEFENDANT

JAMES OTIENO OYUGI 2ND DEFENDANT

RULING

1. The subject of the ruling is the notice of Motion dated 5/06/2025 brought by the plaintiff seeking the following verbatim orders
 1. That this Honourable Court be pleased to admit and adopt the witness statement of Monica Otieno Oyugi, dated 24th Day of July 2020, as evidence in this matter.
 2. That the said witness statement be deemed as the evidence-in-chief of Monica Otieno Oyugi, pursuant to the provisions of the *Evidence Act* and the Civil Procedure Rules.
 3. That this Honourable Court be pleased to issue any other order or directions as it deems fit and just in the circumstances.
 4. That the costs of this application be provided for
2. The application is based on the supporting affidavit sworn by Daniel Abura Juma and founded on the following grounds; -



- a. That Monica Otieno Oyugi is a material witness in this matter having witnessed the land transaction giving rise to the dispute herein and having previously recorded a witness statement dated 24th Day of July, 2020, which was filed and served upon the Defendants.
 - b. That the said Monica Otieno is currently critically ill and incapable of giving oral evidence due to her medical condition, which renders her unable to speak or attend court to testify.
 - c. That Section 33 of the Evidence Act (Cap 80) provides for the admissibility of statements made by a person who is incapable of giving evidence, provided certain conditions are met, including that the statement was made in the course of proceedings or in a document and relates to relevant facts.
 - d. That Section 35(1) of the Evidence Act (Cap 80) allows for the admissibility of a statement in a document as evidence of a fact if the maker is incapable of giving evidence, and the original document is produced or secondary evidence is admissible.
 - e. That the condition under Section 33 and Section 35 of the Evidence Act, that the maker of the statement be called as a witness, need not be satisfied if the maker is incapable of giving evidence due to illness, as is the case here.
 - f. That Order 18 Rule 10 of the Civil Procedure Rules, 2010, grants this Honourable Court the discretion to make such orders as may be necessary for the ends of justice, including the admission of evidence in a manner that ensures a fair hearing.
 - g. That Sections 1A and 1B of the Civil Procedure Act (Cap 21) enjoin Honourable Court to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes, and Section 3A preserves the inherent power of the Court to make orders necessary for the ends of justice.
 - h. That a medical report dated 05/06/2025 confirms that Monica Otieno Oyugi is critically ill, unable to speak, and unfit to attend court, and the Applicant will rely on this report to substantiate the witness's condition.
 - i. That the adoption of the witness statement will not prejudice the Respondent, as the statement was previously served, and the Respondent will have the opportunity to challenge its contents through cross-examination of other witnesses, submissions, or other means as the Court may direct.
 - j. That the interests of justice and the right to a fair hearing under Article 50 of the Constitution of Kenya, 2010, require that the evidence of Monica Otieno be admitted to ensure a just determination of this matter.
 - k. That the Applicant has no other means of presenting the evidence of Monica Otieno, and failure to admit the statement would occasion a miscarriage of justice.
2. Daniel Abura Juma depones in support of the application that Monica Otieno Oyugi (herein Monica) is a key witness in this matter having witnessed the land transaction that gave rise to the dispute herein. That she had recorded a witness statement dated 24/7/2020 which was filed and served upon the defendants. The deponent states he is aware and has further been informed by her daughter Peris Oyugi that her mother is currently critically ill and unable to attend court to give oral testimony. The deponent is also aware that Monica is unable to walk and is under the care of her said daughter and a full time house help. A copy of a Medical Report dated 5/6/2025 confirming Monica is unfit to testify in court as her speech is incomprehensible. The report is annexed.



3. It is averred that Monica is a step mother to the 2nd defendant hence she is aware of the facts relating to her medical condition. The rest of the averment rehash the grounds in support of the application based on advise of his counsel on record in this matter.
4. The application is opposed by the replying affidavit of James Otieno Oyugi, the 2nd Defendant. The deponent states that Monica is his stepmother, whom he has known since childhood. That she and the respondent reside in the same home. That the respondent is personally and consistently aware of her day-to-day condition and level of functionality. That Monica is an uneducated and illiterate woman, devoid of the ability to write or execute any form of signature, and has, without exception, relied solely on thumbprints as her authenticating mark throughout her entire life.
5. It is deponed that Monica Oyugi has unequivocally disowned the very witness statement which the Applicant now seeks to have admitted into evidence, openly rejecting its contents not only to the respondent but also to her biological children and to officials sent previously by the Plaintiff's legal team in a bid to compel her participation in a virtual court session when this matter was coming up for hearing. That this persistent rejection speaks volumes about the authenticity and reliability of the statement purportedly bearing her endorsement.
6. Further that on the day when the Plaintiff's lawyer dispatched individuals to connect Monica Oyugi to a virtual court session, those individuals departed promptly after she unequivocally informed them, in no uncertain terms, that she would not testify falsely against the respondent especially based on the witness statement filed by the Plaintiff.
7. It is averred that although Monica Oyugi recently suffered a stroke which has impaired her ability to speak coherently and travel to distant locations such as Siaya, she remains fully capable of communication through alternative means, and can, without a doubt, confirm to this Honourable Court whether or not she authored and signed the witness statement in question.
8. It is stated that Monica Oyugi personally informed the deponent that she has, for a long time, eagerly awaited the opportunity to testify in court regarding this matter-not merely to distance herself from the false allegations attributed to her in the impugned witness statement, but more importantly, to speak the truth and set the record straight on the issues at the heart of this case.
9. It is deponed she has expressly and repeatedly told the deponent that she will never, under any circumstances, appear before any court to testify falsely against the deponent. That it is for that very reason that she voluntarily released a copy of her National Identity Card to the deponent, which not only affirms her ability to communicate meaningfully, but also clearly demonstrates that she has never used a signature - even on her official identification document-further reinforcing the fact that the impugned witness statement, allegedly bearing her signature, is inconsistent with her lifelong practice. A copy of the ID is annexed.
10. That the said witness statement is, to the best of the deponents knowledge and belief, fraudulent document falsely authored by the Plaintiff in the name of Monica Oyugi, with the sole intention of presenting perjured and misleading evidence before this Honourable Court.
11. That it is in the interest of justice and to put the matter beyond speculation and within its powers to direct the Deputy Registrar, or any other duly appointed officer of the Court, to visit Monica Oyugi and assess her current state of communication. That such an inquiry would not only confirm that she is capable of expressing herself, but would also allow her to clearly state whether or not she authored or approved the witness statement in question.



12. That in view of the serious doubts surrounding the authenticity of the said statement, and the grave implications of admitting potentially fraudulent evidence, such a step would serve the ends of justice and protect the integrity of these proceedings. The witness further depones on advise of counsel that the purported witness statement does not meet the legal threshold for admissibility under either Section 33 or Section 35 of the *Evidence Act* (Cap. 80, Laws of Kenya), and as such, it ought to be excluded from evidence in its entirety for the following reasons:
1. Section 33 has two parts, both of which must be strictly fulfilled.
 2. The first part describes the category of the statements while the second part describes the circumstances when the statement which belongs to any of the categories in the first part can be admitted.
 3. First part states that:
 - a) The statement must have been made by a dead person;
 - b) The statement must have been made by a person who cannot be found;
 - c) The statement must have been made by a person who has become incapable of testifying;
 - d) The statement must have been made by a person whose attendance cannot be procured e.g. because he enjoys diplomatic immunity.
 - e) The statement must have been made by a person whose attendance cannot be procured on grounds of delay or expense.
- 16.4 The second part, is that the statement must relate to any of the following situations:
- a) It relates to the cause of death;
 - b) It is made in the course of business;
 - c) It is made against the interest of the maker;
 - d) It relates to a matter of public right or custom;
 - e) It relates to family affairs
 - f) It relates to a transaction asserting a custom;
 - g) It is made by several persons expressing an opinion;
- 16.5. Where the statement relates to existence of a relationship or to family affairs then it must have been made before the dispute between the parties arose.
13. Accordingly the deponent states that it is manifestly clear that the impugned witness statement does not fall within any of the seven recognized exceptions under the second limb of Section 33 of the *Evidence Act*. Specifically; the statement does not relate to the cause of death; it was not made in the ordinary course of business; it is not a statement made against the interest of the maker; it was not made prior to the dispute arising between the parties, and therefore cannot be deemed a statement concerning the existence of any relationship or family affair; it does not pertain to any transaction involving the assertion of a custom; and finally, it is not a statement expressing a commonly held opinion made by multiple persons. Accordingly, the witness statement fails to satisfy the legal threshold for admissibility under this provision.



14. Additionally it is deponed that section 35 of the *Evidence Act* has conditions for admissibility as follows: a) the matters in issue must be within the personal knowledge of the person making the statement; b) or the statement must have been made pursuant to a duty to record; c) the witness must attend court and produce it unless the circumstances in section 33 are proven; and the court may at its discretion waive condition (b).
15. Under section 35 the court is given the discretion to determine whether or not to waive the requirement for physical attendance, which discretion the court can only exercise where it has satisfied itself on the basis of the facts of the case that the statement is undoubtedly true and /or that there is an independent guarantee of its truthfulness. That where the Court is satisfied that the statement contains a lie or that the witness did not have personal knowledge of the matters deponed to then it cannot exercise its discretion by waiving physical attendance of the maker of the statement especially when the maker is still alive.
16. It is deponed that in this case, the witness statement contains a blatant lie (that is, that I took the 1st Defendant to Siaya to force her to transfer the land to him when the land records have always been maintained in Bondo and not Siaya). That since the aforesaid claim is obviously a lie, it is probable that all the other claims made in the statement are equally mere fabrications and lies. Further the court must also satisfy itself that the maker of the statement had personal knowledge of the facts deponed in the statement.
17. It is stated that Section 35 generally does not apply to witness statements, rather it applies to a document itself as evidence made on a matter of admissible fact rather than an affidavit setting out a deponent's testimony or statements in the wording of section 33 of the *Evidence Act*.
18. It is stated that the admission of the impugned witness statement without affording the respondent an opportunity to subject the maker to cross-examination would gravely undermine the defendants constitutional right to a fair hearing as enshrined under Article 50 of *the Constitution*. That Cross-examination is a fundamental safeguard in the adversarial system of justice, intended to test the veracity, credibility, and reliability of a witness's testimony. To admit such a statement as evidence without scrutiny or challenge-would amount to condemning the deponent on the basis of untested allegations, thereby offending the principles of natural justice and procedural fairness. That it is in the interest of justice that the application by the Plaintiff be dismissed.

Applicants Further Affidavit

20. The applicant responded further vide an affidavit sworn on 9/6/2025. That the allegations that Monica disowned her witness statement amount to hearsay. That they have not been substantiated with any evidence. It is deponed that the statement was filed way before Monica suffered the stroke. The respondent was aware of Monicas intention to appear and testify in support of the plaintiffs case as the witness statement was filed long ago. There was nothing barring the respondent from requesting Monica to file an affidavit then stating the statement was a forgery.
21. It is deponed on advise of counsel on record for the plaintiff that the provisions of section 33 and 35 are mutually exclusive. That while section 33 is limiting the application is brought under the provisions of Section 1, 1A, 1B, 3, 3A of the *Civil Procedure Act* which emphasize substantive justice and a right to a fair hearing as opposed to technicalities. On the averment that the statement contains falsehoods it is deponed that the content will be tested against the totality of the evidence produced in court including other witnesses subjected to cross examination. Further the defendant will also make final submissions on the same and therefore there is no prejudice that will be suffered at all.



22. The deponents asserts that the invitation for the court to make a finding that the statement contains falsehoods is untenable since the statements have not been formally produced before the court.

Submissions

23. The application was dispensed by way of written submissions. The applicant submissions are dated 9/6/2025 and the respondent 23/06/2023. The court has considered the submissions.

Analysis And Determination

24. I have considered the application, the supporting affidavit, the response thereto and the submissions of the parties. The main issue for determination is whether the witness statement of Monica Otieno Oyugi, dated 24th Day of July 2020, should be admitted as her evidence in chief without calling the maker.
25. The application is brought under Order 19(1) of the Civil Procedure Rules Section 1, 1A, 1B, 3, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Sections 33 & 35 of the *Evidence Act* and all other enabling provisions of the law).
26. The provisions of Order 19 Rules 1 of the Civil Procedure Rules, Cap 21 reads;-

“Power to order any point to be proved by affidavit [Order 19, rule 1]

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.’

27. I must state at the outset that the above provisions refer to affidavit evidence. In the present case what is sought to be admitted as evidence in chief is the witness statement of Monica Otieno Oyugi, dated 24th Day of July 2020. It is not an affidavit. I have noted the plaintiff’s submission invoking substantive justice. In my view the fact that the witness statement is not an affidavit cannot be cured under the provisions of Section 1, 1A, 1B, 3, 3A of the *Civil Procedure Act*. These sections do not donate this power and I will not belabor the point. The provisions do not envisage a witness statement.
28. I will proceed to extract the provisions of sections 33 and 35 of the *Evidence Act* Chapter 80 of the laws of Kenya
29. Section 33 of the *Evidence Act* is on statements by persons who cannot be called as witnesses and provides as follows;-

Statement by deceased person, etc., when.

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- (a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible



whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

- (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;
 - (c) against the interest of maker when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;
 - (d) an opinion as to public right or custom when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;
 - (e) relating to existence of relationship when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;
 - (f) relating to family affairs when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;
 - (g) relating to a transaction creating or asserting, etc., a custom when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13(a);
 - (h) made by several persons and expressing feelings when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.
30. I have carefully reviewed the above provisions against the document sought to be produced. Firstly, both the 1st part and second part of the above section must be fulfilled as they are cojoined. The witness statement herein would not fit into the attributes a-h enumerated above. I must respectfully agree with the respondents that the conditions under section 33 herein do not perfectly suit the current situation. Indeed Counsel for the plaintiff has admitted in its submissions that section 33 is limiting. But what about the provisions of section 35 of the [Evidence Act](#).
31. Section 35 is on admissibility of documentary evidence as to facts in issue.
- 1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—



- (a) if the maker of the statement either—(i)had personal knowledge of the matters dealt with by the statement; or(ii)where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
- (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.
- (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—(a)notwithstanding that the maker of the statement is available but is not called as a witness;(b)notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.
- (3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.
32. It is submitted on behalf of the plaintiff that the respondent has failed to clearly state how section 35 above is inapplicable in the instant case. Rehashing the provisions of section 35 (1)(a)(b) it is submitted that the conditions under section 35 unlike section 33 of the *Evidence Act* are very wide. It is urged that the statement must be made in a document, the original document must be produced and the witness must have had personal knowledge of the matters in her statement. That the respondent did not produce any evidence to show his step mother lacked personal knowledge of the matters in her statement.
33. The respondent on the other hand contend that the provisions of section 35 do not apply to witness statements and robust analysis has been given in this regard which the court has noted.
34. The question that emerges as correctly posed by counsel for the plaintiff is whether a witness statement is documentary evidence for purposes of section 35. The plaintiff submits in the affirmative that it qualifies to be a document because it is a written record containing statements of fact intended to establish matters in issue. Counsel cites Blacks Law Dictionary 11th Edition 2019 on the definition of documentary evidence thus;-
- “Documentary evidence. Evidence supplied by a writing or other document, which must be authenticated before the evidence is admissible.- Also termed documental evidence.”;
35. A witness statement in my view is not a documentary evidence as contemplated under the provisions of section 35. The documentary evidence envisaged under this section is a specific document being produced in proof of a matter for example a title deed in proof of ownership, a medical report inter alia. This court is persuaded and emboldened by the case of *Re Estate of Chabari of Chabari Manyara*



(deceased) succession cause No. 117 of 2007 [2023] KEHC 18650 KLR cited by the respondent where the court had this to say about the interpretation of the section 33 and 35;-

“ 11. The Court has no problem finding that an affidavit and statements made in writing therein are “Statements, written or oral or electronically recorded” within the meaning of section 33 of the Act which applies to matters of evidence made by persons who cannot, for the reasons, set out therein be called as witnesses. An affidavit by definition set out in Order 19 Rule 3(1) as containing “such facts as the deponent is able of his own knowledge to prove” is clearly such a statement, whether as a whole or a body of distinct statements contained therein, for purposes of the provision. Section 35, however, appears to apply to a document itself as evidence made on a matter of admissible fact rather than an affidavit setting out the deponent’s testimony of the matter or statements in the wording of section 33. In the context of a transaction for transfer of land, the Green Card register at the Lands office may be such a document.’ Emphasis is mine”

36. Additionally in *Makanda v Osita* (Civil Appeal E213 of 2023) [2025] KEHC 8510 (KLR) (Civ) (17 June 2025) (Judgment) Neutral citation: [2025] KEHC 8510 (KLR) the court aptly and persuasively stated thus;-

“The character of the witness statement in civil proceedings is the same as that in criminal proceedings. The only difference is that the Civil Procedure Rules requires its filing and service on the other side. See Order 3 rule 2 and Order 7 rule 5 of the Civil Procedure Rules. The fact of the filing of the witness statement, in civil proceedings, does not elevate it to the status of a pleading or an affidavit. It is not evidence. The civil court should not treat it as such. It is not a sworn statement, and it should not be treated as evidence. It should also be clear that a witness statement is not one of the evidentiary documents referred to in section 30 of the Small Claims Act and section 32 of the *Evidence Act*, Cap 80, Laws of Kenya.

20. The witness statement is a mere guide to the parties, on what the witness would testify about, to obviate ambush and to expedite proceedings. The case the parties are expected to prove is that disclosed in the pleadings, and the documents, if any, that they rely on and not in the witness statement. With these on record, the failure to file a witness statement should not hurt. There is need to avoid elevating witness statements to the level of pleadings and affidavits...”

37. The court has been called upon to choose substantive justice and avoid recourse to technicalities. But this is not a matter of pure discretion as there are specific statutory guidelines that have been given to ensure there is no miscarriage of justice. This objective cannot be watered down. It is important to recognize the rigorous legal framework created by section 33 and 35, with reference to the level of scrutiny that a plea to admit such statements should be subjected to. I have noted the proposition that there is no prejudice to be occasioned to the defendant since there is room for cross examination of other witnesses in relation thereto , arguments in final submissions and review of the contents against the rest of the evidence in court. This proposition cannot be upheld.

38. Our legal system is adversarial. A witness statement is only an indication of what the witness in this case Monica would tell the court. It only becomes evidence in chief upon being adopted as such otherwise it remains a mere story. While there is procedure for adopting an affidavit I have already noted what is in issue is not an affidavit.



39. But what about the constitutional right to a fair hearing. It is the defendant's contention that his right to a fair hearing shall be infringed upon in the absence of an opportunity to cross examine the witness. My considered view is that evidence must be tested through cross examination and I think this is where a fair hearing lies. Where a right to cross examine is lost then a miscarriage of justice ensues.
40. The court has deliberately steered off the discourse on the truthfulness or otherwise of the contents of the witness statement, execution thereof, no one should be condemned unheard.
41. I think I have said enough to demonstrate why the witness statement of Monica Otieno Oyugi, dated 24th Day of July 2020, cannot be admitted as evidence in this matter. It cannot be deemed as the evidence-in-chief for the reasons rendered.
42. The application dated 5th June 2025 is hereby dismissed. The costs of the application shall be to the 2nd defendant.

DELIVERED AND DATED AT SIAYA THIS 3RD DAY OF JULY 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

3/07/2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Saro holding brief for Mr. Que for the plaintiffs

Ms. Rachier holding brief for Ms. Adunga for 2nd defendant

1st defendant is deceased

Court Assistant: Ishmael Orwa

