



Oombo & another v Onyango (Administratrix of the Estate of John Onyango Amach) (Environment and Land Appeal E027 of 2022) [2024] KEELC 553 (KLR) (6 February 2024) (Ruling)

Neutral citation: [2024] KEELC 553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E027 OF 2022
GMA ONGONDO, J
FEBRUARY 6, 2024**

BETWEEN

RONALD ODONGO OOMBO 1ST APPELLANT

ALEX OMBENG OKELLO 2ND APPELLANT

AND

PERES ATIENO ONYANGO (ADMINISTRATRIX OF THE ESTATE OF JOHN ONYANGO AMACH) RESPONDENT

RULING

1. By an amended Notice of Motion Application dated 26th September 2023 (the application herein), the applicants through Aluoch Odera and Nyauke Advocates are seeking the following orders;
 - a. The honourable court be pleased to admit a copy of the bundle of application of notice of motion filed by the respondent at the High Court in Homa Bay being Misc Application No. 45 of 2019 as new evidence to be considered in this appeal.
 - b. The honourable court be further pleased to call for Homa Bay High Court Misc Civil Application No. 45 of 2019 to be brought before it as part of records to be considered in this appeal.
 - c. The costs of this application to abide the outcome of this appeal.
2. The application is founded upon grounds (1) to (3) stated on the face of the same. It is further anchored on the 1st applicant's supporting affidavit of seven paragraphs sworn on 26th September 2023 together with the annexures thereto.
3. Briefly, the applicant contends that he has lodged an appeal against the judgment of the trial court on various grounds, including that the purported agreement for sale of land was illegal and should not



have been considered by the trial court. That he now wishes to produce in additional evidence, which did not form part of the evidence produced at the trial court. That the same proves that he did not have capacity to contract when the agreement for sale relied on at the trial court was entered into.

4. The application was heard by way of written submissions further to this court's directions of 25th January 2023; see Order 51 Rule 16 of the *Civil Procedure Rules*, 2010 and Practice Direction number 33 of the *Environment and Land Court (ELC) Practice Directions*, 2014.
5. Accordingly, learned counsel for the applicants filed submissions dated 7th February 2023 on 8th February 2023. Counsel submitted that the applicants wish to introduce new evidence to show that the 2nd appellant/ applicant had no capacity to contract as he was a minor at the time the agreement was entered into.
6. The respondent opposed the application by way of a replying affidavit sworn on 14th November 2023 wherein he contended that the instant application is frivolous, vexatious and an abuse of the court process. That therefore, allowing the same would prejudice him.
7. The respondent's counsel filed submissions dated 30th November 2023 and submitted that this application is an afterthought. That litigation must come to an end and it is in the interest of justice that it be dismissed with costs. To fortify the submissions, reliance was placed on the Mohamed Abdi Mahamud case (infra), among other authoritative pronouncements.
8. I have duly considered the application, the Replying Affidavit and the rival submissions in their entirety. The principal issues for determination are:
 - a. Whether the applicants are deserving of leave to introduce new evidence at appeal.
 - b. Who should bear the costs of this application?
9. 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.”



10. The procedural rules that are hand maidens to Section 78 (supra) provide under Order 42 Rule 27 of the *Civil Procedure Rules*, 2010 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.”

11. In *Mobamed Abdi Mahamud v Ahmed Abdullahi Mobamad & 3 others* [2018] eKLR, the Supreme Court of Kenya laid down guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out 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.”

12. On one hand, the applicants asserted that the agreement for sale of land that the trial court relied on in reaching its verdict was illegal as one of the alleged parties thereto was a minor at the time the purported contract was entered into. That the new evidence they seek to introduce proves their assertion. On the other hand, the respondent contends that the suit at the trial court was determined on the premise of adverse possession. That thus, the validity or otherwise of the purported agreement is inconsequential.
13. In that regard, it is the finding of this court that the response in the Replying Affidavit does not displace the Notice of Motion.
14. It is therefore, my considered view that the additional evidence is directly relevant to the instant appeal and is in the interest of justice. That the same will influence the outcome of the present appeal. That therefore, the application has satisfied the requirements for introduction of additional evidence as set out in Section 78, Order 42 Rule 27 and *Mohamed Abdi Mahamud case* (all supra).
15. To that end, I find the applicants’ application dated 23rd November 2022 and filed herein on 2nd December 2022 merited. The same is hereby allowed.
16. Costs of the application to abide the appeal.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 6TH DAY OF FEBRUARY 2024.

G.M.A ONGONDO

JUDGE

Present

Ms. Quinter Adoyo holding brief for Aluoch Odera, learned counsel for the appellant



1st appellant

Respondent

Luanga, Court Assistant

