



**In re Estate of the Late William Morogo (Succession Cause
12 of 2001) [2025] KEHC 3405 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 12 OF 2001
RN NYAKUNDI, J
MARCH 20, 2025**

IN THE MATTER OF THE ESTATE OF THE LATE WILLIAM MOROGO

BETWEEN

**LINDA CHELIMO SAINA 1ST APPLICANT
CALVIN KIPTOO SAINA 2ND APPLICANT**

AND

**STELLA CHEPCHUMBA SAINA 1ST RESPONDENT
MICHELLE CHEBET SAINA 2ND RESPONDENT
JOANNE CHEROTICH SAINA 3RD RESPONDENT**

RULING

1. The applicant approached this court vide a Notice of Motion dated 7th March 2025 seeking the following orders;
 - a. Spent.
 - b. That this honourable court be pleased to grant leave to the applicants to adduce and file additional evidence limited to the audio recording of 4th February, 2025 and the transcription thereto between Linda Chelimo Saina and Michelle Chebet Saina.
 - c. That the Supplementary Affidavit sworn on 7th March, 2025 and filed herewith containing the Audio Recording, the transcription thereto and the certificate of electronic production be admitted as being part of the court record.
 - d. That this Honourable Court be pleased to recall Michelle Chebet Saina for the purpose of cross examination on the contents of the said new evidence.



- e. That the costs of this application be provided for.
2. The application is expressed to be brought under sections 1A, 1B, 3A of the *Civil Procedure Act* and Rules 63 and 73 of the *Probate and Administration Rules*. The application is further premised on the grounds on the face of it and the averments of the applicant in the supporting affidavit to the application.
 3. The applicant seeks to introduce additional evidence that was neither available nor within her knowledge during the hearing of the summons for the revocation or annulment of the grant on 28th January 2025 and 4th February, 2025, evidence and new information that has come to light since then. She deponed that Michelle Chebet Saina, the second applicant to the summons for the revocation of the grant confessed to her that all that she testified in court together with Stella Chepchumba Saina on 28th January, 2025 and 4th February, 2025 respectively were pure lies and falsehoods. Further, that on 4th February, 2025 at around 8:48PM or thereabout after the court attendance before Justice Reuben Nyakundi, Michelle Chebet Saina called her through her phone number 07216XXXXXX to the applicants' number 07965XXXXXX. She missed her call, but soon thereafter, called her back and they held quite a lengthy conversation that largely revolved around her testimony in court and that of Stella Chepchumba Saina.
 4. The applicant attached and marked LCS-1, a flash disk containing the audio recording, and additionally provided that the same could be accessed and listened through a link provided. Further, for ease of reference, the applicant transcribed the audio recording into a word document. The deponent averred that the 2nd applicant expressly admitted that she was colluding with Stella Chepchumba Saina to tell lies to the court on her administratorship and actual position of distribution of the Estate of their late father. She stated that she has since made a report for perjury at Eldoret Police Station under OB Number 123/17/2/2025 and investigations in that regard are underway.
 5. The deponent averred that the crux of the matter before the court is revocation or annulment of grant to which Michelle Chebet Saina, in concert with Stella Chepchumba Saina allege that the certificate of confirmation of grant made in the applicants' favour obtained without their consent or knowledge and, that in fact they have been disinherited from the estate. She produced the consent on the distribution of the estate and urged that the evidence obtained after the hearing of 28th January 2025 and 4th February 2025 demonstrate that the 1st and 2nd respondents lied under oath with an intention to besmirch, injure and defame her. She urged the court to allow the application as prayed.
 6. The supplementary affidavit filed by the applicant was a regurgitation of the contents of the supporting affidavit and need no repetition. There is no response on the part of the respondents and further, no evidence that the application was served on the respondents.
 7. In response to the application, the 1st Respondent filed grounds of opposition in which he laid the following grounds:
 - a. The Notice of Motion is seeking to introduce electronic evidence which does not meet the threshold set out under the *Evidence Act*, Cap. 80 of the Laws of Kenya.
 - b. The Notice of Motion is maliciously seeking to introduce private, confidential and without prejudice conversations contrary to the constitutional tenets on the Right to Privacy.
 - c. The Notice of Motion is mischievously aimed at blackmailing, intimidating, coercing on unduly influencing the 2nd Respondent into unmeritorious recanting her true Statements and depositions before this Honourable Court.



- d. This Honourable Court had an absolute duty to protect witnesses appearing before it hence the 2nd Respondent should not be blackmailed, threatened or intimidated on the basis of her testimony before this Honourable Court.
 - e. The Applicants have not sufficiently demonstrated the relevance and probative value of the Audio Recording to the determination of the two legal questions before this Honorable Court being;
 - i. The Propriety of a Certificate of Confirmation issued without a Grant of Letters of Administration.
 - ii. The Propriety of a Certificate of Confirmation issued without a Consent of the bona fide beneficiaries of the estate.
 - f. The instant Motion is part of a wider scheme by the Applicants to derail the hearing of the Summons in the matter thereby disenfranchising the Respondents hence this Honourable Court should see through the mischief.
 - g. The Applicants are seeking to produce an Audio Recording originally purportedly originally in Nandi Language without an appropriate Certificate of Translation hence fatally impeaching its admissibility.
8. In further response, the 2nd Respondent filed a replying affidavit sworn on 17th March, 2025 in which she deposed as follows:
- a. That the allegations in the application are untrue and a ploy to divert the court's attention from the main issue subject of the proceedings which is the absence of a grant of letters of administration in the name of the applicant as the administratrix to the estate.
 - b. That vide the summons for revocation of grant dated 8th April 2021, I sought this court to annul the amended certificate of confirmation of grant that was issued to the applicant on the ground that the applicant had made an application for substitution of Ruth Jepchirchir Saina(deceased) with her name as the sole administrator without involving me and other beneficiaries.
 - c. That the applicant intends to disinherit other beneficiaries and I unlawfully from what we are entitled to.
 - d. That the allegations as set out in the application are meant to further cause disharmony among the siblings further dimming the chances of this matter ever being resolved amicably or otherwise concluded.
 - e. That the recordings have been encrypted to suit the 1st applicant's selfish agenda and is a misinterpretation of the alleged conversation both in form and substance.
 - f. That I even as I impugn the authenticity of the recordings, I wish to state that a cursory look at the conversation as recorded at no point capture me admitting that I deliberately lied to the court or at all.
 - g. That the allegation of perjury, which is a criminal matter should not be litigated in this forum but rather in a criminal cause.



- h. That even if the recording sought to be adduced as evidence by the applicant were accurate, which it is not, the same constitutes a violation of my Right to Privacy under Article 31(d) of the Constitution of Kenya, 2010 hence should not be admitted.
- i. That further, the alleged recording was made without my consent and knowledge, therefore, a violation of Section 29 (b) of the Data Protection Act and as such, the same should not be admitted in evidence.
- j. That the additional evidence sought to be produced was obtained illegally and should not be admitted as evidence as per Article 50(4) of the Constitution of Kenya, 2010.
- k. That the recording does not show the phone number of the recipient in the alleged conversation and it is possible that it could be another person in the conversation as neither the applicant nor this Honourable Court are voice experts to verify that I am the one speaking in the impugned recording.
- l. That a court of law is precluded from admitting evidence that would be detrimental to the administration of justice and infringes on the rights of a person.
- m. That litigation must come to an end, the instant application is an abuse of the court's process and a waste of the court's precious time and should therefore be refused with costs.

Analysis & Determination

- 10. The sole issue for determination is; Whether the applicants should be granted leave to adduce and file additional evidence
- 11. In Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed and 3 others [2018] eKLR, the Supreme Court laid out the guidelines on admission of additional evidence. The Court stated as follows:

“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 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 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. whether the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filing gaps in evidence;
- j. the Court must find the further evidence needful;
- k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.”

12. It is important to distinguish at this juncture between the application for leave to adduce additional evidence and the subsequent determination of admissibility of such evidence. The present application before the Court is strictly limited to seeking leave to file and introduce the additional evidence for consideration. The question of admissibility and the weight to be attached to such evidence, if any, is a separate question altogether after the evidence has been subjected to scrutiny and its fitness to be admitted.
13. I have carefully considered the grounds of opposition raised by the 1st Respondent and the replying affidavit by the 2nd Respondent. Their objections primarily focus on the admissibility, authenticity, and legality of the evidence itself. These include assertions that the recording violates the right to privacy under Article 31(d) of the *Constitution*, contravenes the *Data Protection Act*, fails to meet the threshold for electronic evidence under the *Evidence Act*, and was obtained illegally contrary to Article 50(4) of the *Constitution*.
14. While these objections raise serious concerns that merit thorough consideration, they are premature at this stage of proceedings. The question before the Court is not whether the evidence should be admitted as proof of the facts it purports to establish, but whether the applicants should be permitted to present it for the Court’s consideration in the first place.
15. The evidence that the applicant seeks to introduce is a recording of a conversation that allegedly occurred after the court proceedings on 4th February 2025. This temporal sequence is significant as it establishes that the evidence could not have been obtained or produced during the trial, satisfying criterion (c) from the Mohamed case. This is not a case of evidence that existed but was overlooked during trial, but rather new information that materialized afterward.
16. Further, the alleged recorded conversation, if authentic, would be directly relevant to the matter as it pertains to the veracity of testimony central to the succession dispute. If the 2nd Respondent indeed made statements contradicting her court testimony, this would have significant bearing on the credibility of evidence already before the Court. This satisfies criterion (a) regarding relevance and criterion (b) regarding potential impact on the verdict.
17. Of particular significance is criterion (h) from the Mohamed case, which explicitly recognizes that additional evidence may be admitted when it “discloses a strong prima facie case of wilful deception of the Court.” The alleged recording, if it contains what the applicant claims, would directly speak



to potential wilful deception, which strikes at the heart of the judicial process and the Court's truth-seeking function.

18. I am mindful of section 146(4) of the *Evidence Act* and Order 18 Rule 10 of the *Civil Procedure Rules*, which grant the Court discretionary powers to recall witnesses. The Court in *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR held that:

“the Court’s discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.”

19. The Court must also be guided by the overriding objective of civil procedure as enshrined in sections 1A and 1B of the *Civil Procedure Act*, which enjoins this Court to ensure the just, expeditious, proportionate and affordable resolution of disputes. The primary purpose of court proceedings is to arrive at the truth and to dispense justice based on that truth.

20. I note the Respondents’ concerns regarding the alleged conversation having occurred in private and the recording potentially having been made without consent. These are serious considerations that will be central to the determination of admissibility. However, these concerns should not preclude the Court from even considering evidence that may be crucial to uncovering the truth, especially where allegations of perjury are involved.

21. It is also significant that the applicant has made a report of perjury at Eldoret Police Station under OB Number 123/17/2/2025. While the outcome of these investigations is pending, the Court has an independent interest in ensuring that testimony provided under oath is truthful.

22. The Respondents have raised legitimate concerns about the authenticity of the recording, suggesting it may have been encrypted to suit the 1st applicant's selfish agenda and may be a misinterpretation of the alleged conversation both in form and substance. These objections go to the weight of the evidence rather than to whether leave should be granted to adduce it. The appropriate forum for testing these assertions is through cross-examination and the presentation of contrary evidence.

23. I am conscious of the warning in *Wanjie & others v Sakwa & others* [1984] KLR 275, where the Court of Appeal stated thus:

“The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rules were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence”. (Emphasis mine).

24. However, in the present case, the applicant is not seeking to fill gaps in her evidence but rather to introduce new evidence that came into existence after the hearing and which potentially reveals that testimony given under oath was false. This falls within the exceptional circumstances contemplated in the Mohamed case, particularly under criterion (h).

25. The 2nd Respondent has argued that litigation must come to an end and that the application is an abuse of the court’s process. While finality is indeed an important principle in litigation, it cannot override the more fundamental principle that justice must be based on truth. If there is credible evidence suggesting



that the Court has been deliberately misled, it would be a greater abuse of process to refuse to consider such evidence.

26. The Court is not at this stage making a determination on whether the recording is authentic, whether it was legally obtained, or whether it is admissible under the *Evidence Act*. These are matters that will be fully ventilated if leave is granted and the evidence is properly served on the Respondents, giving them adequate opportunity to challenge it.
27. Regarding the allegation that there is no proof that the applicant attempted to serve the Respondents, this concern can be addressed by making service of the additional evidence a condition of the leave granted. This would ensure that principles of natural justice and the right to a fair hearing are upheld.
28. In weighing all these considerations, I am guided by the principle that at this preliminary stage, the Court should not adopt an overly restrictive approach that might prevent relevant evidence from being considered. The threshold for granting leave to adduce additional evidence should be lower than the threshold for ultimately admitting that evidence and giving it weight.
29. As the court approaches this matter, it must bear in mind that fresh evidence refers to new information or proof that he was not available during the original hearing at the main trial. It must be something that has either occurred after initial trial or something has recently come to the Applicant's knowledge. If the evidence pertains to the events prior to the trial, he must have come to the Applicant's attention only after the trial and could not have been discovered through reasonable diligence beforehand. It must also be fresh evidence that offers something significant enough to warrant reconsideration of a case based on the sought new evidence.
30. I therefore find that the interests of justice would be best served by granting leave to the applicants to adduce the additional evidence, subject to strict conditions ensuring that the Respondents have full opportunity to challenge its authenticity, legality, and admissibility.
31. In the premises, the application is allowed on the following terms:
 - a. The applicants are granted leave to adduce and file additional evidence limited to the audio recording of 4th February 2025 and the transcription thereto between Linda Chelimo Saina and Michelle Chebet Saina.
 - b. Leave is granted for the Supplementary Affidavit sworn on 7th March 2025 containing the Audio Recording, the transcription thereto, and the certificate of electronic production to be produced, subject to the test of admissibility.
 - c. Linda Chelimo Saina shall be called for the purpose of cross-examination on the contents of the said evidence at a later stage when she will be taking her case.
 - d. The issue of admissibility of the additional evidence shall be determined after hearing all parties on the matter.
 - e. In the meantime, the case shall proceed with the main hearing scheduled on 8th May, 2025 at 11a.m
 - f. Costs shall be in the cause.
32. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON 20TH MARCH 2025

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R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Kenei Advocate for the Objector

M/s Mbugua Advocate for the Objector

Mr. Busiega Advocate for the Petitioner

