Wandera v Opondo (Succession Appeal E006 of 2022)
[2024] KEHC 744 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 744 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION APPEAL E006 OF 2022

WM MUSYOKA, J

FEBRUARY 2, 2024

BETWEEN

TERESA RAEL WANDERA ..... APPELLANT

AND

EBBA AGUT OPONDO ..... RESPONDENT

(an appeal arising from orders made in the ruling of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCSC No. 430 of 2017, of 22nd March 2022)

RULING

1. On 28th September 2023, I delivered a judgment herein, wherein I allowed the appeal, after concluding that the trial court ought to have found and held that the respondent herein was not a spouse of the deceased person, whose estate was the subject of the proceedings. The respondent was aggrieved by that outcome, and she filed a Motion herein, on 4th October 2023, of even date. The Motion seeks review of the orders made in the judgment of 28th September 2023, specifically on the marital status of the respondent. The grounds on the face of the application are that there was evidence which was not considered by the trial court, the trial court had failed to analyse some documentary evidence which was not on record, among others.

2. In her affidavit, sworn in support of the application, on 4th October 2023, the respondent avers that she has evidence of persons who knew her as the wife of the deceased, having been married under customary law. She has attached affidavit evidence of individuals, who she says were witnesses to the fact of the marriage. She says that some of that evidence was available, but some of the witnesses were not available, hence their witness statements were not taken and filed. She states that she filed written submissions, but the same were not considered by the court. She further says that there was material that she availed to her then Advocate, but that material never got to the trial court file. She says that neither the trial court nor this appellate court had the benefit of seeing the documents that are now in her possession. She mentions that after the trial court ruled in her favour, lands officials visited the land,

and the locals identified her as the spouse of the deceased. She further avers that there were witnesses, who had informed the trial court that it was Nerea, her sister, who was married to Elijah Opondo. She also refers to a letter from the area Chief, where she is recognized as the widow of the deceased. She urges the court to find, on the basis of this new evidence, that she was a widow of the deceased, and hence review the judgment.

3. The documents annexed to the supporting affidavit are witness evidence affidavits of Benjamin Wandera Wanzala and Peter Barasa Okumu, both sworn on 4th October 2023; the written submissions that were filed herein for the purpose of the appeal, dated 5th July 2023; a letter dated 22nd March 2017, from a liguru; copies of the identity card for the deceased; a faint document, dated 3rd June 1984, in Kiswahili, relating to payment of dowry; a document from the lands registry, dated 20th July 2022; a letter from the County surveyor, dated 20th July 2022; and a letter from the Chief of Nambale Location, dated 4th October 2023.

4. The appellant filed a replying affidavit, on 15th November 2023, sworn on 14th November 2023. She avers that the respondent had emerged victorious in the proceedings before the trial court, and vigorously defended the decision of the trial court, and it was strange that she is now complaining that the trial court did not consider her evidence, which has now come to her possession. She avers that the letter dated 23rd March 2017 and the dowry agreement dated 3rd June 1984, were before the trial court, but were not produced as exhibits, as the makers of the documents were not availed, hence the said documents are not new evidence. She avers that the new evidence now being referred to, should have been presented before the appeal was canvassed, for consideration in the final judgment. She avers that the application is an afterthought. She further avers that review is based on record of the trial court, and no new evidence is permissible. She avers that the High Court sat as an appellate court, and relied on the record of the trial court, and its decision could only be reversed on appeal. She avers that there is no jurisdiction for the High Court to admit new evidence, and hear oral evidence after it has rendered its judgment. She argues that there was no discovery of new evidence, and what the respondent has done is to gather new evidence after the judgment on appeal was rendered.

5. The application was canvassed by way of written submissions. The respondent argues that there is discretion to review, based on section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and Rule 45 of the *Civil Procedure Rules*. The appellant argues that there is no new evidence to warrant review of the judgment herein. It is submitted that the High Court is being invited to sit on appeal on its own judgment. *National Bank of Kenya Ltd vs. Ndungu Njau* [1997] eKLR (Kwach, Akiwumi & Pall, JJA) is cited in support.

6. The law on review of decisions of the High Court, in both exercise of its original and appellate jurisdictions, is set out in section 80 of the *Civil Procedure Act* and Rule 45 of the *Civil Procedure Rules*.

7. Section 80 of the *Civil Procedure Rules* states as follows:

QUOTE{startQuote “}

80. Review Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by *this Act*, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by *this Act*, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

8. An appeal is available from the judgment herein of 28th September 2023, by dint of section 72 of the *Civil Procedure Act*, which states:

QUOTE{startQuote "}

72. Second appeal from the High Court

(1) Except where otherwise expressly provided in *this Act* or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by *this Act* or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An Appeal may lie under this Section from an appellate decree passed *ex parte*."

9. When sections 72 and 80 of the *Civil Procedure Act* are read together, it would appear, to me, that the review application is properly before me, for there is no proof that an appeal has been proffered against the judgment of 28th September 2023.

10. Rule 45 of the *Civil Procedure Rules* states as follows:

" Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

11. Rule 45 regurgitates the contents of section 80 of the *Civil Procedure Act*, but goes on to state the grounds upon which a review may be sought, and granted. Such application may be founded on error on the face of the record, discovery of new evidence, and any other sufficient reason.

12. The grounds for review on the face of the Motion are essentially that the trial court failed to do a number of things, like not considering some evidence, failing to analyse evidence, failing to evaluate crucial documents, among others. Failure to do the things that the trial court is accused of cannot possibly be a basis for review, for it has nothing to do with an error on the face of the record, nor new evidence, nor even a sufficient reason for review. In any case, the trial court had found in favour of the respondent, based on the material that the respondent had presented before the trial court, and, therefore, there cannot be any basis for faulting the trial court in anyway. It cannot be said not to have considered evidence adduced by the respondent, or not analysing it, or not evaluating the documents presented, when it found in favour of the said respondent, ostensibly based on what was on record.

13. I believe what is averred in the supporting affidavit to be more substantial. My understanding of that affidavit is that the respondent is saying that she has evidence which establishes that she was a widow of the deceased. She has attached that evidence, being some documents that had been placed before the trial court, and some that were generated after the impugned ruling of the trial court, and some after the judgment of 28th September 2023.

14. What the respondent is attempting to do is to have new or additional evidence considered on appeal. The law does allow admission of such evidence, subject to certain limitations. The law on production of additional evidence, with respect to appeals at the High Court, is section 78 of the *Civil Procedure Act*, which enables an appellate court, the power, among others, to take additional evidence or to require the evidence to be taken. Order 42 rule 27 of the *Civil Procedure Rules* provides the procedural guidelines for exercise of the power given by section 78(1)(d), on taking of additional evidence. Order 42 rule 27 of the *Civil Procedure Rules* states as follows:

> "(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."

15. The principles governing productional of additional evidence have been stated in a number of decisions, but that by the Supreme Court, in *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR (Maraga, CJ&P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), should be considered as the leading authority on the matter, for in it the court sought to lay down a principle to guide all the courts handling appeals. See also *Chris Munga N. Bichage vs. Richard Nyagaka Tong'i, Independent Electoral and Boundaries Commission & Robert K. Ngeny* [2015] eKLR (Ojwang & Njoki, SCJJ), *Kanyuira vs. Kenya Airports Authority* [2021] KESC 7 (KLR)(MK Koome, CJ, MK Ibrahim, SC Wanjala, NS Ndungu & W Ouko, SCJJ). It was stated as follows, in *Mohamed*

Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 others [2018] eKLR (Maraga, CJ&P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ):

> "(79) ... 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. The Court of Appeal, both before and after *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR (Maraga, CJ&P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), has in such cases as *Wanje vs. AK Saikwa* (1984) eKLR (Hancox JA, Chesoni & Nyarangi, Ag JJA), *Kuwinda Rurinja Co. Ltd vs. Kuwinda Holdings Ltd and 13 Others* [2013] eKLR (Nambuye, Ouko & Kairu, JJA), *John Kiplangat Barbaret & 8 others vs. Isaiah Kiplagat Arap Cheluget* [2016]

eKLR (Githinji, Koome & Otieno-Odek, JJA), *Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others* (2019) eKLR (Ouko (P), Warsame, Musinga, Kiage & Otieno-Odek, JJA), *Joseph Kingsley Karuri vs. Housing Finance Co. Ltd & another* [2019] eKLR (Ouko (P), Nambuye & Warsame, JJA), *Attorney General vs. Torino Enterprises Limited* [2019] eKLR (Waki, Gatembu & Otieno-Odek, JJA) and *Archer & another vs. Archer & 2 others* [2022] KECA 9 (KLR)(P Nyamweya, SG Kairu & JW Lessit, JJA) had and have stated, restated and applied these principles in this area. The High Court, and courts of equal status, have equally stated, restated and applied the said principles in such cases as *Jamil Mohamed Farah Said vs Hussein Shariffa Adnan* [2004] eKLR (Maraga, Ag J), *Kenya Medical Research Foundation vs. Eric K Omanje t/a Manje Auto Garage* [2020] eKLR (Mrima, J), *EO vs. COO* [2020] eKLR (Aburili, J), *James Kiarie Kibobi vs. Daniel Ongeri & another* [2020] eKLR (Meoli, J) *Dharmagha Patel & another vs. TA (Minor suing through the mother and next friend HH)* [2021] eKLR (T. Matheka, J), *Sharon Mwende Ndoi vs. Rahab Nyangima John & another* [2022] eKLR (Kasango, J), *Kenya Agricultural and Livestock Research Organization vs. Leah Okoko & another* [2022] eKLR (Aburili, J) and *Kaluworks Limited vs. Mkala* (Appeal 10 of 2019) [2023] KEELRC 1405 (KLR)(Mbaru, J). It is within the discretion and jurisdiction of the High Court, to consider production and admission and taking of fresh evidence on appeal, within the thresholds set out in the cases cited above.

17. Have those thresholds been met? I do not think so. The respondent has not sought to bring herself within the parameters of Order 42 rule 27 of the *Civil Procedure Rules*, for she has not sought production of the additional evidence on grounds that the trial court refused to admit evidence which she had sought to be admitted; and this court, before it rendered itself on the appeal, did not find it necessary to have some document produced or a witness be examined.

18. It could be that she founds her case on some other reason to have additional evidence adduced. That other reason appears to be that the said evidence was not available, either because the documents she seeks to rely on had not been generated by the time of the trial, or the persons who would have bespoken them, and produced them, were not available. Was that so? I doubt it.

19. I will start with the letter from the liguru, dated 22nd March 2017, and the dowry agreement document, dated 3rd June 1984. These 2 documents are not new evidence. They were placed before the trial court on 27th April 2021, when the respondent testified. She did not produce them as exhibits, instead they were marked for identification, the letter of 27th April 2017 as MFI 3, and the document dated 3rd June 1984 as MFI 5. The respondent called 1 witness thereafter, PW2, who did not make any reference to the 2 documents, and who, therefore, did not produce them. That meant that the 2 documents were never produced, and were not material that could be considered for the purpose of determining the marital status of the respondent. It was incumbent on the respondent to call the makers of those documents at the trial, if she was keen or intent on relying on them. She did not call the makers, and the documents did not, therefore, form part of the trial record. She now submits that the makers had all died. That is a matter she should have raised with the trial court, and she should have sought to have the trial court admit the documents on record then, by either getting the appellant to consent to them, or by placing material on record demonstrating that the makers were dead, and applying that the said documents be admitted under those circumstances, otherwise provide other evidence to establish the point that the documents were intended to prove. It would be too late now to have them reckoned on appeal.

20. The law on production of documents is now well settled, following *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others* [2015] eKLR (Visram, Mwilu & Otieno-Odek, JJA), that marking of documents for identification and admission of documents do not amount to proof of those documents, and a document marked for identification or admitted into the record must be proved, by way of a witness producing the document, tendering it in evidence as an exhibit, and laying foundation for

its authenticity and relevance to the facts of the case. That decision has been followed by the High Court, and courts of equal status, in such cases as *South Nyanza Sugar Co. Ltd vs. Mary A. Mwita & another* [2018] eKLR (Mrima, J), *Billiah Matiangi vs. Kisii Bottlers Limited & another* [2021] eKLR (Ndung'u, J), *Sammy Wafula Meja vs. Republic* [2021] eKLR, *Jackson Ndwiga vs. Elizabeth Thara Ngahu* [2021] eKLR (Njuguna, J), *Sofie Feis Caroline Lwangu vs. Benson Wafula Ndote* [2022] eKLR (Nyagaka, J) and *Lwangu vs. Ndote* [2021] KEELC 2 (KLR)(Nyagaka, J).

21. Next I will consider the 2 witness statements, by Benjamin Wandera Wanzala and Peter Barasa Okumu, both dated 4th October 2023. The respondent was given an opportunity to call witnesses in support of her case at the trial. She had a chance to call these 2 gentlemen, if they had information that would have assisted. She passed up that chance, and called PW2 instead, who was an infant when the marriage sought to be proved was allegedly being contracted. Her failure to call these witnesses at the trial is not a matter of an error on the face of the record. The contents of the witness affidavits are nothing new. The respondent has explained the 2 prospective witnesses were unavailable then, but she has not explained where they were, and the trial record does not reflect that the respondent sought time, from the trial court, to trace and call the said witnesses.

22. The other new document is the written submissions, dated 5th July 2023, signed by her Advocate. When I was preparing my judgment herein, I did not find these written submissions in the court file, and I have stated so in paragraph 11 of the judgment of 28th September 2023. The said submissions comprise a summary of the evidence and background to the matter. No caselaw nor statutory provisions are cited in them. In my judgment of 28th September 2023, I recited, at paragraphs 1, 2, 3, 4 and 5, the contents of the filings in the trial record, relevant to these proceedings, being the summons for revocation of grant dated 6th November 2018, and the affidavits sworn on 16th October 2019 and 23rd October 2020. At paragraphs 7, 8 and 9, of the judgment, I recited the testimonies that were taken from PW1, PW2 and DW1, the 3 witnesses who testified before the trial court. Then at paragraph 10 I set out, verbatim, the impugned ruling that the trial court delivered on 22nd March 2022. I thereafter analysed that material as against the grounds of appeal, set out in the memorandum of appeal, dated 18th August 2022. As it is, there is nothing in the written submissions, that the respondent filed in opposition to the appeal, that would have made a difference, for she did not make legal arguments to support her case, backed by statutory provisions or caselaw. Needless to say, written submissions are not of evidential value.

23. The rest of the documents were generated after the ruling the subject of the appeal was delivered, and they are material that was not available before the trial court made its impugned ruling, nor before me when I considered and determined the appeal. They are new material. One of them is a letter from the Chief, dated 23rd October 2023. I take judicial notice of the fact that there must have been a Chief in office, as at the time the trial court was handling the matter. Nothing prevented the respondent from collecting evidence from that Chief for presentation in court then, or even to call him as her witness. The rest are materials from lands officials, about boundaries, which are not of relevance here. What is recorded, as having been remarked, in the proceedings relating to those documents, are facts that the respondent could have placed before the trial court when the case was active before the said court. In any case, the trial records do not reflect that the respondent sought to call the Chief, or the other persons mentioned in those documents, and they, those persons, declined to come to court. There is nothing on record to reflect that witness summonses were ever procured, for service on these individuals.

24. A related issue is at what stage should additional evidence be adduced? Should it be prior to the appeal being considered on merit, so that the additional evidence is taken into account, or should it be after the appeal has been determined, and the additional evidence is sought to be introduced by way of review of the judgement? *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020]

eKLR (Asike-Makhandia & Kiage, JJA), appears to provide the answer to those questions. The party seeking to rely on such information must seek leave of court to adduce such additional evidence, given that such evidence is not part of the record that was before the trial court. Such additional evidence can only be placed before the appellate court upon leave being granted. Further, such additional evidence cannot be placed before the court by way of an application for review, as was done in this case.

25. Overall, I find no new material that the respondent discovered after I delivered the judgment, which was not within her reach at the time she was mounting the trial. She has not demonstrated that she was prevented, by someone or something, from marshalling that evidence at the trial. I agree with the appellant, that what the respondent has done is to go on an evidence gathering spree after she lost at the appeal. What she should have done should have been to appeal against the judgement of 28th September 2023.

26. I find no merit in the Motion herein, dated 4th October 2023, and I hereby dismiss it. I believe the appellant is entitled to costs of the Motion, which I hereby grant.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 2ND DAY OF FEBRUARY, 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Wanyama, instructed by Messrs. Wanyama & Company, Advocates for the appellant.

Mr. Okutta, instructed by Messrs. Ouma Okutta & Company, Advocates for the respondent.