

- a) The new evidence is important and will influence the case.
- b) The Applicants were trying to trace the case number to the succession proceedings in Nanyuki as the file had been archived.
- c) The Applicants only obtained the filed copies in respect of the Nanyuki Succession No. 17 of 2004 on 16.8.2024.
- d) The said information in the Nanyuki file to wit Petition for Letters of Administration, Grant and Certificate of Confirmation of Grant were thus unavailable to be presented in the lower court.
- e) The evidence is credible.

3. In response to the application, the Appellant as Administrator filed his sworn affidavit dated 2.4.2024 by which it was materially deposed as follows:

- (a) The issue of the Respondent's deceased mother taking out letters of Administration was raised in the lower court and the court considered it in its ruling.
- (b) The Applicants were aware of the alluded succession and cannot claim it as a new matter of evidence.
- (c) The matters in the application were an afterthought after the appeal was filed in order to patch up their case.

Submissions

4. The Respondents as applicants filed submissions dated 9.9.2025. It was submitted that the Respondents had made up a case for adducing new evidence and the application was brought under Section 78 of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules. They cited **Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR**, where they submitted that the Supreme Court emphasized that additional evidence is to be allowed sparingly, in exceptional circumstances, and on a case-by-case basis.
5. The Appellant as Respondent on his part also filed submissions dated 2.6.2025. It was submitted the Respondents knew of the existence of the succession cause in Nayuki Law Court during the pendency of the lower court case and the application was an afterthought. Reliance was placed *inter alia* on **Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others [supra]**.

Analysis

6. The application is premised on Section 78(1) of the Civil Procedure Act, which provides as follows:

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.

7. In the case of **Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR**, the Supreme Court laid down the following principles to guide applications for adducing further evidence:

(A) the additional evidence must be directly relevant to the matter before the court and be in the interests 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 must be shown that the evidence 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) it must be capable of removing any vagueness or doubt over the case and have 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) if the evidence discloses a strong prima facie case of willful deception to the court;

(h) the evidence must be needful and should not be for the purposes of removing lacunae and filling gaps in evidence.

(i) the evidence is not intended to enable an unsuccessful party at the trial to make a fresh case on appeal, fill up omissions or patch up the weak points in his or her case.

(j) 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. Therefore, the guiding principle in determining whether to grant leave to adduce new evidence on appeal is the proportionality and prejudice of allowing the additional evidence. The first aspect must be that the material sought to be adduced must first be evidence. Secondly, it must be new and could not be available with due diligence at the time the

case was proceeding. It must be such that it has an impact on the appeal without stealing a march on the other parties. It is not enough to state that the evidence could not be found. It must be shown that it could not be available during the trial despite diligent efforts.

9. This Court must therefore strike a balance between the probative value and significance of the additional evidence on one hand, and, on the other, the need for the expeditious conduct of litigation and the potential prejudice that may result from the admission of such evidence. The court may only allow additional evidence on a case-by-case basis and, even then, sparingly, with abundant caution.

10. The new evidence sought to be adduced on appeal by the Applicants comprises the Petition for Letters of Administration, the Grant, and the Certificate of Confirmation of Grant in Nanyuki Succession Cause No. 17 of 2004. It was submitted that the applicants were aware of the succession cause number but did not have the documents in their possession. This position, however, marks a departure from their deposition in the supporting affidavit to the present application, wherein they averred that they were still tracing the case number.

11. The court has perused the Letters of Administration, Grant and Certificate of Confirmation of Grant attached to the

supporting affidavit as the new evidence sought to be adduced. The Appellant's position is that the same information was in the knowledge of the Applicants and cannot be said to be new evidence. In any case the content of that evidence was already in the court record. The documents cannot add or subtract an iota of evidence given. The son-ship of the applicant to their mother is not in dispute. The marriage of the mother to the deceased son of the deceased is equally not in dispute. The time and date of death of the son of the deceased and his marital status together with the civil status was equally not in dispute. There is nothing the new evidence will be adding to the appeal or even the cross appeal.

12. The court must determine whether the applicants have satisfied the legal threshold for the grant of leave to adduce new evidence at the appellate stage. The Applicants state that the purpose of the proposed evidence is to demonstrate that they were named as children of Obadiah Muthui Ndegwa. That fact is however not in dispute in so far as who the applicants are. The difficulty lies in the approach taken by the Applicants, which appears out of synch and not in harmony with the principles governing the law of succession. The court finds that the proceedings in the Nanyuki Succession Cause do not alter the nature of this case or shift the legal position in any material respect. It will add no value to add the proceedings or leave them out. Given the neutral nature of the evidence, it serves no useful purpose to add them.

13. The court is equally mindful that the Applicants were aware of Nanyuki Succession Cause No. 17 of 2004 at the time the proceedings in the lower court, which are the subject of this appeal, were ongoing.
14. The crucial consideration is that the court's determination would remain the same with or without the additional evidence. The central issue in these proceedings is not whether the Applicants were sons of Obadiah Muthui Ndegwa, but whether the estate of Obadiah is entitled to benefit from the estate in question. The identification of his heirs is a distinct matter to be addressed in a separate succession cause. Similarly, the duration or existence of any marriage involving another beneficiary is not a matter for this Court to determine in the present proceedings. In addressing the question of whether Obadiah died without a wife, the proposed additional evidence bears no relevance.
15. In the circumstances, the Court finds that the Applicants have fallen short of the legal threshold for the admission of new evidence on appeal. The evidence sought to be introduced is neither relevant nor material to the determination of the real issues before this court, and its admission would serve no useful purpose. The application is therefore dismissed in its entirety.

16. On costs, the same are discretionary. The matter raises a unique issue that was not idle. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the

circumstances merit an award of costs to the Applicant.

17. The most appropriate order in the circumstances is that each party shall bear its own costs. Since the appeal has already been admitted, the court shall proceed to issue directions on its expeditious conclusion.

Determination

18. In the upshot, I make the following orders:

- a) The Notice of Motion application dated 20.8.2024 is dismissed.
- b) Each party to bear their own costs.
- c) Directions shall be issued shortly.

DELIVERED, DATED and SIGNED at **NYERI** on this **15th** day of **October, 2025**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Gichuki for the Appellant/Respondent

Mr. Muchangi for the Respondents/Applicants

Court Assistant - Michael

ORIGINAL