



**Kiplagat v Gare & another (Suing as the Legal Representative of the Estate of Emmanuel Oduor Ooko (Deceased)) (Civil Appeal E009 of 2025) [2025] KEHC 14892 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E009 OF 2025  
DK KEMEL, J  
OCTOBER 24, 2025**

**BETWEEN**

**KORIR KIPLAGAT ..... APPELLANT**

**AND**

**LUCAS OOKO GARE ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN ATIENO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EMMANUEL ODUOR OOKO (DECEASED)**

*(Appeal arises from the ruling/order of Hon. E. Tsimonjero (SRM) in Ukwala PMCC No. 56 of 2020 delivered on 6/2/2025)*

**JUDGMENT**

1. The appeal arises from the ruling/order of Hon. E. Tsimonjero (SRM) in Ukwala PMCC No. 56 of 2020 delivered on 6/2/2025 wherein the learned trial magistrate rejected an objection raised by the Appellant regarding the production of a certain letter by the Respondent on the ground that the Respondent was not the author of the document and proceeded to direct that the Respondent to produce the said document as an exhibit.
2. The Appellant was aggrieved by the said decision and filed his memorandum of appeal dated 10/2/2025 wherein he raised the following grounds of appeal namely:
  1. That the learned trial magistrate erred in Law in failing to sustain the Appellant's objection on production of the letter of appointment by the Plaintiff/Respondent herein who was not the maker as provided for by the law on evidence.



2. That the learned trial magistrate erred in law and facts by allowing the Respondents/Plaintiffs to produce the letter of appointment without being the maker and /or author of such document.
3. That the learned trial magistrate erred and misdirected himself by relying on wrong principles when he overruled the Appellant's Objection on production of the Letter of Appointment by the Respondent/Plaintiff.
4. That the trial magistrate erred in fact and in law in failing to consider the Appellant's submissions on the issue of the production of documents thus arriving at an unjustified decision.

The Appellant therefore prayed that the appeal be allowed and the order of the learned trial magistrate dated 6/2/2025 be set aside and substituted with an order rejecting the production of the document in dispute dated 15/2/2019 by the Respondent and that the case be re-opened so that the author can be called to testify and that the cost of the appeal be paid to the Appellant.

3. Being a first appeal, this court has a duty to evaluate the entire evidence presented before the trial court by subjecting it to a fresh exhaustive scrutiny and arrive at its own independent conclusion. The court has to bear in mind that it did not have the opportunity to hear or see the witnesses and thus it must give an allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123; *Peters v. Sunday Post Ltd* (1958) EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000. ( Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).
4. The record of the lower court indicates that the Respondent's case was proceeding and that the Respondent's second witness (PW2) was presenting her evidence when the Appellant's counsel raised an objection to the production of a letter from the deceased's employer on the ground that the witness was not competent to produce it since she was not the author of the document. The trial court considered the arguments of counsel and came up with the following order:

“Court – I have considered the objection to the production of the letter of appointment of the deceased into the administration police service. I have also considered the response. I do note that the deceased was an employee of the government of Kenya and the records are with the ministry. This is not a private entity that may be subject to doubt as to its existence. The Plaintiff is the father to the deceased and he definitely knew the nature of employment of his son. The standard of proof in civil matters is that on a cadence of probabilities.”

It is the above decision that precipitated this appeal.

5. From the perusal of the memorandum of appeal, the appeal challenges the decision of the trial court in Ukwala CMCC 56 of 2020 to dismiss the Appellant's objection raised in to challenge the admissibility of one of the documents that the Respondent had produced before court despite not being the maker and/or creating a basis as provided for under section 35 of the *Evidence Act*, Cap 80 Laws of Kenya.
6. The appeal was canvassed by way of written submissions. The Respondent complied while the Appellant appears to have presented submissions in respect to their application dated 24/2/2025 which apparently was compromised on 4/6/2025 when the parties agreed to abandon the Interlocutory application and proceed with the appeal proper.



7. As noted above, the Appellant erroneously filed submissions in respect of the compromised application and that the relevant portion of those submissions would only be relevant in terms of the introductory part in paragraph one thereof only. This court will reproduce the same and which reiterates the Appellant's contention that the objection raised before the lower court ought to have been allowed. The Appellant's gravamen in the lower court was that he had raised an objection on production of an employment letter of offer of the deceased by the Respondent herein and that the objection was premised on Section 35 of the Evidence Act which provides that;

'35. 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.

8. It was further submitted that, upon raising the objection, the court ruled that the document emanating from a public office, was believable and therefore there was no reason to call the maker and that the Respondent herein was allowed to produce the same.

9. The Respondent's submissions are dated 16/7/2025. It was submitted that the Respondent occupies the position that the decision by the trial court to admit a letter of appointment dated 15/2/2019 was sound and backed by law for reasons inter alia; that the letter was addressed to the deceased and the Respondents as his personal representatives had it in their custody and could competently produce it as an exhibit; that the said letter bore the coat of arms of the Republic of Kenya which is part of the public seal and in law the court could take judicial notice of it as a public document; that the admission of the letter said did not occasion any prejudice to the Appellant as its contents were corroborated by other documentary evidence that the Appellant admitted by consent; that the Appellant had never indicated to court that the document was contested as required under Order 11 of Civil Procedure Rules. It was further submitted that the contentious letter was addressed to the deceased and therefore upon his death the Respondents had possession of the letter once the temporary grant was issued to them. That had the issue of the deceased's employment status been realized when he was alive, he would have used the letter to verify his status in death the Respondents as his personal representative were the competent witnesses to produce it. That in their view, a letter like the one contested herein can competently be produced by the maker(author) as addressee (the deceased) and that where the



addressee is dead, his personal representative can produce it. Further, that the letter is evidently issued on the Government of Kenya letter head and specifically the Ministry of Interior and Coordination of National Government. That by virtue of Section 60(1) (e) of the *Evidence Act*, Cap 80 Laws of Kenya, the court is mandated to take judicial notice of inter alia the public seal of Kenya. That in law, no fact of which the court shall take judicial notice need be proved. That the trial court was therefore entitled to take judicial notice of the said letter to that extent as the contents of the said letter needed not to be proved in deference to Section 60 aforesaid. That the contents of the letter relate to the deceased employment and his stated income. Further, the Respondents had filed the deceased's certificate of appointment and certificate of death which showed that the deceased served as an administration police officer and which documents were admitted by consent of the parties. Since the contents of the letter were corroborated by the documents admitted by consent, then the admission of the said letter did not occasion any prejudice to the Appellant. It was further submitted that the Appellant did cross examine the Respondents on the probative value of the letter and therefore the Appellant had the opportunity to rebut the contents of the letter during defence hearing. Further, it was submitted that the parties were to be guided by the provisions of Order 11 of the Civil Procedure Rules regarding the need to indicate the documents to be admitted without calling the makers. That the Appellant from the time the suit was filed in 2020 upto 2025 did not indicate that he needed the maker of the contested letter to testify and produce it. That there is delay which the court should consider it as unreasonable. It was finally submitted that the appeal lacks merit and should be dismissed.

10. I have given due consideration to the evidence on record and the submissions filed. I find the issue for determination is whether the appeal has merit.
11. It is not in dispute that the matter before the lower court was a running down case and that it was proceeding for hearing on the part of the Plaintiff who had called the second witness (PW2). It was at that juncture that the said witness was about to produce a list of documents contained in his list dated 17/8/2020 when the Appellant's counsel objected more particularly the production of an appointment letter from the deceased's employer and listed as number 7 in the list of documents on the grounds that the witness (PW2) was not the author/maker of the document and which violated the provisions of Section 35 of the *Evidence Act*. It is noted that the Respondent's counsel vociferously defended his position and contended that the witness (PW2) was a father to the deceased and one of the legal representatives who now had the authority to produce documents which belonged to the deceased and specifically the letter that had been sent by his employer. Learned counsel further went ahead to rely on provisions of Section 60 of the *Evidence Act* where the courts are mandated to take judicial notice of certain documents. Learned counsel was of the view that the deceased who served as an administration police officer under the ministry of Interior National Coordination of National Government and who was issued with a letter by his said employer then the same should be taken judicial notice of by the court as the document in issue is not in contention and that the Appellant was at liberty to bring rival evidence to controvert the same. It is noted that the Appellant's gravamen is that the witness is not the author of the document in dispute and is against the provision of Section 35 of the *Evidence Act*. There is need to revisit the said provision which is as follows:

35. 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.

12. . An analysis of section 35 of the *Evidence Act* points to the fact that documents tendered in evidence must be original documents and are only admissible if produced by the maker. The maker shall, further, fulfil the following conditions:

- a. He must have personal knowledge of the matters dealt with by the statement; or
- b. He must in the performance of his duties have recorded information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters.

Section 35 makes exception to this general rule and provides that a document need not be produced by the maker if the maker is:

- a. Dead;
- b. Cannot be found;
- c. Is incapable of giving evidence;
- d. His attendance cannot be procured without an amount of delay or expense- which appears to the court unreasonable.

13. It is noted from the foregoing provision that it is good practice to have the maker of a document be called to testify regarding such documents. It is not in dispute that the Respondents claim that the deceased who was their son was an Administration Police Officer working under the ministry of Interior and Coordination of National Government and that the letter in contention that had been sent to the deceased was sent by the said ministry. It is also not in dispute that the deceased was not the author of the said employment letter. It is also not in dispute that the deceased's employer is still in existence and that no efforts have been made by the Respondents to call the relevant officers from the deceased's employer to appear in court and testify regarding the said letter. Learned counsel for the Respondents has sought to rely on the provisions of Section 60 of the *Evidence Act* and contented that the court should take judicial notice of public documents issued from public offices of government. Even though the letter in issue has the Coat of Arms for which the courts takes judicial notice of, there is need to call the maker of that document since they are available. This will go a long way in promoting the best evidence rule. It is instructive that the Respondents did not tell the trial court if they faced any challenges in securing witnesses from the deceased's employer to come forward and testify regarding the contents of the employment letter. Even if there were any such challenges, the Respondents were at liberty to seek for witness summons. It is noted from the record of the proceedings that the matter



proceeded for hearing in earnest on 6/2/2025 for the first time and therefore there is no evidence that the matter had been unduly delayed. The Respondents therefore could not raise the issue of delay caused by the objection by the Appellant. Again, there is no evidence that the parties while complying with the provisions of Order 11 of the Civil Procedure Rules, entered into a consent regarding the admission of any or all the items listed in their respective lists of documents prior to setting down the matter for hearing. Hence, the Respondents counsel's submission that the issue of the letter in dispute had been resolved during the pretrial conference are not convincing. Indeed, the Appellant made his intention to contest the suit and that part of his strategy was to challenge the production of the letter in question unless the maker is called. The Appellant was entitled to challenge the said letter as there is a proliferation of fake claims lodged in various courts in the country and hence the need for due diligence by all parties involved. The Respondents therefore cannot deny the Appellant his opportunity to challenge the documents. I am therefore not persuaded by the submissions of Respondents' counsel that the Appellant should rebut the contents of the letter during the defence hearing since the authenticity of the letter should be resolved first before it is produced and then the Appellant would then present the evidence to controvert the same. I find that the admission of the letter in question would occasion prejudice to the Appellant. It is instructive that even though the Respondents maintain that the deceased was an administration police officer, the Appellant is entitled to contest the documents presented in support of the Respondents' case. Hence, the finding by the learned trial magistrate was in error and must be interfered with.

14. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The ruling/order by the learned trial magistrate dated 6/2/2025 is set aside and substituted with an order sustaining the Appellant's objection to the production of the contentious letter of appointment contained as No. 7 in the Respondents' list of documents dated 17/8/2020. Each party to bear their own costs.

**DATED AND DELIVERED AT SIAYA THIS 24<sup>TH</sup> DAY OF OCTOBER 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

M/s Ongonga.....for Appellant

Omondi.....for Respondents

Kimaiyo/Maureen.....Court Assistant

