



**Okuwa & another v Ochieng (Family Appeal E012 of 2024)
[2025] KEHC 15791 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E012 OF 2024
DK KEMEL, J
NOVEMBER 6, 2025**

BETWEEN

ISAIAH OPONDO OKUWA 1ST APPELLANT

SAMUEL AFWANDE OKUWA 2ND APPELLANT

AND

CLEMENT FESTO OCHIENG RESPONDENT

RULING

1. The Appellant filed Notice of Motion dated 22nd July 2025 seeking the following reliefs:
 1. Spent.
 2. That the Applicant be granted leave to file and adduce new documentary evidence in support of their case as espoused in the Appellant/Applicant's supporting affidavit dated 22nd July 2025.
 3. That upon granting prayer (2), the Honourable Court do and hereby orders that the new evidence adduced be filed and served as a supplementary record of appeal within fourteen days of the date of the order of the court or as may be directed by this Honourable Court.
 4. That this court be pleased to order the former chief Uholo Sub-Location Charles Ochieng Otieno be summoned to appear before this court and give a comprehensive, detailed and conclusive account in respect to the issuance of a death certificate to the Respondent herein.
 5. That the Respondent be at liberty to file a replying affidavit if only to the supplementary record of appeal and submissions on the said new evidence.
 6. Costs be int the cause.



2. The application is supported by the grounds set out thereunder and the supporting affidavit sworn by Isaiah Opondo Okuwa. The Appellant's gravamen is inter alia; that the Appellants/Applicants are the sons of the late Bartholomew Okuwa who was the paternal nephew of the late Afwande Obudho the 1st registered owner of the parcel known as Uholo/Rambula/265; that during proceedings at the trial court, the death certificate of one Andrea Owuor Afwande was relied upon in support of the Petition for letters of administration; that the said certificate had been supplied to the Respondent herein through the issuance of death notification and other documents relied upon by former Chief Uholo Sub-Location Charles Ochieng Otieno; that it was after the ruling of Hon. E. Tsimonjero (SRM) issued on 11/9/2024 at Ukwala in Succession Cause No. E134 of 2021, that the Appellants discovered that a different death certificate from the one issued to them had been relied on in support of the petition for letters of administration; that upon discovering the discrepancies in the certificate on record, and the one issued to Appellants, efforts to seek assistance on authenticity of the two death certificates through the department of civil registration was initiated by the Appellants; that the Appellants through their Advocate M/s Odero & Partners on 12/2/2025, wrote to the Registrar of births and deaths registry at Hass Plaza Laser Hill Road Nairobi seeking verification of the death certificates with entry numbers 0840 and 1139245; that the Registrar was able to authenticate both certificates with the details as they appear as true death certificates in line with their records; that the Appellants are now reasonably apprehensive that the court may have mistakenly entertained succession proceedings for the wrong estate based on the findings of the Registrar of births and deaths; that the Appellant only came across the impugned certificate after the ruling of Hon. E. Tsimonjero (SRM) issued on 11/9/2024 in Ukwala Succession Cause No. E134 of 2021 thus the Appellants could not have reasonably been aware of and procured the further evidence in the course of trial in the trial court; that the chief testified on the authenticity of the death certificate relied upon at the trial proceedings as being that of the deceased; that this mistake was occasioned solely by the negligence of the former Chief Uholo Sub Location, Charles Ochieng Otieno who despite being privy to all relevant documentation, failed to exercise due diligence and vigilance, thereby issuing a death notification without proper verification, and consequently the death certificate of Andrea Owuor Afwande; that the Appellants/Applicants upon learning of the existence of an alternative death certificate which the chief had testified to be authentic, also reported this matter at Ugunja Police Station bearing OB No. 23 on 3rd March 2025; that it is instructive to note that the Appellant/Applicant by beseeching this court to take new evidence, is not seeking to make a fresh case or to fill up omissions or patch up the weak points in his case but the mere fact that new evidence divulges the fact that the Respondent had knowledge that he produced a death certificate of Andrea Owuor Afwande purporting to be Andrew Owuor Afwande discloses a strong prima facie case of willful deception of the court by the Respondent; that the Appellant/Applicant has satisfied the principles that ought to be satisfied in an application imploring the court to allow new evidence as the new evidence sought to be adduced is patently directly relevant to the matter before the court and it is in the best interest of justice that it be allowed to account that the Appellants stand to lose Uholo/Rambula/265 and suffer irreparable harm and their constitutional right to equal benefit and protection of the law and access to justice is at the brink of being flagrantly violated if the new evidence is not allowed by this court; that the new evidence could not have been obtained with reasonable diligence for use at the trial, Appellant/Applicants could not have produced the new evidence at he time of the trial proceedings; that the new evidence is credible and is not voluminous; that the new evidence discloses a strong prima facie case of willful deception of the court by the Respondent; that the new evidence is not utilized for the purpose of removing lacunae and filing gaps in evidence but for advancing the interest of justice; that the Respondent will not suffer any prejudice if the new evidence is allowed. That it is therefore with utmost importance that the court certifies the matter urgent, be heard and determined and that orders sought are granted.



3. The application was opposed by the Respondent who filed a replying affidavit sworn on 23/9/2025 wherein he averred inter alia; that the Appellant's application dated 22nd July 2025 and its supporting affidavit as presented is incompetent, bad in law and should be dismissed with costs; that the instant appeal emanates from Succession Cause vide Ukwala Succession Cause No. E134 of 2021 wherein the Appellant alleges that they had been left out as rightful beneficiaries to the estate of one Andrea Owuor Afwande(deceased herein); that this court is invited to consider the application for summons for revocation dated 17/11/2022 forming part of the lower court file; that the issue of authentication of the deceased's death certificate was not raised in the application and the only complaint was that the Appellants were not included in the Petition; that the matter was set down for pre-trial direction when both parties were getting ready for trial due diligence ought to have been conducted but the Appellants failed to do so; that the succession cause was set down for hearing and the matter proceeded and was concluded hence this present appeal; that at no point did it come to the Appellants' knowledge that there were discrepancies in the death certificate of the deceased persons herein; that after the Appellants learnt of the additional evidence after the delivery of the impugned ruling, they never sought to review the case on the basis of having new additional evidence which could not have been discovered in the course of trial even after due diligence was conducted; that the Appellants have not shown how the proposed additional evidence removes any vagueness or doubt on the issues in the appeal pending before this court considering that the allegations on the authenticity of the death certificate of the deceased have no direct bearing on the main issue in this instant appeal which was about dependency to the deceased person herein; that the area chief who did the alleged illegal and fraudulent introductory letter testified as under oath and confirmed the relationship between the Respondent and the deceased as being brothers and therefore allowing this application will give the Appellants leeway to give rise to a new arising issue and re-opening the case on new grounds; that the Appellants have failed to show that the new documentary evidence they now wish to adduce could not have been obtained by reasonable diligence before and during the hearing of the succession cause before the trial court and that the affidavit is made in opposition to the application as the Appellants are being overly mischievous having been unsuccessful at the trial and as a result they are trying to patch up the weak points in their case.
4. The application was canvassed by way of written submissions. Both parties duly complied.
5. The Appellant's submissions are dated 6th October 2025 while those of the Respondent are dated 15th October 2025.
6. The Appellant's counsel submitted inter alia; that the availability of a duplicate death certificate leads to the existence of two certificates of death in respect of the deceased and which casts some uncertainty as to which record accurately represents the estate of the deceased and hence the need for the fresh evidence so as to clear the doubt; that the Applicants could not have known about the duplicate certificate of death as they believed that the area chief had acted faithfully and hence the issue was not within their knowledge at the time; that the admission of the new evidence would be in the best interest of the parties; that the Applicants have satisfied the condition that the additional evidence is credible and worthy of belief; that the new evidence is not so voluminous as it consists only of a single document and does not cause any prejudice to the Respondent; that the additional evidence is not meant to fill up gaps or patch up weak points in the Applicants case; that the new evidence will assist the court in achieving a fair and conclusive determination of the appeal. Reliance was placed in the case of Mohamed Abdi Mohamoud Vs Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR.
7. The Respondent submitted inter alia; that the Applicants have not fully complied with the provisions of section 78 of the *Civil Procedure Act* and Order 42 Rule 27 of the Civil Procedure Rules; that the issue of the authenticity of the death certificates was not raised in the Applicants' summons for revocation of grant but that the trial court dealt with the issue of whether the Applicants are



beneficiaries of the estate of the deceased; that it is the Registrar of persons and deaths to be called and to shed light regarding the authenticity of the documents and if the same is done then it will be reopening the case and which the Applicants are now pursuing with a view of re-litigating afresh in a matter that arose at trial; that the matter now pursued by the Applicants was within their knowledge at the time of trial and ought to have raised it then and that if they came to know about it later on then they should have lodged a review; that the issue before the trial court was about the status of the Applicants as dependants of the deceased and not about duplication of death certificates yet the area chief indicated only one deceased with different names and went ahead to confirm who the beneficiaries were; that the application seeks to re-open the case on new grounds and should be dismissed with costs.

8. I have given due consideration to the application, rival affidavits and submissions. I find the issue for determination is whether the application has merit.
9. It is noted that the Appellants herein lodged the present appeal arising from the decision of Hon Tsimonjero (SRM) in Ukwala Succession Cause No. E134 of 2021 dated 11/9/2024 and that parties herein had already taken directions on the disposal of the appeal when the present application was filed by the Appellants. The Appellants' main gravamen is that they have discovered that there are two certificates of death issued by the Registrar of births and deaths in respect of the deceased and that they seek to have the same resolved in this appeal by allowing the Appellants produce the same as additional evidence and that the concerned area chief be summoned to appear before this court and shed light on the circumstances regarding the issuance of a death certificate to the Respondent herein. Basically, the Appellants' case is that they need to be allowed to adduce additional evidence on appeal.
10. The applicable law regarding the admission of additional evidence by an appellate court is found in section 78 of the [Civil Procedure Act](#) which provides as follows:

“(1) 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.

(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.”

It is also common ground that in the application of the foregoing provision, Order 42 Rule 27 of the Civil Procedure Rules kicks in to aid the court 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 judgement, or for any other substantial cause, the court to which the appeal is preferred



may allow such evidence or documents to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reasons for its admissions.”

11. A perusal of the lower court record reveals that the Appellants herein had approached the trial court through a summons for revocation of grant on the ground that the Respondent herein had left them out of the estate yet they are genuine dependants of the deceased and entitled to benefit. Indeed, the trial court considered the matter and found no merit in the application and dismissed it thus precipitating in the present appeal. The trial court duly noted that there were two certificates of death namely No. 1139245 and 0840618 and upon deliberation and summoning the area chief who confirmed that he knew the family members of the deceased and that the two documents referred to the same deceased and thus went ahead to dismiss the summons for revocation of grant to the chagrin of the Appellants. It is also noted that the Appellants have not approached the trial court for review of its orders if they came across new and crucial evidence so as to warrant the trial court to reconsider its decision if persuaded.
12. Learned counsel for the Appellants has cited the case of Mohamed Abdi Mohamoud Vs Ahmed Abdullahi Mohamed & 3 Others [2018] Eklr to bolster his argument that the application for additional evidence is merited. The Supreme Court of Kenya in “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 an 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 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 an procured the further evidence in the course of trial is essential consideration to ensure fairness and due process;
 - h. The court must be satisfied that the additional evidence is not utilized for the purposes of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.
 - i. A party who has been unsuccessful at the trial must not seek 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.

Learned counsel for the Appellants has maintained that the Appellants have satisfied the conditions imposed in the foregoing authority and therefore they should be allowed to present additional evidence and that the application should be allowed in the interest of justice.

13. Upon analyzing the application brought by the Appellants as juxtaposed with the guidelines in the Supreme Court case above, it is noted that the Appellants had presented their case before the trial court seeking for revocation of grant in which the area chief was called to testify and confirm the relatives of the deceased and that the Appellants proceeded in the trial. Further, the Appellants were well aware about the two copies of death certificates regarding the deceased but went ahead to present their evidence without raising any queries over the said death certificates. Indeed, if the Appellants felt that they have come across new evidence which was not within their knowledge or could be procured without great expense were at liberty to approach the trial court and seek for review of the orders in line with the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. I am of the considered view that the application filed by the Appellants is likely to convolute this matter yet they had every right to approach the trial court for review. No reasons have been presented by the Appellants to show that they approached the said court and were denied audience. Consequently, I am not persuaded that the Appellants should be allowed to adduce additional evidence as the same will amount to re-opening the case on new grounds. Further, it is my view that the Appellants are out to obtain new evidence so as to seal gaps in their case against the Respondent who stands to be prejudiced in the final analysis.
14. In view of the foregoing observations, it is my finding that the Appellant's application dated 22nd July 2025 lacks merit. The same is dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF NOVEMBER 2025.

D.KEMEI

JUDGE

In the presence of:

Masinde for Odero.....for Appellants/Applicants.

M/s Ochieng.....for Respondent.

Maureen/Kimaiyo.....Court Assistant.

