



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO E099 OF 2025

RHOBAI MUSIMBI ANGULE 1ST
APPLICANT/APELLANT

MATHIAS LUBUTSE ANGULE 2ND
APPLICANT/APELLANT

ODARI GERALD ANGULE 3RD APPLICANT
APELLANT

VERSUS

JUDITH LUNGATSO 1ST
RESPONDENT

ELIZABETH AKOTH NDEGE 2ND
RESPONDENT

ODHIAMBO NDEGE (DECEASED) 3RD
RESPONDENT

RULING

1. The Applicants/ Appellants herein moved this court vide a Notice of Motion application dated 21/11/2025 seeking the following orders;
 - a) *That the Honourable court be pleased to grant leave to the Appellants to adduce additional evidence in the form of*

photographic evidence, video evidence, documentary evidence, and witness statements that were not available during the trial in the lower court.

b) The additional photographic evidence, videographic evidence, documentary evidence, audio recordings, and witness statements by Joseph Obonyo Angule, George Ochanda Ogionyo, Jeremiah Otieno Obonyo, and Mathias Lubutse Angule be admitted for consideration in this appeal.

c) THAT the applicants' application be admitted for hearing during this honourable court's vacation.

d) The costs of this application should be provided for.

e) This Honourable Court be pleased to grant any other

2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn by the 1st Applicant on behalf of the 2nd and 3rd Applicants who avers that during the trial in the lower court being Kakamega MCCC E010 of 2025 the photographs which they seek to be produced were not available as they were in the possession of the 2nd Applicant who was not available hence they were not able to comply with Order 11 of the Civil Procedure Rules.

3. She contends that the following witnesses, Joseph Obonyo Angule, George Ochanda Ogionyo, Jeremiah Otieno Obonyo, and Mathias Lubutse Angule, were not contacted during the lower court proceedings because they were unavailable, as some were out of the country and further that other statements were taken

down by the counsel proceeding with the matter at the lower court, but they were not called to testify.

4. She asserts that the witnesses who were previously unavailable to testify would attest to the closeness of the relationship between her and the 2nd and 3rd Applicants, his wishes before his death, and closeness with the family before his passing, which would corroborate their testimonies at the lower court.
5. She claims that the lower court never had a chance to interrogate her children's birth certificates, which showed that she and the deceased sired the 2nd and 3rd Applicants. Hence, they had the right to bury their father and further that the Respondents would suffer no prejudice since they would have the opportunity to cross-examine the witnesses and challenge the photographic, video, and documentary evidence.
6. On 2nd December 2025, the Respondent filed their grounds of opposition opposing the application, stating that it was an abuse of the court's process and further that it violates provisions of order 42 Rule 27(1) of the Civil procedure rules and that it does not meet the governing principles set by the Supreme Court of Kenya in the case of ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 others (2018) KLR*** on admission of additional and further evidence on appeal. They aver that the application is an attempt to engineer a fresh trial at the appellate stage or a retrial, as they were unsuccessful before the trial court, and they intend to patch up the weak points at the appellate stage.

7. The court directed that the application be canvassed by way of written submissions.

Applicants' Submissions

8. On the issues for determination, the Applicants rely on Order 42 Rule 27 (1) of the Civil Procedure Rules on the circumstances under which additional evidence can be adduced and cited the Supreme Court decision in ***Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR*** paragraph 79 on the principles the court ought to consider in allowing the production of the additional evidence.
9. According to the Applicants, the additional evidence would depict the times and milestones between the deceased and his children, the 2nd and 3rd Applicants. They claim that the 2nd Applicant witness was unavailable during the trial period and that virtual attendance was not possible, as his work was physically demanding, making it impossible for him to attend court, either in person or virtually.
10. They further aver that the 2nd and the 3rd Applicant's birth certificates would prove that the deceased was their father and husband to the 1st Applicant, and that the Respondents would have an opportunity to cross-examine the witnesses and bring the dispute to finality.
11. They submit that they have met the requirements under Order 42 rule 27 and the cited Supreme Court decision and pray that the court grant them leave to admit the evidence and that refusal would lead to an injustice.

Respondents' Submissions

12. The Respondents oppose the application for leave to adduce the additional evidence, submitting that it is an abuse of the court's process and outside the provisions of Order 42 Rule 27 of the Civil Procedure Rules and the Supreme Court's threshold set in ***Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR)***. They contend that the application is intended to delay the disposal of the appeal and, if granted, would mean a restart of the case at the appeal stage.
13. On whether the application has met the threshold of Order 42 Rule 27, they posit that the Applicants did not allege that the lower court had refused to admit the evidence that they are now seeking to introduce to warrant the grant of the leave. Further, they submit that the appellate court has not required the production of any document or the examination of any witness. They argue that the adduction of new and additional evidence in an appeal is not permitted, and further that the Applicants have failed to satisfy the requirements of the law and the Supreme Court in the case of ***Mahmud v Mohamad & 3 others (Supra)***, upon which their application was anchored.
14. They submit that the Applicants now seek to call six new witnesses and new evidence, which are supplementary to what was tendered at the trial. They assert that the Applicants were aware of the case and would have tendered their evidence during the trial since they were the ones who commenced the case. They argue that the Applicants have not indicated any

supplementary evidence or which countries the witnesses were or why they were unreachable despite the numerous channels of communications available. They contend that the Applicants never raised the issue of missing witnesses during the trial before the lower court and never applied for an extension of time to seek the missing witnesses and file their statements.

15. They aver that the Applicants are seeking a fresh hearing of their case before the appellate court and that the said additional evidence cannot alter their case or the deceased's wishes on the place he intended to be buried,
16. According to the Respondents, they would suffer prejudice if the application is allowed, as they would not be able to defend the appeal or examine the witnesses. They pray that the application be dismissed.

Analysis and Determination

17. I have carefully considered the application, the affidavit in support, the grounds of opposition, the parties' rival submissions and the relevant law.
18. The main issue for determination is whether the Applicants have met the legal threshold for admission of additional evidence in this appeal.
19. Order 42 Rule 27(1) of the Civil Procedure Rules provides that;
“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. 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 appellate court requires any document to be produced or any witness to be examined to enable it pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an appellant court, the court shall record the reason for its admission.”

20. The above provisions underscore the general principle that appeals are to be determined based on the records from the trial court and that fresh evidence is only acceptable in exceptional circumstances. The rationale is to prevent parties from abusing the appellate process by seeking remedies where there were loopholes or deficiencies in their case, which might have arisen from a lack of due diligence during the trial.
21. This was observed in the Supreme Court Petition No. 2 of 2018 case ***Mahamud v Mohamad & 3 others (Petition 7 & 9 of 2018 (Consolidated)) (Supra)*** in paragraph 79, which gave the guiding principles on admission of additional evidence on appeal, which the apex court noted was not to fill gaps, patch up weak points, or to make out a fresh case. The court noted the key consideration 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 as to make 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 utilised 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.”

22. Flowing from the above decision, it is clear that the power to admit fresh evidence is discretionary but must be exercised judiciously to avoid turning an appeal into a trial *de novo*.
23. In applying the above principles in the instant application, this court should consider if the Applicants have shown that the proposed additional evidence which include documentary evidence being the 2nd and 3rd Applicants birth certificates, the photographic evidence showing the deceased with the 2nd and 3rd Applicants during their milestones, vieographic evidence and the new witness statements could not have been obtained within a reasonable diligence during the lower court trial and whether its

abduction as further evidence would guide the court in arriving at a fair and just decision.

24. The 1st Applicant avers in her supporting affidavit that the photographic and other visual evidence were in the possession of the 2nd Applicant, who was unavailable during the trial period due to his demanding work commitments out of the country, hence rendering virtual or physical attendance difficult for him.
25. She states that the witnesses were unreachable, with some being out of the country, and that their statements, though prepared, were not tendered as the counsel handling the matter at the lower court did not call them. Notably, the Applicants exhibited copies of the photographs (marked RMA 02 (a) to (g)), an audio recording, and a certificate of electronic evidence, which purportedly depict the deceased's close relationship with the Applicants.
26. The Respondents counter the Applicants by pointing out that the 2nd Applicant was a party to the lower court proceedings and was present throughout, as evidenced by the lower court records. They argue that no efforts were made to contact the witnesses or secure their testimony, such as by applying for an adjournment or a virtual hearing. She further contends that the Applicants did not raise the issue of unavailable evidence or witnesses during the trial, nor did they seek extensions to file supplementary statements. The Respondents submit that this was based on negligence rather than the genuine unavailability of the witnesses.

27. Having analysed the parties' submissions, I am not convinced with the Applicants' explanation for the unavailability of the 2nd Applicant as it lacks evidential support; the 2nd Applicant has not given a convincing explanation as to why he was unable to virtually attend court or even seek for an adjournment when he was not available or that the nature of his work precluded even virtual participation. There was also no evidence explaining why he could not forward the evidence electronically for filing purposes. They have also not demonstrated that they failed to procure the other witnesses and evidence despite having exercised due diligence in searching for them.
28. Having said that, it is common ground that the 1st Appellant was married to the deceased under statute and that the said marriage was still in subsistence at the time of his death. The 1st Respondent did not dispute the 1st Appellant's claim that she sired children with the deceased. Considering the fact that each party presented divergent views regarding the wishes of the deceased as to his final resting place, and in view of the fact that the Appellants only relied on the 1st Applicant's evidence and that of the deceased's uncle, the Respondents' evidence weighed heavily against that of the Appellants, as the Respondents adduced evidence through eight witnesses. The evidence relied upon by both parties was primarily oral, as the deceased left no will indicating his preferred burial place.
29. The court has taken note of the 1st Applicant's deposition that their Counsel on record had taken some of the evidence of the

witnesses, but they were not called to testify. No reason was given as to why the said witnesses were not called to testify. Be that as it may, the final effect of the failure was a judgement that dismissed the Applicants' claim.

30. Having gone through the trial court record, I find that the parties sufficiently demonstrated that there was a strained relationship between the 1st Appellant and the deceased. Coupled with the speed at which burial trials are held, this may have prevented the consolidation of the additional evidence now proffered to the court.

31. Section 78 of the Civil Procedure Act provides that:-

“(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.”

32. Burial disputes are sui generis in nature. Following the decision in **James Apeli & Another v Prisca Buluku [1980] KECA 39**

(KLR), it is evident that courts must balance customary law, the wishes of the deceased, and the feelings of the immediate family in such disputes. The Appellants' evidence at the trial precludes the appellate court from achieving that balance because it was too scant.

33. Under Order 42 Rule 27 1(b), the appellate court may admit additional evidence if it requires it to enable it to pronounce a decision that would settle the issues to finality. In **Mahamud v Mohamad & 3 others (supra)**, the Supreme Court noted one of the key considerations in an application to adduce additional evidence to be the necessity to remove any vagueness or doubt over the case. It held that the evidence should be such that it has a direct bearing on the main issue in the suit. Given the conflicting claims between the deceased's two wives, the court requires a more comprehensive picture of the deceased's status as a family man in order to make a decision that would bring finality to the dispute as to his final resting place noting that in African custom, the dead should be left to rest in peace without any disturbance such as exhumation and protracted litigation. I am also mindful of the fact that death and how the remains of a deceased person are dealt with are an emotive issue that requires proper closure amongst the deceased person's next of kin.
34. In **Mborothi & Another v. Kanyia [2025] KEELC 6913 (KLR)**, the court admitted evidence at the appeal stage as it held that

the testimony of the intended witnesses would assist the court to determine the dispute to finality.

35. Additionally, Articles 11, 44 and 45 of the Constitution necessitate that the court hear all pertinent witnesses to determine a conflict over which place between the matrimonial home and the ancestral home of the deceased should be his rightful final resting place while bearing in mind his home of origin and his cultural beliefs. This can only be determined after hearing the witnesses who were not able to give evidence before the trial court.
36. Regarding the claim that the Respondents would suffer prejudice, the court is of the opinion that compensation with costs can mitigate any prejudice since the Respondents shall have the opportunity to cross-examine the additional witnesses. I am persuaded that it is necessary, for the ends of justice, that the court exercises its discretion in favour of the Applicants.
37. After a painstaking review of the application and the applicable law, I am satisfied that the court requires the additional evidence to enable it pronounce its judgement to finality. The application is therefore allowed as prayed. However, the costs of the application shall be borne by the Applicants.

Dated, signed and delivered at Kakamega, this 5th day of March 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr. Mbetera for the Appellants

No appearance for the Respondents

Court Assistant: Polycap

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