Wanyonyi & another v Wafula & another (Civil Appeal E054 of 2022) [2026] KEHC 5636 (KLR) (16 April 2026) (Judgment)

Neutral citation: [2026] KEHC 5636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E054 OF 2022

REA OUGO, J

APRIL 16, 2026

BETWEEN

ERIC WAFULA WANYONYI ..... 1ST APPELLANT

RODAH NASWA NDINYO ..... 2ND APPELLANT

AND

CYNTHIA NASAMBU WAFULA ..... 1ST RESPONDENT

ELIVIA CHEBET MURUNGA ..... 2ND RESPONDENT

(Being an appeal from the ruling of Hon. C.A.S. Mutai SPM delivered on the 4/7/2022 in Bungoma CM Succession Case No. 276 of 2019)

JUDGMENT

1. Robinson Wanyonyi Wafula, the deceased, died on the 5/6/2018 in a fatal air crash in the Aberdare ranges. The respondents lodged the Petition for Letters of Administration Intestate dated 31/12/2018. The appellants subsequently filed objection proceedings dated 25/10/2019 opposing the making of the grant to the respondent.

2. When the appellants' motion came up for hearing, the appellants were heard and closed their case however when the respondents were presenting their case, the appellants through their advocate objected to the production of the affidavits sworn on the 23/7/2018 and the joint affidavit sworn on 1/7/2016 seeking to have the makers and commissioners of the said affidavit produced in court.

3. In its ruling of 4/7/2022, the trial court dismissed the appellants' objection on the grounds that they had the opportunity to adduce evidence disputing the signature on the impugned documents but failed to do so. The court noted that the issues raised in objection could be addressed in submissions thus inviting the court to make a finding on the same.

4. Being aggrieved by the trial court's ruling, the appellants filed the instant appeal vide a memorandum of appeal dated 9/7/2022. The appeal raised 7 grounds as follows;

    a. The trial magistrate erred in law and fact by allowing the respondents to produce two affidavits sworn on 23/7/2018 and 1/7/2016 without the attendance of the commissioner for oaths and the maker.

    b. The trial magistrate erred in law and fact by permitting the respondents to produce the two affidavits sworn on 23/7/2018 and 1/7/2016 when no direction had been taken during pre-trial to that effect.

    c. The trial magistrate erred in law and fact by allowing the respondents to produce the two affidavits when the same were supposed to be put to test.

    d. The trial magistrate erred in law and fact by becoming partial and or partisan by allowing the respondents to produce the said affidavits hence arriving at wrong decisions.

    e. The trial magistrate erred in law and in fact by blanketly permitting the respondents to produce the two affidavits without considering that every documentary evidence ought to be tested through cross-examination of the commissioner for oaths and the maker.

    f. The trial magistrate erred in law and fact by permitting the respondents to produce the two affidavits without giving cogent reasons.

    g. The trial magistrate erred in law and fact by generally acting imbalanced in an adversarial system kind of litigation.

5. The appeal was disposed of by written submissions; however, at the time of writing this judgment, only the appellant's submissions were on record.

6. The appellant submitted that they objected to the production of the two marriage affidavits on the ground that the 1st respondent was not the maker, and that the maker and the commissioner for oaths of the said documents were required to be in court. That no evidence was adduced to show that both the maker and the commissioner for oaths were dead or could not be found to attend court, and that the court therefore erred in allowing the said documents to be produced. Reliance was placed on the case of West Kenya Sugar Company Limited v Simiyu & Another (Suing as Administrators and Personal Representatives of the Estate of Victor Masibo Simiyu – Deceased) (Civil Appeal E072 OF 2022 [2024] KEHC 15914 (KLR) (22 October 2024) (Judgment).That pre-trial was not held, and thus the appellant never agreed that the two affidavits be produced.

7. This being a first appeal, the Court is duty-bound to evaluate the evidence at the trial afresh and come to its own independent findings and conclusions, but at all times having in mind that it did not have the advantage of seeing the witnesses testify. See Selle & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.

Analysis And Determination

8. I have considered the trial record. The appellant objected to the production of the affidavits sworn on 1/7/2016 & 23/7/2018 and sought to have the makers and commissioners of the said affidavit produced in court. The affidavit, sworn on 1/7/2016, was jointly sworn by the deceased and the 1st respondent in proof of their marriage. It was commissioned by one Paul. S. Juma, while the affidavit dated 23/7/2018 was sworn by the 1st respondent and commissioned by one George Wandati and stated to have been drawn by the firm of Aluvale & Company Advocates.

9. The provisions of Section 35 of the *Evidence Act* require that documents be produced by the maker. However, Section 33 of the *Evidence Act* provides for the admissibility of statements, whether oral or written, made by persons who cannot be called as witnesses. The exception provides as follows;

> " 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."

10. As previously stated, the 1st respondent was the maker of both affidavits dated 1/7/2016 and 23/7/2018. Paul S. Juma and George Wandati were the advocates who, in the course of their business as advocates, commissioned the respective documents.

11. I find it unreasonable to call both advocates to produce the documents or to testify as to their veracity, given that the maker of the documents was in court and available for cross-examination. In High Chem East Africa Limited v David Njau Wambugu & 4 others [2020] eKLR, the Court, while allowing a letter produced by a witness who was not the maker, stated that;

> " There is no doubt that the letters were made in the course of business of KRA and to insist that it is only the writer of those letters, the KRA officer, who can produce them in evidence would be too odious and unreasonable. The very reason Section 33 was enacted was to ensure that where the calling of witnesses would entail expenses and delay, their presence would be dispensed with. Having that in mind the letters of KRA are admissible in evidence. To insist that KRA officer be called to testify would in my view be unreasonable"

12. The provisions of Order 11 of the Civil Procedure Rules, 2010 provide for pre-trial conferences, which are intended, inter alia, to facilitate the expeditious disposal of suits. To this end, courts are mandated to uphold the objectives set out under Article 159 (2) (b) and (d) as well as Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act* by exploring expeditious ways of introducing evidence at an early stage. Hence, the trial bundle is usually made available well in advance of the trial date. This means that courts are called upon to actively manage cases so that the trial in a harmonious and speedy manner.

13. In the instant case, the appellant submitted that no pretrial was conducted prior to the hearing, and I have confirmed the same. However, the record reveals that prior to the hearing, the parties exchanged various documents and ultimately agreed that they were ready for the hearing on 26/11/2021.

14. Counsel for the respondents before the trial court similarly stated, in response to the appellants' objection, that the appellants had always been aware of both affidavits and thus had the option to challenge them but failed to do so.

15. The provisions of Article 50 (4) of *the Constitution* stipulate that courts have discretion to determine whether admitting documents would be detrimental to the administration of justice, in the following words:

> " Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice"

16. In the case of Ntarangwi M'Ikiara v Jackson Munyua Mutuera [2018] eKLR, the court cited the case of Evangeline Nyegera (suing as the legal representative of Felix M'Ikiugu alias M'Ikiugu Jeremiah

M'Raibuni (deceased) v Godwin Gachagua Githui, where the Court of Appeal in Civil Appeal No 28 of 2016 held that;

> " The test for admission of evidence is relevancy. There is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross examine on veracity and legitimacy if it be necessary"

17. From the foregoing analysis, I find that the appellants presented no evidence to show that the affidavits in question were procured in a manner that violated constitutional principles. The authenticity of the contents of the affidavits, though challenged, was not shown to be illegal. Finally, the appellants would have had the opportunity to cross-examine the witness regarding the witness's veracity and the legitimacy of the affidavits.

18. In conclusion, I find that the trial court did not err in dismissing the appellants' objection. The said ruling is thus upheld. The upshot of the above is that I find this appeal lacks merit and I dismiss it with no orders as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 16TH DAY OF APRIL 2026.

R.E. OUGO

JUDGE

In the presence of:

Mr. Walamwa . R. - For the Appellant

Mr. Museve - For the Respondent

Wilkister C/A