



**Bunde v Osoro & 2 others (Environment and Land Appeal
E017 of 2022) [2024] KEELC 1483 (KLR) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E017 OF 2022
GMA ONGONDO, J
MARCH 18, 2024**

BETWEEN

JOSEPH ODHIAMBO BUNDE APPELLANT

AND

JOHN PHELIX OPIYO OSORO 1ST RESPONDENT

OMONDI OSORO 2ND RESPONDENT

ODONGO OSORO 3RD RESPONDENT

RULING

1. This ruling is in respect of an application by way of an amended Notice of motion dated 19th October 2023 and filed herein on 23rd October 2023 by the applicant, Joseph Odhiambo Bunde, through the firm of Nyakwamba & Company Advocates, seeking the orders *infra*:
 - a. Moot
 - b. Moot
 - c. Moot
 - d. The applicant be granted leave to file additional evidence in support of his case as espoused in his supporting affidavit.
 - e. That the honourable court be pleased to issue further or better orders as shall meet the ends of justice.
 - f. The costs of this application be provided for.
2. The application is anchored on seventeen grounds and the further affidavit of ten paragraphs sworn on even date by the applicant. Briefly, the applicant contends that he had been issued with a grant to



- the estates of Bunde Odongo and Omutu Odongo (deceased 1 and 2 respectively). That however, the grant issued in respect to the estate of deceased 1 was annulled on 12th July 2023, vide Homa Bay High Court Succession Cause No 3 of 2018. That the said court also issued an order directing that LR No Kanyada/Kotieno/Katuma A/885 (the original land) revert back to the names of deceased 1 and 2.
3. Further, the applicant laments that the suit land in the instant appeal to wit, LR No Kanyada/Kotieno/Katuma/2511, is a subdivision of the original land, which was held in equal shares by deceased 1 and 2. That therefore, the additional evidence sought to be adduced has a direct bearing on the main issue in the suit. That the instant application should be allowed in the interest of justice.
 4. The respondents through Robert Ochieng and Company Advocates opposed the application by way a replying affidavit sworn on 31st November 2023 by himself. He stated that there was collusion between the applicant and his counsel to obtain the new evidence that they wish to introduce herein.
 5. The respondent averred that in Homa Bay High Court Succession Cause No 3 of 2018, the applicant’s counsel appeared for the objector as against the applicant herein. That the same occurred during the pendency of this appeal. That allowing the application would greatly prejudice the respondents.
 6. Hearing of the application proceeded by way of written submissions pursuant to the court’s directions of 4th December 2023.
 7. Accordingly, the applicant’s counsel filed submissions dated 3rd January 2024 and identified three issues for determination thus: whether additional evidence can be admitted on appeal, whether there are exceptional circumstances to constitute sufficient reason for receiving fresh evidence on appeal and whether the new evidence was obtained by collusion and connivance? Counsel cited Section 78 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 42 rule 27 of the *Civil Procedure Rules, 2010* and stated that the new evidence they seek to introduce was not obtained by collusion or connivance and the same should be admitted by the court.
 8. Counsel submitted that the objector had a right to choose a counsel of her own choice; the cab rank rule and Article 50(h) of the *Constitution* of Kenya, 2010. Reliance was placed on the case of *Phillip Chemwolo and another v Augustine Kubende* (1986) eKLR, among others, to fortify the submissions.
 9. The respondents’ counsel filed submissions dated 2nd February 2024 and identified two issues for determination namely:
 - a. What evidence is being sought to be introduced in the Amended Notice of Motion application dated the 19th day of October, 2023?
 - b. Is the said evidence “such evidence that could not have been obtained by reasonable diligence before and during the hearing?”
 10. Counsel submitted that the supporting affidavit sworn by the applicant on 19th October 2023 had no exhibits annexed thereto. That therefore, there is nothing that has been presented before the honourable court to warrant consideration. That even if the same had been annexed for consideration, it was obtained during the pendency of this appeal by way of collusion to defeat the ends of justice. That therefore, the application is untenable.
 11. During highlighting of submissions on 21st February 2024, the applicant’s counsel stated thus:

“...I have nothing to orally highlight. We rely on our submissions...”



12. The respondents' counsel stated that allowing the instant application would prejudice the respondents since during the trial, there was an alternative prayer of adverse possession. That the same was not adjudicated upon by the trial court as the issue of trust had been determined thereof.
13. In the foregone, the following issues fall for determination by this court:
- a. Whether the applicant is deserving of leave to introduce new evidence at appeal.
 - b. Who should bear the costs of this application?
14. It is important to note that the applicable law as regards the admission of additional evidence by an appellate court is Section 78 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya which provides that: -
- “(1) Subject to such condition 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; (Emphasis added)
 - (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.”
15. In addition, Order 42 Rule 27 of the [Civil Procedure Rules, 2010](#) provides the procedural rules with respect to the same; see also [Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others](#) [2018] eKLR.
16. At the first instance, I note that the annexures that have been attached to the Supporting Affidavit of the applicant and which the applicant seeks to introduce as additional evidence herein, have not been marked and commissioned by the Commissioner for Oaths. This is contrary to Rule 9 of the [Oaths and Statutory Declarations Rules](#) (under the [Oaths and Statutory Declarations Act](#), Chapter 15 Laws of Kenya) which provides that:
- “All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters for identification.”
17. So, what is the legal effect of the failure to seal and serialise the exhibits as provided for in Rule 9 (*supra*)?
18. In [Francis A. Mbalanya v Cecilia N. Waema](#) (2017) eKLR, the court stated that it is trite in law that an Affidavit and the annexures attached on it constitute evidence. That where a person seeks to prove a fact by way of Affidavit, he is obligated to exhibit any document on his Affidavit. However, before such a document can be received in evidence by the court, the law requires that such a document must be sealed by the Commissioner for Oaths.
19. Indeed, Rule 9 (*supra*) is in mandatory terms, and must be complied with. Therefore, I support the standpoint taken in Mbalanya case (*supra*).



20. Also, I associate myself with the findings of the Learned Judge in the case of *Musikari Nazi Kombo v Moses Masika Wetangula and 2 others* [2013] eKLR, where the court held in part that:

“...The legal requirement relating to securely sealing and marking all exhibits in an affidavit entailed a substantive legal act, within the context of the production of evidence and the admissibility of evidence, and it was not a legal technicality. The requirement would serve to ensure that only proper documents were placed before court and admitted in evidence.

Allowing documents brought in an improper and inappropriate manner to form part of the court’s record would prejudice the administration of justice and it would also go against the law of evidence as it would defeat the aims of safeguarding the fairness of the trial process...” (Emphasis added)

21. In the premises, I am persuaded by the submissions of the respondent’s counsel that there is nothing that has been presented before the honourable court to warrant consideration. The court cannot, thus, make a determination on whether documents that have not been properly presented before it can be adduced as additional evidence.

22. In the end, I find the application incompetent.

23. *Afortiori*, the instant application in entirety is hereby struck out.

24. Costs to be in the cause.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 18TH MARCH 2024.

G.M.A ONGONDO

JUDGE

Present

Mr. Nyakwamba, learned counsel for the applicant

C. Adingo, learned counsel for the respondents

Luanga, Court Assistant

