



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v Rateng (Succession Cause E002 of 2023)  
[2025] KEHC 5080 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5080 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
SUCCESSION CAUSE E002 OF 2023**

**DK KEMEL, J  
APRIL 30, 2025**

**BETWEEN**

**HILDA ANYANGO ONYANGO ..... APPELLANT**

**AND**

**MONICA ATIENO RATENG ..... RESPONDENT**

**RULING**

1. The Appellant herein has filed an application dated 4/2/2025 expressed to be brought under Section 1, 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 42 Rules 2, Order 51 Rules 1,4,6, 10 (1) (2) of the *Civil Procedure Rules* seeking principally an order that the Appellant/Applicant be granted leave to file further evidence in the form of a chief's letter from the Area Chief Rangala Location identifying her as a widow to Vincent Onyango (deceased) who is a son to Odongo Odongo alias Rateng Odongo the previous owner of the suit property herein.
2. The application is based on the grounds set out thereunder and the affidavit of the Appellant/Applicant sworn on even date. The Appellant's gravamen is inter alia; that the Applicant had lodged an objection while acting in person and that she omitted to file the chief's letter' that the issue for determination in the trial court was whether the Appellant was entitled to a share of the deceased's estate on behalf of her deceased husband Vincent Onyango by virtue of being a daughter in law which could only come out through a chief's letter that it is the only fair and just to allow the application.
3. The application was opposed by the Respondent who filed a replying affidavit sworn on 16/3/2025 by the Respondent who averred inter alia that the Appellant is attempting to introduce new evidence that was not put of the evidence on the lower court and which is not admissible at this stage; that the application is an abuse of the court process; that the chief's letter eluded to has not been annexed to the application; that the Appellant and her deceased husband have no legal interest in the estate of the Respondent's late father; that the application should be dismissed.



4. The Appellant filed a supplementary affidavit sworn on 19/3/2025 wherein she averred that she had forgotten to annex two letters from the local chief identifying her as being related to one Vincent Onyango Odongo who is the Appellant's deceased husband and went ahead to annex copies of the two letters as Annexures HAO-1 and HAO-2.
5. The Respondent opted to rely on the contents of a replying affidavit sworn on 6/3/2025 while the Appellant/Applicant opted to file written submissions.
6. The Appellant/Applicant's submissions are dated 30/3/2025. She submitted that Order 42 Rule 27 of the *Civil Procedure Rules* allows the Appellate court to grant the order now sought by the Appellant. Learned counsel sought reliance in the case of *Dorothy Nelima Wafula Vs. Helen Nekesa Nielsen and Paul Fredrick Nielsen* [2017] eKLR.
7. I have given due consideration to the Appellant's application and the rival affidavits as well as the submissions filed. It is not in dispute that the Appellant had filed a summons for revocation in the lower court dated 2/11/2021 which was dismissed by Hon. Sarapai (PM) vide the ruling dated 9/11/2022. It is also not in dispute that the Appellant has not approached the trial court for review of its orders upon discovery of new evidence. It is also not in dispute that the parties herein have already taken directions on the disposal of the appeal to the effect that the same be disposed of by way of written submissions and that the same was yet to be complied with when the present application was filed. I find the issue for determination is whether the application has merit.
8. It is noted that the Appellant's application aforesaid is predicated on Order 42 Rule 27 of the *Civil Procedure Rules* which provides 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 judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.
  - (2) Whenever additional evidence is allowed to be produced by the court which the appeal is preferred the court shall record the reason for its admission.

From the foregoing provisions, it is clear that the Appellant ought to have approached the trial court to be allowed to admit new evidence or even file an application for review pursuant to Order 45 of the *Civil Procedure Rules* upon realizing that she had omitted to annex to her affidavit the chief's letters for the court's consideration. It is only after the trial court declines the request to admit new evidence that the Appellant could approach this court over the same. Again, it is noted that the parties have opted to canvass the application by way of written submissions and not oral evidence. The Appellant having opted to prosecute the appeal by way of written submissions, this court's duty/role to inquire into whether any document needs to be produced or any witness to be examined to enable it pronounce judgment is thereby curtailed. The Appellant is deemed to have exercised her choice wisely and therefore must recon with the same. It is also noted that the Appellant has not satisfied the requisite condition which this court can describe as “sufficient cause” to justify an order to be made for the



Appellant to present additional evidence on appeal. It is my considered view that the Appellant should have approached the trial court for review of its orders upon the discovery of new evidence which could not have been obtained by reasonable diligence and that the said new evidence would have had an important influence on the result of the case if the same was made available to the trial court. It is only after the trial court declines the request that the Appellant could move to this court for appeal. Now that the Appellant has opted to move to this court on appeal regarding the orders of the trial court dated 9/11/2022, she cannot expand the field in this appeal by seeking to introduce new evidence as the same amounts to an ambush on the Respondent yet the appropriate arena should be the trial court.

9. In view of the foregoing observations, it is my finding that the Appellant's application dated 4/2/2025 lacks merit. The same is dismissed with no orders as to costs. The parties are now directed to ensure compliance of the directions issued on 2/2/2025.

**DATED AND DELIVERED AT SIAYA THIS 30<sup>TH</sup> OF DAY APRIL, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of

Ashioya.....for Appellant/Applicant

BF Odhiambo.....for Respondent

Okumu.....Court Assistant

