



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 74 OF 2020**

**NGENDA LOCATION**

**RANCHINF CO. LTD..... APPELLANT/ APPLICANT**

**-VERSUS-**

**HARI GAKINYA.....1<sup>ST</sup> RESPONDENT**

**KEENGWE & CO. ADVOCATES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant (hereinafter 'the Applicant') being aggrieved by the Judgment and Decree of Hon J. B. Kalo in *Nakuru CMCC No. 999 of 2016* filed its Memorandum of Appeal on 08/07/2020. When the matter came up on 25/01/2021, the Applicant's Advocate communicated his intention to file a Supplementary Record of Appeal and an application to adduce further evidence. I directed the Applicant to make a formal application

2. The Applicant filed the Application dated 29/01/2021 seeking the following orders:

*1. Spent*

*2. THAT leave be granted to the Appellant to amend the Memorandum of Appeal as per the draft Amended Memorandum of Appeal*

*3. THAT leave be granted to the Applicant to introduce new evidence by way of Sworn Affidavits.*

*4. THAT the Appellant be granted leave to amend and supplement the Record of Appeal*

*5. THAT the costs of this Application abide by the outcome of the appeal.*

3. The Application is supported by four Affidavits all dated 29/01/2021. The Affidavits are sworn by Gabriel Chege Gichane, a Director of the Applicant, Felister Njeri Cheror, also a Director of the Applicant, Gatheru Gathemia- Advocate and Mbari Kioni- Advocate.

4. In the four affidavits, the Applicant seeks to narrate the origins of the dispute in the hope that the narrative re-told would persuade the Court that the principles for granting the extra-ordinary relief of adduction of new evidence at the appellate stage have been satisfied.

5. The Applicant's account is that upon a resolution to sell a parcel of land belonging to it, the Applicant was contacted by the 1<sup>st</sup> Respondent herein who expressed the ability to assist the Applicant sell the parcel of Land. They then entered into an agreement where the 1<sup>st</sup> Respondent would negotiate the purchase price and receive a commission of any amount over Kshs. 600,000 on every acre sold. Eventually, that commission would amount to Kshs. 11,000,000 given the selling price that was ultimately used.

6. The Applicant says that the 2<sup>nd</sup> Respondent was then appointed as the purchaser's advocate in the transaction. The Applicant says that the two advocates- the Applicant's advocates – Mbari Kioni & Company Advocates - and the 2<sup>nd</sup> Respondent entered a professional undertaking that the said commission would be deposited in an account held by the 2<sup>nd</sup> Respondent and would be transmitted to the 1<sup>st</sup> Respondent upon the completion of the transaction. Upon the completion of the transaction, the Applicant says that the same was never transmitted to the 1<sup>st</sup> Respondent and is to date, being held by the 2<sup>nd</sup> Respondent.

7. According to the Applicant, the circumstances surrounding the 2<sup>nd</sup> Respondent retaining the commission are that under the terms of a Sale Agreement dated 02/10/2014, the Agent's Commission was to be retained by the Purchaser's Advocate -the 2<sup>nd</sup> Respondent. Further, that according to a Professional Undertaking between the firm of Mbari Kioni & Co. Advocates and the 2<sup>nd</sup> Respondent, it was agreed that they would transmit the amount due as commission to the 1<sup>st</sup> Respondent. Thereafter the proprietor of the 2<sup>nd</sup> Respondent suggested the bank where the joint escrow account would be opened, after which they- Mbari Kioni & Co. Advocates - received the total sum of Kshs. 150,744,000 less the sum of the agreed commission. After the completion of the transaction, the Applicant says its advocates withdrew, transferred the purchase price to their client and left the commission monies in the joint escrow account in the 2<sup>nd</sup> Respondent's bank account. The 2<sup>nd</sup> Respondent was to retain the monies and release it to the agent upon registration of the transfer.

8. It is the Applicant's claim that from the record of the Trial Court, there was an ostensible conspiracy to suppress the facts of the case, particularly regarding the understanding reached between the Applicant and the 1<sup>st</sup> respondent. The Applicant also claims that to the extent that the matter consists of perjured sworn statements by some key witnesses, it would be instructive to involve various state agencies to shed light on the matter before the Court reaches its verdict, and for the Court to rely on that expert testimony to unearth and determine the accurate facts on whether the alleged sum of Kshs. 11,000,000 was diverted by the 2<sup>nd</sup> Respondent.

9. From the Affidavit of Felister Cheror, the Applicant says that the additional facts which ought to be brought before the Appellate Court are that the 2<sup>nd</sup> Respondent presented false evidence before the Trial Court and the true facts did not emerge during the Trial at the Lower Court. She also deposes that the Applicant's Board of Directors was kept in the dark regarding the case until the time of the judgment and information from the Applicant's Chairman Joseph Wahogo was not forthcoming. According to her, it is through subsequent meetings, that it has now become clear that the 2<sup>nd</sup> Respondent is the one who retained the commission meant for the 1<sup>st</sup> Respondent.

10. The application is fervently opposed through the Replying Affidavit dated 11/03/2021 sworn by Samuel Bogonko Keengwe, the proprietor of the 2<sup>nd</sup> Respondent. He is not opposed to the Applicant filing a Supplementary Record of Appeal but says that the same should only be limited to documents tendered as evidence before the Trial Court. He is opposed to the application to tender new evidence, particularly, the four affidavits and the annexures in support of the Application.

11. His contention is that the new evidence suggested to be brought by way of Affidavits will not be subject to cross-examination in the normal manner of trial and is an abuse of the Appellate Jurisdiction of the Court. The 2<sup>nd</sup> Respondent contends that a party cannot introduce fresh evidence, which is a complete departure from its pleadings and evidence adduced at trial. He also contends that the matter having been determined by a Court of competent jurisdiction, the present application is an attempt to prosecute an appeal and a review at the same time. He contends further that the Applicant has not expressly identified which specific documents and evidence could not have been obtained with reasonable diligence at trial. He says that having testified at trial and having been cross examined, he is certain that the evidence contained in the said affidavits was never presented at trial.

12. The 2<sup>nd</sup> Respondent's narrative on the order of events is that the law firms of Mbari Kioni and Gatheru Gathemia handled the transaction for the Appellant while the 2<sup>nd</sup> Respondent handled the transaction for the purchaser from beginning to end and was released from the professional undertaking given at the end of the transaction. To his knowledge, commission for the said transaction was paid to Advent Valuers Ltd. who were the known appointed agents of the Appellant. He contends that his firm forwarded the full purchase price to the firm of Mbari Kioni & Co. Advocates, who acknowledged receipt.

13. He alleges that during the pendency of the case at the Trial Court, the plan to 'fix' his firm to pay the Commission to the 1<sup>st</sup> Respondent fell through and he suspects that this may be second attempt to do so, with the allegation that he retained the commission. He believes that the same may be intended for the benefit of the 1<sup>st</sup> Respondent and certain Senior Provincial Administrators, who previously frustrated the land transaction and to interfere, influence and defeat the proceedings in **Nakuru HCCC No. 36 of 2019** currently before the High Court.

14. It is the 2<sup>nd</sup> Respondent's Replying Affidavit of 11/03/2021 and annexures thereto that prompted the filing of further multiple Affidavits by the Applicant. The Applicant filed a total of six new Affidavits. First was the affidavit of James Wagemu Ruitha dated 22/03/2021. James identifies himself as a valuer practising as Advent Valuers Ltd. His affidavit is to the effect that certain annexures to the 2<sup>nd</sup> Respondent's Affidavit contain forgeries. Particularly, a forged signature on the letter dated 18/10/2016, a forged letterhead, receiving stamp and signatures on the letters dated 04/10/2016 and forged receiving stamp and signatures on the letter dated 14/10/2016. He has annexed a Report by a Forensic Document examiner to that effect. He also denies his company's involvement in the sale of any property owned by the Appellant or any dealings with Stima Investment SACCO Ltd. He denies having ever received any money from the Appellant for the sale of any property.

15. The second affidavit is by Joseph Wahogo Karari, a Chairman/Director of the Applicant. It is dated 22/03/2021. His affidavit is to the effect that the contents of the minutes on Page 6 of the 2<sup>nd</sup> Respondent's Replying Affidavit together with the signature thereupon purporting to be his signature are forgeries. He also denies the allegation that the Applicant appointed one James Ruitha of Advent Valuers to act as its Sales agent and points to the findings of the Forensic Document Examiner's Report attached to Mbari Kioni's affidavit.

16. The third affidavit is by Dorcas Njoki Gathegu, also dated 22/03/2021. She says she worked for the firm of M/S Mbari Kioni & Co. Advocates and was tasked with typing letters and legal documents, collecting money paid by clients and issuing receipts and taking messages among other administrative tasks. She deposes that in the year 2009, Mrs. Mbari Kioni left her office and left the firm of Gatheru Gathemia, whom she shared an office with to manage all the affairs of her law firm and she- Dorcas continued to work for both firms until 2014.

17. Her affidavit is to the effect that the receipt attached at page 15 of the 2<sup>nd</sup> Respondent's Replying Affidavit purporting to be from the firm of MS Mbari Kioni and Company Advocates is a forgery. She also claims that the documents attached at pages 7,14 and 15 of the said Affidavit are also forgeries. She however acknowledges the receipts at page 11 and 13 of the said affidavits to be authentic.

18. The fourth Affidavit is by Pius Musembi, a Court Clerk and Personal Assistant at the firm of Mbari Kioni & Co. Advocates. He concurs

with the Affidavits of Mbari, Kioni, Gatheru Gathemia and Dorcas Njoki regarding the impugned documents. He deposes that from the year 2009 when Mr. Gatheru Gathemia took over the office of Mbari Kioni & Co. Advocates, he calls him to collect cheques issued in the name of Mbari Kioni & Co. Advocates and any other crucial documents. He also says that the receipt shown at page 15 of the 2<sup>nd</sup> Respondent's Affidavit is a forgery and acknowledges the receipts on page 11 and 13 of the 2<sup>nd</sup> Respondent's affidavit as the authentic receipts.

19. The fifth affidavit is sworn by Mbari Kioni- Advocate. It is dated 22/03/2021. She confirms that the amounts of Kshs.37,686,000 each were paid to her firm on by the 2<sup>nd</sup> Respondent on 17/10/2014 and 22/05/2015 respectively and receipts issued thereof, while the last instalment of Kshs. 75,372,000 was paid on 17/06/2015 totalling to Kshs.150,744,000.

20. She denies having ever received Kshs. 85,421,600 on 09/05/2016 as purported by the 2<sup>nd</sup> Respondent and states that the receipts, purported to have been issued by her firm are forgeries. She also believes that the purported signatures by the Appellant's Chairman- Joseph Wahogo Karari and the purported Letters from Advent Valuers Ltd are also forgeries. She alludes to a complaint lodged with the Directorate of Criminal Investigations based on the expert opinion of a Forensic Document examiner. Lastly, she associates with the depositions in the Affidavits of James Wagemu Ruitha, Gatheru Gathemia, Dorcas Njoki and Pius Musembi.

21. The sixth Affidavit is by Gatheru Gathemia- Advocate. It is dated 22/03/2021. He maintains that under the terms of the Sale Agreement and Professional Undertaking dated 18/09/2014 it was the 2<sup>nd</sup> Respondent who retained the sales commission of Kshs. 10,049,600 and the obligation never changed. He contends further that two amounts of Kshs.37,686,000 each were remitted to the Law Firm of Mbari Kioni & Co. Advocates via RTGS and two receipts -No. 341 dated 22/10/2014 and No. 161 dated 02/06/2015 issued. According to him, the documents produced at pages 6,7,8,14 and 15 of the 2<sup>nd</sup> Respondent's Affidavit are all forgeries as demonstrated by the attached Report of the Forensic Document Examiner,

22. He says that the Applicant's advocates having received the total the sum of Kshs. 150,744,000, there was no need for them to receive an additional Kshs. 85,421,600 as alleged by the 2<sup>nd</sup> Respondent. He denies any departure from their pleadings in the Lower Court and restates that there was an apparent collusion between the Trial Magistrate and the 2<sup>nd</sup> Respondent to assign liability to the Applicant. He wonders why 2<sup>nd</sup> Respondent would transmit the money meant for commission to other third parties without proof of the same yet it was a variation of the agreement and Professional Undertaking. From the above facts.

23. The 2<sup>nd</sup> Respondent then filed a Further Replying Affidavit dated 29/03/2021 sworn by Samuel Bogonko Keengwe. He states that the additional evidence the Applicant intends to rely on is under investigations by the Directorate of Criminal Investigations and is therefore premature to seek orders based on the same. He says that five years have lapsed since the transaction took place, his law firm released from the professional undertaking, and it is therefore an afterthought for the Applicant to state that the evidence it seeks to adduce was not within its knowledge at the time of the hearing before the Trial Court.

24. He contends further that the Applicant has not shown that the evidence it seeks to rely on could not be obtained by reasonable diligence. He believes that the said evidence has always been in the possession of the Applicant and would have been adduced before the Trial Court upon reasonable diligence. He believes that the Applicant's intention is to make a different case other than the one it made in the Trial Court since the allegations of fraud and the claims against the 2<sup>nd</sup> Respondent were never made at the Trial Court.

25. To him, the depositions in Mr. Gatheru Gathemia's affidavit lack legal foundations to amount to evidence by affidavit. He discredits the report by the Forensic Document Examiner for various reasons: First for not swearing an affidavit to support his findings, the absence of a letter of instructions from the two law firms and the lack of proof of academic qualification. He states further that the said report is based on limited documents intended to secure particular results and does not state whether the examined documents were originals or originals and copies, which would make him arrive at different conclusions.

26. He also states that the documents exhibited in his Replying Affidavit especially exhibit A1 has the seal of the Appellant which has not been mentioned in the Report and the report only mentions stamps, logos, signatories and impressions which could change from time to time. No watertight conclusions have been provided for the same to enable the court to rely on them.

27. He also says that the said Forensic Document examiner has not specified the dates of the signatures and the variations thereof or compared them to documents made at the same time and they therefore lack authenticity in addition to not displaying proof of his certification.

28. He insists that it was only after all the commission had been paid that his law firm was issued with a receipt by Mbari Kioni for all the received money amounting to Kshs. 85,421,600. He denies that there is any discrepancy in the sale price and commission and that the agency commission was Kshs. 10,049,600 and the sale price was Kshs.150,744,000 totalling to Kshs. 160,793,600. He questions further why since 2016, the Applicant has never made any demand for the alleged unpaid commission and states that if indeed the commission had not been received, the two law firms representing the Applicant would have received his letter of 12/10/2018 under protest and disputed the tabulation indicated in that letter.

29. He contends that Mr. Gatheru Gathemia had indicated to him that Mrs. Mbari Kioni was indisposed and that Mr. Gatheru Gathemia collected all the commission agency fees in cash from the purchaser, after indicating that he was under undue pressure to pay the commission, which he conceded to. He maintains that every amount collected by Mr. Gatheru Gathemia was acknowledged in a note, which the 2<sup>nd</sup> Respondent kept until they received a receipt acknowledging receipt of all the monies totalling to Kshs. 85,421,600, both from the escrow account and in cash, together with a letter releasing him from the professional undertaking that he released all the original acknowledgement notes.

30. He also states that due to the large number of persons claiming to be agents in the transaction, he requested for a resolution by the

Applicant appointing an agent, a letter confirming payment of agent fees. His firm having been released from the undertaking, he requested to collect these documents which he picked personally from Mr. Gatheru Gathemia.

31. He deposes that the signatures of Mr. Gatheru Gathemia vary in all documents giving no clear indication of his true signature as shown in the annexures marked SK-2(a) to 2(e), as such he ought to have disclosed all these variations to the Forensic Document examiner unless he wished to achieve a manipulated result. He discredits the alleged employment of Pius Musembi and Dorcas Njoki Gathegu by the firm of Mbari Kioni & Co. Advocates and contends that they have not shown any proof of the same and that Dorcas Gathegu having information on the workings at the said firm after leaving employment is hearsay and ought to be disregarded.

32. In response to the Affidavit by Joseph Wahogo Karari, Mr. Keengwe deposes that the same is contradictory to the evidence given by the same witness in the Lower Court since he claimed not to know who the appointed Commission Agent was and that his signatures are also varied in the various documents filed before the Lower Court and those submitted in this Court.

33. In response to the affidavit by Mbari Kioni, Mr. Keengwe contends that the said advocate was not in active service and her averments concerning the transaction in question amounts to hearsay. He contends further that she is unclear on the amount of the agency fees payable, indicating Kshs. 11,000,000 at paragraph 3 and Kshs 10,049,600 at paragraph 12. The other discrepancy he says is Mbari Kioni admitting to having received Kshs. 150,744,000 yet only acknowledging the receipt showing Kshs. 75,372,000 without indicating how the balance was received.

34. In response to the Affidavit of James Wagemu, Mr. Keengwe states that the signature the Deponent alleges to have been forged appears at various introduction letters to various organizations by Advent Valuers as shown in Annexures marked SK-1(a) to 1(c). He contends that the Applicant has varied letterheads and stamps to deceive the court. He maintains that Mr. Ruitha held himself out as the Managing Director of Advent Valuers, which was appointed as an agent in the transaction.

35. Mr. Keengwe believes that the Applicant is only seeking to introduce a new claim at the appeal stage with the aim of recanting evidence given at the Trial Court and add a claim against the 2<sup>nd</sup> Respondent. Lastly, he contends that the application is bad in law, an abuse of the Court process and offends the provisions of Order 1 Rule 24 of the Civil Procedure Rules.

36. The Applicant's final affidavit is also by Gatheru Gathemia- Advocate. It is dated 27/05/2021. He deposes that the 2<sup>nd</sup> Respondent's Affidavit dated 29/03/2021 is a departure from the 2<sup>nd</sup> Respondent's pleadings in the Lower Court. He alleges that the 2<sup>nd</sup> Respondent never tendered this evidence at the Lower Court when the matter was heard. He maintains that despite sharing premises with the Firm of Mbari Kioni & Co. Advocates, the two law firms have always been distinct entities and despite managing the affairs of the law firm on behalf of Mbari Kioni, she still handles all her finances, and he does not have the authority to receive monies on her behalf.

37. He contends that after Mbari Kioni went to receive treatment, his firm defended the suit in the Lower Court without the benefit of and advantage of crucial information that was held by the firm of Mbari Kioni.

38. The 2<sup>nd</sup> Respondent insists that the 2<sup>nd</sup> Respondent was aware that the correct agent for the transaction was the 1<sup>st</sup> Respondent and further that the Applicant is being deceitful. He also contends that the 2<sup>nd</sup> Respondent had been aware that the appointed agent was the 1<sup>st</sup> Respondent and had even exchanged correspondences. It is therefore not true that the said commission was paid out to the Applicant since no proof of the said payment has been adduced. He states that the amount of the commission would have required that the same be drawn out in 11 instalments under the current Central Bank Regulations, which drawings he says have not been demonstrated by the 2<sup>nd</sup> Respondent.

39. The 2<sup>nd</sup> Respondent states further that there is an admission in paragraphs 16,17 and 24 of the said affidavit and the pleadings by the 2<sup>nd</sup> Respondent contain inconsistencies as to the whereabouts of the said commission monies. He alludes to having been present at a meeting between the 2<sup>nd</sup> Respondent and the said Mbari Kioni to discuss the transaction. He denies the assertion that the commission was paid in cash since all payments relating to the transaction were done via RTGS to the firm of Mbari Kioni & Co. Advocates. According to him, the obligation to pay commission did not lie with the Mbari Kioni & Co. Advocates but rather lay with the 2<sup>nd</sup> Respondent.

40. The 2<sup>nd</sup> Respondent also denies any release of receipts to him as alleged under Paragraphs 23 and 24 of the said Affidavit. He further denies the amount awarded by the Trial Court and states that the same ought to have been Kshs. 10,049,600 and not Kshs. 11,000,000 as awarded.

41. All three parties filed their submissions. The Applicant's submissions are dated 15/06/2021. The Applicant relies on the provisions of Order 42 Rule 27 of the Civil Procedure Rules. It also relies on the case of **Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR** where the Court of Appeal laid down the governing principles on allowing additional evidence at the appellate stage. It submits that the additional evidence it intends to produce will impact the result of the case and help the Court determine the matter on merit.

42. It is the Applicant's submission that by disclosing new facts in his Replying Affidavits, the 2<sup>nd</sup> Respondent has essentially conceded to the introduction of new evidence. Further, the Applicant argues that the 2<sup>nd</sup> Respondent has departed from his pleadings in the Trial Court, which warrants that the matter be retried afresh.

43. The Applicant also submits on alleged forgeries by the 2<sup>nd</sup> Respondent and argues that the report by the Forensic Document Expert has not been countered by another expert. It relies on the case of Ali Mohamed **Sunkar v Diamond Trust Bank Ltd [2011] eKLR**. Lastly, the Applicant alleges Partiality of the Trial Magistrate in handling the matter saying that the Trial Magistrate ignored the evidence showing that the 2<sup>nd</sup> Respondent retained the Sales Commission in the transaction. On the issue of amendment of the Memorandum of Appeal, the Applicant relies on the provisions of Order 42 Rule 3 of the Civil Procedure Rules.

44. From the 1<sup>st</sup> respondent's submissions dated 31/08/2021, the 1<sup>st</sup> Respondent is not opposed to the application and asks that the same be allowed on condition that evidence being produced is credible and will help decide the appeal. The 1<sup>st</sup> Respondent relies on the case of **EO v COO [2020] eKLR**. He agrees with the finding of the Trial Court on the amount of Commission and submits that they intend to oppose the appeal
45. The 2<sup>nd</sup> Respondent filed their submissions dated 15/07/2021. The 2<sup>nd</sup> Respondent submits that the jurisdiction to introduce new evidence at the appellate stage ought to be exercised sparingly and relies on the case of **Francis Gicharu Kariri v Peter Njoroge Mairu [2005] eKLR** and Section 78(1) of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules 2010. The 2<sup>nd</sup> Respondent has also cited the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR**. The 2<sup>nd</sup> Respondent argues that the information now sought to be introduced by the Applicant would have been easily obtained had it exercised due diligence and does not in any way influence the finding of the Trial Court. Further, the 2<sup>nd</sup> Respondent argues that all the Deponents of the affidavits that seek to introduce the new evidence have always been available to give their testimony. He submits that the application herein is meant to strengthen the Applicant's case and patch up lacunas in its case at before the Trial Court.
46. On the reason given that the Advocate Mbari Kioni was away for surgery, the 2<sup>nd</sup> Respondent submits that the said Advocate was away in 2013 while the trial was conducted in 2019, which cannot be a valid reason for not availing any evidence.
47. It is also the 2<sup>nd</sup> Respondent's submission that the evidence sought to be produced will not have any impact on the outcome of the appeal. He argues that the same will not change the question of whether the 1<sup>st</sup> Respondent was an agent of the Applicant. The suit against the 2<sup>nd</sup> Respondent in the Trial Court having been dismissed with Costs to the 2<sup>nd</sup> Respondent, it is the 2<sup>nd</sup> Respondent's submission that he was wrongly enjoined in the suit since an agent should not be sued where there is a known principal. He relies on the case of **Victor Mabachi & Another v Nurtun Bates Limited [2013] eKLR**. He submits therefore the orders sought against the 2<sup>nd</sup> Respondent cannot be sustained.
48. The 2<sup>nd</sup> Respondent also submits that the decision of the Trial Court cannot be reviewed and appealed at the same time. He contends that prayer (c) of the Application is seeking a review at the appellate stage and that the Applicant can only either review the decision of the Trial Court or appeal against the same, He relies on the case of **Mary Wambui Njuguna v William Ole Nabala & 9 Others [2018]**.
49. On the issue of amendment of the Memorandum of Appeal, the 2<sup>nd</sup> Respondent argues that the Applicant cannot introduce a new claim against the Co-Defendant when the same was not raised in the Subordinate Court. He argues that having failed to issue a Notice to Co-Defendant under Order 1 Rule 24 at the Trial Court, raising a claim against the 2<sup>nd</sup> Respondent at the Appellate State amounts to trial by ambush. He relies on the case of **Kihuha James & another v Margaret Njeri Ngure [2017] eKLR**.
50. On the factual issues, the 2<sup>nd</sup> Respondent reiterates that his being discharged from the professional undertaking was evidence that all the monies had been paid to the Applicant's advocates, there was not partiality on the part of the Trial Magistrate and that the Applicant has departed from its pleadings in the Lower Court. He also contends that the documents he has now produced were never necessary in the Lower Court and that the only reason for producing them at this stage was in answer to the Allegations levelled against him by the Applicant.
51. On the allegations of forgeries, the 2<sup>nd</sup> Respondent relies on the provisions of Section 107 of the Evidence Act and reiterates that the maker of the Forensic Examination Report has failed to swear an affidavit in support of his findings.
52. In conclusion, the 2<sup>nd</sup> Respondent submits that the Applicant has failed to meet the criteria for the introduction of new evidence at the Appeal stage. He relies on the case of **Wanjie & Others v Sakwa & Others [1984] KLR**
53. The Two issues that emerge are first, whether it would be prejudicial for the Applicant to amend its Memorandum of Appeal in the manner sought. Secondly, whether the Applicant has met the threshold for the introduction of new evidence at the appeal stage.
54. The guiding principle on amendment of pleadings was stated by the Court of Appeal in **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR** as follows:
- Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).*
55. The proposed paragraphs to be included in the Amended Memorandum of Appeal include a prayer to essentially, substitute the Applicant with the 2<sup>nd</sup> Respondent as the Judgment Debtor. The other amendments include, grounds upon which this prayer is sought. It will then be upon the Court to consider the prayer and the supporting grounds and reach its conclusion at the hearing of the substantive appeal. In the event the Applicant is unsuccessful, the Respondents can be compensated in Costs. It would therefore not be prejudicial to allow the amendments sought.
56. The gist of the Applicant's application is that the evidence he seeks to introduce was not in its possession at the time when the matter was heard and could not have been obtained with reasonable diligence. Another reason advanced by the Applicant is that there was failure of justice in the trial and that the outcome of the Subordinate Court's decision by virtue of omission and/or oppression of the correct facts. The Applicant now seeks to introduce new evidence, which it alleges is relevant and will directly influence the outcome of the appeal.
57. Both the Applicant and the 2<sup>nd</sup> Respondent have relied on the case of **Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR**, with the Applicant arguing that it has met the criterion laid therein and the 2<sup>nd</sup> Respondent arguing that the Applicant has not met that criterion. In the **Mohammed Abdi Mahamud Case** the Supreme Court comprehensively and authoritatively laid out the

principles to be considered in determining whether an appellate Court should accept the adduction of additional evidence. The Court laid out the following principles:

79. 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 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 making 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 utilized 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.*

58. After laying down this criterion, the Supreme Court also remarked:

*We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.*

59. Applying this multi-pronged test enunciated by the Supreme Court to the case at hand, it is my considered view that the Applicant has failed to meet the threshold for the grant of the extraordinary relief of being permitted to adduce additional evidence at the appellate level. I say so for at least three controlling reasons.

60. *First*, the explanation offered by the Applicant for failing to produce during trial the evidence now sought to be produced is not a credible and satisfactory one. This is the most paramount consideration in an application to introduce fresh evidence at the appeal stage because it guards against the real prejudice that an appellant could use this procedure to patch up their case and cushion against weaknesses identified by the Trial Court. In this case, the explanation given by the Applicant is that Mrs. Mbari Kioni, the Advocate who initially handled the transaction was not available to avail the evidence. However, the record supplied by the Applicant itself suggests that the said Mrs. Mbari Kioni was away sometime in 2013. It does not indicate her unavailability after 2014 or thereafter, even up to the time the trial was being conducted.

61. In ***Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat [2014] eKLR*** the Court of Appeal rejected the introduction of new evidence at the appeal stage when it was apparent that the Applicant had access to the said evidence at the initial trial. It was stated thus:

*We are of a similar view regarding the letter which the applicant claims was authored by the deceased. This is a letter that has been in the applicant's possession since the death of her husband. She had it all along during the course of the trial. Again, it is unclear why she failed to adduce it if she felt that it would aid her cause. We must reiterate that it is the duty of the applicant to demonstrate to this Court that the additional evidence sought to be adduced was not available during the trial.*

62. *Second*, the Applicant was represented by Gatheru Gathemia, one of the Advocates who also handled the transaction that is the subject of the present appeal. It is inconceivable that the said advocate was not able to obtain the documents now sought to be produced. It is also odd that the Applicant gives the absence of Mrs. Mbari Kioni as the reason for inability to procure the evidence but also says that the said Mrs. Mbari Kioni -advocate has always been available to attend her matters and deal with all financial issues arising therefrom. This is my view, points to a lack of candour on the Applicant's part.

63. It is important to point out that the evidence sought to be adduced now is mainly in the form of affidavits. All the six deponents of these affidavits were available and accessible to the Applicant and its lawyers during the trial. The argument given that there was a “conspiracy” to suppress evidence by the 2<sup>nd</sup> Respondent is unavailing: it was incumbent upon the Applicant to prove its case on a preponderance of evidence. If the Applicant legal strategy was one where it did not think it important to adduce the evidence it now seeks to adduce, then the Applicant made that bed; it must lie on it.

64. *Third*, throughout the proceedings in the Trial Court, the Applicant’s narrative was that it had never appointed the 1<sup>st</sup> Defendant as its agent and that it had never at any point entered any principal-agent relationship with the 1<sup>st</sup> Respondent. The narrative which the Applicant seeks to proffer through the additional evidence is radically different: it now seeks to demonstrate that the 1<sup>st</sup> Respondent was indeed its agent and that the monies to be paid to him were paid out to the 2<sup>nd</sup> Respondent who was to transmit the same to the 1<sup>st</sup> Respondent but failed to do so.

65. Indeed, all the additional evidence sought to be produced is meant to support the assertion that the 1<sup>st</sup> Respondent was the Appellant’s agent and that the monies to be paid to him were paid out to the 2<sup>nd</sup> Respondent who was to transmit the same to the 1<sup>st</sup> Respondent but failed to do so. This assertion is untenable. The Applicant cannot purport not to have known that it appointed the 1<sup>st</sup> Respondent as its agent, or that it had paid out monies to the 2<sup>nd</sup> Respondent. Had this been the Applicant’s narrative in the Trial Court, then there would arise the need to produce fresh evidence to demonstrate the agency relationship or the transfer of monies to the 2<sup>nd</sup> Respondent for onward transmission. This is not the case. It appears that the Applicant, having been unsuccessful at the Trial Court is only seeking to adduce additional evidence to make a fresh case in appeal and fill up omissions and patch up the weak points in its case. This is impermissible. If permitted to pursue this course, the Applicant would, in essence, be allowed to change its case completely at the appellate stage. This is certainly not one of the objectives of the extra-ordinary relief of being permitted to adduce additional evidence.

66. The upshot, then, is that make the following orders:

- a) **The Amended Memorandum of Appeal dated 27/05/2021 and filed on 16/06/2021 be deemed as duly and properly filed.**
- b) **The Prayer for introduction of fresh evidence is declined. For the avoidance of doubt the Applicant shall only file a Supplementary Record of Appeal to include any documents filed at the Trial Court which were omitted in the Record of Appeal.**
- c) **The Applicant shall pay to the 2<sup>nd</sup> Respondent the costs of this Application.**

67. Orders Accordingly

**Dated and Delivered at Nakuru this 17<sup>th</sup> day of February, 2022**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.