



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 484 OF 2015**

**GOVERNORS BALLOON SAFARIS LIMITED .....APPELLANT**

**VERSUS**

**ZACHARIA W. BARAZA T/A SIUMA AUCTIONEERS .....RESPONDENT**

**RULING**

1. This ruling determines the application by way of Notice of Motion dated 22<sup>nd</sup> February 2016 brought under certificate of urgency by the applicant/appellant Governors Balloon Safaris Limited. The application is brought under the provisions of Order 42 Rule 27(1) (b) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. In the application, the applicant seeks orders.

1. Spent

2. That the appellant be granted leave to produce additional documentary evidence in the appeal.

3. That the costs of this application be provided for.

2. The application was predicated on the grounds that:

a) The present appeal originates from a decision by the Auctioneers Licensing Board (AUCTIONEERS LICENCING BOARD) and by dint of Section 25 of the Auctioneers Act, the appeal is intended to be an expeditious and or summary process.

b) The underlying subject matter of the proceedings comprises of various trading assets and or vehicles of the appellant, which the appellant contends were unlawfully attached by the respondent contrary to the law as espoused under the Auctioneers Act Order 5 of 1996.

c) The additional documentary evidence that the appellant wished to produce and rely upon in the appeal is a letter from the judiciary, office of the Ombudsperson which has subsequently established that the Disciplinary Committee relied on false and perjured evidence when making the decision appealed against.

d) It is in the interest of justice that the above evidence be produced in the appeal for the fair determination of the appeal in order to prevent a miscarriage of justice.

3. The application was further supported by an affidavit sworn by Justin Grammaticas the Executive

Director of the appellant company who deposes that the ruling by the Auctioneers Licensing Board contained in their letter of 2<sup>nd</sup> October 2015 was based on an affidavit which was false and which annexed Notice of proclamation which were never filed in court on 8<sup>th</sup> November 2014 as alleged by the respondent; that the said new evidence is crucial to the determination of the appeal and that if allowed will prevent miscarriage of justice. The affidavit annexes the letter dated 25<sup>th</sup> January 2016 from the Judiciary Ombudsperson Mr Kennedy Bidali claiming that their office had cross checked with the Deputy Registrar, High Court Commercial Division who had confirmed that the said documents filed by the respondents on 8<sup>th</sup> November 2014 were suspect as they did not form part of the court record. That letter was addressed to Department of Criminal Investigations and copied to Sharply Barret and Company Advocates.

4. The application is opposed by the respondent Zachariah W. Baraza T/A Siuma Traders who filed an affidavit sworn on 2<sup>nd</sup> March 2016. In the said affidavit, the respondent contends that the application by the appellant/applicant lacks merit and amounts to an abuse of court process and should be dismissed with costs; that the admission of 'new' evidence which was not produced to the Auctioneers Licensing Board amounts to the appellate court hearing the matter afresh and amounts to a miscarriage of justice since:

- a) The office of the Ombudsman had never contacted the respondent to give him a hearing over their purported investigation.
- b) The letter from the Ombudsman is inconclusive in its findings as to the authenticity of the proclamation notice.
- c) That it was the registry which stamped the proclamation notice and the respondent did not notice that the notice was stamped 8<sup>th</sup> November 2014 until the time the complaint was being heard and that such error had to be explained by the court registry itself.
- d) That such errors in stamping documents are common place as shown by the appellant's own notice of motion dated 21<sup>st</sup> July 2015 bearing two stamps.
- e) That there is an order in HCCC 461/2008 for the applicant to pay the respondent's costs which have not been settled to date and that despite the appellant's attempts to appeal against costs vide CA 32/2015, the Court of Appeal dismissed their application for stay of execution pending appeal;
- f) that it was after the High Court in HCC 461/2008 decision refusing to set aside orders on costs as taxed that the applicant filed a complaint before Auctioneers Licensing Board hoping to procure the release of the attached goods without paying costs ordered by the Court in HCC 461/2008;
- g) that the applicant is a vexatious litigant and hence this court should not entertain the present application and that the applicant had not met the threshold required for the orders sought.

5. The parties' advocates agreed to canvas the application by way of written submissions. The applicant's submissions dated 16<sup>th</sup> March 2016 were filed on 16<sup>th</sup> March 2016 whereas the respondent's submissions dated 21<sup>st</sup> March 2016 were filed on 22<sup>nd</sup> March 2016.

6. In their submissions, the applicants maintained that the new evidence was not before the lower court or tribunal at the time when the decision appealed against was made. They relied on **Sadrudin Sarrif Vs Tarlochan Singh S/OJwala Singh [1961] EA 72 and Wanje V Sakwa [1984] KLR 275** which decision set out the principles upon which an appellate court in civil cases will exercise its discretion in deciding whether or not to receive further evidence and in what circumstances, which decisions are of the Court of Appeal and which are binding on this court.

7. Applying the said principles to the instant case, the applicant maintained that at the time when the reference was heard before the Auctioneers Licensing Board, the appellant had no reason to believe or know that the respondent had committed the acts of fraud apparent in exhibit JG 2 which had a forged court stamp; that the respondent filed its replying affidavit on the eve of the hearing of the disciplinary proceedings thereby giving the applicant no time to check the correct position from the court file regarding the filing of the alleged proclamation; that the applicant seeks to introduce the best evidence in the determination of the crucial issue in the appeal regarding the validity of a document allegedly filed in court by the respondent; the evidence if allowed will have an important bearing on the appeal and may in fact determine the appeal; the credibility of the evidence cannot be challenged taking into consideration that it originates from the court record, and is officially given by the Ombudsperson relying on official confirmation given to him by the Deputy Registrar of the High Court; and that the evidence corroborates the appellant's evidence. The applicant urged this court to allow its application with costs.

8. In the respondent's written submissions, it was contended that the application by the applicant is untenable and that it amounts to asking this court to rehear the complaint before the Auctioneers Licensing Board which it does not have jurisdiction to hear; that the letter from the Ombudsperson dated 25<sup>th</sup> January 2016 is inconclusive in that it does not put the issue of whether the proclamation notices were stamped by the court or not but merely asks the Director of Criminal Investigations to investigate to establish whether a crime had been committed, which inconclusiveness cannot affect the findings of this court when it hears the substantive appeal. Reliance was placed on **James Mwangi Nganga Vs Kenyatta University Council & 4 Others [2009] e KLR** where the Court of Appeal laid down conditions that must be satisfied before the court's discretion can be invoked or exercised in favour of the applicant in circumstances as those prevailing in this case.

9. The respondent maintained that the purported new evidence would not conclusively determine this appeal and that to admit the said new evidence would be in breach of the rules of natural justice as the respondent will not have a chance to rebut that evidence or even question its veracity since the Ombudsman never gave the respondent a hearing under Article 47 of the Constitution and the provisions of the Fair Administrative Act of 2015.

10. It was further submitted by the respondent that the applicant was trying to fill in the gaps and omissions in its case by seeking to introduce new evidence on appeal; that no explanation had been provided as to why the applicant never sought an adjournment before the Auctioneers Licensing Board in order for the applicant to obtain this new evidence. More reliance was placed on the English Decisions in **LADD V Marshall [1954] 1 WLR 1489 and Skone V Skone [1971] KLR** cited in **James Nganga** case (supra) where the courts stated that for new evidence to be admissible, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial and that what the applicant was currently doing was to try and make up for its failure to adduce proper evidence before the AUCTIONEERS LICENCING BOARD in order to build a strong case on appeal hence, it had not fulfilled the conditions for granting of the orders sought and therefore the application should be dismissed with costs to the respondent.

#### **Determination:**

11. I have carefully considered the application for leave to adduce additional evidence on appeal, the opposition thereto and the parties' advocates' rival submissions together with statutory and case law relied on by both parties.

12. In my view, the only issue for determination is whether the applicant has on a balance of probabilities satisfied the conditions for grant of the orders sought for leave to be granted to the applicant to adduce additional evidence on appeal.

13. The substantive law relating to adduction of additional evidence on appeal is the provisions of Section 78(1) (d) of the Civil Procedure Act whereas the procedural law is Order 42 Rule 27 of the Civil Procedure Rules. Under Section 78 (1) (d) of the Civil Procedure Act,

*“78(1) subject to such conditions and limitations as may be prescribed, an appellate court shall have power-*

*a. to determine 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”*

14. Order 42 Rule 27 of the Civil procedure Rules provide that:

*27(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;*

*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,*

*c. The court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined*

*(2) wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.*

Rule 28 sets the mode of taking that additional evidence on appeal.

15. From the above provisions, it is clear to me that the power to call additional evidence on appeal is a discretionary power and from case law binding on this court as cited by both parties’ advocates, that power must be exercised very sparingly and with great caution. It is a discretionary power that should not be exercised so as to bring in contradictory evidence as opposed to additional or new evidence. To bring in contradictory evidence would in effect be to rehear and retry the case, contrary to the spirit and letter of section 78 of the Civil Procedure Act.

16. The power to allow adduction of additional evidence is a power which is not intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case. The discretion is not meant to authorize admission of evidence for the purpose of filling up the lacuna and filling up gaps in evidence nor to enable a party to make out a fresh case on appeal. As was correctly submitted by the respondent’s counsel relying on the Court of Appeal case of **James Mwangi Nganga V Kenyatta University Council and 4 Others**; (supra) **LADD V Marshal and Skone V Skone** (supra), an applicant must demonstrate that such evidence could not have been obtained by reasonable diligence before and during the hearing and that it would have likely to have affected the result of the suit.

17. From the principles set out in the cited authorities, it is clear that if the evidence which is sought to be adduced was either in possession of a party at the time of the trial or which by proper diligence might have been obtained is either not produced or was not produced or was not procured, and the case is decided adversely to such party, no opportunity for producing that evidence ought to be given to such a party. In **LADD V Marshall [1954] 1 WLR 489 page 491** Lord Denning stated (and as approved in **K. Tarmohammed V Lakhani [1958] EA 567** – that:

***“ To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;***

***Secondly, the evidence must be such that if given, it would probably have been an important influence on the result of the case, though it need not be decisive;***

***thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible though it need not be incontrovertible.”***

The court further stated that:

***“..... except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available .....*”**

18. The question is whether the applicant herein has demonstrated that it has fulfilled the above conditions for this court to allow adduction of new or additional evidence. From the available evidence on record and as submitted by the parties' advocates, the applicant was aware of the respondent's replying affidavit sworn on 22<sup>nd</sup> September 2015 by Zachariah Baraza annexing a letter to court dated 7<sup>th</sup> November 2014 and notice of proclamation for the same date showing the proclaimed goods and having a court stamp of 8<sup>th</sup> November 2014. After the dismissal of the Reference/complaint by the applicant against the respondent by the Auctioneers Licensing Board, the applicant embarked on an investigative venture of seeking to establish the genuineness of the 'filed' documents showing there was a proclamation of the applicant's properties on 7<sup>th</sup> November 2014 by the respondent and that it was not until the Judiciary Ombudsman cross checked with the Deputy Registrar of the court that it was alleged the stamped documents were not part of the record hence he wrote to the Directorate of Criminal Investigations to investigate the matter to determine if an offence had been committed. Before the applicant could receive the conclusive results of the said requested investigations, it filed this application seeking for leave to adduce additional evidence, annexing the said letter of the Ombudsman which was merely instructing the police sleuths to investigate the matter. To date, the results of the intended investigations have not been availed.

19. The question therefore is, was such 'evidence' conclusive of an alleged forgery of a court stamp and secondly, was the 'new evidence' apparently credible and or presumably capable of being believed? Thirdly, was that 'new evidence'?

20. It was the contention of the applicant before the AUCTIONEERS LICENCING BOARD that there was no proclamation of the goods prior to their attachment and or taking of possession thereof by Siuma Traders Auctioneers represented hereto by Mr Zachariah Baraza. However, in a rejoinder to that allegation by the applicant before the Auctioneers Licensing Board, the respondent Auctioneer filed a replying affidavit sworn on 22<sup>nd</sup> September 2015 annexing copies of a letter dated 7<sup>th</sup> November 2014 to court returning the copies of Notice of Attachment dated 7<sup>th</sup> November 2014 and filed in court on 8<sup>th</sup> November 2014. In the said replying affidavit by the respondent, at paragraph 4 thereof, the Auctioneer deposed that on 7<sup>th</sup> November 2014 he proceeded to the applicant's premises and issued a proclamation notice to the Manager of the applicant company who declined to sign the proclamation notice as required under the law and at paragraph 5 of the same affidavit, the respondent stated that he filed the said proclamation notice in court and at paragraph 6, he deposed that he was accompanied by one Mr Nangalama who signed the proclamation notice as a witness and on 17<sup>th</sup> November 2014 is when he went to collect the proclaimed goods, stored them at Leakey's Storage Ltd and advertised their sale in the Star Newspapers on 19<sup>th</sup> November 2014 as required by the Auctioneers Rules. The said respondent at paragraph 13 of his affidavit annexed 'ZB1' a bundle of documents which included the documents with a clear court stamp and dates referred to in the earlier paragraphs of the affidavit. The respondent vehemently denied the applicant's allegations that he had flouted Rule 12 of the Auctioneers Rules or at all.

21. From the decision of the Auctioneers Licensing Board communicated to the applicant, it is apparent that the issue of whether the documents which the respondent annexed to his replying affidavit of 22<sup>nd</sup> September 2015 were genuine or not was fully canvassed and a decision reached. There is no evidence that the Board refused to admit that evidence. Although the applicant claims that the said documents were allegedly 'received' in court on a Saturday which was not a working day and that they were only filed 2 days prior to the hearing, it is not disputed that the applicant received those documents with an alleged forged court stamp before the hearing and therefore had an opportunity to not only peruse and claim that they were 'received' in court on a Saturday which was not a working day, but to proceed to the registry and counter check the fact of whether indeed the documents had been 'filed' and or whether they formed part of the record wherein they were allegedly filed. Furthermore, the issue of whether or not the documents were filed in court on a Saturday and or whether they were genuine formed part of the AUCTIONEERS LICENCING BOARD decision.

22. Indeed, the calendar for 8<sup>th</sup> November 2014 shows the date to have been a Saturday. But the question is, is it absolutely not possible for documents to have been stamped with a dated stamp for 8<sup>th</sup> November 2014? And if not, what diligent steps did the applicant take to get the registry staff or Deputy Registrar to either swear an affidavit or to appear before the Auctioneer Licensing Board at the hearing as witnesses to discount the receiving and or presence of those documents in the court file as contended by the respondent? The applicant in this case, regrettably, though represented by an advocate at the Auctioneers Licensing Board, has not explained that which prohibited him from cross checking with the court file to establish the genuineness of the respondent's deposition that he had filed the notice of proclamation in court on 8<sup>th</sup> November 2014, since the documents had a court date stamp showing they were received by the Court and in relevant Registry.

23. Secondly, this court is not persuaded that the letter by the Judiciary Ombudsman is the same as the 'evidence' which the applicant could have produced at the hearing before the Auctioneers Licensing Board and that that letter or new evidence as alleged would have had an important influence on the case, in as much as it need not be decisive. This is so because the letter to the Directorate of Criminal Investigations Department by the Judiciary Ombudsman is not a conclusive investigation report of what the Ombudsman had found out but a request for investigations into the allegations.

24. Thirdly, this court does not find that the so called 'new' evidence is such as is presumably to be believed and or apparently credible although it need not be incontrovertible. I find that the applicant's application is an attempt to fetch new evidence as an unsuccessful litigant who had the opportunity to peruse the annexed documents and challenge their genuineness but did not and now wishes to patch up the weak points in his case, or to fill up the lacuna and gaps in evidence in order to make up a fresh case on appeal. This is compounded by the fact that my perusal of the Notice of Appeal and the grounds thereof date 19<sup>th</sup> October, 2016 reveals that under Grounds 5 and 6 of the Appeal, the applicant herein has challenged the findings of the Auctioneers Licencing Board.... ***"when it acted upon and relied on the alleged proclamation attached to the Respondent's affidavit to make a finding that there had been a proper and valid proclamation by the Respondent in the face of some listed alleged undisputed evidence or facts namely that:***

***a) That the proclamation bore court stamp of the High Court of Kenya dated 8<sup>th</sup> November, 2014, which was a Saturday, a day when courts are closed, and the Court Registry does not receive and stamp documents;***

***b) In the absence of any evidence from the Respondent to explain how he accessed or obtained a court stamp on a Saturday, the court stamp on the alleged proclamation was plainly a forgery;***

***c) It was a serious criminal offence under the Penal Code punishable by a jail sentence of seven years for the respondent to utter and produce as evidence a document bearing a false or forged court stamp.***

***6. the Auctioneers Licensing Board erred in law and fact in receiving and acting upon a***

***purported proclamation bearing a forged or false court stamp to establish a fact in favour of the respondent that the proclamation was genuine.***

25. From the above grounds of appeal, no doubt, the applicant herein had already established that there was a false or forgery of the court stamp used in the stamping of the proclamation. That being the case, what new evidence is the applicant therefore seeking to adduce in this appeal? Glancing at the intended evidence, this court is not persuaded that the applicant acted with reasonable diligence to get that “evidence” before and during the trial and as inconclusive as that cross checking is, it is doubtful that it is the kind of evidence that would have influenced or affected the result of the complaint.

26. I reiterate that the letter by the Judiciary Ombudsperson is equally an allegation being put to the Director of Criminal Investigation to investigate and establish the truthfulness of the preliminary findings by the Deputy Registrar and as notified to the Judiciary /Ombudsperson by the Deputy Registrar. It is not a conclusive fact of forgery or false court stamp. In my view, it did not have to take the Judiciary Ombudsman to cross check the facts or status of those documents produced before the AUCTIONEERS LICENCING BOARD to determine whether they were authentic or not. That information relating to the “suspect” documents could still have been obtained from the Deputy Registrar directly even before the Ombudsman was informed to cross check with the Deputy Registrar. The applicant has not demonstrated to this court what hurdles if any, it encountered in its diligent attempts to cross check with the Deputy Registrar the authenticity of those court stamped documents at the trial or even after the trial, having fully submitted before the AUCTIONEERS LICENCING BOARD that they were a forgery, before approaching the Judiciary Ombudsman.

27. Furthermore, the Judiciary Ombudsman’s letter contains nothing but allegations and not facts or evidence. He does not state that he perused the subject file and confirmed the ‘suspect’ documents to be missing therein. He states in that letter to DIRECTORATE OF CRIMINAL INVESTIGATIONS that *the Deputy Registrar had notified him that the ‘documents were suspect as they did not form part of the court record and called on the Director of Criminal Investigation to investigate the authenticity of the documents with the intention of prosecuting liable parties if a crime had been committed.* That letter is dated 25<sup>th</sup> January 2016 in response to a complaint dated 9<sup>th</sup> December 2015 which was lodged after the decision of the Auctioneers Licensing Board dated 2<sup>nd</sup> October 2015 wherein it was found inter alia that the Proclamation was admittedly court stamped 8<sup>th</sup> November 2014 as forwarded to court vide dated 7<sup>th</sup> November 2014.

28. This court notes that the Auctioneers Licensing Board also conclusively determined the issue of the applicant alleging that the proclamation was a forgery because it was stamped on 8<sup>th</sup> November 2014 which was a Saturday and the Board held that ***“that is an issue which should have been raised and adequately addressed by the court which issued the warrants and stamped the proclamation notice.....”***

29. That being the case, I find that the issue of the letter of the Ombudsman being new evidence in this matter is not true since the issue of whether or not the court stamped proclamation was a forgery was canvassed by the parties who were all ably represented by competent advocates. That evidence, in my view, therefore, was available at the time of the trial and could have been procured by reasonable diligence (See **Birkett LJ in *Shedden V Patrick and the AG.* CLR.1 SC and Dir 545** where it was held inter alia ***“.... It was not shown that this evidence was not available at the time of the trial or could not by reasonable diligence have been procured.”***

30. At the trial, nothing prevented the applicant, upon receiving the replying affidavit and annexures of stamped proclamation, from seeking to obtain clarification from the subject court file HCC 461/2008 whether indeed those documents filed two days to the trial were duly received or filed in court. The applicant cannot, in my view, allege trial by ambush at this stage as it had the opportunity to seek leave of court to diligently peruse the documents and cross check with the Deputy Registrar. It did not have to take the Judiciary Ombudsman to cross check the facts or status of those documents produced to determine whether they were authentic or not. That information relating to the alleged ‘suspect’

documents could still have been obtained from the Deputy Registrar directly even before the Ombudsman was informed to cross check with the Deputy Registrar.

31. There is nothing on record to show that the Ombudsman called for the original file and that he personally verified the record and found that the documents were “suspect”? What he was writing is what he had been told was “suspect” documents which, in my view, was hearsay and such evidence cannot be admissible ( See **Kinyatti V Republic Nairobi [1984]eKLR CA 60/1983** Kneller JA, Chesoni & Nyarangi Ag JJA where the Court of Appeal made it clear that

***“ The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact... Evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.”***

32. In the instant case, the fact of the court stamp having been made on a Saturday is not a new fact. There is no letter written by the Deputy Registrar or an affidavit verifying the correctness of the allegations by the Judiciary Ombudsman that the documents were suspect. The applicant did not, in support of this application, even attempt to get the affidavit of the Deputy Registrar to explain how documents, properly date stamped by the court were not on the court file and or whether that court stamp was genuine and or why the court stamp was for 8<sup>th</sup> November 2014 which was a Saturday.

33. In my view, documents do not become a forgery merely because they bear a court stamp of a Saturday. Further, in the absence of any conclusive investigations as to whether any offence was disclosed by the fact of the respondent having his documents not on the court file as alleged by the Judiciary ombudsman, there is no new and credible evidence to prove such forgery. In fact, the applicant’s own ’ copy of Notice of Motion by the applicant annexed as “ZB 1” has two date stamps of 21<sup>st</sup> July 2015 crossed out and 22<sup>nd</sup> July 2015 stamped as the correct filing date, a clear indication that indeed court registry staff do make errors when receiving documents. Further, that the error of court stamping documents with an incorrect date stamp could only have been explained by the court registry is not disputed.

34. However, the applicant chose not to avail any of the court registry’s staff to swear an affidavit to explain circumstances under which the documents were stamped 8<sup>th</sup> November 2014 which was on a Saturday.

35. The applicant relied on the two cases of **Sadrudin Saffiff Vs Tarlochan Singh S/o Jwalla Singh and Wanje V Saikwa** (supra) to support his propositions. In the first case the Court of Appeal did allow the adduction of new evidence on appeal and held inter alia: that-

i. ....

*ii. As the question of illegality arose ex improvis in the magistrate’s court, it was completely within the discretion of the Supreme Court to admit fresh evidence on application and to have denied the application would have been to risk denial of justice to the respondent*

iii. ....”

36. However, the above case can be distinguished from this case in the sense that in the above case, the Court of Appeal made it clear that ***“the additional evidence was only admissible on appeal because the defense of illegality was not pleaded in the lower court and therefore the question of whether evidence of legality could be admitted on appeal and answered that question in the affirmative.”***

37. In this case, the issue of whether or not the date stamp was false or a forgery and whether or not

the notices of proclamation were filed in court on 8<sup>th</sup> November 2014 which was a Saturday was raised by the applicant before the Auctioneers Licensing Board and responded to by the Respondent by way of a replying affidavit sworn on 22<sup>nd</sup> September 2014 annexing thereto those Notices of proclamation. The applicant then did extensively submit on the said documentary evidence as to it being a forgery and from thereon the Auctioneers Licensing Board made a conclusive decision which has been appealed against. It is not true therefore, to allege in this application that the issue of forgery or illegality of the filing of the notice of proclamation is a new matter. It was pleaded and canvassed before Auctioneers Licensing Board and a decision made on it.

38. In addition, there is no evidence that the issue of forgery of the court stamp was under investigations at the time of the hearing of the complaint by the Auctioneers Licensing Board. The applicant, from the letter by Ombudsman to the Director of Criminal Investigations Department dated 25<sup>th</sup> January 2016 has only sought to show that it has lodged a complaint to the judiciary/Ombudsman who has asked the Director of Criminal Investigations to investigate the matter. It has not demonstrated that the question of illegality of the 'filed' documents is a new or fresh matter and or that the complaint and therefore this appeal would succeed on the basis of that evidence by way of a document in the form of "*a request to investigate an allegation that documents allegedly filed are suspect*"; and why the alleged investigations are being sought three months after the decision of the Auctioneers Licensing Board to the effect that the applicant should have raised the issue of the filing of Notice of Proclamation with the court which issued warrants pursuant to the letter of 7<sup>th</sup> November 2014.

39. The other decision of **Wanje V Saikwa** simply lays down the principles applicable for the grant of leave to adduce additional evidence on appeal and which, in my view, the applicant has failed to demonstrate that its application meets those principles. Furthermore, the Court of Appeal in the **Wanje V Saikwa** case dismissed an application for adduction of new evidence on appeal upon the applicant failing to establish that he had satisfied the principles laid down therein. The court compared the material in the supporting affidavit with the evidence recorded and found that vast majority of the material in the former was not new evidence.

40. In the instant case, the applicant claimed before the Auctioneers Licencing Board that the respondent must have committed perjury by swearing a false affidavit, and the Board made a finding that the best person to determine that issue was the court where the documents were allegedly filed. It was upon the applicant to ensure that it had all the evidence required before proceeding with its complaint before the Board as there was no urgency in the matter.

41. The upshot of all the above is that I find no new and or needful evidence to authorize its adduction at this appellate stage. I also find that the purported new evidence is not new and neither is it foolproof . It is inconclusive and therefore allowing it would be a waste of precious judicial time. I also find that there is no miscarriage of justice that would be occasioned to the applicant if the application is declined . Accordingly, I find the application dated 22<sup>nd</sup> February 2016 devoid of any merit and dismiss it with costs to the respondent.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of May 2016.

.....

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Waweru h/b for Mr Khakula for the Respondent

N/A for the applicants

CA: Adline