



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CIVIL APPEAL CASE NO. 148 OF 2013**  
**DEWDROP ENTERPRISES LIMITED.....APPELLANT**  
**VERSUS**  
**ELKANAH GEKONGE MANGERA.....RESPONDENT**

**R U L I N G**

1. This is a ruling on the Appellant's Notice of Motion dated 4<sup>th</sup> June, 2014. That motion was brought under **order 42 Rule 13, 27 & 28 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. The motion sought two prayers. Firstly, that the Court do give directions generally as to the hearing of the appeal and secondly, that the Appellant be allowed to produce additional evidence on the appeal. The fresh evidence sought to be introduced was an Affidavit of Service dated 3<sup>rd</sup> February, 2012 and a letter dated 10<sup>th</sup> October, 2012 from the Law Society of Kenya.

2. The application was based on the grounds set out in the body of the motion as well as the Supporting Affidavit of Edward Thiong'o Wachira sworn on 4<sup>th</sup> June, 2014. These were that, the Lower Court refused to admit evidence that ought to have been admitted; that the Appellant requested information on the Respondent's practicing status on 23<sup>rd</sup> March, 2012 but the response was delayed until October, 2012; that the delay was caused by the Law Society misdirecting its correspondence to Nakuru instead of Nairobi, where the Appellant was situated.

3. The Appellant produced a copy of the Affidavit sought to be relied on as "ETW 1" and the correspondence between itself and the Law Society of Kenya. The Appellant contended that no prejudice will be occasioned to the Respondent if the orders sought are granted. He concluded that the Record of Appeal having been filed, directions as to the hearing of the appeal should be given. In his submissions Mr. Wachira, the director of the Appellant appearing in person reiterated the foregoing and urged that on the authority of **Edward Njane Ng'ang'a and another vs. Damaris Wanjiku Kamau [2013]eKLR**, the application be allowed.

4. The Application was opposed vide the Replying Affidavit sworn by A. N. Oeri on 20<sup>th</sup> June, 2014. It was contended that the contents of the Appellant's Affidavit in support were incorrect; that the application dated 27<sup>th</sup> February, 2014 never sought to strike out Respondent's Reply to Defence and Amended Counterclaim on the basis that it had been filed by an unqualified person; that the issue of delay and misdirection of correspondence does not arise as the prayers being sought were captured in the application in the Lower Court. The Respondent, therefore urged that the application be declined.

5. I have carefully considered the Affidavits on record and the rival arguments. I have also considered the entire record. To allow additional evidence on appeal is in the discretion of the Court. However, like in all other judicial discretions, the same is not to be exercised capriciously but on sound legal basis. As correctly, held in **Edward Njane Nganga case [Supra]**, the Applicant must establish that the evidence sought to be introduced is not only relevant to the determination of the Appeal but that the said evidence was unavailable in the Lower Court and could not have been obtained without undue hardship.

6. In the present case, the evidence sought to be introduced is an Affidavit of Service by one Isaac Miano Ng'ethe sworn on 3<sup>rd</sup> February, 2012 and a letter from the Law Society of Kenya dated 10<sup>th</sup> October, 2012. Looking at the issues for determination in the Appeal, I am satisfied that the Affidavit of service is relevant in the circumstances but not the letter from the Law Society of Kenya.

7. Were these documents available at the time the Appellant's application dated 27<sup>th</sup> February, 2012 was heard in the Lower Court? The first piece of evidence is the Affidavit of Service of Isaac Miano sworn on 3<sup>rd</sup> February, 2012. It has a court stamp of 22<sup>nd</sup> February, 2012. Obviously, it is clear that as at the time the Appellant was filing his application in the Lower Court, that piece of evidence was available. In his Affidavit in support of the application under consideration, Mr. Wachira only states that the Lower Court refused to admit that evidence. I have looked at the proceedings in the Lower Court and I have seen that the said Affidavit was not referred to anywhere. Its existence was never brought to the attention of the Lower Court. It is therefore insincere to submit that the Lower Court refused to admit it. Indeed, it is the Court itself which indicated in the ruling that the Appellant had not proved the date of service of the principal pleading for the Reply to the Defence and Amended Counter-claim to be said to have been filed out of time.

8. The other evidence is the letter dated 10/10/12 from the Law Society of Kenya. Mr. Wachira contended that the Appellant had written to the Law Society of Kenya on 23<sup>rd</sup> March, 2012 but the Society delayed to reply until October 2012. He further contended that the delay was as a result of the society misdirecting its response to Nakuru instead of Nairobi. Nothing could be further from the truth.

9. After scrutinizing both the averments in the Supporting Affidavit and the exhibits, this court forms the opinion that the Appellant was not being truthful. Firstly, there was no evidence to show that the Law Society of Kenya had misdirected its correspondence to the Appellant to Nakuru as alleged in paragraph 9 of the Supporting Affidavit. Secondly, the letter dated 10<sup>th</sup> October, 2012 by the Society indicates that the same was in response to the Appellant's letter dated 8<sup>th</sup> October, 2012. The response by the Society was clearly prompt and made within two (2) days of the Appellant's inquiry. By exhibiting its letter dated 23<sup>rd</sup> March, 2012 as "ETW 2" and not the one dated 8<sup>th</sup> October, 2012 referred to by the society in its response of 10<sup>th</sup> October, 2012, the Appellant wanted the court to believe that the response of the Law Society delayed for a whooping seven months. Can a court exercise its discretion in favour of such a litigant? I doubt.

10. In any event, it would seem that the Appellant sought the said information from the Law Society of Kenya after filing its application dated 27<sup>th</sup> February, 2012. By seeking that information after the filing of the application, in my view, is a confirmation that the ground of the alleged incompetence of the Respondent's Advocate was but an after thought. To my mind, the Appellant has not shown that the evidence sought to be introduced was unavailable at the time it approached the Lower Court or that it would not have been obtained without undue hardship.

11. As regards directions, I have perused the Record of Appeal. I find the same to be in order except that the Appellant has tried to insert in that Record at page 37, the Affidavit of Isaac Miano Ng'ethe sworn on 3<sup>rd</sup> February, 2012. In view of what I have already held regarding that piece of evidence, that document is hereby expunged from the record. I make the following directions:

- a. The appeal be heard at Nairobi for one (1) day; by one judge
- b. The appeal be determined by way of written submissions to be hi-lighted.

- c. The Appellant to file and serve written submissions within 30 days of today's date.
- d. The Respondent to file and serve his written submissions within 30 days of service.
- e. The submissions to be in New Times Roman Font 14 not exceeding three (3) Pages double spacing.
- f. A date for hi-lighting be taken at the registry.

12. In the meantime, Prayer No. 2 of the application is dismissed with costs to the Respondent.

It is so ordered.

**DATED and DELIVERED at Nairobi this 20<sup>th</sup> day of February, 2015.**

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**A MABEYA**

**JUDGE**