



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ndatatana v National Housing Corporation (Civil Appeal
E010 of 2022) [2025] KECA 865 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 865 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E010 OF 2022
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 21, 2025**

BETWEEN

MARTIN NDAPATANA APPELLANT

AND

NATIONAL HOUSING CORPORATION RESPONDENT

*(Being an appeal from the Judgment and Decree of the Environment and
Land Court of Kenya at Malindi (M. A. Odeny, J.) delivered on 19th January
2022 in E.L.C.A No. 8 of 2019 Consolidated with Civil Appeal Nos. 9 & 10 of 2019)*

JUDGMENT

1. This is an appeal from the judgment and decree of the Environment and Land Court at Malindi (M. A. Odeny, J.) delivered on 19th January 2022 in ELCA No. 8 of 2019 consolidated with Civil Appeal Nos. 9 & 10 of 2019.
2. The genesis of the appeal before us is that the respondent, National Housing Corporation, filed suit against the appellant, Martin Ndatatana, in the Chief Magistrate's Court at Malindi in CMCC No. 229 of 2010 vide a plaint dated 11th August 2010.
3. The precis of the respondent's claim was that it was the owner and otherwise entitled to a piece of land located in Malindi and allocated to it by the Government of Kenya by a letter dated 16th May 1990 for the purpose of a tenant purchase housing scheme; that, upon taking possession of the land, the respondent laid out a development scheme for the entire portion of the land creating access roads, sewerage stations, open spaces, housing areas, a nursery school area, and an area reserved for shops; that, in early July 2010, it came to the respondent's attention that the appellant had encroached on the area reserved for development of shops and marked S1 and S2 on the respondent's drawing number 124/33c (portions S1 and S2); that the appellant caused to be erected a fence on the said portions, dug up the portions of the land and planted corn thereon; that the appellant did not have permission



- to enter and remain on the portions S1 and S2, and that his actions were unlawful and amounted to forceful entry and retainer of private property; and that, despite numerous requests to cease the trespass, the appellant wrongfully persisted in his unlawful and continuing trespass.
4. By reason of the matters aforesaid, the respondent prayed for judgment against the appellant for a permanent injunction restraining him from trespassing into or remaining on portions S1 and S2; a mandatory injunction requiring the appellant to demolish the fence and any other developments carried out by him on the portions S1 and S2; vacant possession of the portions S1 and S2; damages for trespass; cost of the suit; and interest.
 5. Contemporaneously with the plaint, the respondent filed a Chamber Summons, which was later amended on 16th August 2010. In the Amended Summons, the respondent sought orders directing the appellant to demolish the fence and any other developments on the respondent's land intended for the development of sewerage facilities adjacent to the portions marked 5393 and 5394 on the respondent's drawing number 124/33c; and an injunction restraining the appellant from trespassing into and remaining on portions S1 and S2 pending hearing and determination of the suit.
 6. The Amended Chamber Summons was supported by the Affidavit of David N. Ngugi, the officer in charge of the respondent's operations in the Coast region, sworn on 16th August 2010. Annexed to the supporting affidavit was a copy of a letter indicating that the Commissioner of Lands had approved the respondent's application for the reservation of a portion of land in Malindi as shown on an attached Plan No. TP47/1/VII/147B for the purpose of a tenant purchase scheme; a copy of the respondent's drawing number 124/33c laying out the development scheme for the entire portion of land; and copies of photographs of the portion of the land deponed by David Ngugi in his affidavit as being where the appellant encroached on the area intended for development of sewerage facilities, caused a fence to be erected thereon, dug up the said portion of land, and planted corn thereon.
 7. David Ngugi further deponed that the appellant did not have the respondent's permission to enter or remain upon the property; that the appellant's actions were unlawful and amounted to forceful entry and retainer of private property; and that the appellant had ignored his protestations and was intent on remaining on the respondent's property to continue his wrongful occupation, thereby necessitating the injunctive orders sought pending hearing and determination of the suit.
 8. In a ruling dated 1st December 2010, the trial Magistrate (Dr. Julie Oseko, CM) found that the respondent's Amended Chamber Summons had merits; allowed the Summons as prayed with costs; and ordered that the ruling would also apply to the related cases CMCC No. 230 of 2010 and CMMCC No. 231 of 2010, which involved claims that the appellant had encroached on other portions of the land allocated to the respondent.
 9. Before the matter proceeded to hearing, the parties filed several documents, including: two Notice of Motion applications by the appellant; a Statement of Defence and an Amended Statement of Defence by the appellant; as well as written submissions, witness statements and Lists of Documents by both parties.
 10. It is also apparent from the record that Malindi CMCC No. 229 of 2010 was consolidated and heard together with the related cases CMCC Nos. 230 and 231 of 2010 between the appellant and the respondent, and which relate to different portions of the suit property. In the impugned judgment of the ELC, the learned Judge stated that the appeal "arises from the lower court's ruling dated 23rd July 2019 delivered at Malindi in CMCC Nos. 229, 230 and 231 of 2010 which were consolidated", but the requisite order for consolidation does not appear in the record of the proceedings in the lower court as supplied.



11. We also gather from the proceedings on record that the consolidated suits came up for hearing on 27th November 2018 when, after the respondent's first witness, Bernadette Karanja (PW1), gave her evidence, counsel for the respondent made an oral application for adjournment to call David Ngugi to testify and produce evidence referred to in his affidavit dated 16th August 2010, which had been included in the Plaintiff's List of Documents dated 1st November 2018. There being no objection by counsel for the appellant, the application was allowed and the case adjourned.
12. Subsequently, the matter came up for further hearing on 7th May 2019 when counsel for the respondent told the court that they were informed that David Ngugi could not be traced, and that they needed time to make a formal application for orders that his statement be admitted in evidence without having to call him to testify.
13. When the matter came up for mention on 21st May 2019 to confirm whether the respondent had filed the application, and for further directions, counsel for the respondent informed the court that they had not filed the application. Counsel sought a further adjournment to file the application. Counsel for the appellant opposed the application for adjournment as well as the application to have the witness statement admitted in evidence. Counsel submitted that, at the pre-trial conference, it was agreed that the suit would be determined on viva voce evidence; that, despite several adjournments, the respondent had been unable to secure its second witness; that the respondent ought not to be given any more time as it was an old matter; that the oral application had no merit, and that it ought to be dismissed; and that the respondent should close its case.
14. In response, the respondent's counsel reiterated that they had made several attempts to get the witness to testify, but that they had not been able to trace him.
15. Eventually, the respondent filed its formal application dated 20th May 2019 seeking orders that the court be pleased to dispense with David N. Ngugi's attendance; that the respondent be allowed to recall PW1 to produce the affidavit sworn by David N. Ngugi on 16th August 2010 as evidence; and that the said affidavit be admitted as evidence.
16. The respondent's Motion was supported by the affidavit of Joash Onguko, the acting officer in charge of the respondent's operations in the Coast region, essentially deposing to the grounds on which the application was made, namely: that David Ngugi was a predecessor to Bernadette Karanja (PW1) and was at the time the officer in charge of the respondent's operations when the respondent instituted the suit; that David Ngugi had personal knowledge of the contents of the affidavit dated and filed on 16th August 2010; that, despite numerous futile attempts, the respondent had been unable to trace David N. Ngugi after his departure from the respondent Corporation; that the court attendance of David N. Ngugi could not be procured without undue delay and expense; and that it was in the interest of justice that the application be allowed.
17. Dismissing the respondent's application by its ruling delivered on 23rd July 2019, the trial Magistrate observed that the suit was filed in 2010, and that the continued delay in its determination amounted to delay in the administration of justice; that it was not in dispute that the respondent had tried to look for David Ngugi, but in vain; that the application went against the provisions of section 33 of the [Evidence Act](#); that it was clear that the deponent of the affidavit could not be traced; that it was also clear that the appellant wished to cross-examine the witness; and that he would suffer prejudice if the affidavit of an absent witness were to be admitted without giving the appellant the opportunity to test its veracity.
18. Dissatisfied by the trial Magistrate's decision, the respondent moved to the Environment and Land Court at Malindi on three separate but identical appeals, namely ELCA Nos. 8, 9 and 10 of 2019. The three appeals were consolidated on 26th July 2021.



19. In its consolidated appeals, the respondent faulted the learned Magistrate for, inter alia: misdirecting herself in finding that the applicant sought more time to produce David Ngugi in court whereas what the applicant sought was to dispense with his attendance; failing to appreciate the fact that the appellant had been unable to trace the said David Ngugi who swore the affidavit sought to be produced in evidence; identifying the issue of admissibility of the affidavit sworn by David Ngugi, but failing to make a determination thereon; misdirecting herself in applying the provisions of section 33 of the Evidence Act, which relates to statements by deceased persons instead of section 35 of the Act; and for failing to address the issue of costs.
20. In addition to the Memorandum of Appeal, the respondent's Record of Appeal filed in the ELC contained the Notice of Motion dated 20th May 2019 filed in the lower court together with its annexures, the respondent's letter to the court requesting for proceedings, a certified copy of the typed proceedings and a certified copy of the impugned ruling.
21. The appeal was canvassed by way of written submissions and, in their written submissions dated 12th October 2021, counsel for the appellant raised a preliminary objection on the grounds that the Record of Appeal was incomplete and therefore incompetent; and that it was invalid as several pleadings had been allegedly omitted.
22. In her judgment dated 19th January 2022, the learned Judge (M. A. Odeny, J.) found that, reading from the grounds of appeal and the respective submissions by learned counsel, the issues falling to be determined were: whether the appeal was filed out of time; whether the record of appeal was incomplete; and whether the appeal had merit.
23. On the 1st and 2nd issues, the learned Judge found that the appeal was filed within time; and that the record of appeal was complete as filed as it contained the memorandum of appeal, the necessary pleadings (namely the notice of motion and the response thereto) and the impugned order.
24. On the 3rd issue, the learned Judge held that the trial Magistrate misdirected herself on what the respondent sought in its application. According to the learned Judge, the respondent merely sought leave to recall a witness to produce as evidence an affidavit sworn by another person, and to admit that affidavit as evidence; that the affidavit in issue formed part of the record since it had been filed in an interlocutory application, and was one of the documents in the respondent's list and bundle of documents; that the respondent had laid a basis why they were not able to procure the attendance of the said David Ngugi; that there was no evidence that the production would cause any prejudice to the appellant; and that the appellant still had an opportunity to cross-examine and challenge the veracity of the documents attached to the affidavit.
25. In conclusion, the learned Judge held that the appeal had merit, and that the supporting affidavit of the said David Ngugi would be admissible. Accordingly, she allowed the appeal as prayed.
26. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal, faulting the learned Judge for holding that the record of appeal to the ELC was complete; and for holding that the supporting affidavit of David Ngugi sworn on 16th August 2010 in support of the respondent's Chamber Summons amended on 16th August 2010 was admissible in evidence.
27. In support of the appeal, counsel for the appellant, M/s. Aoko Otieno, filed written submissions dated 30th October 2024 and made oral highlights thereon when the appeal came for hearing on the Court's virtual platform on 5th November 2024.
28. However, counsel for the respondent, Mr. Ole Kina, did not file any written submissions, but submitted orally in rebuttal.



29. Having considered the record of appeal, the grounds on which it is anchored, the impugned ruling and the submissions by counsel, we find that two issues commend themselves for our determination, namely: whether the learned Judge erred by holding that the Record of Appeal was complete; and whether the learned Judge erred by holding that the supporting affidavit sworn by David Ngugi on 16th August 2010 was admissible in evidence.
30. Citing Order 42 rule 13(4) of the Civil Procedure Rules to which we will shortly return, the learned Judge pronounced herself on the 1st issue as to whether the record of appeal was complete and observed:
- “This appeal is an interlocutory appeal against the ruling of the trial Magistrate and not on the judgment and final decree of the court. Whether the appeal is allowed or not this matter has to go back to the trial court for hearing and determination. PW1 had not completed her evidence. It is therefore noteworthy as per sub rule (ii) above that the mandatory documents in an appeal as the present one are the memorandum of appeal, the pleadings and the order being appealed against. The necessary pleadings in this case will be the notice of motion and response thereto hence it would not be necessary to have all the pleadings and documents filed in the trial court for purposes of an appeal against a specific ruling. The court also has the benefit of perusing the lower court file hence I find that the record of appeal is complete as filed.”
31. Taking issue with the learned Judge’s conclusion, learned counsel for the appellant submitted that the pleadings which had been filed and served, and which were omitted in the appeals included: the Notice of Appeal; the Plaint; the Statement of Defence; the Amended Statement of Defence; the Chamber Summons and its supporting affidavit; the Amended Chamber Summons and its supporting affidavit; the Replying Affidavit to the Chamber Summons; the Ruling/order issued on 1st December 2010; the Notice of Motion filed by the appellant dated 20th August 2010 and the ex-parte orders issued therein; the Notice of Motion filed by the appellant dated 13th February 2018 seeking to stay the orders issued by the Court on 1st December 2010; the warrants issued by the court on 20th November 2017; the written submissions filed by both parties; the Ruling/Decision of the court on the Notice of Motion dated 13th February 2018; the witness statements; and the List of Documents filed by both parties.
32. According to counsel, these pleadings and documents were necessary for a just and fair determination of the appeal before the court. Counsel submitted further that the learned Judge remarked that she perused the Plaint, which was not part of the Record of Appeal; that she omitted to peruse the Amended Statement of Defence; that, had the Amended Statement of Defence been part of the Record of Appeal, the learned Judge would have made a finding that the contents of the Supporting Affidavit deposed to by David Ngugi were contested, and that the annexures to the aforementioned affidavit offended the express provisions of the *Evidence Act* as relates to photographic evidence. In conclusion, counsel submitted that there is no recourse to an incomplete record except for the Appeal to be struck out with costs.
33. Counsel cited the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR for the proposition that the Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it; and *Hamida Yaro Shek Nuri v Faith Tumaini Kombe & 2 Others* [2019] eKLR for the proposition that, where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.



34. On his part, Mr. Ole Kina argued that not all documents in the lower court's file are necessary for an interlocutory appeal to this Court; and that the record was complete as filed.
35. As cited by the learned Judge, Order 42 rule 13(4) of the Civil Procedure Rules provides that the primary and mandatory, documents that cannot be dispensed with in a record of appeal are those specified in paragraphs (a), (b) and (f) of the rule, namely the memorandum of appeal; the pleadings; and the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal. However, a court has the discretion of dispensing with the production of all or part of any of the other documents specified in the rule if it forms the view that the said documents are not relevant.
36. Order 42 Rule 13 (4) provides as follows:
4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
Provided that—
 - i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).
37. It is instructive that Order 42 rule 13(4) of the Civil Procedure Rules is couched in general terms with reference to substantive appeals in which the documents therein mentioned would be invariably necessary for the determination of the appeal. These documents include the memorandum of appeal, the pleadings, a record of the proceedings, all affidavits and evidential documents, and the judgment, order or decree appealed from.
38. Granted, Order 42 rule 13(4) identifies “the pleadings” as primary documents that cannot be dispensed with in the record of appeal. However, the fact that rule 13(4) does not distinguish between the scope of the pleadings to be included in the record of a substantive appeal on the one hand and an interlocutory appeal on the other, does not mean that such an interlocutory appeal must be founded on each and every document mentioned in rule 13(4). To hold otherwise would be to lose sight of the real purpose of the requisite documents, namely to aid in the determination of the issues raised on appeal.



39. Given that the appeal before the ELC was an interlocutory appeal, the only question that arises is what should be considered as the necessary pleadings and documents for purposes of compiling the record for an interlocutory appeal.
40. In our considered view, the primary documents that comprise the record in an interlocutory appeal, and which meet the requirements of Order 42 rule 13(4), are the memorandum of appeal; the decision or order appealed from; and the pleadings of the lower court upon which the decision or order is based. In an interlocutory appeal as is before us, the pleadings consist of the Motion giving rise to the order appealed from; the affidavits filed in support of and/or in opposition to the Motion; any annexures thereto; written submissions (if any); and the notes or transcript of the proceedings at the hearing of the Motion or other application leading to the impugned ruling or order. Other pleadings and/or documents that do not directly relate to the Motion at hand may be included if any particular point in issue in the appeal turns on such peripheral pleadings and/or documents.
41. In our view, none of the issues in contention in the interlocutory appeal before the ELC turned on any of the pleadings and documents which the appellant complains were omitted from the Record of Appeal. Accordingly, the learned Judge was not at fault in concluding, as we hereby do, that the Record of the interlocutory Appeal in issue was complete, the same having contained all the documents necessary for the determination of the interlocutory appeal.
42. Turning to the 2nd issue as to whether the learned Judge erred by holding that the impugned affidavit by David Ngugi was admissible in evidence, the learned Judge held that:

“From the above ruling it is evident that the learned trial Magistrate misdirected herself from the onset, on what the Appellant’s prayers were. The Appellant’s prayers were basically leave to recall a witness to produce as evidence an affidavit sworn by another person and to admit that affidavit as evidence. The affidavit that was in issue formed part of the record as it had been filed in an interlocutory application. It is also one of the documents in the appellants list of documents dated 1st November 2018. The appellant had laid a basis why they were not able to procure the attendance of the said David Ngugi and that the documents formed part of the record. There was no evidence that the production would cause any prejudice to the respondents and further the respondents still had an opportunity to cross examine and shatter the veracity of the documents attached to the affidavit...

... ..

Having said that, I find that the appeal has merit and that the supporting affidavit of the said Daniel Ngugi would be admissible. I have also had an opportunity to peruse the said affidavit and find that the contents of the said affidavit are a replica of the Plaintiff and the documents annexed thereto are the same documents produced by the Appellant’s witness PW1.”

43. According to counsel for the appellant, production of the affidavit sworn by David Ngugi would definitely prejudice the appellant since there would be no cross-examination of its maker. Counsel submitted that the appellant wishes to cross-examine David Ngugi on the contents of his affidavit because they contest its contents.
44. To buttress her position, counsel cited the case of *G G-R v H-P S* [2012] KEHC 5208 (KLR) where the court stated that:

“The law has allowed evidence to be proved by way of Affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court



to be cross examined. It would appear that where allegations of matters touching on fraud, mala fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent of an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

45. Counsel submitted further that the Court had issued pre-trial directions and directed that the hearing be by viva voce evidence; that the respondent did not indicate that it wanted part of the evidence to be by affidavit; that the letter produced by the respondent dated 10th May 2019 (from the respondent to its counsel indicating that the respondent had been unable to trace David Ngugi’s whereabouts despite several attempts to do so) is therefore an afterthought after the hearing had already began, and that it ought to have been produced or raised at the pre-trial conference; and that every party and their counsel are duty bound to strictly comply with the pre-trial directions.
46. Counsel contended that an affidavit filed to support an interlocutory application is not a statement, and cannot be equated to a statement within the ambit of the provisions of Section 35 of the Evidence Act; that the affidavit was filed for a specific purpose, the Chamber Summons dated 16th August 2010, and that its deponent was not cross-examined thereon.
47. We take to mind the comprehensive arguments advanced by counsel for the appellant touching on the evidential value of the contested affidavit and hasten to observe that we find it necessary to refrain from commenting thereon to avoid encroaching on the merits of the substantive suit. Suffice it to observe that the statutory basis for the learned Judge’s decision to admit the affidavit in issue was the provisions of Sections 34 and 35 of the Evidence Act.
48. Section 35 of the Evidence Act reads:
 35. Admissibility of documentary evidence as to facts in issue.
 1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - a. if the maker of the statement either—
 - i. had personal knowledge of the matters dealt with by the statement; or
 - ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
 - b. if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence,



or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

49. Section 34(1) (a) of the *Evidence Act* provides that:

34. Admissibility of evidence given in previous proceedings.

1. Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—
 - a. where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

50. To our mind, neither Section 34 nor 35 of the *Evidence Act* excludes documentary evidence containing statements made by the maker of the document(s) and given in a previous interlocutory application from admissibility. The two sections provide for the admission of such evidence where the maker is dead, incapable of giving evidence, is kept out of the way by the adverse party, or where his presence cannot be obtained without an unreasonable amount of delay or expense as is the case here.

51. Be that as it may, we need not overemphasise the fact that the admission of a document as evidence under Sections 34 and 35 of the Act does not, of itself, render the evidence as truthful or accurate, more so in the face of opposing evidence by the adverse party. Accordingly, the argument by counsel for the appellant that admission of the contested affidavit evidence imputes its veracity does not hold. The veracity of the affidavit evidence is a different matter to be determined by the trial court on merits after the substantive suit is heard on evidence tendered by the parties.

52. In *Parkar & another v NQ & 2 others* [2023] KECA 908, this Court held that:

“38. In any event, admission of a document in evidence is not to be confused with proof of a document. When the court is called upon to determine the admissibility of a document made by a witness who is dead or cannot be availed, the court concentrates only on the document and the exceptions permitted under the *Evidence Act*. Conversely, when a court is called upon to form a judicial opinion whether a document has been proved, disproved, or not proved the court does not look at the document alone or only at the statement of the witness standing in the box. It takes into consideration probabilities of the case as emerging from the whole record. In our view, it could not have been the intention of the law that the court should always apply its judicial mind to the entire record of the case, each time a document is placed before it for admission and form an opinion if it was proved before marking it as an exhibit.

39. Admissibility of a document is one thing and its probative value quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil. As was held by the Supreme Court of India in *Ramji Dayawala v Invest Import*, AIR 1981 SC 2085, mere production and marking of a document as an exhibit by the court cannot be held to be a due proof of its contents. Its execution and contents have to be proved by admissible evidence, that is, by the evidence of



those persons who can vouchsafe for the truth of the facts in issue. But, more important, as stated above, the appellants will have the opportunity to rebut the evidence during the trial.”

53. In our considered view, the conditions for admitting the contested affidavit under sections 34 and 35 of the *Evidence Act* were met by the respondent who laid sufficient basis for its inability to trace David Ngugi after he left the employment of the Corporation. The change in the circumstances as to the availability of David Ngugi as a witness was realised after the hearing of the matter had already commenced, thereby rendering the pre-trial directions issued by the trial court unsuitable as having been overtaken by events. In the circumstances, it was appropriate for the respondent to file the Motion for orders to dispense with the viva voce evidence of David Ngugi and allow production of his affidavit in evidence.
54. Finally, it is not lost on us that the appellant will have ample opportunity to produce evidence challenging the affidavit evidence in issue when the suit proceeds to further hearing, and the appellant’s contention that he will be prejudiced by the admission of the contested affidavit in evidence is incorrect. In conclusion, the learned Judge cannot be faulted for holding that the affidavit was admissible in evidence.
55. Having carefully considered the record as put to us, the impugned ruling, the grounds on which the appeal is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the Appeal fails and is hereby dismissed. Consequently, the judgment and decree of the ELC at Malindi (M. A. Odeny, J.) delivered on January 19, 2022 are hereby upheld.
56. The appellant shall bear the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

F. TUIYOTT

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA CARb, FCIArb.

JUDGE OF APPEAL

.....

F. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

