



REPUBLIC OF KENYA



KENYA LAW
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**Too v Sitienei (Civil Appeal (Application) 222 of 2020)
[2025] KECA 1332 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1332 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 222 OF 2020
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA
JULY 18, 2025**

BETWEEN

EDWIN K TOO APPLICANT

AND

PAUL K SITIENEI RESPONDENT

(Being an application for leave to file additional evidence against the Ruling and Order of the Environment and Land Court of Kenya at Kisumu (A. Ombwayo, J.) dated 13th November 2019 in ELC Cause No. 6 of 2014)

RULING

1. This appeal, within which the present application dated 2nd October 2020 is made, arises from a ruling dated 5th November 2019 dismissing the applicant's application before the Environment and Land Court (ELC) dated 30th November 2018 in which the applicant had applied to set aside a consent order dated 25th May 2017.
2. It was the applicant's case before the ELC that the consent order dated 25th May 2017 was fraudulent as his advocates then on record did not have his mandate to enter into it. In concluding that the application did not meet the threshold for setting aside the consent order, the learned Judge of the ELC stated in the impugned ruling that:

“The applicant has not proven that there was fraud. He has not proven that there was any express negative direction given to the advocate either. The applicant would have been better placed to provide evidence of correspondence between himself and his advocate concerning the allegations raised with regards to the disputed consent and absence of instructions to enter into the same.”



3. Against that backdrop, the applicant is now before this Court with the said application dated 2nd October 2020 seeking leave “to file new evidence, so as to form part of the record of appeal...”. The new evidence sought to be introduced comprises of a complaint he made against his former advocates to the Advocates Complaints Commission dated 13th March 2020, and the Commission’s responses dated 21st May 2020 and 4th September 2020. He asserts that those documents contain “evidence [which] is extremely necessary for purposes of determining the issues in controversy in the appeal.”
4. The application was urged before us on 19th February 2025 by learned counsel Mr. Nchoe Jaoko for the applicant. Counsel for the respondent was not present during the hearing of the application despite notice of hearing having been served. We have considered the application, the affidavit in support and the rival submissions.
5. Rule 31(1)(b) of the *Court of Appeal Rules* empower the Court in its discretion, and for sufficient reason, to take additional evidence. In *Mohamed Abdi Mahamud v Ahmed Abdulabi Mohamed & 3 Others* [2018] eKLR, the Supreme Court of Kenya pronounced “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 hisher 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.” [Emphasis added]

6. The Supreme Court further stated that applications for additional evidence are to be determined on “a case-by-case basis and even then sparingly with abundant caution.”
7. With those principles in mind, it seems to us that the applicant only moved to lodge a complaint against his former advocates with the Advocates Complaints Commission after the learned Judge in the impugned ruling found that there was no evidence to support his claims. Why such complaint would not have been made soon after the applicant became aware that his former advocates had entered into the consent order dated 25th May 2017 is not clear.
8. It seems to us that the evidence sought to be introduced at this stage, relating to complaints with the Advocates Complaints Commission lodged after the Judge ruled there was no evidence to support his claim is intended to “make a fresh case in appeal” and to “fill up omissions or patch up the weak points in his... case.”
9. This is not a proper case for the Court to exercise its discretion in favour of the applicant. The application fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR

