



REPUBLIC OF KENYA



**KENYA LAW**  
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**Alwiy v Siani Limited & 2 others (Civil Appeal (Application)  
27 of 2016) [2022] KECA 838 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 838 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL (APPLICATION) 27 OF 2016  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MAY 27, 2022**

**BETWEEN**

**GHALIB AHMED ALWIY ..... APPLICANT**

**AND**

**SIANI LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MARIE PAULE PELLE ..... 2<sup>ND</sup> RESPONDENT**

**NJEMA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(An application seeking leave of the Court to admit, as additional evidence, a forensic report dated 11th June 2021 and a letter dated 23rd December 2008 in an appeal against the judgment of the Environment & Land Court at Malindi (Angote, J.) delivered on 19th February 2016 in ELC Civil Case No. 49 of 2011 Consolidated with ELC Civil Case No. 149 of 2010)*

**RULING**

1. In a judgment delivered on 19<sup>th</sup> February 2016 the Environment and Land Court at Malindi (Angote, J.) (ELC) found that the appellant agreed, by agreements of 25<sup>th</sup> September 2006 and March 2007, to sell to the respondents' structures known as "Talking Trees" restaurant, and that he was paid the agreed purchase price. Accordingly, the ELC ordered the appellant, by mandatory injunction, "to forthwith vacate and hand over" to the respondents "the beach banda known as "Talking Trees"". The appellant was also restrained, by permanent injunction, from entering, remaining in, or taking possession of the said beach banda known as "Talking Trees". He was also ordered to pay the respondents mesne profits at the rate of Kshs. 50,000 per month from the date of filing suit until payment in full.
2. Aggrieved, the appellant lodged the present appeal, complaining, among other things, that the learned Judge misdirected himself in "failing to acknowledge that the purported sale agreement contained numerous errors" and that even "if the purported agreement was to be believed as a genuine document,



it did not convey an interest in land” to the respondents “but rather merely an interest in structures on the land thus creating a terminable lease.”

3. By his application the subject of this ruling dated 28<sup>th</sup> October 2020, made under Rule 29 of the Court of Appeal Rules, 2010, the applicant seeks leave of the Court to admit, as additional evidence, a forensic report dated 11<sup>th</sup> June 2021 and a letter dated 23<sup>rd</sup> December 2008. The applicant, who appeared before us in person during the hearing of the application on 28<sup>th</sup> February 2022 urged that the forensic report he proposes to introduce into evidence was prepared on 11<sup>th</sup> June 2021 and it was therefore not available when the suit before the lower court was instituted; that the contents of the report are crucial for determination of the matter; that the case involves an allegation of forgery of his signature and the issue is well captured in the report and it should therefore be admitted to avoid a miscarriage of justice; that the report only became available after the matter had already been placed before the lower court; that the letter of 23<sup>rd</sup> December 2008 that he also proposes to introduce into evidence was not traceable or within his reach at the time the suit was instituted and the same was only traced on 8<sup>th</sup> October 2021; and that the application is made in good faith.
4. Learned counsel for the respondents Mr. Ole Kina stated that his firm had not been served with the application or submissions and was constrained to get the application from the Court. Opposing the application, counsel relied on grounds of opposition dated 18<sup>th</sup> February 2022 in urging that the inquiry the subject of the forensic report sought to be introduced as additional evidence was opened in 2021 well after the suit in the lower court was concluded; that the issue of authenticity of the appellant’s signature and the agreement for sale is not a new issue as it was an issue before the trial court.
5. As regards the letter of 23<sup>rd</sup> December 2008, it was submitted that it is strange that the applicant claims not to have had it when it was in fact addressed to him. Counsel pointed out that this is the second time the applicant is making an application for admission of additional evidence the first one having been dismissed in ruling of the Court on 25<sup>th</sup> May 2017.
6. We have considered the application and the rival arguments. Rule 29(1)(b) of the Court of Appeal Rules on which the present application is based provides, inter alia, that on any appeal from a decision of a lower court acting in exercise of its original jurisdiction, the Court shall have power, in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court.
7. The principles on which the Court exercises its discretion under that rule, as stated by the Court in *Mzee Wanjie and 93 others v A.K. Saikwa and others* [1982-88] 1 KAR 462, are that: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; that the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and that 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.
8. Recently, in *Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR, the Supreme Court of Kenya pronounced, among other things, that: “the additional evidence must be directly relevant to the matter

before the court and be in the interest of justice”; that “it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive”; that “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”.



9. Applying those principles to the present application, the consolidated suits giving rise to the impugned judgment, namely ELC Case No. 49 of 2011 and 149 of 2010 were heard in 2015 and the judgment delivered on 19<sup>th</sup> February 2016. The genuineness of the agreement based on which the trial court found that the appellant had sold the bandas to the respondents was an issue in the suit. It is apparent that the Forensic Document Examiners Report the appellant wishes to introduce relates to an inquiry made with the Directorate of Criminal Investigations (DCI) in 2021, well after the trial court had determined the matter. The applicant does not explain why he had not sought the assistance of the DCI until after the judgment of the trial court had been delivered. As the Supreme Court cautioned, in an application of this nature:

“(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.”

10. As regards the letter of 23<sup>rd</sup> December 2008, it is a letter from a firm of advocates that was addressed to the applicant. Beyond the statement that it was traced on 8<sup>th</sup> October 2021, the applicant, as the recipient of the letter, does not satisfactorily explain why it could not have been produced. Again, we can do no better than echo the words of the Supreme Court that:

“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.”

11. In the end, we find no merit in this application. It is dismissed with costs to the respondents.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF MAY 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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**P. NYAMWEYA**

**JUDGE OF APPEAL**

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**J. LESIIT**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

