



**Tropical Treasures Limited v Mangi & 3 others (Civil Application E009 of 2022) [2022] KECA 1161 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1161 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E009 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**TROPICAL TREASURES LIMITED ..... APPLICANT**

**AND**

**CHARO MWANYULE MANGI ..... 1<sup>ST</sup> RESPONDENT**

**BAYA YAA MANGI ..... 2<sup>ND</sup> RESPONDENT**

**P. M OMWENGA ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, MOMBASA ..... 4<sup>TH</sup> RESPONDENT**

*(An application for reappraisal and re-evaluating of the evidence from the decision of the Environment and Land Court at Malindi (Olola J.) on 24th October 2019 in E.L.C Civil Suit No. 26 of 2015)*

**RULING**

1. The Applicant herein, Tropical Treasures Limited, seeks to stay the directions given by this Court that parties file and serve submissions, and that it be allowed to introduce material evidence to allow this Court to reappraise, re- evaluate the amount, value or significance of the same in the determination of the appeal herein. These prayers are in a Notice of Motion dated 26<sup>th</sup> May 2022, which is supported by an affidavit sworn on even date by Abdulsamad Abeid Said, a director of the Applicant. The Applicant's case is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who were the plaintiffs in the Environment and Land Court (ELC) in ELC Civil Suit No 26 of 2015, instructed their advocates by a letter dated 27<sup>th</sup> October 2016 to withdraw

the suit against the Applicant, who was one of the defendants in the said suit together with the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein.



2. That the Applicant thereupon made a consideration described as a settlement amount on the strength of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents intention to withdraw the case as expressed in their letter of 27<sup>th</sup> October 2016, and the Applicant disbursed the said sum in full to Charo Mwanyule as follows: cash voucher No. 8826 dated 8<sup>th</sup> December 2016 for Kshs 100,000/-, Cash voucher No 8449 dated 3<sup>rd</sup> July 2014 for Kshs 15,000/-, cash voucher no. 8464 dated 23<sup>rd</sup> July 2014 for 150,000/-, cash voucher no. 8826 dated 9<sup>th</sup> December 2016 for Kshs 100,000/-, cash voucher no 8830 dated 23<sup>rd</sup> December 2016 for Kshs 200,000/- and cash voucher no 8565 dated 20<sup>th</sup> June 2017 for Kshs 2,000/.
3. The Applicant argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' advocate was reckless, negligent and acted in bad faith in failing to disclose the instructions to settle the case to the ELC, and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had received a settlement amount. Further, that the Applicant was greatly prejudiced by its reliance on the settlement, for the reasons that a judgment was entered against it, and it was thereby condemned unheard. According to the Applicant, the letter instructing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' advocate to settle the matter out of court and sums procured in consideration sealed a contractual obligation between the parties, which ought to have been presented before the ELC for examination and adoption. The Applicant annexed a copy of the letter dated 27<sup>th</sup> October 2016, and of the cash vouchers evidencing the payments made to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application by a replying affidavit sworn on 20<sup>th</sup> June 2022 by Charo Mwanyule Mangi, the legal representative of the Estate of Manyule Mangi Yaa. It was their case that they filed ELC Suit no 26 of 2015, as Plaintiffs, where they sought inter alia orders for a permanent injunction restraining the Applicant from dispossessing them of the Suit property L.R. No. 28534/KILIFI and CR 53828; that the transfer of the said property to the Applicant was illegal, fraudulent, null and void and that the Registrar be directed to rectify the register and nullify the Applicant's registration. The suit arose out of a sale agreement between the parties in which the Applicant was to purchase the suit property from them for total sum of Kshs 41,500,00/-. They deponed that they only received a sum of Kshs 2,020,000/- as part of the purchase price and conceded that they wrote to their advocates, instructing them to withdraw the suit against the Applicant on the promise that the balance of the purchase price would be paid. However, that the Applicant only paid a further sum of Kshs 100,000/- towards settling the balance of the purchase price on 15th March 2017. Further, the vouchers exhibited by the Applicant, being No. 8449 dated 3rd July 2014 and No. 8964 dated 23rd July 2014 were all paid towards the purchase price prior to instituting the suit, while voucher No. 8826 dated 8th December 2016 is duplicated, and they did not receive the alleged payment on voucher number 8830.
5. After the Applicant did not pay out the balance of the purchase price as agreed, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deponed that on 17<sup>th</sup> July 2017, they instructed their advocate to proceed with the suit, and stated that there was no consent filed between the parties withdrawing the suit, nor did their advocates serve a notice in writing to the Applicant wholly discontinuing the suit. The 1st and 2nd Respondents' advocates thereupon proceeded to fix the matter for hearing. Further, that the Applicant participated in the hearing and was represented by advocates, therefore could not allege that they were condemned unheard. Additionally, the instructions to withdraw the suit was not a contractual obligation between the parties, in the absence of a consent or notice to withdraw.
6. When the Applicant's application came up for virtual hearing on 4<sup>th</sup> July 2022, there was no appearance for the Applicant, even though its advocate was duly served with the hearing notice. We however noted that the Applicant's counsel had filed written submissions dated 13<sup>th</sup> June 2022 on the said application, and proceeded with the hearing on this basis. Learned counsel Ms. Mango appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and indicated that she would rely on written submissions dated 20<sup>th</sup> June 2022.



There was also no appearance for the 3<sup>rd</sup> Respondent though served, while learned counsel Ms. Lutta appeared for the 4<sup>th</sup> Respondent, and counsel submitted that the issues raised in the appeal did not affect her client and left the matter to the Court's discretion.

7. We have carefully considered the application before us and the rival submissions by learned counsels. The application is grounded on Rule 29 of the Court of Appeal Rules of 2010, which has since been succeeded by Rule 31 of the Court of Appeal Rules of 2022, which provides as follows:

1. On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
  - a. to re-appraise the evidence and to draw inferences of fact; and
  - b. in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
2. When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent.
3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court, without any such statements of opinion.
4. The parties to the appeal shall be entitled to be present when such additional evidence is taken.

8. Leave to adduce additional evidence is therefore at the discretion of the Court, and the principles applicable in the exercise of the Court's discretion under Rule 29 were summarized by Chesoni, Ag. JA. (as he then was) in *Mzee Wanjie and 93 others vs A. K. Saikwa and others* (supra) as follows:

“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

1. It must be shown that the evidence could not have been obtained with
  - (a) reasonable diligence for use at the trial;
  - b. 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;
  - c. 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.”

9. Also see *The Administrator, HH The Aga Khan Platinum Jubilee Hospital vs Munyambu* [1985] KLR 127 and *Joginder Auto Service Ltd vs Mohammed Shaffique & Another* [2001] eKLR. The Supreme Court of Kenya has also set out guidelines for the admission of additional evidence before appellate courts in *Hon. Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 others* [supra] as follows:

“(79) ... (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 his/her 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.”

10. The Supreme Court in addition stressed that additional evidence at appellate level should be allowed on a case-by-case basis and even then “sparingly with abundant caution.”.

11. It is notable that the Applicant in the instant application does not indicate nor specify in its prayers the nature of the material evidence that it seeks to introduce as additional evidence. It is however our understanding from a reading of the application, the supporting evidence and submissions that the evidence sought to be introduced is the letter by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 27<sup>th</sup> October 2016 addressed to their advocates, and various cash payment vouchers evidencing payments made by the Applicant to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, that are alleged to be the basis of settlement of the suit in the ELC and of the said Respondent withdrawing the said suit against the Applicant.

12. The questions that we need answered in this regard are firstly, whether the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial. It is only upon a



finding being made that the evidence could not have been obtained after exercise of due diligence that we will then proceed to address the two remaining questions as to whether the evidence will probably have an important influence on the result of the appeal, and whether it is credible evidence. In our view this approach will address the risk of an applicant seeking to set out a new case and fill gaps in its case on appeal by the introduction of new evidence.

13. On the first question, the Applicant's counsel, while relying on the decision of this Court in *Attorney General vs Torino Enterprise Limited* [2019] eKLR submitted that it had introduced exhibits that demonstrated the additional evidence, which ought to have accompanied the consent to settle the matter out of Court and would have had an important influence on the result of the case. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' counsel, while was placing reliance on the Supreme Court's decision in *Mohamed Abdi Mohammed vs Ahmed Abdullahi Mohamed and 3 others* (supra) and this Court's decision in *Attorney General vs Torino Enterprises limited* [supra] submitted that the Applicant had not shown that the said evidence could not have been obtained with reasonable diligence for use at the trial, was not within its knowledge, or could not have been produced at the time of the suit. Further, that the Applicant was reasonably aware of, and would be easily have procured the further evidence in the course of the trial, and the additional evidence was not such that would influence and impact the result of the verdict. Lastly, that the additional evidence did not disclose a strong prima facie case of wilful deception of the Court and the Applicant was therefore seeking to make a fresh case in the appeal.
14. We note that the Applicant did not plead to, or bring any evidence to demonstrate the difficulties it faced, and due diligence it undertook to access and produce the additional evidence that it seeks to introduce, particularly of the payment vouchers that were in its possession and custody. In addition, the Applicant does not dispute the averments that it participated at the hearing of the suit in the ELC, and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this respect annexed a copy of an extract of the proceedings in the ELC, which showed that by 25th July 2018, the advocates for the Applicant and 1<sup>st</sup> and 2<sup>nd</sup> Respondents indicated that they were ready to proceed with the hearing, after various adjournments for the parties to arrive at a settlement did not bear fruit.
15. The alleged settlement was therefore within the knowledge of the Applicant during the hearing of the suit at the ELC, the payment vouchers were in its possession, and the Applicant had the opportunity to produce any evidence as regards any settlement during the said hearing, which its lawyer participated in on 11<sup>th</sup> December 2019. We therefore decline to exercise our discretion in favour of the Applicant for these reasons.
16. In the circumstances, the Notice of Motion application dated 26<sup>th</sup> May 2022, is not merited, and is accordingly dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
17. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF OCTOBER 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

