



**Ngutuny v Kenya National Highways Authority & another (Civil Appeal  
E160 of 2024) [2025] KEHC 10573 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10573 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E160 OF 2024**

**A MABEYA, J  
JULY 21, 2025**

**BETWEEN**

**ESTHER NGUTUNY ..... APPELLANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling determines the Motion dated 21/8.2024. The same was brought under section 78 (1) (d) of the *Civil Procedure Act*, Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules 2010*. It sought leave to adduce additional evidence on appeal.
2. The application was based on the grounds set out in the body thereof and in the supporting affidavit of Robert Mwetich, Advocate. It was the applicant's case that additional evidence sought to be adduced was relevant to the matter before Court. That it was in the interests of justice as it will impact upon the result of the verdict given that it would remove doubt and vagueness over the case, it was credible, not voluminous, discloses a prima facie case of willful deception on the court and that it sought to address a matter raised in the 1<sup>st</sup> respondent's submissions when the case had been closed.
3. The parties filed their respective submissions for the determination of the matter. The applicant submitted that the additional evidence be allowed as it was relevant to the case as it will help address the issue of limitation raised by the 1<sup>st</sup> respondent in its submissions. That it had direct bearing on the issue of service of statutory notice. Reliance was placed on the *Kenya Agricultural and Livestock Organization v Leah Okoko & Another* [2022] eKLR.
4. That the additional evidence would also aid in ensuring that the decision that will be pronounced would have been made relying on all evidence relevant to the case as was held in the case of *A Andisamy Chettiar v A Subburaj Chettiar* (2015) 17 SCC 713.



5. On the other hand, the 1<sup>st</sup> respondent submitted that the appellant failed to exercise reasonable diligence in production of the additional evidence before the trial court and as such, had not met the conditions necessary to be allowed to adduce the said evidence.

6. I have considered the record and the submissions of the parties. Section 78 of the Civil Procedure Act provides: -

- “ 1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
- a. to determine a case finally;
  - b. to remand a case;
  - c. to frame issues and refer them for trial;
  - d. to take additional evidence or to require the evidence to be taken;
  - e. to order a new trial.
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

7. Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules provides: -

“27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if

- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
- (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission.

28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Where additional evidence is directed or allowed to be taken, the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”

8. In Mohammed Abdi Mohamud v Ahmed Abdullahi Mohammed & 3 Others (2018) eKLR, the Supreme Court laid down the following principles: -

- “79. ... We therefore lay down 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 wilful 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.”

9. In the present case, the applicant contends that the additional evidence sought to be introduced relate to showing that the 1<sup>st</sup> respondent was served with the relevant “Notice to Sue” in accordance with the provisions of section 67 (a) of the *Kenya Roads Act* No. 2 of 2007.

10. I have examined the said additional evidence. It is not voluminous. As to whether the same could have been adduced before the trial court, the same was readily available for adduction. The applicant contended that the issue of the limitation of actions was raised in the 1<sup>st</sup> respondent’s submissions. That the stated evidence would address that issue.



11. The record shows that the 1<sup>st</sup> respondent had raised the issue in paragraph 11 of its defence thus: -
- “ .....
12. That being the case, that issue was alive for determination. The applicant was expected to adduce evidence to rebut or challenge the same. With reasonable diligence the same would have been obtained for use at the trial. It was within the knowledge of or could not have been produced at the time of the suit by the applicant.
13. It does not matter that the additional evidence sought to be introduced discloses a strong prima facie case of wilful deception of the court by the 1<sup>st</sup> respondent as alleged. The 1<sup>st</sup> respondent properly put the applicant on notice through paragraph 11 of the defence of denial of service of any notice. It was for the applicant to prove the fact of notice. She failed to do so as required under section 107 of the Evidence Act, Cap 80 Laws of Kenya. She cannot seek to prove it on appeal having had the chance to do so before the trial court. There is no room for litigation by instalment.
14. To this Court’s mind, the additional evidence is intended to fill the lacunae in the applicant’s case. She failed to tender crucial evidence which she admits was within her knowledge power and control.
15. In the premises, the Court finds the application to be without merit and dismisses the same with costs.
- It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF JULY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

