# Mainkam Limited & another v Multichoice Kenya Limited (Civil Appeal (Application) 49 of 2020) [2025] KECA 1596 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KECA 1596 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL (APPLICATION) 49 OF 2020**

**W KARANJA, K M'INOTI & LA ACHODE, JJA**

**OCTOBER 3, 2025**

**BETWEEN**

**MAINKAM LIMITED ........................................................................ 1ST APPLICANT**

**JAMES MAINA KAMAU ................................................................. 2ND APPLICANT**

**AND**

**MULTICHOICE KENYA LIMITED ................................................. RESPONDENT**

***(Being an appeal from the Judgment and Decree of the High Court of Kenya, Commercial and Admiralty Division at Nairobi (F. Tuiyott, J.) dated 24th September, 2019 in HCCC No. 492 of 2012)***

## RULING

1. Multichoice Kenya Limited, the respondent, filed HCCC No. 492 of 2012 against Mainkam Limited and James Maina Kamau, the applicants, and sought judgment against them jointly and severally for, inter alia:-

    i. General damages for breach of contract and fraud.

    ii. Kshs.153,457,809.00 being the amount demanded and payable to the Kenya Revenue Authority in respect of the Imputed Consignments.

    iii. Interest on the amount found to be due to the plaintiff at court rate from the date of the payments made to the defendant or alternatively, from such time as the court may determine till payment in full.

    iv. Costs of this suit.

2. F. Tuiyott, J. (as he then was) heard the matter and on 24th September 2019 delivered judgment as follows;

> "So what damages are due to Multichoice? The loss proved by Multichoice is the sum of Kshs.154,077,023 demanded and paid by it to KRA. However, as it prayed for a slightly smaller sum of Kshs.153,457,809 then judgment is entered for the Plaintiff against the 1st and 2nd Defendants jointly and severally for Kshs.153,457,809.00 with interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit."

3. Being aggrieved by the judgment, the applicants filed an appeal before this Court. Subsequently, the applicants moved to this Court under certificate of urgency through this Notice of Motion on 8th July 2020.

4. The Notice of Motion is expressed to be brought under Rules 29(1)(b), 42 and 47 of the Court of Appeal Rules (the Rules), section 3A of the *Appellate Jurisdiction Act*, and Articles 25(c), 50 and 159 of *the Constitution*. The applicants seek three substantive prayers, namely:-

   i. that leave be granted to adduce additional evidence in the form of customs entry forms amounting to Kshs.246,982,383.00 and that the supplementary record already filed be deemed as properly on record;

   ii. in the alternative, that the matter be remitted to the trial court strictly for the purpose of taking in the additional customs entry forms; and

   iii. that this Court itself do take such evidence, or direct the trial court to do so, in order to satisfy the interests of justice.

5. The application is predicated on grounds on its face and supported by an affidavit sworn by James Maina Kamau, the 2nd applicant, on 8th July 2020. The gist of the depositions is that, after judgment had been delivered, the applicants discovered customs entry forms evidencing payments which had not been produced at trial. They contend that the documents were in the custody of the Kenya Revenue Authority (KRA) and could not, with reasonable diligence, have been obtained earlier, and that the evidence is material and likely to influence the outcome. That he believes that they have an arguable appeal with high chances of success and that there are exceptional circumstances that justify the reception of additional evidence within the meaning of rule 29(1)(b) of the Rules; that the evidence is credible; that refusing the application will be an affront to justice; that they have discovered that they had paid the respondent Kshs.246,982,383.00 and that the Customs Entry Forms were discovered after the case had been adjudicated which ought to be subtracted from the decretal amount; and that they took reasonable diligence but could not trace the Entry Forms; that the same were in possession of KRA which was not a party to the suit but was a necessary party as shown by the bundle of payments to customs from bank statements totaling to Kshs.44,712,768.00 and various custom entry forms used by the appellants to clear the goods; and that the applicants will suffer irreparable prejudice if the additional evidence is not taken and/or allowed by this Court and where applicable the trial court.

6. The applicants further depose that they have a good appeal with high chances of success, and that refusal to admit the documents would occasion injustice. The documents they seek to include in the record are a bundle of bank statements from Barclays Bank of Kenya and Commercial Bank of Africa, and the Customs Entry Forms whose details they have given. All the documents in question are annexed to the applicant's affidavit.

7. The application is opposed through a replying affidavit sworn by Ruth Omondi, the respondent's Finance Director, on 8th March 2024. She contends that the application does not meet the threshold of rule 29(1)(b), as the suit before the trial court was pending for eight years, giving the applicants sufficient time to produce the documents.

8. It is further averred that the credibility of the bank statements is questionable as they lack verification stamps, dates of issue, and proof that the cheques reflected were indeed payments to KRA in respect of the transactions in issue. The respondent also notes that during the pretrial process, the applicants never disclosed any missing documents, and that the witnesses from KRA were not cross- examined on the alleged forms.

9. The respondent argues that the application amounts to an abuse of the court process and is intended to patch up gaps in the defence. It also highlights the delay: judgment was delivered on 24th September 2019, yet this application was filed ten months later.

10. The applicants filed a supplementary affidavit maintaining that the forms were not in their possession, that no prejudice would be suffered by the respondent, and that the evidence would aid a just decision.

11. We have considered the application before us, the rival affidavits, submissions and the law. The central question is whether the applicants have satisfied the legal test for adducing further evidence on appeal. Rule 29(1)(b) of the Court of Appeal Rules (now Rule 31(1)(b) of the 2022 Rules) empowers this Court, in its discretion, to take additional evidence or to direct that it be taken. This jurisdiction, however, is exceptional and sparingly exercised.

12. In Mzee Wanjie & 93 Others v A.K. Saikwa [1984] KLR 275, this Court adopted the English case of Ladd v Marshall [1954] 1 WLR 1489, which requires that:-

    i. the evidence could not have been obtained with reasonable diligence for use at the trial;

    ii. the evidence would probably have an important influence on the result of the case; and

    iii. the evidence is apparently credible.

13. The above requirements were amplified by the Supreme Court in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] KESC 62 where the Court issued further guidelines,emphasising diligence, relevance, credibility, non-voluminous nature, and the requirement that such evidence not be used to fill gaps or patch up a party's case. The Court expressed itself more specifically as follows:-

> " 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 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…”

14. Applying these principles to the present case, we note that the suit was before the trial court for eight years, and there was ample opportunity to obtain or compel the production of the alleged documents. No explanation has been tendered as to why this discovery could not happen earlier with exercise of due diligence.

15. We have also looked at the attached documents. Firstly, on the bank statements, we note that since they belong to the applicants, they must have been in their custody all the time and if they were not, they should have applied to their banks to be supplied with the statements, and that would not have taken eight (8) years. We note further, that the highlighted entries, on which the applicants seek to rely do not indicate who the payee was or the purpose to which they were to be applied. They only present evidence that the bankers’ cheques were purchased. Moreover, the documents are contested in terms of credibility, lacking verification or a clear nexus to the customs entries. In our view, their potential influence on the result of the case is, at best, speculative. We are doubtful whether the said documents, as they are, absent authentication, would have any evidential value in aid of the applicant’s case.

16. We also hold the view that re-opening the case after so many years will definitely be prejudicial to the respondent, not to mention that equity does not aid the indolent.

17. The Court is persuaded by the respondent’s argument that the application is intended to repair deficiencies in the applicants’ case, which is impermissible. This Court has consistently rejected such attempts: see, for example, Kinungi alias Mary Wangu Mbogo & another v Kariuki [2024] KECA 1536, where additional evidence was declined because the documents were always available to the applicant, and M’Miti v Ndwiga [2024] KECA 725, where fresh evidence was refused as unlikely to affect the outcome.

18. Finally, there has been an inordinate delay of nearly ten months after judgment, without adequate explanation. The Supreme Court in Mahamud (supra) cautioned against allowing applications that constitute an abuse of process or undermine the finality of litigation.

19. In the premises, we find that the applicants have not met the stringent threshold for the admission of additional evidence before this Court. Accordingly, we find this application devoid of merit and dismiss it.

20. The applicants shall bear the respondent's costs.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.**

**W. KARANJA**

**JUDGE OF APPEAL**

**……………………………….**

**K. M'INOTI**

**JUDGE OF APPEAL**

**……………………………….**

**K. ACHODE**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**