

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION & ECONOMIC**  
**ANTI-CORRUPTION APPEAL CASE NO. E007 OF 2025**

**CHARLES CHEGE MBUTHIA.....**  
**.....APPLICANT**

**VERSUS**

**REPUBLIC.....**  
**.....RESPONDENT**

**RULING**

**1.** The applicant herein has moved this court by way of the application dated the 3<sup>rd</sup> September, 2025 under **Articles 22, 23, 48, 50 and 159** of the **Constitution, Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act** and all the other enabling provisions of the law. The application is premised on the grounds of its face and it is supported by the annexed affidavit sworn by the applicant. Through the application, the applicant has sought the following orders;

**1) Spent.**

**2) This Honourable Court be pleased to admit, adopt, and deem as evidence in this matter the Plaintiffs list of documents dated 18<sup>th</sup> September 2019 that the Ethics and Anti-Corruption Commission (EACC) previously relied upon**

- and produced before the High Court, Anti-Corruption and Economic Crimes Division in ACEC NO 1 of 2025.*
- 3) The said documents be deemed as duly filed, produced, and forming part of the record of this Court for purposes of the fair and just determination of this matter.**
- 4) THAT this Honorable court do grant any further orders it deems fit.**
- 5) THAT the costs be in the cause.**

- 2.** The applicant avers that he has a fundamental right under **Article 159 (1)** of the **Constitution** to a fair hearing, which includes the right to be heard and to adduce and rely on evidence in support of his defence. He states that under **Article 48** of the **Constitution**, he is entitled to access justice while **Article 159 (2) (d)** obligates this Honourable court to administer justice without undue regard to procedural technicalities so as to ensure substantive justice.
- 3.** The applicant states that Anti-Corruption Commission previously relied on and produced before the High court, Anti-Corruption and Economic Crimes Division, a list of documents that are directly relevant and material to the present proceedings, which documents contain critical information that will assist the court in fully appreciating the issues in dispute,

and their adoption is necessary to avoid a miscarriage of justice.

- 4.** That the documents are essential in advancing the applicant's defence, establishing the theory of his case and demonstrating his innocence against the allegations brought by the respondent. That unless the said documents are urgently admitted and adopted as part of the record herein, the applicant will suffer grave prejudice as the court will be deprived of crucial evidence, and his ability to mount a full and effective defence will be severely undermined.
- 5.** He avers that the application has been brought in good faith, and that no prejudice will be suffered by the respondent if the orders herein are granted, as the documents in question emanated from the respondent's own reliance before the High court. That it is the overriding interest of justice and fairness that all relevant evidence be admitted before this court to enable a just and conclusive determination of the matter.
- 6.** The respondent filed a replying affidavit sworn by Faith Mwila, on the 28<sup>th</sup> October, 2025. She contends that admission of additional evidence at the appellate stage is not a matter of

right but lies purely within the discretion of the Court to be exercised only in exceptional and deserving circumstances. That it ought to be exercised sparingly and only where it is demonstrated that such evidence is fresh, relevant, credible and would have a significant impact on the determination of the appeal.

- 7.** That the applicant has not met the requisite standards for the exercise of this court's discretion to admit additional evidence in that although the applicant avers that the documents allegedly filed and produced in court by EACC before the High court Anti-Corruption court case No. 1 of 2020 directly bear on the issues before this court and are indispensable to his case, he has failed to avail the said evidence to this court and merely alludes to its existence without exhibiting it. That he has not demonstrated that the alleged evidence is of such weight or probative value that had it been adduced at the trial, it would have led the learned trial Magistrate to reach a different conclusion.
- 8.** That the applicant has not demonstrated to the court that in the absence of the said documents, the court is unable to

assess their relevance, credibility or potential impact and whether they would have impact on the applicant's conviction as alleged.

**9.** That the applicant's application is replete with falsehoods and misrepresentations calculated to mislead the court in that he is a stranger to the alleged proceedings and was never a party to High court ACEC No. 1 of 2025. She stated that the EACC had indeed filed a Civil suit against Testimony Enterprises, a company affiliated with the applicant but the same was instituted vide High court Civil Suit No. 1 of 2020 and not High Court Civil suit No. 1 of 2025, and it filed a list of documents dated the 17<sup>th</sup> February, 2020 and served the bundle of documents upon the applicant.

**10.** The respondent contends that the evidence sought to be adduced is not new evidence and nothing has been demonstrated to prove that the evidence was unavailable in the course of the trial. That at all material times, the applicant was represented by the firm of Swaka & Company Advocates during the trial and had an opportunity to avail such evidence if he deemed it important, yet, he was

accorded sufficient time by the trial court to defend himself and at no time did he seek to produce the said evidence before the trial court. That he actively participated in the proceedings by way of Cross- examination of witnesses, testing and challenging the evidence that the prosecution tendered.

**11.** The respondents avers that the application is intended to fill in the gaps in the applicant's case and it is prejudicial to the respondent. That having diligently prosecuted his case in 2019, the respondent is entitled to the finality of litigation and that reintroduction of evidence at this stage would only delay the final resolution of the matter.

**12.** The application was disposed of by way of written Submissions.

### **Applicant's Submissions**

**13.** The applicant submits that the application is specific and clear on issues of the Constitution and the Law and that the applicant will suffer injustice if no additional evidence is allowed at this point of the appeal process. That the additional

evidence raises exceptional circumstances regarding Constitutional and legal issues, disclosure and admissibility of evidence which cannot wait until the appeal is heard and determined.

**14.** He further submitted that the prosecution deliberately refused to disclose this material evidence which was available to them despite a stern warning by the trial Magistrate to honour pre-trial disclosure. That the warning occurred during the testimony of PW6 as per the Trial court's proceedings when Mr. Swaka for the defence complained that the prosecution was ambushing the accused persons and the trial court delivered a ruling on the 16<sup>th</sup> March, 2022 in which the trial court ordered the prosecution to forthwith supply to the defence advocates copies of all the documents that had been omitted.

**15.** That the applicant underwent the entire trial process and tendered his defence without the benefit of the Audit report and the document that he seeks to have produced were made known to the defence at the tail end of the current trial in

another related matter Civil Suit No. ACEC 1 of 2020 by DW4 (Charles Chege Mbuthia).

- 16.** That the Audit report is a crucial document that outlined key issues in the performance of the contract including monies paid by Kiambu County Government as at the time of the audit and failure to provide the applicant with the material exhibits during trial denied him the opportunity to adequately prepare for his defence, access evidence in his favour, or challenge the prosecution's evidence, an omission that entitled the trial court to conclude that Kiambu County lost some money during performance of the contract, a fact that prejudiced him.
- 17.** It is the applicant's submission that the additional evidence will disclose key constitutional issues on fair trial, a basis to prove that Kiambu County did not lose any money and that the basis for engagement in a fraudulent procurement process will be erased or shaken as performance of the contract will defeat the assertion that the aim of the procurement was fraud. Reliance was placed on the following cases;

- a) Thomas Patrick Cholmondeley Vs Republic (2009) eKLR
- b) Republic Vs Mohamed Abdow Mohamed (2013) eLKR
- c) Republic Vs Pattni 1LKR 310

**18.** The applicant urged the court to summon the certified copies of the proceedings in ACEC I of 2020 pursuant to **Sections 33, 34 and 77** of the **Evidence Act** as it is less expensive and it saves time and it is not prejudicial to any party as all the parties had an opportunity to cross examine the maker when he appeared to give evidence in the Civil case when the audit report was tendered by EACC.

### **Respondent's Submissions**

**19.** The respondent submitted that the application is a legal misadventure without any gravitas and thus, an abuse of the court process aimed at causing delay in the determination of the appeal. That the applicant has failed to meet the threshold to warrant the admission of the said documents and that the applicant has failed to demonstrate any real prejudice that he will suffer if the orders are not granted.

**20.** That the applicant has not demonstrated that the evidence he seeks to adduce was not within his knowledge or that he could not have produced it at the time of the trial. That the documents were exhibited and brought to the attention of the applicant during the trial and he was ably represented by the firm of Swaka and company advocates and had an opportunity to avail that evidence if he deemed it important as counsel was representing him both at the trial and in ACEC Suit No. 1 of 2020.

**21.** On the principles that should guide the court in an application seeking to adduce additional evidence, the respondent relied on the case of **Elgood vs Regina (1968) E.A 274** which adopted the summary enunciated by Lord Parker C.J in R vs Parks (1969) All ER page 364. Reliance was also placed on the case of **Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed and 3 others ( Petition No. 9 of 2018 (2018) eKLR.**

**22.** That the applicant must not seek to adduce additional evidence to make a fresh case, fill up omissions or patch up the weak points in his appeal. Reliance was placed on the

case of **Samuel Kangu Kamau Vs Republic (2015) eKLR.**

That he has not demonstrated that the alleged additional evidence is of such weight or probative value that had it been adduced at the trial, it would have led the learned trial magistrate to reach a different conclusion. That the nature of proceedings in ACEC No. 1 of 2020 are civil and therefore cannot be relied upon in a criminal case.

### **Analysis and Determination**

**23.** The court has considered the application and all the material that were supplied to the court in support of and in opposition of the application. The only issue for determination is whether the applicant has laid sufficient grounds to warrant admission of the evidence at the appellate stage.

**24.** The applicant has sought leave to adduce additional evidence. Section 358 of the Criminal Procedure Code makes provision for taking of additional evidence by the High court and it provides;

***“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record***

***its reasons, and may either take such evidence or direct it to be taken by a subordinate court.”***

**25.** The Supreme court in the case of **Mohamed Abdi Mohamud (supra)** laid down the governing principles on allowing additional evidence;

- 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 the 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 with any prejudice that might arise from the additional evidence on the other.

**26.** In the case of **Samuel Kangu Kamau (supra)** the court of appeal stated that **“the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal”**. The court referred to the case of **Wanje Vs Saikwa (1984) KLR 275** thus;

*“The rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were to be used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very*

***sparingly and great caution should be exercised in admitting fresh evidence''.***

**27.** The applicant in his application has sought to have the documents dated the 18<sup>th</sup> September, 2019 that the EACC previously relied upon and produced before the High court, Anti-Corruption and Economic Crimes Division in ACEC No. 1 of 2025. It is his contention that the said documents are critical to his defence as they directly bear on issues before this court and are indispensable in advancing his case, establishing his innocence, and ensuring that all relevant materials are placed before this Honourable court.

**28.** I have perused the application in the body of the application, the applicant has sought production of the documents dated the 18<sup>th</sup> September, 2019. In his Submissions he sought for admission and adoption as evidence in the form of an Audit Report dated the 25<sup>th</sup> September, 2019. The applicant has also asked the court to rely on certified copies of the proceedings in ACECA No. 1 of 2020, under **Sections 33, 34 and 77** of the **Evidence Act**.

**29.** From the application and the Submissions, it is not clear the documents that the applicant is seeking to have produced. He has not even annexed them to his affidavit for the court and the respondent to see and appreciate the relevance of those documents. He is not a party to ACEC Suit No. 1 of 2025 that he has referred to. It is trite law that a party is bound by its pleadings.

**30.** In the end and for the reasons that the court has given hereinabove, the application is hereby struck out.

**31.** It is so ordered.

Signed, dated and delivered virtually on this 26<sup>th</sup> day of November, 2025

.....  
**L.M. NJUGUNA**  
**JUDGE**

**In the presence of:-**

*Miss Kamau holding brief for Mr. Swaka for the Appellant*

*Mr. Monda appearing with Faith Mwila and Ms. Mwasaru for the Respondent*

*Mr. Mutuku for the Appellant in E006/2025*