

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: W. KARANJA, M'INOTI & ACHODE, JJ.A.)**

**CIVIL APPLICATION NO. NAI 276 OF 2020**

**BETWEEN**

**HON. BASIL CRITICOS.....APPELLANT**

**AND**

**THE HON ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT THE CHIEF LAND REGISTRAR.....  
2<sup>ND</sup> RESPONDENT THE DIRECTOR LAND ADJUDICATION &  
SETTLEMENT.....3<sup>RD</sup> RESPONDENT  
TOWN COUNCIL OF TAVETA.....4<sup>TH</sup> RESPONDENT  
JOHN MRUTTU.....5<sup>TH</sup>  
RESPONDENT TRUTH JUSTICE & RECONCILIATION  
COMMISSION.....6<sup>TH</sup>  
RESPONDENT NATIONAL LAND COMMISSION.....  
....7<sup>TH</sup> RESPONDENT COUNTY GOVERNMENT OF  
TAITA-TAVETA.....8<sup>TH</sup> RESPONDENT/APPLICANT**

*(Being an application brought under Rule 31 of the Court of Appeal Rules, to adduce additional evidence in pending appeal against the Judgment of the Environment and Land Court of Kenya at Nairobi (E.*

*Obaga, J.) dated 12<sup>th</sup> March, 2020*

*in*

***ELC Petition No. 576 of 2012)***

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**RULING OF THE COURT**

1. The Notice of Motion before us is not properly intituled and the heading used for the application is the same as that in the appeal itself. It is necessary to clarify that the applicant in the Notice of Motion dated 28<sup>th</sup> January 2025 is the County Government of Taita Taveta (8<sup>th</sup> respondent in the Appeal), while the respondent is Basil Criticos (the Appellant). The applicant seeks leave to adduce additional evidence, as particularized in the application,

in support

of its cross-appeal against the judgment and decree of the Environment and Land Court at Nairobi, in **ELC Petition No.576 of 2012.**

2. The application is brought under **Rule 31(1)b** of the **Rules** of this Court. The grounds on the face of the application are that: the appellant filed a constitutional petition before the superior court challenging the decision of the respondents to refuse to renew or extend his lease over land parcel No. 5827 Taveta; that the petition was dismissed and hence the instant appeal; that on 4<sup>th</sup> November 2022 this Court issued orders allowing the appellant leave to produce additional evidence including letters issued after the judgment; that this Court in arriving at its decision observed that the additional evidence will have an influence to the appeal and that the evidence looks credible; that after carefully reviewing the additional evidence produced by the appellant, the applicant would also wish to produce additional evidence which will assist the Court to arrive at a just determination; that the evidence sought to be produced by the applicant was not within its knowledge at the time of the hearing of the petition before the superior court and the evidence will have an important influence of the result of appeal; and that no prejudice will be suffered by the appellant if the leave sought is allowed.
3. The application is supported by an affidavit sworn by Habib

Mohammed Mruttu of even date. The applicant deposed that  
the

evidence sought to be produced was a letter dated 12<sup>th</sup> May 2021 from the National Land Commission where it was communicated that the suit property was to be used to settle squatters; also a report by the Senate resolving that the suit property should be used to settle squatters and that the additional evidence sought to be produced will prove that the suit property has already been identified and reserved for public use within the meaning of the **Land Act, 2012** and as a result, that the pre-emptive rights of the appellant have been extinguished.

4. The application was opposed by the respondent through a replying affidavit dated 20<sup>th</sup> February 2025. It was deposed that the evidence sought to be produced was obtained after the superior court's judgment in March 2020 and hence it was prejudicial and should not be admitted; further, that allowing the new evidence would contravene the right to a fair hearing and the right to property, especially since the appellant did not participate in the Senate proceedings where some of the new evidence originated and also that the matter was *sub judice* when the Senate Committee heard the complaint.
5. The other respondents did not respond to the application.
6. The applicant and the respondent filed submissions amplifying their rival positions and case digests in support thereof.

7. When the matter came up for hearing before us on 29<sup>th</sup> April 2025 learned counsel Mr. Bwire appeared for the applicant, while learned counsel Mr. Allen Gichuhi (SC) appeared for the respondent. They both highlighted, albeit briefly, their submissions which are quite detailed and which in our view cover every aspect of the application before us. We have read and noted the contents of the said submissions.
8. On behalf of the applicant, it was submitted that the core of the appeal involves interpreting **section 13(1)(b)** of the **Land Act**, specifically balancing a past leaseholder's pre-emptive rights against the requirement of the land for public use. It was contended that the Senate Report meets the criteria for admitting new evidence on appeal, as established in **Attorney General & 3 others -vs-Tott & 8 others [2024] KECA 1275 (KLR)**. These criteria include, among others, that; the evidence is directly relevant and could impact the verdict; it could not have been obtained with reasonable diligence during the trial and that its admission would not prejudice the opposing party.
9. Further it was submitted that the Senate Report includes findings that the appellant's lease renewal process was potentially fraudulent, that the land is currently occupied by squatters and Kenya Prisons, and as of 2013, the appellant was only occupying

42 hectares of the large parcel. The applicant contended that the report

is credible, relevant, and will assist the Court in reaching a just determination.

10. On his part the appellant submitted that all the parties were aware of the pending constitutional petition filed in 2012 regarding the appellant's legitimate expectation of lease renewal and that the applicant filed grounds of opposition but no evidence in rebuttal at the time. It was further contended that the additional evidence now sought to be adduced was not before the proceedings in the superior court and could not have been considered in the judgment.

**11.** It was further submitted that allowing new evidence obtained after the superior court's judgment was delivered on 12<sup>th</sup> March 2020 would be prejudicial, as the appellant did not participate in the Senate proceedings where the evidence was derived. It was contended that **Rule 31** of the **Court of Appeal Rules** does not allow for new evidence years after a judgment, restricting it to matters available before the final judgment was rendered. Counsel relied on **P.G.M. -vs- A.W.M. [2020] eKLR** and **Garama -vs- Karisa & 3**

**others [2024] KESC 1(KLR)** which held that additional evidence rules are not intended to allow a party to patch up weak points or fill up omissions in their case on appeal. Further it was submitted that the Court must exercise great caution and assess proportionality and potential prejudice.

12. Finally, it was submitted that the application should be dismissed with costs as the the matter was sub judice at the time the Senate Committee heard the complaint. We are urged to dismiss the application with costs.

13. We have considered the application in light of the pleadings of the parties, the authorities cited and the law. The application is grounded on **Rule 31(1)b** of the **Court of Appeal Rules** which provides as follows:

- “1. On an 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 and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.***
- 2.When additional evidence is taken by the Court, the evidence may be taken orally 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.***
- 4.When additional evidence is taken by a commissioner, the commissioner shall certify the evidence to the Court, without any such statements of opinion.***
- 5.Each party to the appeal shall be entitled to be present when the additional evidence is taken.”***

14. In essence, leave to adduce additional evidence is a discretionary relief of this Court, and the Court grants such leave on the basis of

'sufficient reason'. In the case of **Attorney General -vs- Torino**

**Enterprises Limited [2019] eKLR**, this Court observed thus:

***“Though what constitutes ‘sufficient reason’ is not explained in the rule, through judicial practice the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing; two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible.”***

**15.** The Supreme Court in **Mohamed Abdi Mahamud -vs- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** laid out the guidelines on admission of additional evidence by an appellate Court 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. [80] We must stress here that this Court even with the application of the above-stated principles will only allow additional evidence on a case-by-case basis, and even then, sparingly with abundant caution.”**

16. The applicant in this case wishes to adduce additional evidence in form of:

- i) A letter dated 12<sup>th</sup> May 2021 by the 8<sup>th</sup> Respondent;
- ii) Report of the Senate Standing Committee on Land, Environment and Natural Resources dated 7<sup>th</sup> July 2021 and the resolution thereof. It is important to note that both

documents were made after the judgment in the trial court had been delivered and the matter was pending before this Court.

17. We have grappled with the question as to whether **Rule 31(1)(b)** of the **Rules** of this Court anticipated a situation where the evidence sought to be introduced was made, or came into existence post judgment. We have not come across any decided cases where the evidence sought to be introduced was made after the judgment appealed against had been made. One may argue that such evidence can fall within the description of “evidence that could not be obtained with exercise of due diligence”, but on the other hand, it would also be argued that such evidence would have been made and tailored to specifically fill in gaps or lacunae in the case which the appellant discovered after judgment. Does the evidence before us fall in this category? In answering these questions we shall consider the specific circumstances pertaining to this case and refrain from delving into the discourse on whether as a general rule, evidence created post judgment can be admissible.

18. We have considered the said documents and evaluated each of them against the guidelines and criteria laid down by the Supreme Court in **Mohamed Abdi Mahamud** (supra). In essence, we have queried whether the additional evidence sought to be introduced by the

applicant is directly relevant to the appeal before us, and if allowed, whether it would influence or impact the result of the verdict, and

whether it could not have been obtained with reasonable diligence for use at the trial, and was not within the knowledge of, or could not have been produced by the applicant at the time of trial.

19. It has been submitted by the applicant that the evidence to be adduced is credible, authentic, and directly relevant to the subject matter, and would have significant impact on the final verdict; and that it could not, with reasonable diligence, have been obtained for use at the trial.
20. A perusal of the record before us shows that the applicant only moved this Court on the present application because according to it, the appellant's application dated 24<sup>th</sup> February 2021 to introduce additional evidence was allowed by this Court on 4<sup>th</sup> November 2022. However, the applicant filed the instant application on 28<sup>th</sup> January 2025, two years and two months after this Court's order allowing the appellant's application. The documents sought to be introduced in this matter were obtained on 12<sup>th</sup> May 2021 and 7<sup>th</sup> July 2021 respectively, some three years and 8 months before the instant application was filed. Why the delay? The court has always frowned upon unexplained inordinate delay when called upon to invoke its discretion in favour of a party.
21. The Senate sat and decided it had jurisdiction to investigate the

issue of the squatters and made a determination to settle them on the suit land when this appeal was pending. That issue had not been

pleaded or canvassed before the ELC. It seems to us that the evidence sought to be introduced at this stage, is intended to “make a fresh case on appeal” and to “fill up omissions or patch up the weak points in the applicant’s case”. To our mind, the introduction of these items of evidence in the appeal before us will only serve to introduce fresh issues not litigated in the suit before the trial court, from which the appeal arises. In fact, it will cloud and confuse the issues that this Court is mandated to consider on appeal. This runs afoul the clear principles set by the Supreme Court in **Mohamed**

**Abdi Mahmoud** (supra). See also the Supreme Court decision in

**Freedom Limited -vs- Omar Awadh Mbarak Supreme Court**

**Petition No. E009 of 2024.**

**22. In Mzee Wanje and 93 others -vs- A.K. Saikwa (1982- 88) 1 KAR**

**463**, this Court observed as follows:

***“This 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 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.”***

23. We note further, that in this case, the appellant, who is the registered owner of the suit land was not called to testify before the Senate before the report in question was prepared. His constitutional right to be heard before an adverse finding was made against him or his property was, therefore, violated. How would such issues be canvassed before this Court if the report in question was to be admitted in evidence?. We have no doubt in our minds that admitting the said evidence would be immensely prejudicial to the respondent.

24. Accordingly, for the foregoing reasons, we find that this application fails to pass the test set in the decisions we have referred to above. The same is hereby dismissed with costs to the appellant.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of February 2026**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**K. M'INOTI**

.....  
**JUDGE OF APPEAL**

**L. ACHODE**

.....  
**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR.**