

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: GATEMBU, OCHIENG & MUCHELULE,

JJ.A.) CIVIL APPEAL (APPLICATION) NO. 630 OF

2019 BETWEEN

MJENGO LIMITED.....APPLICANT

AND

**BAKERY,
CONFECTIONERY, FOOD
MANUFACTURING &
ALLIED WORKERS UNION.....RESPONDENT**

*(Being an application for adduction of additional evidence in an appeal from
the Judgment and Decree of the Employment & Labour Court of Kenya, at
Nairobi (B. Ongaya, J.) dated 29th March 2019*

in

***ELRC Cause No. 1720 of
2017)***

RULING OF THE COURT

1. Mjengo Limited (the applicant), by an application dated 6th August 2024, seeks leave to adduce additional evidence in the appeal, by way of affidavit or in such manner as the Court may deem appropriate. The additional evidence sought to be introduced is a Forensic Document Examination Report dated 3rd June 2024, together with its annexures.
2. The application is premised on the grounds that the

additional evidence is relevant and material to the appeal.
The applicant contends that the report demonstrates that
the signatures

appearing on the check-off form relied upon to secure its consent to the impugned Recognition Agreement were forged. It is asserted that the evidence is credible, emanates from a qualified expert, and is likely to be believed. The applicant further maintains that the report exposes a scheme by the respondent to mislead it into believing that the respondent represented a simple majority of its unionisable employees.

3. According to the applicant, following the delivery of the superior court's judgment on 29th March 2019, it commissioned a forensic analysis of the check-off forms submitted by the respondent. The examination, conducted on 3rd June 2024, sought to ascertain the validity, authenticity, and consistency of the signatures against known specimens of the alleged signatories. The applicant argues that the additional evidence would probably have an important influence on the outcome of the appeal, would occasion no prejudice to the respondent, and would assist the Court in arriving at a just determination.
4. The application is supported by an affidavit sworn on the same date. The deponent states that before the superior court, the applicant had sought to terminate the Recognition Agreement dated 30th March 2012 on grounds of material non-disclosure, fraudulent misrepresentation, forgery, and breach of labour laws. However, in its judgment delivered on

29th March 2019, the superior court upheld the validity of the Recognition Agreement. The applicant now asserts that it has discovered

new evidence demonstrating that the signatures on the check-off forms used to procure its consent were forged.

5. It is further deposed that on 20th September 2011, the respondent delivered check-off forms to the applicant, claiming to represent a simple majority of its unionisable employees. Relying on that representation, the applicant executed the Recognition Agreement on 30th March 2012. Subsequent review allegedly revealed that 31 individuals listed on the check-off forms were not legitimate employees of the applicant, while one listed individual did not sign the form.
6. The applicant also notes that the respondent has instituted **ELRC Cause No. 1844 of 2017, Bakery Confectionery Food Manufacturing & Allied Workers Union (K) -vs- Mjengo Limited**, seeking adoption and confirmation of its proposed Collective Bargaining Agreement (CBA) on the basis that it represents a simple majority of the applicant's unionisable employees.
7. Finally, the applicant contends that the forensic analysis conducted on 3rd June 2024 resulted in a report concluding that the impugned signatures were forgeries. It is argued that this report substantiates the claim that the Recognition Agreement was procured through forgery and misrepresentation, and should therefore be admitted as additional evidence in the appeal.

8. The motion is opposed vide a replying affidavit dated 6th February 2025, sworn by Danchael Mwangure, the respondent's General Secretary. According to the respondent, the parties executed a valid **Recognition Agreement in 2012** pursuant to **section 54** of the **Labour Relations Act, 2007**, after it had attained the requisite simple majority of the applicant's unionisable employees. It explained that although the applicant initially objected to signing the agreement through its advocates prompting the respondent to report a trade dispute under **section 62** of the **Act**, the applicant subsequently executed the agreement, leading to the withdrawal of the dispute. The respondent added that it thereafter forwarded proposals for a Collective Bargaining Agreement (CBA) in accordance with **section 57** of the **Act**, but instead of negotiating, the applicant filed a claim before the ELRC seeking to terminate the Recognition Agreement. That claim, it noted, was dismissed in a judgment delivered on 29th March 2019.
9. Opposing the application to adduce additional evidence, the respondent asserted that the attempt to introduce a forensic report was a belated effort to re-litigate matters that had already been fully canvassed before the trial court. It contended that although allegations of forgery had been pleaded, they were neither particularised nor supported by evidence at trial, despite the applicant's witness claiming to possess such

evidence. The respondent emphasized that the applicant, as custodian of its employees' records under **section 74** of the **Employment Act**, had always been in possession of the relevant documents, yet failed to procure a forensic report until June 2024 approximately 13 years after the check-off forms were submitted and about five years after the appeal was filed without offering any explanation for the delay. It maintained that the report was intended to fill evidentiary gaps and that its admission would occasion prejudice, particularly because some of the employees who had signed the check-off forms in 2011 had since left the applicant's employment and might not be traceable to respond to the new allegations.

10. The respondent further argued that even if the additional evidence were admitted, it would not alter the outcome of the case, as the trial court had held that it lacked jurisdiction to revoke the Recognition Agreement, such mandate being vested in the National Labour Board. It therefore characterized the application as an abuse of the court process. Finally, the respondent clarified that **ELRC Cause No. 1844 of 2017** had been filed not on the basis of simple majority, but to enforce a consent order in which the applicant had agreed to negotiate a CBA and had failed to do so. That vide the ruling, the learned judge opined that the simple majority was only a precondition to a recognition agreement and not a condition precedent to

negotiating a Collective Agreement, urging the parties to negotiate the CBA.

11. At the hearing of the application, it was submitted for the applicant that leave should be granted under Rule 31 to adduce as additional evidence the Report by Dignity Forensics Document Examiner. Relying on the principles in **Ladd -vs- Marshal I [1954] 1 WLR 1489**, as adopted in **Mzee Wanjie & 93 Others -vs- A.K. Saikwa & Others [1982-88]** and affirmed by the Supreme Court in **Mohamed Abdi Mahamud -vs- Ahmed Abdullahi Mohamed & 3 Others Sup Petition No. 7 of 2018**, the applicant argued that additional evidence may be admitted where it could not have been obtained with reasonable diligence at trial, would probably have an important influence on the outcome, is credible, and is not intended to fill evidentiary gaps. It contended that the forensic report is new evidence that came into existence after delivery of the impugned judgment, is relevant and credible, and would significantly affect the determination of the appeal. The applicant further submitted that admission of the report would occasion no prejudice to the respondent, and that it discloses a strong prima facie case of willful deception of the court, as the Recognition Agreement was allegedly procured through forged signatures and thus without attainment of the statutory simple majority. Accordingly, the applicant urged the Court to allow the

application and admit the additional evidence as set out in the supporting affidavit.

12. In opposing the motion, it was submitted for the respondent that the application seeks to introduce a forensic report examining signatures on check-off forms submitted in 2011, yet the report was only procured in June 2024, approximately 13 years later, without any explanation for the delay. It argued that the applicant had knowledge of the alleged forgery since 2011, pleaded it in the 2017 suit, and, as custodian of the relevant employment records under **section 74** of the **Employment Act**, had possession of the documents throughout but failed to produce any supporting evidence at trial despite its witness asserting that such evidence existed. The respondent contended that the application does not satisfy the principles governing admission of additional evidence, as the material could have been obtained with due diligence and is now being introduced to fill gaps and re-litigate issues already canvassed before the trial court. It further maintained that the proposed evidence would have minimal influence on the appeal, particularly because the applicant voluntarily executed the Recognition Agreement despite earlier reservations and is estopped from rescinding its conduct. The respondent also argued that admission of the bulky report would occasion prejudice, since many affected employees have since left the applicant's employment and

their particulars were never pleaded at trial.

In any event, it is submitted that the issue of forgery is peripheral, as the trial court's decision turned on a lack of jurisdiction to revoke the Recognition Agreement, a mandate vested in the National Labour Board under **section 54(5)** of the **Labour Relations Act**, and thus the additional evidence would not alter the outcome. Accordingly, the respondent urged the Court to dismiss the application.

13. We have considered the application, the oral and written submissions made on behalf of the parties, the authorities cited and the law. The issue for determination is whether the applicants are deserving of the orders sought.
14. Under **Rule 31(1)(b)** of the **Court of Appeal Rules**, the Court has power, in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. In the case of **Mahamud -vs- Mohamad & 3 Others**, (above) the Supreme Court of Kenya laid down the governing principles on allowing additional evidence in appellate courts in Kenya. It is necessary to reproduce at length the relevant passages from the decision of the Supreme Court:

“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.***

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.”

- 15.** In the same vein, we consider the principles enunciated in the decisions of this Court in **Tarmohamed & Another -vs- Lakhani & Company [1958] EA 567; Attorney General -vs- Torino Enterprises Limited [2019] eKLR; Safe Cargo Limited -vs- Embakasi Properties Limited & 2 Others [2019] eKLR; and Republic -vs- Ali Babitu Kololo [2017] eKLR.** We bear those principles in mind.
16. We must add with caution that the bench seized with the hearing and determination of an application of this nature should refrain itself from delving into the merits and demerits of the main appeal. That will be the preserve of the bench that will be seized of hearing the main appeal.
17. The evidence which the applicant wishes to produce is the Report by Dignity Forensics Document Examiner. The applicant argues that new evidence that came into existence after the delivery of the impugned judgment is relevant and credible, and would significantly affect the determination of the appeal. That the discloses a strong prima facie case of willful deception of the court, as the Recognition Agreement was allegedly procured through forged signatures and thus without attainment of the statutory simple majority.

18. In the instant application, we do not have the benefit of perusing the record to appreciate the nature of the case and the pleadings filed before the trial court. However, we have applied industry and accessed the ruling of this court dated 18th June 2021, which quoted the finding of the superior court in its judgment. We note from the judgment that the learned trial Judge, Ongaya, J., in the impugned judgment, declined to revoke the Recognition Agreement, ordered the suit to be dismissed, and the applicant to pay costs of Kshs.100,000/=. Further, on 22nd July 2019, the court directed the respondent to serve the applicant with a draft Collective Bargaining Agreement (CBA) for purposes of negotiations. That is the gravamen of the applicant's appeal, as it challenging the order directing them to negotiate a CBA, which, in their view, is premised on a defective Recognition Agreement.

19. From the averments of the applicant, it did not depose or demonstrate the difficulties that it encountered and the due diligence that it undertook to access and produce the document it now wants to produce, 13 years post judgment and 4 years post filing the appeal before this court. We find that the proposed additional evidence could have been discovered with due diligence.

20. Lastly, delay in bringing an application for additional evidence on appeal is a significant factor that courts consider

when exercising their discretion (See Francis Oyatsi -vs- Nzoia Sugar

Company Ltd, Supreme Court Civil Application No. E032 of 2023). Where there is a long delay, like in this case, and the same has not been reasonably explained, the Court will decline to exercise its discretion favourably.

21. This, in our view, is not a proper case for the Court to exercise its discretion in favour of the applicant. Consequently, the application fails, and it is hereby dismissed. Costs follow the event. The respondent shall be paid costs of the application by the applicant.
22. This ruling is delivered pursuant to Rule 33(3) of the Court of Appeal Rules, 2022, following the demise of His Lordship F. Ochieng.
23. We profusely apologize for the delay in delivering the above ruling.

Dated and delivered at Nairobi this 6th day of March 2026

S. GATEMBU KAIRU, FCI Arb, C.Arb.
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...
JUDGE OF APPEAL

A.O. MUCHELULE
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...
JUDGE OF APPEAL

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

Signed _

DEPUTY

REGISTRAR.