

RULING
HCCA E036 OF 2025



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCA E036 OF 2025
BETWEEN
FRANCIS KEREYIAN MORINTAT
APPELLANT/APPLICANT
AND
PHILIP NYAKUNDI NYAMOTA
RESPONDENT

RULING

1. The Appellant/Applicant has moved this Court by the Notice of Motion dated 23rd January 2026, brought pursuant to Order 42 Rule 27 of the Civil Procedure Rules, 2010, Section 78(1)(d) as read with Sections 1A and 1B of the Civil Procedure Act, and Articles 50(1) and 159(2)(d) of the Constitution. The application seeks orders that:

1) This Honourable Court be pleased to grant leave to the Applicant to adduce additional evidence on appeal.

2) The additional evidence sought to be adduced, namely:

(a) the Investigation Report dated 21st January 2026 prepared by Spotlight Loss Assessors; and

(b) the letter from the Technical and Vocational Education and Training Authority dated 28th

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January 2026, be admitted as part of the record of appeal.

3) The Applicant be granted leave to file and serve a supplementary record of appeal incorporating the said additional evidence

4) Costs of the application be provided for.

2. The application is supported by a Supporting Affidavit sworn by the Appellant/Applicant on 23rd January 2026. He depones that the appeal arises from the judgment of the Chief Magistrate's Court at Keroka in Keroka MCCC E081 of 2021, in which the Respondent was awarded damages, including damages for loss of earnings. He avers that the award for loss of earnings was founded on a letter allegedly authored by the Respondent's employer, St. Alois Mwangaza College, which letter was admitted in evidence without the maker being called to testify and without independent verification of the existence or legal status of the said institution.

3. The Applicant further depones that following delivery of judgment and filing of the appeal, he instructed investigations into the Respondent's alleged employment. Those investigations culminated in an Investigation Report dated 21st January 2026, prepared by Spotlight Loss Assessors, following site visits conducted on 12th January 2026 at Nyansiongo, Nyamira County.

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4. The Applicant subsequently filed a Further Supporting Affidavit sworn on 28th January 2026, annexing a letter from the Technical and Vocational Education and Training Authority dated 28th January 2026, referenced TVETA/5/3/1 (149), stating that St. Alois Mwangaza College, Nyansiongo, is not registered as a TVET institution under the Technical and Vocational Education and Training Act.

5. The application is opposed through a Replying Affidavit sworn on 28th January 2026 by Mong'are Gekonga, Advocate, on behalf of the Respondent, and a further Replying Affidavit to the Further Supporting Affidavit, which is undated and sworn by the same deponent.

6. The Respondent contends that the Applicant was represented by counsel during trial and had sufficient opportunity to verify the Respondent's employment status. It is argued that the Investigation Report dated 21st January 2026 confirms the existence of the alleged institution, albeit temporarily closed, and that the TVETA letter dated 28th January 2026 does not conclusively disprove employment. The Respondent further contends that the evidence sought to be adduced could, with reasonable diligence, have been obtained at trial, and that its admission would occasion prejudice.

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7. The Applicant filed Written Submissions dated 30th January 2026, relying on Order 42 Rule 27 of the Civil Procedure Rules and the decision of the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] KESC 62 (KLR)**. The Respondent on the other hand filed Written Submissions dated 04th February 2026, contending that the application seeks to fill gaps in the Applicant's case after an adverse judgment.

Issues for Determination

8. Having considered the Notice of Motion dated 23rd January 2026, the affidavits on record, and the submissions filed by the parties, the following issues arise for determination:

- 1) Whether this Court has the legal basis to admit additional evidence at the appellate stage.**
- 2) Whether the Applicant has satisfied the threshold for admission of additional evidence on appeal.**
- 3) What orders ought to issue.**

Analysis and Determination

- 1) Whether this Court has the legal basis to admit additional evidence at the appellate stage**

9. In the exercise of its appellate jurisdiction under section 78(1) (d) of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules, and guided by Articles 50(1) and 159(2)(d) of the Constitution, the Court is required to ensure a fair

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hearing while administering justice without undue regard to procedural technicalities. The statutory framework permits an appellate court, in appropriate circumstances, to receive additional evidence or to direct that such evidence be taken, subject to the careful and sparing exercise of judicial discretion.

10. Against that statutory framework, the Court is satisfied that it has the jurisdiction to entertain the present application.

2) Whether the Applicant has satisfied the threshold for admission of additional evidence on appeal

11. The principles governing admission of additional evidence at the appellate stage were authoritatively set out by the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] KESC 62 (KLR)**.

The Court held that additional evidence may be admitted where it is directly relevant to the matter before the court, where it is capable of influencing the outcome, where it could not with reasonable diligence have been obtained at trial, where it removes doubt over a central issue, where it is credible, and where it is not intended to fill gaps or patch up weak points in a party's case.

12. Applying those principles to the present matter, the additional evidence sought to be adduced, namely the

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Investigation Report dated 21st January 2026 and the letter from the Technical and Vocational Education and Training Authority dated 28th January 2026, relates directly to the Respondent's alleged employment, which formed the basis of the award for loss of earnings. The evidence is therefore relevant and capable of influencing the outcome of the appeal.

13. The record further shows that the Respondent did not testify orally on the issue of employment and that the maker of the employment letter was not called at trial. The Applicant's consistent position was that the claim for loss of earnings had not been proved. It was only upon delivery of judgment, when the trial court nonetheless relied on the employment letter to make an award, that the necessity of verifying the Respondent's alleged employment crystallised. In those circumstances, the Applicant has provided a reasonable explanation for not obtaining the evidence earlier.
14. The additional evidence is limited in scope, emanates from identifiable sources, and is not inherently incredible. Any prejudice to the Respondent can be sufficiently mitigated by affording an opportunity to respond by way of affidavit and record. The Court is therefore satisfied that the Applicant has met the threshold for admission of additional evidence on appeal.

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3) What orders ought to issue

15. Having found that the Court has the legal basis to admit additional evidence and that the Applicant has satisfied the applicable threshold, the appropriate orders are those that admit the evidence into the appellate record and afford the Respondent an opportunity to respond, while preserving the integrity of the appellate process.
16. In the end, the Court makes the following orders:
- 1) The Applicant is granted leave to adduce additional evidence at the appellate stage**
 - 2) The Investigation Report dated 21st January 2026 prepared by Spotlight Loss Assessors and the letter from the Technical and Vocational Education and Training Authority dated 28th January 2026 are admitted as additional evidence and shall form part of the record of appeal.**
 - 3) The Applicant is granted leave to file and serve an Additional Record of Appeal incorporating the admitted additional evidence within seven (7) days from the date hereof.**
 - 4) The Respondent is granted leave to file and serve a Respondent's Record of Additional Evidence incorporating its response to the admitted**

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additional evidence within seven (7) days of service of the Additional Record of Appeal.

5) Upon service of the Respondent's Record of Additional Evidence, each party shall have seven (7) days to file and serve written submissions on the additional evidence, starting with the Appellant/Applicant.

6) Mention before the Deputy Registrar on 16th March 2026 to confirm compliance with orders (4) and (5) and filing of written submissions on the Appeal

7) Parties are at liberty to apply

8) Costs of the application shall abide the outcome of the appeal.

**DELIVERED AT NYAMIRA THIS 12th DAY OF
February 2026**

**WAMAE.T. W. CHERERE
JUDGE**

Appearances

Court Assistant - Hilda

**For Appellant/Applicant - Mr. Kiplagat for Munene
Wambugu & Kiplagat Advocates**

**For Respondent - Mr. Gekongá for Gekongá &
Co. Advocates**