

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: MUMBI NGUGI, TUIYOTT & ODUNGA,**

**JJ.A.) CIVIL APPEAL (APPLICATION) NO. 156 OF**

**2020 BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT**

**AND**

**SHAYONA TIMBER LIMITED.....RESPONDENT**

*(Being an application for leave to amend the memorandum of appeal and leave to adduce additional evidence in an appeal originating from the Environment and Land Court of Kenya at Nakuru (**Munyao Sila, J**) dated 1<sup>st</sup> October 2019*

*in*

***ELC Case No. 149 of  
2012)***

**\*\*\*\*\***

**RULING OF THE COURT**

**[1]** The parameters for adducing additional evidence at an appeal were comprehensively laid down by the Supreme Court in the case of **Mahamud v Mohamad & 3 others (Petition 7 & 9 of 2018**

**(Consolidated)** [2018] KESC 62 (KLR). These are the parameters that guide this Court in considering whether to allow additional evidence under rule 31(1)(b) of the Court of Appeal Rules, 2022.

**[2]** In a notice of motion dated 14<sup>th</sup> October 2024, Kenya National Highway Authority, the applicant, seeks two prayers; leave to

amend its memorandum of appeal dated 31<sup>st</sup> March 2020; and

leave to adduce additional documents in evidence in form of a letter and bank statement from the Central Bank of Kenya. The application to amend a memorandum of appeal is the remit of a single judge (see Rule 55) unless adjourned by the judge for determination by the court. This rule implicates the right of reference under rule 57 of a party dissatisfied with the decision of a single judge. We have no intention of short circuiting this procedure and shall not consider the prayer for leave to amend the memorandum of appeal.

- [3] Regarding the plea to adduce additional evidence, the applicant sets out the following background. It is a statutory corporation established under The Kenya Roads Act. Before the trial court, it prosecuted a case that the Commissioner of Lands had compulsorily acquired land which is now vested in it as a road reserve and duly made payment of compensation in form of a cheque for Kshs. 7,705,590.00 issued by Central Bank of Kenya on 30<sup>th</sup> June 2009. Further, the applicant produced copies of payment vouchers showing that the award for compensation of Kshs. 7,705,590.00 was processed in two instalments with the first being Kshs. 6,297,690.00 paid to A/c No. 1-384-0000- 3110400 approved by the Ministry of Roads Cash Office and a second voucher for Kshs. 1,409,900.00.

- [4] The applicant asserts that Shayona Timber Limited, the respondent, produced copies of bank statements which showed only the payment of Kshs. 1,409,900.00. However, notwithstanding requests made before the trial Court, the applicant was unable to get CBK Bank Statements in proof of all the payments made and its counsel duly informed the trial Court of the frustration on 25<sup>th</sup> June 2019 at the hearing of the case.
- [5] On 23<sup>rd</sup> March 2021, this would be after the trial had concluded and judgment delivered, the applicant received a letter dated 9<sup>th</sup> March 2021 from the State Department of Infrastructure purportedly confirming the payment and attaching CBK statements showing payment of Kshs. 6,297,690.00 and of Kshs. 1,409,900. This is the evidence it seeks to adduce as additional evidence.
- [6] The respondent, through an affidavit sworn by its Managing Director, Jayen Dodhia Motichand on 21<sup>st</sup> November 2024, asserts that: the applicant had more than sufficient time to produce the documents; in a notice to produce dated 16<sup>th</sup> April 2019, the respondent had requested the applicant to provide the two cheques, evidence that the said cheques were paid and to whom; delivery of the cheques, evidence of payment of Kshs. 6,297,690 to Richard Crawford Ingram and a valuation ref: VAL. 1258/63. Despite the notice, the applicant failed to

produce the

documents. In addition, the documents sought to be produced, being the cheque and payment voucher, were issued on 30<sup>th</sup> June 2009 and the CBK statement on 30<sup>th</sup> June 2010. The applicant is faulted for taking 15 years, since the year 2009, to produce the documents when a request had been made. It is asserted that the documents still do not prove payment of Kshs. 6,297,690 to Richard Crawford who was not party to the suit, who passed on eight years ago and who would be required to respond to the new evidence.

[7] At the hearing of the application learned Senior Counsel, Prof.

Mumma, appeared for the applicant while learned Counsel, Mr. Karanja, represented the respondent. Both made brief highlights to submissions they had filed on behalf of the parties.

[8] The applicant submitted that rule 31 grants power to the Court to take additional evidence for sufficient reason. It was argued that the standard practice permitted taking of additional documentary evidence by way of affidavit, citing the decision of

**Attorney General v Torino Enterprises Limited (Civil Application 84 of 2012) [2022] KECA 78 (KLR)** which restated the guiding principles in adduction of new evidence detailed by the Supreme Court in **Mahamud (supra)**.

[9] The applicant submitted that the **Torino case** involved public land and compensation, much like the present suit, leading the

Court to conclude that the survey plans and correspondence between government departments were relevant, impactful, and necessary for the appeal. Drawing a parallel, it was contended that the correspondence and bank statements from the Central Bank of Kenya were intended to prove payment for the compulsory acquisition of the suit property. The applicant explained that at the time of the trial, it was unable to secure these documents because they were held by the Ministry of Roads and the Central Bank of Kenya. It was argued that the evidence was not voluminous, consisting of only three pages, and since the respondent had already seen the documents in the replying affidavit, no prejudice would be suffered. It was asserted, further, that the documents were official government records and therefore credible and prima facie admissible.

**[10]** In response, the respondent argued that under rule 31, additional evidence should only be allowed for sufficient reason. The respondent asserted that a notice to produce had been served on the applicant on 16<sup>th</sup> April 2019, but the applicant had failed to produce the documents despite them being in their possession. Citing the decision in **Chase Bank (Kenya) Ltd v Cannon**

**Assurance (K) Ltd (Civil Appeal 11 of 2017) [2019] KECA 313 (KLR)**, the respondent urged the court to draw an adverse inference that the evidence was withheld because

it was

unfavourable to the applicant. Regarding the criteria set in

**Mahamud**, the respondent argued that the documents were not new as defined in **Wandaka & 2 others v Elizabeth Wambui**

**Mwangi (Civil Appeal 36 of 2019) [2024] KECA 1315 (KLR)** because they were issued on 30<sup>th</sup> June 2010, and had been in the possession of the applicant for approximately 15 years and could have been obtained with reasonable diligence. The respondent contended that the applicant was merely an unsuccessful party attempting to fill up omissions or patch up the weak points in its case. Reference was also made to the trial court judgment which, in paragraph 9, found that there was no evidence of payment to the registered landowner. Consequently, the respondent argued that the applicant was seeking a second bite of the cherry by trying to fill the gaps that were present during trial.

[11] In **Mohamed Abdi Mahamud** (Supra), the Supreme Court stated:

***“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.**

***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.”***

[12] These principles guide our hand.

[13] At trial, **Mr. Kariuki**, appearing for the applicant, informed the Court that:

***“I have consulted my client on proof of payment. My client will avail the same in a month’s time.”***

[14] To that **Mr. Karanja** for the respondent replied:

***“We issued a notice to the defendant in the year 2012 to avail proof of payment. I will oppose any attempt to adjourn the matter. It also cannot take a month to avail a bank statement.”***

[15] It is apparent that the applicant was aware from sometime in the year 2012, seven years before judgment was delivered in the matter, that they would be required to avail proof of payment made for the compensation. So as to come within the ambit of new evidence that had been sought diligently, the applicant needed to show the effort that it made to procure this evidence after receiving the notice to produce in 2012, and at the very least, before trial had concluded.

[16] Answering a question posed by the Court in plenary, Prof.

Mumma SC pointed to the letter of 9<sup>th</sup> March 2021 from the State Department for Infrastructure as a demonstration that the applicant had diligently sought the new evidence. This letter,

however, is a response to an enquiry from the applicant made on 4<sup>th</sup> March 2020. This would be about six months after the trial Court had delivered judgment. This does not explain the decisive question why the evidence now sought to be produced could not have been obtained with the exercise of reasonable diligence for use at the trial.

[17] Lack of diligence on the part of the applicant does not end there.

Although the information was availed to the applicant on 9<sup>th</sup> March 2021, it was not until three years, later on 14<sup>th</sup> October 2024, that the application before the Court was brought. This long delay is not explained at all.

[18] While it can be argued that it is in the public interest that the evidence be allowed so as to forestall the possible waste of public money on double compensation, it would do violence to the principles set out in **Mohamed Abdi Mahamud** to allow adduction of additional evidence where there has been unexplained, repeated and prolonged indolence on the part of the applicant.

[19] And if we may add: the argument by the respondent that the evidence sought to be adduced does not have a direct bearing on the issue it seeks to address is not idle. As we understand it, the additional evidence seeks to prove that payment of Kshs.6,297,690 was made to Mr. Crawford as part

compensation for the land that was compulsorily acquired.

The letter of 9<sup>th</sup>

March 2021 and the CBK statements sought to be adduced as additional evidence do not reveal the person to whom payment was made.

[20] From whatever angle we consider the notice of motion dated 14<sup>th</sup> October 2024, it is without merit. It is hereby dismissed with costs.

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

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR.**