



Owner of Motor Vessel “Dolphin Star” v ET timbers PTE Limited (Civil Appeal (Application) E078 of 2021) [2024] KECA 37 (KLR) (26 January 2024) (Ruling)

Neutral citation: [2024] KECA 37 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E078 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JANUARY 26, 2024**

BETWEEN

THE OWNER OF MOTOR VESSEL “DOLPHIN STAR” APPELLANT

AND

ET TIMBERS PTE LIMITED RESPONDENT

(Being an application for leave to file a Supplementary Record of Appeal and leave to adduce additional evidence against the Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 14th July 2021 in H.C.A.C Cause No. 9 of 2018)

RULING

1. The applicant, E. T. Timbers PTE Limited, moved this Court by way of a notice of motion dated 30th August 2023 under Articles 25(c) and 50(1) of the [Constitution](#), sections 3A and 3B of the [Appellate Jurisdiction Act](#), and Rules 31 and 94 of the [Court of Appeal Rules, 2022](#) seeking orders, inter alia: that the hearing of this appeal be stayed pending hearing and determination of its Motion; that the applicant be granted leave to file a second supplementary record of appeal to introduce into the record clear rubberstamps and signatures over material documents on record, namely the time charterparty dated 1st January 2019 purporting to have been executed by the respondent and a company known as Starryway Trading and Shipping Company Limited; that the Court be pleased to exercise its discretion to take additional evidence of the applicant by way of affidavit, and to give an opportunity to the respondent to admit or contest the additional evidence before the hearing of this appeal; that the Court be pleased to reappraise the evidence on record, and to appraise the additional evidence and draw inferences of fact in determining this appeal; and that costs of this application be in the appeal.
2. The applicant’s Motion is supported by the annexed affidavit of Annamalainadar Thalamuthu, the sole shareholder and director of the applicant company, sworn on 30th August 2023, and is made on 12 grounds set out on the face of the Motion, but which we need not replicate here. Suffice it to state in summary: that one of the grounds the applicant intends to argue turns on the time charterparty



dated 1st January 2019 (on which the challenge on jurisdiction is founded), and which the applicant describes as a forgery; that it purports to be a charterparty between Defang Shipping Company Limited as owner and Starryway Trading and Shipping Company Limited as time charterer; that circumstances have arisen that require the applicant to rely on additional evidence by way of an affidavit; that the additional evidence is material and relevant in determining the issues in the appeal on jurisdiction; that the additional evidence was not available when the application whose ruling is appealed against was heard and determined; that part of that evidence was by way of an admiralty cause filed by the respondent in May 2023; and that, in view of the respondent's submission to the jurisdiction of the High Court subsequent to filing this appeal, additional evidence is necessary to establish that the appeal is an abuse of the due process of this Court, and that it has been overtaken by events.

3. According to the applicant, the other additional evidence not available at the time include the release of the original Bills of Lading in 2022, the payment of freight in August 2022, an application by the respondent in August 2022 for extension of time to acknowledge service of the claim form and certificates of insurance showing that the alleged time charterer of the vessel in question was the commercial manager of the respondent, survey reports showing that the motor vessel "Dolphin Star" was laid up in June 2022, the insurance for the applicant's cargo on board the vessel, clear copies of documents showing that the main document on which the appeal is based is a forgery, an admiralty claim No E003 of 2023 filed by Kenya Ports Authority in July 2023 against the parties herein. In sum, the applicant contends that the afore-mentioned additional evidence is necessary to enable the Court to determine the appeal with finality on evidence which was not included, and could not have been included, in the record or the supplementary record filed by the respondent; and that there is justifiable need to reappraise the evidence, and to draw inferences of fact.
4. In addition, the applicant submits that it intends to file an application under rule 96 of the Rules of this Court (which provides for notice of grounds for affirming, varying or reversing decision) in respect of which it cannot argue all the grounds on notice under the rule without the second supplementary record of appeal containing the additional evidence sought to be introduced. It contends that the respondent will not suffer any prejudice if its Motion is granted as the documents sought to be introduced as additional evidence are common to the parties; and that it is only fair, just and equitable that the application be granted.
5. In a further affidavit of Simon Wanjohi Gathoni, a Chinese language translator, sworn on 21st September 2023 in support of the applicant's Motion, he deponed that he was instructed by counsel for the applicant M/s. F. Kinyua Kamundi to provide translations of the words "Defang Dolphin and star" in a document titled "personal statement" signed by Lu Jian, Senior Manager of Defang Shipping Company Limited; that he provided the translations; and that, in his understanding, if Defang Shipping Company Limited and Dolphin Star Shipping Company Limited were one and the same company, there would not have been any need for one to authorise the other, as a company cannot authorise itself to seal its documents.
6. In support of the applicant's Motion, learned counsel for the applicant, Mr. F. Kinyua Kamundi, filed two sets of written submissions, one dated 19th September 2023 together with a list of authorities of even date, and the second dated 21st September 2023. Counsel drew the Court's attention to, *inter alia*, this Court's ruling in *Starryway Trading and Shipping Company Ltd v E. T. Timbers PTE Ltd & the Owners of Motor Vessel "Dolphin Star"* Civil Application No E026 of 2022 (Unreported) in which the Court set out the test in an application to adduce or use additional evidence at paragraph 26 thereof.
7. Opposing the applicant's Motion, the respondent filed a replying affidavit of Yu Zhongjian, the respondent's marine manager, sworn on 20th September 2023 and containing a whopping 116 paragraphs of the factual background and arguments on points of law, all of which have been rendered



with utmost zeal, and which we have carefully considered albeit with respectful reservations on how far a replying affidavit should stretch in relation to such straightforward issues as are in contention in the Motion before us.

8. In addition to the foregoing, the respondent filed a further affidavit of Zhu Yi, a native Chinese language speaker, sworn on 29th September 2023 essentially discrediting the translations provided by Simon Wanjohi Gathoni, whose credentials he considered questionable. In conclusion, Zhu Yi stated that, if called upon by the court, he would provide an accurate and reliable translation of the disputed text.
9. Upon scrutiny of the respondent's replying and further affidavits, we take note of the following grounds, which we consider relevant in opposition to the applicant's Motion, namely: that some of the evidential material sought to be introduced on appeal, such as the time charterparty and related documents, are not new, and that they were at all times available to the applicant; that others are not directly relevant to the appeal; that the other remaining documents are not capable of affecting the results of the appeal; that the evidential documents sought to be introduced on appeal are an attempt to make a fresh case in the appeal or, otherwise, to fill up omissions or patch up the weak points in their case; that the orders sought in the applicant's Motion are designed to fill gaps in evidence; that some of the documents sought to be introduced on appeal touch on Starryway Trading and Shipping Company Limited, who is best placed to respond to the Motion, and yet they are not party to the appeal; that the application is an attempt to sneak in other documents; and that the applicant has not met the requisite threshold to merit leave to introduce additional evidence, or for reappraisal of the evidence adduced before the trial court.
10. On their part, learned counsel Mr. Njuguna for the respondent, filed written submissions dated 20th September 2023 together with a list of authorities of even date, and further submissions dated 29th September 2023. Counsel cited 6 judicial authorities, including the cases of *Mohammed Abdi Mobamoud v Ahmed Abdulabi Mohamad & 3 others* [2018] eKLR where the Supreme Court set out the criteria and guidelines for determining an application for leave to adduce additional evidence; and *Wanje v A. K. Saikwa* [1984] eKLR in which this Court held that "... additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal".
11. Having carefully considered the applicant's Motion, the supporting and further affidavit, the respondent's affidavits in reply, the rival submissions, judicial decisions and the law, we hasten to take to mind the provisions of Rule 31 of this Court's Rules, which reads in part:

“ 31. Power to re- appraise evidence and to take additional evidence

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”



12. In *Mohamed Abdi Mohamed v Ahmed Abdullabi Mohamed and 3 others* [2018] eKLR, the Supreme Court laid out the guidelines on admission of additional evidence. The Court stated as follows:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. 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 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 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. whether 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;
- j. the Court must find the further evidence needful;
- k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.”

13. In every case, the Court considers the necessity, the proportionality and the prejudice (as the case may be) 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. It is also instructive that, even with the application of the foregoing principles, the Court would only allow additional evidence on a case-by-case basis and, even then, sparingly, with abundant caution.

14. There isn't much to say of the evidence sought to be adduced by the applicant. It is clear that, taking to mind the principles applicable to the exercise of the Court's discretion to allow or decline leave to



adduce additional evidence on appeal, we are cognizant of the 16 grounds affirming the impugned decision as set out in the notice dated 30th August 2023, which have a bearing on some of the specified evidential documents sought to be adduced as new evidence.

15. The first and, perhaps, the main reason advanced by the applicant in its quest for leave to adduce the first category of additional evidence is that it would be necessary to file a second supplementary record of appeal to introduce into the record “clear rubberstamps and signatures over material documents on record,” namely the time charterparty dated 1st January 2019 allegedly executed by the respondent and a company known as Starryway Shipping and Trading Company Limited.
16. Our scrutiny of the facts deponed in the affidavit filed in support of the applicant’s Motion does not reveal anything to suggest that the charterparty and the related document constitute new or additional evidence beyond the applicant’s reach and which the applicant could not, with due diligence, have obtained and adduced before the trial court. We have not been told that legible copies were not accessible or within the knowledge of the parties, or were otherwise incapable of production at the trial.
17. It is noteworthy that all that the applicant seeks in relation to the aforesaid documents is to produce legible copies of what is already on record or common to the parties, and previously accessible to them. That said, we hasten to observe that nothing bars either party from supplying to the Court clearer copies of any documents that might appear illegible to facilitate just and fair determination of the appeal.
18. In addition to the foregoing, we take note of the respondent’s replying affidavit of Yu Zhongjian sworn on 20th September 2023 in which the deponent avers that the issues which the applicant wishes to advance by the production of the above-mentioned documents were not contested at the trial court. Yet, it had the opportunity to raise them. Some of the documents, such as the fixture note and the time charterparty were not new as they were available to the applicant way before the arrest of the vessel. In view of the foregoing, the applicant’s Motion fails on this score.
19. Regarding the second category of the documents referred to in the applicant’s Motion, including the record of Mombasa High Court admiralty case No E005 of 2023 – Defang Shipping Company Limited v E. T. Timbers PTE Limited – filed subsequent to the lodging of the appeal before us, it is clear to our mind that such a record would only serves to introduce issues not litigated on in Admiralty cause No E003 of 2021 that culminated in the impugned ruling. We agree with the respondent that Admiralty Case No E005 of 2023 was a separate suit seeking enforcement of payment by the applicant of port charges pursuant to its undertaking at the time of the arrest of the motor vessel, and would be unlikely to have any nexus to the appeal herein.
20. Whether or not the subsequent Admiralty Case No E003 of 2023 amounts to abuse of court process is a matter falling to be determined in that case, and not in the appeal before us. To that extent, the record sought to be introduced is not directly relevant to the appeal as required under rule 31 of the Rules of this Court (power to re-appraise evidence and to take additional evidence). Moreover, the issues sought to be introduced by production of those documents were not in contention or otherwise litigated in the suit (to wit Admiralty Cause No E003 of 2021) leading to the impugned decision.
21. In the same vein, the applicant’s wish to introduce the court record in Mombasa HC Admiralty Claim No E003 of 2023 – Kenya Ports Authority v Defang Shipping Company Limited and E. T. Timbers PTE Limited – and an application filed by Starryway Trading and Shipping Company Limited whose number remains undisclosed) to demonstrate further “gross abuse of court process has generated two other claims, and that the respondent is unable to pay court charges or to provision the motor vessel “Dolphin Star” is likewise an attempt to introduce issues not litigated in the case culminating in the



- impugned ruling and orders. We take note of the respondent's contention that the case aforesaid seeks to enforce payment to Kenya Ports Authority by the applicant and Defang Shipping Company Limited of port charges, and is a matter pending before the trial court. Accordingly, the court records on the pending High Court cases are of no direct relevance to the appeal before us.
22. We also hasten to observe that, from the scanty record as put to us in the applicant's Motion, we are unable to ascertain which of the grounds of appeal (if any) is intended to be advanced by the aforementioned record of the admiralty cases and application. To our mind, introduction of those records in the appeal before us can only serve to introduce issues not litigated in the suit to which the impugned ruling and orders relate.
 23. Likewise, the letters exchanged in December 2022 between the applicant's former advocates, the respondent's advocates, the advocates for the respondent's agents, and the Admiralty Marchal of the High Court of Kenya at Mombasa, concerning the applicant's request to inspect its cargo on board the motor vessel "Dolphin Star", also amount to no more than opinions of the respondents and their agents, and are matters that have no bearing on the impugned ruling and orders to which the appeal relates. Neither do they relate to any of the grounds set out in the notice of grounds affirming decision.
 24. It is also noteworthy that the impugned ruling and orders were made in July 2021 while the letters in issue were exchanged in December 2022. In effect, that correspondence can only be interpreted as an attempt to introduce new issues in the appeal, issues that the record before us does not demonstrate as having been litigated upon in the suit from which the appeal arises. Moreover, it is not clear which of the grounds of appeal or the grounds on which the decision is affirmed stand to be advanced and proved by production of copies of this set of correspondence. As the respondent correctly states, they are not relevant to the appeal.
 25. As for the alleged evidence that the respondent has refused to release the applicant's cargo despite payment of freight, we hasten to observe that, in the absence of anything on the record before us to suggest otherwise, this contention is not one of the findings of the learned Judge challenged on appeal. To our mind, the evidence sought to be introduced under this category is not relevant to the appeal even though it features in the notice of grounds affirming the decision. Moreover, any claim relating thereto may be pursued elsewhere as a separate cause of action between the applicant and Starryway Trading and Shipping Company Limited.
 26. Turning to the evidence of the survey report made on 10th June 2022 together with emails exchanged in June and July 2022, and intended to show that the motor vessel was laid up and could not complete its voyage despite receiving full freight, and that the applicant could not renew the insurance of its cargo on board the vessel as the vessel was laid up, we can only say this: that we fail to see how this complaint relates to the findings of the learned Judge as challenged in the appeal before us. Once again, the applicant does not render with clarity and persuasion the relevance of this category of evidential documents to the appeal. Neither does it touch on the issues addressed in the impugned ruling and orders and, to that extent, the same is not directly relevant to the appeal before us.
 27. With regard to copies of the Bills of Lading belatedly issued on behalf of the Master of the motor vessel "Dolphin Star" to the applicant after the impugned ruling was delivered, suffice it to observe that we are persuaded that these Bills of Lading would go a long way in determination of the issue as to whether the respondent was the carrier, or that the applicant was entitled to seek arrest of the respondent's ship. It is noteworthy that, the impugned decision having been reached on the basis of affidavit evidence, it becomes necessary to accord the applicant the opportunity to adduce evidential documents not previously accessible to it, and which are directly relevant to the issue in contention before the trial court, and on which the learned Judge pronounced herself.



28. We also take note of the fact that another of the grounds raised by the applicant in its claim against the motor vessel itself was that the respondent failed or refused to issue the Bills of Lading for the cargo of timber logs loaded at the port of Greenville, Liberia. To our mind, the refusal was presumably in conformity with the practice in the shipping industry. In practice, once a shipper has received the original Bills of Lading from the shipping line, it arranges the Bills to be sent to the consignee usually when the consignee has paid the shipper, and that explains why those Bills were inaccessible to the applicant at the time of trial and appeal against the impugned decision. Moreover, the evidence of payment of freight on which release by the respondent consignee of the Bills of Lading to the shipper (Euro Liberia Logging Company) was dependent, was made on 25th August 2022, an eventuality beyond the applicant's control. In the circumstances, the Bills of Lading meet the requirements for leave to introduce new evidence pursuant to rule 31 of the Court of Appeal Rules. However, that is in so far only as the Bills are intended to demonstrate that the respondent was the carrier, and that the applicant was entitled to seek arrest of its ship.
29. Finally, the appellant contends that the Certificates of Entry of the motor vessel "Dolphin Star" covering the insurance period from 23rd February 2021 to 20th February 2022; and from 20th February 2022 to 20th February 2023 are relevant to the appeal in that they are intended to demonstrate that Starryway Trading and Shipping Company was the agent, and not the charterer of the motor vessel. Be that as it may, it is noteworthy that the 1st entry certificate was in existence during the period between 23rd February 2021 and 20th February 2022. To our mind, nothing stood in the applicant's way to take diligent steps to obtain the 1st certificate prior to delivery of the impugned decision. The 2nd certificate related to the period between 20th February 2022 to 20th February 2023, way after delivery of the impugned decision. Granting leave to adduce the 2nd certificate would be tantamount to re-opening the case on appeal for introduction of issues not raised for determination by the trial court. Moreover, to allow introduction of the two certificates of entry to prove that Starryway was the respondent's agent may prejudice Starryway's case. Yet, Starryway is not party to these proceedings. We reach this conclusion cognisant of the fact that Starryways is currently party to ongoing proceedings between it and the applicant herein.
30. We also take note of the respondent's, submission that the certificates of entry in issue are not new documents; and that they were available to the applicant throughout the trial. Accordingly, we are not persuaded by the applicant's contention that the certificates sought to be introduced as additional evidence are material and relevant in the determination of this appeal, but that they were not available, or did not exist, when the appellant's application notice dated 16.4.2021 was heard and determined. We do not agree with the applicant that "... no prejudice would be suffered by the respondent if documents common to both parties are relied upon in the appeal to enable the Court to determine all matters in issue conclusively." These documents touch on an ongoing dispute between the applicant and Starryways, who are not party to the proceedings to which the impugned ruling relates. In conclusion, we form the view that the two documents do not meet the test under rule 31 of the Rules of this Court.
31. Having carefully considered the applicant's Motion dated 30th August 2023, the affidavit in support thereof, the applicant's further affidavit, the evidential documents sought to be introduced on appeal; the affidavit in reply, the respondent's further affidavit, the record of appeal and the impugned ruling, the written and oral submissions of counsel for the applicant and for the respondent, the cited authorities and the law, , we find that the applicant's Motion partially succeeds. Accordingly, we hereby order and direct that:



- a. leave be and is hereby granted to the applicant to adduce new evidence pursuant to rule 31 of the Court of Appeal Rules, and that such evidence be limited to a copy of the Bills of Lading issued on behalf of the Master of the motor vessel “Dolphin Star” to the applicant;
- b. the applicant do file and serve a further supplementary record of appeal within fourteen (14) days from the date hereof; and
- c. that the costs in this application do abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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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

DEPUTY REGISTRAR

