

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E165 OF 2021

**CHRISTIAN BROADCASTING NETWORK
(CBN) KENYA
LIMITED.....APPELLANT**
VERSUS
ALMAK AQUA DRILLERS LIMITED.....
RESPONDENT

RULING

1. By the Notice of Motion dated 7th April 2025 the Appellant/Applicant seeks orders firstly, to be allowed to adduce additional evidence in support of the appeal and secondly that the certificate of incorporation and trust deed of the Christian Broadcasting Network Kenya limited be deemed as duly filed and form part of the record of appeal, also prays that the costs of this application be provided for.

The Applicants case

2. In Supporting Affidavit sworn on 7th April 2025, the Applicant deposes that at the time of filing the appeal they realized that the certificate of incorporation and trust deed of the Christian Broadcasting Network Kenya limited were not part of the documents filed by their former advocate. That the two

documents were crucial to the appeal in demonstrating when the appellant was incorporated and that no prejudice will be suffered by the respondent if the additional evidence is allowed.

The Respondent's case

3. The Respondent opposed the application through a Replying Affidavit dated 24th April 2025 wherein she deposes, *inter alia*, that the additional evidence sought to be introduced has been brought with inordinate delay and no reasonable explanation has been tendered as why the applicant did not verify the completeness of its record. It was also deposed that no evidence has been tendered to show that the applicant's former advocates were instructed to file the evidence but failed to do so. It was also deposed that the applicant was simply trying to introduce new evidence and this court should dismiss the application.
4. Learned counsel for the parties consented to canvass the application by way of written submissions.

Submissions

5. In submissions dated 8th May 2025, Learned Counsel for the Applicant placed reliance on case of **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad and 3 others [2018] eKLR** wherein the Supreme Court set out the guiding principles for the admission of additional evidence by appellate courts. Counsel

submitted that the certificate of incorporation and trust deed of the Christian Broadcasting Network Kenya limited were directly relevant to the matter and should be admitted Counsel urged this court to allow the application arguing that the Applicant had demonstrated that it is merited.

6. For the Respondent, reliance was placed on **Order 42 Rule 27 of Civil Procedure Rules** and on the case of **Wanje vs Saikwa(1984) KLR275**
7. Counsel for the Respondent submitted that the new evidence to be adduced was not new as the applicant had the knowledge of its existence and had not done enough to ensure it was adduced at the trial court. That allowing the new evidence would offend the principle of litigation must come to an end.
8. Counsel for the Respondent submitted that should the new evidence be admitted, the Respondent will be greatly prejudiced; that the Appellant has not in any way or form demonstrated that the additional evidence has any important or direct effect on the outcome of the appeal and hence the application should be dismissed with costs.

Analysis and determination

9. This court has considered the application, the response thereto the rival submissions, the cases cited and the law. The principles

that should guide an appellate court in an application for additional evidence on appeal were laid by the Supreme Court in the case of **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad and 3 others [2018] eKLR**, where the court stated:

“[79] 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 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.....”***

10. Therefore, whereas whether or not to grant leave to adduce additional evidence is in the discretion of the court, the court must bear in mind and must be guided by the above principles albeit noting that each application must be decided on its own

merits. The discretion is not to be exercised at a whim or arbitrarily.

11. I have considered the additional evidence sought to be introduced by the Appellant. The same is in the form of the certificate of incorporation and trust deed of the Christian Broadcasting Network Kenya limited. These documents indeed will demonstrate the date of incorporation of the appellant. The evidence is in my view relevant to the issue in dispute between the parties in this appeal and the Appellant/Applicant has given a plausible explanation as to why the evidence was not available to him during the trial in the magistrate's court. I am also not persuaded that admitting the evidence will compromise or prejudice the Respondent's case.

DISPOSITION

12. Accordingly, I find merit in the Appellants' Notice of Motion dated 7th April 2025 and grant orders as follows: -

(i) **That leave be and is hereby granted to adduce and file additional evidence limited to the following documents:**

(a) **The Certificate of Incorporation for the Christian Broadcasting Network (CBN) Kenya Ltd.**

(b) **Trust Deed for Christian Broadcasting Network (CBN).**

- (ii) **The additional evidence shall be adduced by means of a Supplementary Record of Appeal to be filed and served within fourteen (14) days of the date of this ruling.**
- (iii) **The costs of this application shall be borne by the Appellant.**

Orders accordingly.

Ruling signed, dated and delivered virtually on this 14th day of November 2025.

**E N MAINA
JUDGE**

IN PRESENCE OF:

Mr. Edwin Otieno for Mr. Anzala Adv for the Applicant/appellant

Ms Mole for the Respondent

C/A: Geoffrey