



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.491 OF 2018

PAN AFRICA STAFF SACCO SOCIETY LTD.....APPELLANT

VERSUS

DAVID KIGATIA MUCHUNGU.....RESPONDENT

VUSHA ONSEMBE & MAMBIRI ADVOCATES.....INTERESTED PARTY

RULING

1. The subject matter of this ruling is the Notice of Motion dated 8th June 2021 brought by the interested party/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of advocate Esther Onsembe. The applicant sought for an order to expunge from record the documents appearing as documents no.18 contained at pages 101-122 of the Appellant's Supplementary Record of appeal dated 7th December, 2020 from the record.
2. To oppose the Motion, the appellant's filed grounds of Opposition dated 20th September 2021.
3. The motion was canvassed through oral arguments.
4. I have considered the grounds stated on the face of the motion dated 8th June 2021 and the grounds of opposition. It is the submission of the interested party that the appellant was granted leave to file the Supplementary Record of Appeal but instead went ahead to introduce new evidence.
5. The Interested party further stated that the procedure to adduce additional evidence was not adhered. The respondent supported the arguments by the interested party.
6. The appellant opposed the application arguing that they had sought for leave to file the Supplementary Record of Appeal. The appellant avers that the new evidence adduced was introduced to the court was not available at the trial court and that it will help in the determination of this appeal.
7. Having considered the rival positions above, it is clear that the interested party in their motion dated 8th June 2021 is seeking for an order to expunge the documents appearing in document no.18 contained at pages 101-122 of the Appellant's Supplementary record dated 7th December,2020.
8. Section 78 (1) (2) of the Civil Procedure Act empowers the Court to take additional evidence in the Appeal.
9. It is not in dispute that the Appellant sought for leave to file the supplementary Record of Appeal and also produced the documents in the application for leave as new evidence and that the documents came to existence after the appeal had been filed.
10. From the perusal of the record, I note that the parties have already filed their submissions in relation to the appeal recently after this application was filed, which to me is a clear indication that all the parties were comfortable without the additional evidence and wanted the Appeal to be concluded.
11. I am convinced that the additional evidence may not be important to the appeal and may not assist this court to adjudicate the case. If the application is disallowed, the interested party and respondent will not be prejudiced in any way.
12. In the Court of Appeal's decision of *Attorney General V Torino*

Enterprises Limited (2019) eKLR, the Court of Appeal while citing with approval the Supreme Court decision of *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR* highlighted instances where a Court can admit additional evidence in an appeal and stated thus:

“[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. [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.”

13. Based on the evidence before me and relying on the Court of Appeal decision, I find that the application is merited and it is allowed as prayed save that costs shall abide the outcome of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent