



**Mobile Pay Limited v Governor, Central Bank of Kenya & another (Constitutional  
Petition E028 of 2023) [2025] KEHC 4713 (KLR) (9 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4713 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CONSTITUTIONAL PETITION E028 OF 2023  
DO CHEPKWONY, J  
APRIL 9, 2025**

**BETWEEN**

**MOBILE PAY LIMITED ..... PETITIONER**

**AND**

**GOVERNOR, CENTRAL BANK OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**CENTRAL BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 3<sup>rd</sup> April, 2025, this matter came up for mention for the parties to confirm compliance of directions issued on 24<sup>th</sup> July, 2024 on the disposal of the Petition by way of written submissions.
2. Counsel for the respective parties appeared before court to confirm compliance of the said directions whereby it was established that they had not fully complied when Mr. Ken Francis, learned counsel holding brief Mr. Omollo for the Petitioners sought leave to file a Supplementary Affidavit alongside written submissions. Mr. Kamara, learned counsel for the Respondent sought to be allowed to have the Petition proceed by viva voce evidence in addition to filing written submissions whereby he specifically sought to have the Petitioner cross-examined. The Respondents' counsel anchored his request on the assertion that there were claims by the Petitioner that its right had been infringed through the cancellation of its operational rights, this necessitating oral evidence to be adduced.
3. This request, was vehemently opposed by Mr. Ken Francis, counsel holding brief for Mr. Omollo for the Petitioner, who submitted that the Constitutional questions that have been raised I the Petition were quite straight forward and can sufficiently be determined on submissions as per the directions earlier issued by the court on 24<sup>th</sup> July, 2024.
4. Thus, having carefully listened to both counsel in their arguments on whether or not to direct that over and above the written submissions, the Petition be canvassed by viva voce evidence by having the



Petitioner cross-examined on the claims therein, the court is set to determine whether it should grant the request for the Petitioner to be cross-examined in this Constitutional Petition.

5. From the onset, it is worth-noting that the Petitioner is a Corporate Entity, known as Mobile Pay Limited. The doctrine of what a legal personality is as enunciated in the landmark case of *Salomon –vs- Salomon & Company Ltd* [1897] AC 22 remains firmly embedded in the Kenya jurisprudence. That a Company, being a distinct legal person, acts through its Directors and Officers but it is not automatically susceptible to lifting of the corporate veil unless there is a specific and justified basis pleaded and established and or demonstrated for this to be done.
6. In the present case, no clear or compelling basis has been demonstrated to justify and warrant the lifting of the Petitioner’s corporate veil so as to enable cross-examination of its Directors, Officials and or representatives. Infact, the Respondent’s counsel has not pointed out any instance of fraud, bad faith, concealment and or abuse of the corporate firm that would warrant such an exceptional step to be taken. Mere dissatisfaction with the contents of an affidavit or a ..... deserve to test the deponents’ credibility does not by itself, justify cross-examination of a deponent in Constitutional Petitions.
7. More crucially, the Respondents have not demonstrated with specificity the issues or allegations they wish to test through cross-examination. The law is clear that cross-examination is not an automatic right in Constitutional Petitions and must be sought with precision and adequately justified. The Court of Appeal in the case of *Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR held that:-

“Cross-examination of deponents in Constitutional Petitions is not a matter of course. It must be shown that there is a real conflict in affidavit evidence that cannot be resolved without testing the credibility of the deponents.”
8. Likewise, in the case of *Coalition for Reform and Democracy (CORD) & Another –vs- Republic of Kenya & Another* [2015] eKLR, the High Court held:-

“The court may, in appropriate cases, permit cross-examination of deponents. However, that discretion should not be exercised lightly but in circumstances where such cross-examination is necessary to resolve material conflicts or ambiguities in the evidence.”
9. It follows that Constitutional Petitions are generally determined on affidavit evidence and written submission unless the court is satisfied and convinced that there is a compelling need to call for oral evidence, including for purposes of cross-examination. The court also notes that Mr. Kamara, counsel for the Respondents in making the application, was not specific as to which issues he intends to cross-examine the Petitioner on or which affidavit (s) contain conflicting or disputed evidence to necessitate cross-examination.
10. Having read through the record herein, it is clear that the Petitioner filed sworn affidavit in support of the Petition to which the Respondents filed responses to. And at no time, in the course of their proceedings, have the Respondents indicated an intention to cross-examine any of the deponents of those affidavits or raise any objection on the veracity of the said affidavits, to warrant oral interrogation of the same.
11. As was held in the case of *Trusted Society of Human Rights Alliance –vs- Cabinet Secretary, Devolution and Planning & 3 Others* [2017] eKLR, “mere dissatisfaction with the contents of an affidavit is not a sufficient ground to warrant a demand for cross-examination of the deponent. The Application must demonstrate specific material contradictions or factual disputes that cannot be resolved without oral evidence.



12. Nevertheless, this Court has also examined the contents of the Petition and the prayers being sought therefrom, and find that the issue raised therein largely pertain to the declaratory reliefs concerning the Petitioner's right to conduct the business of payment of services in Kenya and whether that right was unlawfully infringed by the Respondents when the licence was cancelled. These issues are primarily legal and constitutional so that to determine when Article 40, 47 and 232 of *the Constitution* have been violated, the court does not necessarily depend on oral evidence as affidavit evidence, written submissions and the law can sufficiently be relied on to completely resolve the said issues.
13. Thus, in this Court's humble opinion, where a Petitioner seeks declaratory reliefs and does not involve complex disputes of fact, the court is entitled to proceed on affidavit evidence and written submissions without requiring viva voce testimony.
14. Further, the court is guided by the provision of Article 159(2)(b) of *the Constitution*, which required that justice shall not be delayed and Sections 1A and 1B of the *Civil Procedure Act* that reinforce its duty to ensure just, expeditious and proportionate disposal of disputes.
15. It is worth noting that the directions issued by the court on 24<sup>th</sup> July, 2024 on the disposal of the Petition, the same clearly stated that the Petition be canvassed by way of written submissions and parties have had ample opportunity to file any necessary pleadings and or written submissions since then. The Court finds that the Respondent's counsel has not advanced any valid justification to warrant this Court depart from the said directions at this late stage of the proceedings, almost a year later.
16. Accordingly, the Court proceeds to decline the Respondent's request for cross-examination of the Petitioner and directs that:-
  - a. The Petition to proceed for hearing based on the written submissions to be filed by the parties herein as per the directions issued on 24<sup>th</sup> July, 2024.
  - b. The Petitioner is granted leave to file and serve a further affidavit alongside written submissions within fourteen (14) days from the date of this ruling.
  - c. The Respondents are equally granted corresponding leave to file and serve their written submissions within fourteen (14) days of being served with the Petitioner's further affidavit and written submissions.
  - d. Mention on 7<sup>th</sup> May, 2025 for parties to confirm compliance and take directions on ruling date.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 9<sup>TH</sup> DAY OF APRIL , 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Omollo counsel for Petitioner

Mr. Brian Onyango holding brief for Mr. Paul Kibara counsel for the Respondents

Court Assistant - Martin

