



**Garama v Karisa & 3 others (Petition E020 of 2023)  
[2024] KESC 1 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KESC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION E020 OF 2023**

**MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM,  
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**FEBRUARY 16, 2024**

**BETWEEN**

**KOMBE HARRISON GARAMA ..... APPELLANT**

**AND**

**KENGA STANLEY KARISA ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**AMINA ABUBAKAR SENG (MAGARINI CONSTITUENCY RETURNING  
OFFICER) ..... 3<sup>RD</sup> RESPONDENT**

**MICHAEL THOYAH KINGI ..... 4<sup>TH</sup> RESPONDENT**

*(Being applications for leave to adduce new and additional evidence in respect of the judgment and order of the Court of Appeal (Gatembu, Lesit & Odunga JJA) dated 28th July 2023 and to strike out submissions for non-compliance with the Directions of the Hon. Deputy Registrar, Supreme Court issued on 18th September 2023)*

**Governing principles on allowing the filing of additional or new evidence**

*The applications sought leave to adduce new and additional evidence and orders to strike out the 1st respondent's submissions for non-compliance with the directions of the Deputy Registrar of the court as well as Supreme Court (General) Practice Directions, 2020. The court highlighted the governing principles on allowing the filing of additional or new evidence.*

Reported by Kakai Toili

**Evidence Law** – evidence - filing of additional or new evidence - what were the governing principles on allowing the filing of additional or new evidence - Supreme Court Act, 2011, section 20(1)



## Brief facts

Before the court were two separate applications; the first application was by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated October 13, 2023, seeking leave to adduce new and additional evidence while the second application dated October 13, 2023, was by the appellant seeking orders to strike out the 1<sup>st</sup> respondent's submissions for non-compliance with the directions of the Deputy Registrar of the court as well as Supreme Court (General) Practice Directions, 2020.

The 2<sup>nd</sup> respondent contended that the additional evidence was not for the purpose of removing *lacunae* and filling gaps in evidence but was needful to assist the court in making its determination in the interest of justice. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submitted that the additional evidence was directly relevant to the issue regarding the election result for Mapimo Youth Polytechnic polling station 1 of 6 and that it was likely to influence the court's determination of whether the process of opening the ballot boxes to retrieve the original Form 35A and consequential recount met the tests of transparency.

The appellant contended that the Deputy Registrar issued directions that all parties present file their submissions within the stipulated timelines; however, the 1<sup>st</sup> respondent in total disobedience of the court's directions filed two sets of submissions, one for his preliminary objection and the other for the main petition. The appellant further contended that the 1<sup>st</sup> respondent disregarded Direction 17 of the Supreme Court (General) Practice Directions, 2020 by exceeding the limit of 15 pages and the font size requirement.

## Issues

What were the governing principles on allowing the filing of additional or new evidence?

## Held

1. Section 20(1) of the Supreme Court Act, 2011 granted the court the authority to admit further evidence in determining an appeal, where it considered necessary and appropriate. Section 20(2) provided for things to consider when admitting additional evidence. The governing principles on allowing the filing of additional or new evidence were 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 needed not be decisive;
  - c. it was 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 removed any vagueness or doubt over the case and had a direct bearing on the main issue in the suit;
  - e. the evidence must be credible in the sense that it was 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 was an essential consideration to ensure fairness and due process;
  - h. where the additional evidence disclosed a strong *prima facie* case of willful deception of the court;
  - i. the court must be satisfied that the additional evidence was 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 had 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 would consider the proportionality and prejudice of allowing the additional evidence. That required 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.

2. Applying the principles of allowing the filing of additional or new evidence, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents at all material times had knowledge of the existence of and were in actual custody of the additional or the so-called new evidence during the trial of the matter in the superior courts below. They admitted that the additional or the so-called new evidence was in their custody and had not reasonably explained to the court why the evidence was not produced before the trial court or was not part of the record despite the trial court having custody of the same. It was upon them to adduce and point out the evidence and its relevance to the trial court, whether or not it was part of the record, and not wait until the second appeal to do so.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents not only had prior knowledge of, but were in actual possession of the additional or the so-called new evidence, their attempt to adduce additional or new evidence before the court was intended to fill up omissions or patch up the weak points in their case which action, the court refused to countenance. Consequently, the application seeking to adduce additional evidence failed and was dismissed.
4. A perusal of the impugned submissions revealed that the 1<sup>st</sup> respondent filed two separate submissions, the submissions in respect of the appeal were 14 pages while the submissions in support of the preliminary objection were 12 pages. The Deputy Registrar's directions issued on September 18, 2023, were clear that the 1<sup>st</sup> respondent ought to file composite submissions in respect of the appeal and the preliminary objection. The 1<sup>st</sup> respondent failed to comply with those directions but instead filed separate submissions for the preliminary objection and the appeal. The two added up to 26 pages and the explanation for doing so given was escapist. Directions were given to ensure orderly conduct of proceedings and it was not for parties to choose which ones to comply with and which ones to disregard.
5. As the submissions on the appeal went to the root of the dispute, the court admitted them but the 1<sup>st</sup> respondent's submission in regard to the preliminary objection, filed outside the directions of the court, were struck out.
6. As the ruling was limited to the application seeking leave to adduce additional and new evidence and the striking out of the 1<sup>st</sup> respondent's submissions, the court would give directions on the 1<sup>st</sup> respondent's preliminary objection at the hearing of the appeal and being on points of law only, the 1<sup>st</sup> respondent could submit on the issues raised orally.

*Application seeking to adduce additional evidence dismissed; application seeking to strike out the 1<sup>st</sup> respondent's submissions partly allowed.*

#### **Orders**

1. *The 1<sup>st</sup> respondent's submissions dated October 12, 2023 in respect of the preliminary objection were hereby struck out.*
2. *Each party to bear its own costs.*

#### **Citations**

##### **Cases**

1. Khwa Jirongo , Cyrus Shakhalaga v Soy Developers Limited & 9 others (Petition 38 of 2019; [2020] KESC 38 (KLR)) — Explained
2. Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohamad & 3 others (Petition 7 of 2018; [2018] KESC 26 (KLR)) — Explained
3. Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others (Application E029 of 2023; [2023] KESC 69 (KLR)) — Explained
4. Rai & 3 Others v Rai & 4 others (Petition 4 of 2012; [2013] eKLR; [2014] 2 KLR 253) — Explained

#### **Statutes**



1. Constitution of Kenya, 2010 — article 81 — Cited
2. Supreme Court Act (cap 9B) — section 20, 20(1); 20(2); 21; 23(2B) — Cited
3. Supreme Court (General) Practice Direction, 2022 (cap 9B, Sub Leg) — part D direction 17 — Cited
4. Supreme Court Rules, 2020 (cap 9B, Sub Leg) — rule 26, 31 — Cited

#### **Advocates**

*Mr. Wakwaya & Mr. Ometo* for 1st respondent

*Mr. Gichaba & Mr. Bwire* for 1st respondent

*Mr. Mukele, Mr. Gicheru & Ms. Kiboi* for 2nd & 3rd respondents

*Mr. Busiega* for 4th respondent

## **RULING**

### **Representation:**

Mr. Wakwaya & Mr. Ometo for the appellant

(Rachier & Amollo LLP)

Mr. Gichaba & Mr. Bwire for the 1st respondent

(Gichaba & Company Advocates)

Mr. Mukele, Mr. Gicheru & Ms. Kiboi for the 2nd & 3rd respondents

(Hassan Mutembei & Company Advocates)

Mr. Busiega for the 4th respondent

(Mayende & Busiega Advocates)

1. Before the court are two separate applications brought by the parties for determination. While not directly related, to ensure judicious use of time, this ruling will dispose of both. The first application is by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seeking leave to adduce new and additional evidence while the second application is by the appellant seeking orders to strike out the 1<sup>st</sup> respondent's submissions for non-compliance with the directions of the Deputy Registrar of this court issued on September 18, 2023 as well as [Supreme Court \(General\) Practice Directions, 2020](#); and
2. Upon perusing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application dated October 13, 2023 brought pursuant to section 20 of the [Supreme Court Act, 2011](#) and rule 26 of the [Supreme Court Rules, 2020](#) seeking leave to adduce new and additional evidence; and
3. Upon considering the grounds in support of the application and the averments contained in the supporting and supplementary affidavits sworn by Chrispine Owiye, the Director, Legal, and Public Affairs of the 2<sup>nd</sup> respondent, wherein he *inter alia* contends that; on March 3, 2023, the High Court rendered its decision in Malindi Election Petition No E001 of 2022 where it among others, determined that there was no evidence to identify the persons who had witnessed the re-opening of the ballot boxes at Mapimo Youth Polytechnic polling station 1 of 6 hence depriving the process of any transparency; the appellant appealed the decision vide Election Appeal No E001 of 2023 and on the July 28, 2023, the Court of Appeal rendered its decision where it found *inter alia* that, the act of taking a vote recount in the absence of all the agents of the parties failed to meet the constitutional test of transparency and accountability in light of article 81 of the [Constitution](#); the said decision was taken by the Court of Appeal despite the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' testimony that over 14 agents witnessed the process of opening the ballot boxes to retrieve the original Form 35A accidentally locked in the wrong ballot box;



the High Court at all material times had full access to the polling station diary which was by order deposited with the court; the two judgments of the superior courts question the transparency of the process of re-opening the ballot boxes to retrieve the original Form 35A and the incidental recount of the votes which was at the core of the courts' decision to invalidate the election result of Mapimo Youth Polytechnic polling station 1 of 6; it is therefore necessary for this court to have the benefit of perusing the polling station diary for Mapimo Youth Polytechnic polling station 1 of 6 to test the correctness of the superior court's decision; the additional evidence is not for the purpose of removing lacunae and filling gaps in evidence but is needful to assist the court in making its determination in the interest of justice; and

4. Noting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submissions dated October 26, 2023 where they reiterate the contents of their supporting affidavit and further submit that; the court has jurisdiction to call or admit additional evidence in any proceedings where it considers necessary; the relevance of the additional evidence they seek to produce is that it is directly relevant to the issue regarding the election result for Mapimo Youth Polytechnic polling station 1 of 6; it is likely to influence the court's determination of whether the process of opening the ballot boxes to retrieve the original Form 35A and consequential recount met the tests of transparency; and
5. Further noting the 1<sup>st</sup> respondent's submissions opposing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application where he submits that; he filed a preliminary objection on August 25, 2023 on the ground that this court lacks jurisdiction to hear and determine the petition; parties have filed their respective responses to the preliminary objection; that the preliminary objection ought to be disposed of first; the applicants have failed to meet the conditions as provided for by law and in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others*, SC Petition No 7 & 9 of 2018 [2018] eKLR and *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others*, SC Petition (Application) No 38 of 2020 [2020] eKLR for the court to exercise its discretion in their favour; the principles set by the court in the above-quoted cases for admission of new and additional evidence are not disjunctive and must be complied with in totality; and
6. Taking into account the appellant's application dated October 25, 2023 brought pursuant to sections 21 and 23(2B) of the *Supreme Court Act, 2011* and rule 31 of the *Supreme Court Rules, 2020* Direction 17 and Part D of the *Supreme Court (General) Practice Directions, 2020* seeking an order that the submissions by the 1<sup>st</sup> respondent be struck out for non-compliance with the directions of the Deputy Registrar of the Supreme Court issued on September 18, 2023 as well as *Supreme Court (General) Practice Directions, 2020*; and
7. Considering the grounds in support of the application and the averments contained in the supporting and supplementary affidavits sworn by Kevin Wakwaya, an Advocate practicing with the firm of Rachier & Amollo LLP wherein he contends that: he has had the conduct of the matter on behalf of the appellant and has instructions to swear the affidavit; on September 18, 2023, the Deputy Registrar of this court issued directions that all parties present do file their submissions within the stipulated timelines; on September 28, 2023, the appellant filed his submissions in total compliance with the court's directions; the 1<sup>st</sup> respondent in total disobedience of the court's directions filed two sets of submissions, one for his preliminary objection and the other for the main petition; the 1<sup>st</sup> respondent disregarded direction 17 of the *Supreme Court (General) Practice Directions, 2020* by exceeding the limit of 15 pages and the font size requirement of Times New Roman and font size 12; the disregard of the *Supreme Court (General) Practice Directions, 2020* was deliberately made to unduly benefit the 1<sup>st</sup> respondent to the detriment of the appellant who was limited to addressing both the preliminary objection and petition of appeal in 15 pages; and



8. Also considering the appellant’s submissions dated October 25, 2023 wherein he reiterates the contents in support of the application and submits that; the Deputy Registrar directed that all parties should file one set of submissions to address both the 1<sup>st</sup> respondent’s preliminary objection and the petition of appeal; the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and 4<sup>th</sup> respondent complied with the Deputy Registrar’s direction on the page limit; but the 1<sup>st</sup> respondent not only filed two sets of submissions but also exceeded the page limit of 15 pages; the submissions also did not follow the set font type, font size or the spacing required; this court in *Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others*, SC Application E029 of 2023) [2023] KESC 69 (KLR) struck out the applicants’ submissions for non-compliance with the rules and directions and cautioned against exceeding the permissible lengths of submissions; and
9. Further noting the 1<sup>st</sup> respondent’s replying affidavit sworn by Wesley Robinson Gichaba, an advocate practicing at Gichaba and Company Advocates wherein he contends that; he was present in court together with Mr Bwire, Advocate, when the Deputy Registrar issued directions on filing documents including submissions; he does not recall the Deputy Registrar issuing a direction that parties should file a single set of submissions to both the preliminary objection and the petition; the preliminary objection and the petition are independent and special pleadings/documents diametrically opposed to each other and had not been consolidated and the assertion of one the filing of one set of submissions would prejudice the 1<sup>st</sup> respondent; the appellant chose to file a single set of submissions to his petition and preliminary objection and cannot blame the 1<sup>st</sup> respondent for not doing so; the appellant was not prejudiced as he had a right to file further submissions in rejoinder; the submissions in support of the preliminary objection and petition did not each exceed 15 pages; the application is an abuse of the court process and the submissions are properly on record; and
10. Also noting the 1<sup>st</sup> respondent’s submissions dated November 6, 2023 wherein he reiterates the contents in support of the application and submits that; the preliminary objection is an independent and stand-alone document and not inferior to the petition, and therefore attracts its own responses and submissions; the submissions in regard to the petition were 14 pages and therefore did not exceed the limit of 15 pages; the circumstances in *Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others*(*supra*) are different and distinguishable because therein, the court found it irregular to file joint and separate submissions at the same time and therefore the decision cannot apply to this matter; and
11. Having considered the applications, responses, and submissions before us,  
We now opine as follows:
  - i. Section 20(1) of the *Supreme Court Act, 2011* grants the court the authority to admit further evidence in determining an appeal, where it considers necessary and appropriate. Section 20(2) provides as follows:

“ The court, in admitting additional evidence, shall consider whether the additional evidence —

    - a. is directly relevant to the matter before the court;
    - b. is capable of influencing or impacting on the decision of the court;
    - c. could not have been obtained with reasonable diligence for use at the trial;



- d. was not within the knowledge of the party seeking to adduce the additional evidence;
  - e. removes any vagueness or doubt over the case;
  - f. is credible and bears merit;
  - g. would not make it difficult or impossible for the other party to respond effectively; and
  - h. discloses a case of wilful deception to the court.”
- ii. This court set the governing principles on allowing the filing of additional or new evidence in the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others*, SC Petition No 7 & 9 of 2018 [2018] eKLR 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.”



- iii. Applying the above set principles, it is evidently manifest that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents at all material times had knowledge of the existence of and were in actual custody of the additional or the so-called new evidence during the trial of the matter herein in the superior courts below. They admit that the additional or the so-called new evidence was in their custody and have not reasonably explained to this court why the said evidence was not produced before the trial court or is not part of the record despite the trial court having custody of the same. In any event, if it is true that, the polling station diary for Mapimo Youth polling station was in the custody of the trial court as alleged by Chrispine Owiye in his supporting affidavit, then why seek to adduce it as new and additional evidence at this point? Furthermore, it was upon them to adduce and point out the evidence and its relevance to the trial court- whether or not it was part of the record-and not wait until this second appeal to do so.
- iv. Having found that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents not only had prior knowledge of, but were in actual possession of the additional or the so- called new evidence, it is our considered view that their attempt to adduce additional or new evidence before this court is intended to fill up omissions or patch up the weak points in their case which action, we refuse to countenance. Consequently, the application seeking to adduce additional evidence fails and is dismissed.
- v. We now turn to the 2<sup>nd</sup> application which sought striking out of the 1<sup>st</sup> respondent's submissions. A perusal of the impugned submissions reveal that the 1<sup>st</sup> respondent filed two separate submissions, the submissions in respect of the appeal are 14 pages while the submissions in support of the preliminary objection are 12 pages.
- vi. We note that the Deputy Registrar's directions issued on September 18, 2023 were clear that the 1<sup>st</sup> respondent ought to file composite submissions in respect of the appeal and the preliminary objection. The 1<sup>st</sup> respondent failed to comply with those directions but instead filed separate submissions for the preliminary objection and the appeal. The two add up to 26 pages and the explanation for doing so given is, with respect, escapist. Directions are given to ensure orderly conduct of proceedings and it is not for parties to choose which ones to comply with and which ones to disregard.
- vii. Consequently, as the submissions on the appeal go to the root of the dispute before us, we shall admit them but the 1<sup>st</sup> respondent's submission in regard to the preliminary objection, filed outside the directions of the court, are hereby struck out.
- viii. As this ruling is limited to the application seeking leave to adduce additional and new evidence and the striking out of the 1<sup>st</sup> respondent's submissions, the court will give directions on the 1<sup>st</sup> respondent's preliminary objection at the hearing of the appeal and being on points of law only, the 1<sup>st</sup> respondent can still submit on the issues raised orally.
- ix. As regard costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*, SC. Petition No 4 of 2012; [2013] eKLR it is settled that costs follow the event and that the court may in appropriate cases exercise discretion and decide otherwise. Given that the court has dismissed and partially allowed the applications, we find it judicious for each party to bear its own costs.

12. Accordingly, we make the following orders:

- a. The notice of motion dated October 13, 2023 is hereby dismissed.
- b. The notice of motion dated October 25, 2023 is hereby partially allowed.



- c. The 1<sup>st</sup> respondent's submissions dated October 12, 2023 in respect of the preliminary objection are hereby struck out.
- d. Each party shall bear its own costs.

13. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**

