



**Barclays Bank of Kenya Limited (Now Absa Kenya PLC) v Commissioner of Domestic Taxes (Large Taxpayer's Office); Kenya Bankers Association & another (Interested Parties) (Petition (Application) 12 (E014) of 2022) [2023] KESC 44 (KLR) (Civ) (16 June 2023) (Ruling)**

Neutral citation: [2023] KESC 44 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
CIVIL**

**PETITION (APPLICATION) 12 (E014) OF 2022**

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

**JUNE 16, 2023**

**BETWEEN**

**BARCLAYS BANK OF KENYA LIMITED (NOW ABSA KENYA PLC) ..... PETITIONER**

**AND**

**COMMISSIONER OF DOMESTIC TAXES (LARGE TAXPAYER'S OFFICE) ..... RESPONDENT**

**AND**

**KENYA BANKERS ASSOCIATION ..... INTERESTED PARTY**

**MASTERCARD ASIA PACIFIC (PTE) LIMITED ..... INTERESTED PARTY**

*(Being an application to strike out the 2nd Interested Party's Replying Affidavit sworn on 19th October 2022 and to expunge additional new evidence therein)*

**New and additional evidence contained in a party's replying affidavit could only be adduced following the grant of leave by the court**

*The application sought to strike out the 2nd interested party's replying affidavit and to expunge from the record the additional new evidence therein. The court held that pursuant to the provisions of rule 26 of the Supreme Court Rules and the principles established in Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others, SC Petition No. 7 of 2018; [2018] eKLR, such evidence could only be adduced following the grant of leave by the court.*

Reported by Kakai Toili

**Evidence Law** - evidence - adducing of new and additional evidence - when could new and additional evidence contained in a party's replying affidavit be adduced at the Supreme Court - , 2020, rule 26.



## Brief facts

The application sought to; strike out the 2<sup>nd</sup> interested party's replying affidavit sworn by Shafi Shaikh on October 19, 2022 and filed on October 21, 2022; to expunge from the record the additional new evidence therein; and costs of the application. The applicant contended that; the 2<sup>nd</sup> interested party's impugned replying affidavit was incurably defective for reasons that it adduced additional evidence without leave of court; that the impugned affidavit raised new grounds of appeal and pleaded new facts, substantially changing the primary parties' case; and that such conduct amounted to disregard of the court's procedural laws and was an outright abuse of the court's process.

The 2<sup>nd</sup> interested party moved the court by way of a motion dated July 5, 2022 and filed on July 8, 2022 under the provisions of rules 31(1), (2),(4),(5) and 24 of the 2020, seeking; leave to be admitted as an interested party; an order directing the Deputy Registrar of the court to supply the applicant with pleadings filed by the parties in the appeal; leave to submit affidavit evidence and written submissions in support of the appeal; any other order the court deemed fit to grant; and costs of the application. The court allowed the application and admitted the 2<sup>nd</sup> interested party and directed it to file its affidavit in response to the petition within 14 days and any other party to file a rejoinder, if need be, within 14 days of service.

## Issues

When could new and additional evidence contained in a party's replying affidavit be adduced at the Supreme Court?

## Relevant provisions of the Law , 2020

### Section 26 - Admission of additional evidence

1. *The Court may call or admit additional evidence in any proceedings.*
2. *A party seeking to adduce additional evidence shall make a formal application to the Court.*

## Held

1. The court could, *in exceptional circumstances and on a case-by-case basis, exercise its discretion and call for and allow additional evidence to be adduced before it.* The procedure to move the court for leave to adduce additional evidence was provided for under rule 26(2) of the , 2020.
2. The contents of the 2<sup>nd</sup> interested party's replying affidavit constituted new and additional evidence. Pursuant to the provisions of rule 26 of the and the principles established in , SC Petition No. 7 of 2018; [2018] eKLR, such evidence could only be adduced following the grant of leave by the court.
3. The application dated July 5, 2022 and filed on July 8, 2022, upon which it was urged such leave was sought and granted, was brought pursuant to rules 31(1),(2),(4),(5) and 24 of the , 2020 which set out the procedure for interlocutory applications and joinder of an interested party. Consequently, by its ruling delivered on October 7, 2022, the court limited itself to the issue of joinder only. As a result, the new additional evidence adduced in the 2<sup>nd</sup> interested party's replying affidavit, excluding the copy of the judgment of the Court of Appeal at pages 39-47, was irregular and inadmissible. Whether the 2<sup>nd</sup> interested party's affidavit introduced new grounds of appeal was a substantive question that would be properly determined in the main appeal.

*Application partially allowed; the offending annexures of the 2<sup>nd</sup> interested party's replying affidavit sworn by Shafi Shaikh on October 19, 2022 and filed on October 21, 2022, collectively marked as "SS-3" was expunged from the record; costs of the application to abide the outcome of the appeal.*

## Citations

### Cases

1. Francis Kariuki Muruatetu & another v. Republic & 5 others (Petition 15 & 16 of 2015 (Consolidated)) — Mentioned



2. Methodist Church in Kenya v Mohamed Fugicha, Teachers Service Commission, County Director of Education - Isiolo County & District Education Officer - Isiolo Sub-County (Petition 16 of 2016; [2019] KESC 59 (KLR)) — Mentioned
3. Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others (Petition 7 of 2018) — Explained

#### **Statutes**

1. Supreme Court Rules, 2010 (No. 7 of 2011 Sub Leg) — Rule 24,26,31(1),(2),(4),(5) — Interpreted
2. Supreme Court Rules, 2020 (No. 7 of 2011 Sub Leg) — Rule 31 — Interpreted

#### **Advocates**

None mentioned

## **RULING**

#### **Representation:**

Mr. G. O. Ochieng..... for the Applicant

*(G. O. Ochieng Advocates)*

Ms. Nazima Malik..... for the Respondent

*(Kaplan & Stratton Advocates)*

Ms. Faith Macharia, Mr. Edel Ouma &

Mr. Elly Obegi..... for the 1st and 2nd Interested Parties

*(Anjarwalla & Khanna LLP)*

- [1] Upon perusing the notice of motion dated November 25, 2022 and filed on December 2, 2022, pursuant to rule 31 of the Supreme Court Rules, 2020 seeking to: strike out the 2<sup>nd</sup> interested party's replying affidavit sworn by Shafi Shaikh on October 19, 2022 and filed on October 21, 2022; to expunge from the record the additional new evidence therein; and costs of the application; and
- [2] Upon considering the applicant's grounds and supporting affidavit in support thereof, sworn by Philip Munyao, wherein it is contended that; the 2<sup>nd</sup> interested party's impugned replying affidavit is incurably defective for reasons that it adduces additional evidence without leave of court contrary to rule 26 of the Supreme Court Rules, 2020 and the principles established in *Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others*, SC Petition No 7 of 2018; [2018] eKLR (Mohamed Abdi case); that the impugned affidavit raises new grounds of appeal and pleads new facts, substantially changing the primary parties' case; and that such conduct amounts to disregard of the court's procedural laws and is an outright abuse of the court's process; and
- [3] Upon Further considering the applicant's submissions dated November 25, 2022 and filed on December 2, 2022, to the effect that the primary parties' interests in the appeal are crucial; that the 2<sup>nd</sup> interested party is not a primary party; and that it cannot introduce new evidence or plead new grounds or facts (in support thereof, the applicant cites *Francis Kariuki Muruatetu & another v Republic & 5 Others*, SC Petition No 15 & 16 Consolidated; [2016] eKLR and *Methodist Church in Kenya v Mohamed Fugicha & 3 others*, SC Petition No 16 of 2016 [2019] eKLR; In any event, it is urged, that this court has already pronounced itself on the issue of leave to adduce additional evidence in the 1<sup>st</sup> interested party's application dated July 7, 2022 and consequently any application by the 2<sup>nd</sup> interested party would suffer the same fate; and



- [4] Upon considering the 1<sup>st</sup> and 2<sup>nd</sup> interested parties' replying affidavits in opposition sworn on December 13, 2022 and December 10, 2022 respectively, wherein it is urged; that contrary to the applicant's allegations, the 2<sup>nd</sup> interested party specifically sought leave to submit affidavit evidence as per prayer (c) of its application for joinder dated July 5, 2022; that by a ruling of this court dated October 7, 2022, the 2<sup>nd</sup> interested party was joined and granted leave to submit affidavit evidence and written submissions in support of the appeal; that consequently, the 2<sup>nd</sup> interested party's impugned replying affidavit is in conformity with this court's ruling; and therefore the respondent's application is baseless, incompetent and lacks merit; and
- [5] Upon considering the 1<sup>st</sup> and 2<sup>nd</sup> interested parties' submissions dated December 20, 2022 and December 18, 2022 respectively, wherein it is contended that, the 2<sup>nd</sup> interested party has not introduced any new grounds of appeal but has only responded to grounds raised by the primary parties; that in any event, the evidence adduced is inextricably linked to the central issues in the appeal; that the court's reasoning dismissing the 1<sup>st</sup> interested party's application for leave to adduce new evidence cannot apply to the 2<sup>nd</sup> interested party; and that the allegation of collusion to present additional evidence on the part of the interested parties' advocates is a mere allegation; and
- [6] Cognisant of the fact that the 2<sup>nd</sup> interested party moved this court by way of a motion dated July 5, 2022 and filed on July 8, 2022 under the provisions of rules 31(1), (2),(4),(5) and 24 of the Supreme Court Rules, 2020, seeking; leave to be admitted as an interested party; an order directing the Deputy Registrar of the Court to supply the applicant therein with pleadings filed by the parties in the appeal; leave to submit affidavit evidence and written submissions in support of the appeal; any other order the court deemed fit to grant; and costs of the application; and
- [7] Considering that by a ruling of this court delivered on October 7, 2022, we allowed the application and admitted Mastercard Asia Pacific PTE Limited as the 2<sup>nd</sup> interested party and directed it to file its affidavit in response to the petition within 14 days and any other party to file a rejoinder, if need be, within 14 days of service; and
- [8] Bearing In Mind that this court settled with finality the question of its jurisdiction to grant leave to a party to adduce additional evidence and laid down the governing principles in the case of *Mohamed Abdi* case (supra) where it 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...” [Emphasis added].
- [9] Noting that the procedure to move the court for leave to adduce additional evidence is provided for under rule 26(2) of the Supreme Court Rules, 2020 as follows:
- “26 Admission of additional evidence
1. The court may call or admit additional evidence in any proceeding
  2. A party seeking to adduce additional evidence shall make a formal application to the court...” [Emphasis added].
- [10] We now opine as follows: -



In agreement with the applicant, we find that the contents of the 2<sup>nd</sup> interested party's replying affidavit constitute new and additional evidence.

Pursuant to the provisions of rule 26 of this Court's Rules and the principles established in the Mobamed Abdi case (*supra*), such evidence can only be adduced following the grant of leave by this court.

- (i) The application dated July 5, 2022 and filed on July 8, 2022, upon which it is urged such leave was sought and granted, was brought pursuant to rules 31(1),(2),(4),(5) and 24 of the Supreme Court Rules, 2020 which set out the procedure for interlocutory applications and joinder of an interested party. Consequently, by its ruling delivered on October 7, 2022, this court limited itself to the issue of joinder only; and
- (ii) As a result, the new additional evidence adduced in the 2<sup>nd</sup> interested party's replying affidavit, excluding the copy of the Judgment of the Court of Appeal at pages 39-47, is irregular and inadmissible. Regarding the issue as to whether the 2<sup>nd</sup> interested party's affidavit introduces new grounds of appeal, we hold that this is a substantive question that will be properly determined in the main appeal.

[11] Consequently, for reasons aforesaid, we make the following orders:

- (i) The notice of motion application dated November 25, 2022 and filed on December 2, 2022, be and is hereby partially allowed;
- ii. The offending annexures of the 2<sup>nd</sup> interested party's replying affidavit sworn by Shafi Shaikh on October 19, 2022 and filed on 21<sup>st</sup> October 2022, collectively marked as "SS-3", be and are hereby expunged from the record; and
- iii. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023.**

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**P. M. MWILU**

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

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....



**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**

