



Kampala International University v Housing Finance Company Limited (Petition (Application) 34 (E035) of 2021) [2023] KESC 67 (KLR) (Civ) (4 August 2023) (Ruling)

Neutral citation: [2023] KESC 67 (KLR)

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

CIVIL

PETITION (APPLICATION) 34 (E035) OF 2021

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

AUGUST 4, 2023

BETWEEN

KAMPALA INTERNATIONAL UNIVERSITY PETITIONER

AND

HOUSING FINANCE COMPANY LIMITED RESPONDENT

(Being an application for leave to amend the Petition of Appeal and file a Supplementary Record of Appeal)

The Supreme Court has the discretion of allowing amendments to a petition to determine the real questions in dispute

The application sought the amendment of the petition and leave to file a supplementary record of appeal. The court noted that the provisions of section 21(2) of the Supreme Court Act, 2011 and rule 3(5) of the Supreme Court Rules, 2020 granted the court inherent power to make any ancillary or interlocutory orders as may be necessary for the ends of justice. The court therefore held that it had discretion to allow amendments to determine the real questions in dispute and to do substantial justice.

Reported by Kakai Toili

Jurisdiction - jurisdiction of the Supreme Court - discretion of the Supreme Court to allow amendments to a petition - whether the Supreme Court had discretion to allow amendments to a petition to determine the real questions in dispute - whether the Supreme Court could delve into the merits or the likelihood of success of a matter in an application to amend a petition and to file a supplementary record of appeal - of Kenya, 2010, article 163(4) (a);, section 21(2); Supreme Court Rules, 2020, rules 3(5) and 40(4).

Brief facts

The applicant contended that it filed its appeal without the proceedings of the Court of Appeal and the High Court as they had not been typed by then and that the record of appeal was incomplete without the proceedings of the courts. The applicant further contended that it was necessary to amend the petition of appeal so as to



bring out the inadvertently omitted background information on the matters raised in the arbitration and that the information would enable the court to make a determination from a fully informed position.

The applicant argued that the amendment would give the court a wider latitude to either hear and ventilate through the issues raised before the arbitrator and give its final determination or remit the same back to the arbitrator for a fresh hearing. The applicant stated that application ought to be allowed in the spirit of the court's judicial authority under article 159 of Kenya, 2010 (Constitution) and that no prejudice would be suffered by the respondent should the orders sought be granted. The applicant finally contended that the amendment was necessary so as to bring out the background information and material and that the information had a direct bearing on the main issue of the appeal.

Issues

- i. Whether the Supreme Court had discretion to allow amendments to a petition to determine the real questions in dispute.
- ii. Whether the Supreme Court could delve into the merits or the likelihood of success of a matter in an application to amend a petition and to file a supplementary record of appeal.

Held

1. The provisions of section 21(2) of the Constitution and rule 3(5) of the Supreme Court Rules, 2020, granted the court inherent power to make any ancillary or interlocutory orders as may be necessary for the ends of justice. The court therefore had discretion to allow amendments to determine the real questions in dispute and to do substantial justice. Thus, the purpose of any amendment was to define the real question in controversy and the respondent would, in any event, have an opportunity to respond to the same.
2. The court had powers to grant leave to file a supplementary record under rule 40(4) of the Supreme Court Rules, 2020, when satisfied that the amendment sought to introduce a critical document that had been omitted.
3. From a perusal of the draft amended petition, the applicant sought to set out the background of what transpired before the arbitrator including an additional prayer. The applicant's argument was that it merely intended to place the issues in dispute in perspective to facilitate the just determination of the appeal.
4. In the court's earlier ruling delivered on January 27, 2023 in the instant matter ((Petition (Application) 34 (E035) of 2022) [2023] KESC 5 (KLR) (27 January 2023) (Ruling)), the court noted some of the contentions that rendered the appeal arguable. Taking into account the respondent's perception as to the nature and extent of issues in the intended appeal, the court, like in the earlier ruling, shall not at that juncture delve into the merits or the likelihood of success. The parties would have ample time to fully ventilate their arguments in line with the court's jurisdiction under article 163(4)(a) of the Constitution. The respondent's prejudice to be suffered, if any, would be discernible then.
5. On the leave to file a supplementary record of appeal containing the proceedings of the High Court and Court of Appeal, the same were not available at the time of filing the record of appeal. The unavailability of the proceedings of the superior courts below and the time taken to secure them was not attributed to the fault of the applicant. The respondent had not controverted that limb of argument or demonstrated any likely prejudice if that prayer was granted. That rendered the prayer as one that was merited.
6. The interest of justice was best served by allowing the amendment of the petition and for the petitioner to file the supplementary record containing the proceedings before the superior courts below for the purposes of placing before the court all matters in controversy for the court's determination.

Application allowed.

Orders

- i. *The petitioner shall file and serve its amended petition and supplementary record within 14 days from the date of the ruling.*



- ii. *The respondent had 14 days after service of the amended petition to file a supplementary/further response, if need be.*
- iii. *Costs of the application to abide the outcome of the appeal.*

Citations

Cases

1. Attorney General v Zinj Limited (Petition 1 of 2020; [2021] KESC 23 (KLR)) — Explained
2. Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019; [2020] KESC 1 (KLR)) — Explained
3. Githiga & 5 others v Kiru Tea Factory Company Limited (Application 12 of 2019; [2019] eKLR) — Explained
4. Kampala International University v Housing Finance Company Limited (Petition (Application) 34 (E035) of 2022; [2023] KESC 5 (KLR)) — Explained
5. Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) (Petition 12 of 2016; [2019] KESC 11 (KLR)) — Explained
6. Surya Holdings Limited & 2 others v CFC Stanbic Limited & another (Petition 8 of 2019; [2020] KESC 2 (KLR)) — Explained
7. Synergy Industrial Credit Limited v Cape Holdings Limited (Petition 2 of 2017; [2019] KESC 12 (KLR)) — Explained

Statutes

1. Constitution of Kenya (2010) — Article 159, 163 (4) (a) — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 21 (2) — Interpreted
3. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) — Rule 18, 23 — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 3 (5), 26, 40 (4), 41 — Interpreted

Advocates

Ms. Esami h/b for Mr Nyamu for petitioner/ applicant

Mr. Kiche h/b for Mr. Ohaga, SC for respondent

RULING

1. Upon perusing the notice of motion dated March 17, 2023 and filed on May 5, 2023 by the petitioner indicated as brought pursuant to rules 18 and 23 of the *Supreme Court Rules*, seeking leave to amend the petition of appeal and file a supplementary record of appeal; and
2. Upon perusing the grounds on the face of the application and the supporting affidavit of Hassan Basajjalaba, the Chairman of the petitioner's Board, sworn on March 11, 2023, wherein the applicant contends that; it filed its appeal without the proceedings of the Court of Appeal and the High Court as they had not been typed by then; the record of appeal is incomplete without the proceedings of the courts; it is necessary to amend the petition of appeal so as to bring out the inadvertently omitted background information on the matters raised in the arbitration; the information will enable the court to make a determination from a fully informed position; the amendment will give this court a wider latitude to either hear and ventilate through the issues raised before the arbitrator and give its final determination or remit the same back to the arbitrator for a fresh hearing; this application ought to be allowed in the spirit of this court's judicial authority under article 159 of *Constitution*; no prejudice will be suffered by the respondent should the orders sought be granted; and it is in the interest of justice for the amendment to be allowed; and



3. Upon considering the applicant’s further argument in its submissions dated April 17, 2023 and filed on May 5, 2023 where it relies on rule 18 of the *Supreme Court Rules 2012* (now rule 26 of the *Supreme Court Rules 2020*) and the principles set out in this court’s ruling in *Attorney General v Zinj Limited* Sup Ct Petition (Application) No 1 of 2020 [2021] eKLR on filing of additional evidence, and contends that the amendment is necessary so as to bring out the background information and material that will remove vagueness or doubt over the case and that the information has a direct bearing on the main issue of the appeal; and
4. Upon perusing the respondent’s replying affidavit sworn by Regina Kajuju Anyika on May 24, 2023 in opposition to the application, and its submissions dated May 31, 2023, it contends that the petition of appeal in the present case must be limited to the question whether the Court of Appeal properly applied the principles enunciated by this court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* Sup Ct Petition No 12 of 2016 [2019] eKLR and *Synergy Industrial Credit v Cape Holdings Limited* Sup Ct Petition No 2 of 2017 [2019] eKLR in dismissing the applicant’s application for leave to appeal the decision of the High Court dated October 21, 2022, and noting that the appeal herein is an interlocutory appeal, pursuant to rules 40 and 41 of the *Supreme Court Rules, 2020* the typed proceedings from the High Court and the Court of Appeal are not necessary; and
5. Upon further considering the respondent’s arguments that; based on this Court’s decision in *Geo Chem Middle East v Kenya Bureau of Standards* Sup Ct Petition No 47 of 2019 [2020]eKLR, this court lacks jurisdiction to grant the prayers sought in the application and to give a final determination or remit the same to the arbitrator for fresh hearing as sought in the amended petition; the factual background sought to be introduced are matters already pleaded in the various pleadings in the record of appeal; the application lacks merit, is an abuse of the court process, and is merely filed to delay and deny the respondent the opportunity to enjoy the fruits of its judgment arising from the arbitration award made on September 27, 2019; and
6. considered the application, response and the submissions filed by the petitioner and by the respondent we therefore opine as follows:
 - i. The provisions of section 21(2) of the *Supreme Court Act 2011* and rule 3(5) of the *Supreme Court Rules 2020* grant this court inherent power to make any ancillary or interlocutory orders as may be necessary for the ends of justice. This court therefore has discretion to allow amendments to determine the real questions in dispute and to do substantial justice. We echo our position in *Stephen Maina Gitbiga & 5 others v Kiru Tea Factory Company Ltd* Sup Ct Application No 12 of 2019 [2019] eKLR, where we held as follows:

“(27) ... Rule 3(5) of the Supreme Court Rules gives this court inherent power to make such orders, or give such directions as may be necessary for the ends of justice. We are satisfied that the purpose of the proposed amendment is to define the real question in controversy, and that the respondents will still have an opportunity to respond to the amendment, thereby addressing any potential prejudice that they may have suffered.”

Thus, the purpose of any amendment is to define the real question in controversy and the respondent will, in any event, have an opportunity to respond to the same.
 - ii. In the same vein, the court has powers to grant leave to file a supplementary record under rule 40(4) of the *Supreme Court Rules, 2020* when satisfied that the amendment seeks to introduce



a critical document omitted. In *Surya Holdings Limited & 2 others v CFC Stanbic Limited & another* Sup Ct Petition No 8 of 2019 [2020] eKLR we stated as follows:

“In considering whether to exercise discretion and grant leave to file documents out of time, we have time and again restated that the onus is on the applicant to explain the delay and that no prejudice will be caused to the opposing party. Rule 40(4) of the Supreme Court Rules, 2020 obligates an applicant to seek leave to file a Supplementary record of appeal to include a document omitted from the record of appeal unless such a supplementary record is filed within 15 days of lodging the record of appeal.”

- iii. On the prayer to amend the petition, a perusal of the draft amended petition reveals that the applicant seeks to set out the background of what transpired before the arbitrator including an additional prayer to, ‘either quash the Arbitral Award subject to HC Misc Cause No E564 of 2019 and judgment be entered as prayed in the claim before the arbitrator, or the court invokes its powers under article 159 of the Constitution and orders the parties to hold in equal rights in respect of the property subject of charge in equal shares’. In our view, the applicant’s argument as we perceive it is that it merely intends to place the issues in disputation in perspective to facilitate the just determination of the appeal.
 - iv. In our earlier ruling delivered on January 27, 2023 in this matter (*Kampala International University v Housing Finance Company Limited* (Petition (Application) 34 (E035) of 2022) [2023] KESC 5 (KLR) (27 January 2023) (Ruling)), the court noted some of the contentions that rendered the appeal arguable. taking into account the respondent’s perception as to the nature and extent of issues in the intended appeal, the court, like in the earlier ruling, shall not at this juncture delve into the merits or the likelihood of success. The parties will have ample time to fully ventilate their arguments in line with our jurisdiction under article 163(4)(a) of the Constitution. The respondent’s prejudice to be suffered, if any, will be discernible then. For these reasons, we are therefore inclined to allow the prayer to amend the petition of appeal as sought.
 - v. On the leave to file a supplementary record of appeal containing the proceedings of the High Court and Court of Appeal, it is apparent that the same were not available at the time of filing the record of appeal. The unavailability of the proceedings of the superior courts below and the time taken to secure them is not attributed to the fault of the applicant. The respondent has not controverted this limb of argument or demonstrated any likely prejudice if this prayer is granted. This renders the prayer as one for allowing.
 - vi. In the circumstances, the interest of justice is best served by allowing the amendment of the petition and for the petitioner to file the supplementary record containing the proceedings before the superior courts below for the purposes of placing before the court all matters in controversy for the court’s determination.
7. Consequently, for reasons aforesaid, we make the following orders:
- i. The notice of motion dated March 17, 2023 and filed on May 5, 2023 be and is hereby allowed.
 - ii. The petitioner shall file and serve its amended petition and supplementary record within 14 days from the date of this ruling.
 - iii. The respondent has 14 days after service of the amended petition to file a supplementary / further response, if need be.



iv. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT.

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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

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

Representation:

Ms. Esami h/b for Mr Nyamu for the petitioner/applicant

(Nyamu & Nyamu Co. Advocates)

Mr. Kiche h/b for Mr. Ohaga, SC for the respondent

(TripleOKLaw LLP, Advocates)

