



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 91 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KESC 91 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 12 (E014) OF 2022
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
OCTOBER 6, 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 for leave to adduce additional evidence)

Conditions under which the Supreme Court would allow one to adduce additional evidence.

In a case in which an interested party before the Supreme Court sought leave to adduce additional evidence; the court held that none of the conditions for the grant of leave to adduce additional evidence had been satisfied.

Reported by John Ribia

Law of Evidence – additional evidence – application to adduce additional evidence at the appellate stage – application to adduce additional evidence in a second appeal - under what conditions would the Supreme Court allow an applicant to adduce additional evidence - , section 20; , rule 26; .

Brief facts

The applicant (an interested party in the suit) sought leave to adduce additional evidence in support of the applicant’s replying affidavit. The applicant contended that the applicant was joined at the final stage of appeal (before the Supreme Court) and therefore had no opportunity to produce evidence before the superior courts below. The applicant further contended that the evidence in question was credible, authentic, was directly



relevant to the issues presented for determination, and would have a significant impact on the final verdict of the Supreme Court.

The respondent opposed the application on grounds that the applicant was not a primary party to the suit and as such could neither frame new issues nor adduce additional evidence. The respondent claimed that the applicant had also failed to meet the principles set under case law to adduce additional evidence.

Issues

Which conditions would the Supreme Court allow an applicant to adduce additional evidence?

Held

1. A number of the documents the applicant sought leave to adduce as additional evidence were part of the record. The card transaction flow chart illustration that the applicant sought to introduce as additional evidence was repetitive of the respondent's explanation and almost a replica of the pictorial illustrations in the petition. The other documents that the applicant sought to introduce as additional evidence were in the public domain.
2. In exceptional circumstances and on a case-by-case basis, the Supreme Court could exercise its discretion and call for, and allow additional evidence to be adduced. The applicant was duty bound to satisfy all the elements under section 20 of the ; rule 26 of the ; and the principles set out in
3. The Supreme Court would only allow additional evidence on a case-by-case basis and even then, sparingly and with abundant caution. The additional evidence sought to be introduced was either part of the record before the Supreme Court or in the public domain both locally and internationally.
4. Had the applicant's advocates on record exercised due diligence and taken time to peruse the Supreme Court's record, they would have spared the court's judicial time as well as their client's and other parties' time and resources. None of the conditions for the grant of leave to adduce additional evidence had been satisfied. The instant application was frivolous and an abuse of court process.

Application dismissed.

Orders

Costs to be borne by the applicants.

Citations

Cases

1. Mahamud v Mohammad & 3 others (Petition 7 of 2018; [2018] KESC 26 (KLR)) — Explained
2. Muruatetu & another v Republic & 5 others (Petition 15 & 16 of 2015 (Consolidated); [2016] eKLR; [2016] 1 KLR) — Explained
3. A Andisamy Chettiar v A Subburaj Chettiar ([2015] 17 SCC 713) — Explained
4. Sanjay Kumar Singh v The State of Jharkhand (Civil Appeal No 1760 of 2020 (Unreported)) — Explained
5. DPP v Kilbourne ([1973] 2 W.L.R. 254) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 20 (3), 22 (3)(d), 25 (c), 259 — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 20, 21(2)(3) — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 26, 31 — Interpreted

Advocates

Ms. Faith Macharia, Mr. Edel Ouma & Mr. Ikobo Mubindi for 1st and 2nd Interested Parties

Ms. Nazima Malik for Petitioners

Mr. G. O Ochieng for Respondent



RULING

1. Upon perusing the 2nd interested party's (the applicant) motion dated July 6, 2023 and filed on July 10, 2023, pursuant to articles 20(3), 22(3)(d), 25(c) and 259 of the Constitution, sections 20, 21(2) and (3) of the Supreme Court Act, 2011 and rules 26 and 31 of the Supreme Court Rules, 2020 seeking: leave to adduce additional evidence in support of the applicant's replying affidavit sworn by Shafi Shaikh on October 19, 2022; Upon grant of leave, the court do admit the documentary evidence attached to the said affidavit; and consider costs of the application; and
2. Upon considering the applicant's grounds on the face of the application, and affidavit in support sworn by Shafi Shaikh on July 6, 2023, to the effect that this court has jurisdiction to admit Further evidence under section 21(3) of the Supreme Court Act, 2011; the applicant was joined at the final stage of appeal and therefore had no opportunity to produce evidence before the superior courts below; the evidence in question is directly relevant to the issues presented for determination and will bring clarity to the disputed issues; the said evidence is credible, authentic and will have a significant impact on the final verdict of this court; no prejudice will be occasioned to any party in these proceedings; but instead, the applicant stands to suffer permanent prejudice if the application is denied; and
3. Further considering the applicant's submissions dated July 6, 2023 and filed on July 10, 2023, restating the grounds set out above and in addition, urging that the applicant has satisfied the threshold under section 20 of this court's rules and principles settled in Mohamed Abdi Mabamad v Ahmed Abdullahi Mohamed & 3 others, SC Petition No 7 of 2018; [2018] eKLR (Mohamed Abdi case). In support thereof, the applicant cites {{abbr{title Director of Pubic Prosecution} DPP v Kilbourne [1973] 2 WLR. 254; Sanjay Kumar Singh v The State of Jharkhand Supreme Court of India, Civil Appeal No 1760 of 2020 (Unreported) to urge that the evidence in question is relevant, logically probative, has a direct and important bearing to the issues in the appeal; and A Andisamy Chettiar v A Subburaj Chettiar [2015] 17 SCC 713 to contend that this court is not able to pronounce itself on the material dispute, without taking into consideration the additional evidence; and
4. Upon considering the 1st interested party's consent dated July 28, 2023 and the petitioner's consent dated August 1, 2023, both filed on August 3, 2023, wherein they do not oppose the motion for leave to adduce additional evidence; and
5. Upon further considering the respondent's replying affidavit sworn by Philip Munyao on July 21, 2023 and submissions of even date, wherein it is urged that, the most crucial interest or stake in a case is that of the primary parties; the applicant is not a primary party and as such can neither frame new issues nor adduce additional evidence (in support thereof the respondent relies on this court's decision in Francis Kariuki Muruatetu & another v Republic & 5 others, SC Petition No 15 of 2015, as consolidated with No 16 of 2015: [2016] eKLR); in any event, the applicant has failed to meet the principles settled in the Mohamed Abdi case; the dispute between the primary parties is plain and requires no more than the applicant's limited participation; the applicant is regurgitating the case before the trial court, specifically, the card transaction process flow; if the application is allowed, the respondent will suffer irreparable prejudice; and the application is *res judicata* and an abuse of court process; and
6. Further considering the applicant's supplementary affidavit sworn by Shafi Shaikh on August 1, 2023 and supplementary submissions of even date, to the effect that the respondent has failed to demonstrate what prejudice it will suffer if leave is granted and the additional evidence adduced; contrary to the respondent's argument, the applicant has not introduced any new grounds of appeal but only seeks to adduce new evidence to clarify issues raised by the primary parties; it is illogical for the respondent to



urge that this court's reasoning dismissing the 1st interested party's application for leave to adduce new evidence must apply to the instant application; and the application is not *res judicata* or an abuse of court process as it has not been previously heard or determined on its merit; and

7. Upon examining the petition and record of appeal before us, we note that quite a number of the documents the applicant seeks leave to adduce as additional new evidence, are part of the record, reproduced in volumes six and seven as follows; the Card Member License Agreement between the applicant and the petitioner dated January 25, 1989 at pages 998 to 1009; the Letter dated February 24, 1993 at page 1010; Amendment to License Agreement at page 1011; Revised Exhibits at page 1012; Letter dated February 12, 1993 at page 1013; and the Global Lease and License Agreement at pages 1074 to 1077; and
8. Further noting that the card transaction flow chart illustration annexed at page 42 of the applicant's replying affidavit (in response to the petition) as additional evidence is repetitive of the respondent's explanation at volume 2 pages 418 to 419, and 424 to 428 of the record; and almost a replica of the pictorial illustrations at Volume 6, pages 891 and 893; and the petitioner's elaboration at paragraphs 4 to 6 of the petition before this court; and
9. Appreciating that the only two remaining documents from the list of documents the applicant seeks to adduce are an excerpt of the applicant's bulletin No 2 of October 4, 2010 and screenshots of the Kenya eCitizen portal, which are in the public domain; and
10. Bearing in mind that this court settled the law on its jurisdiction to grant leave to a party to adduce additional evidence and laid down the governing principles in the *Mohamed Abdi* case (*supra*) wherein 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].

11. We now opine as follows: -
 - i. The applicant is duty bound to satisfy all the elements under the provisions of section 20 of the *Supreme Court Act, 2011*; rule 26 of the *Supreme Court Rules, 2020*; and the principles set out in the *Mohamed Abdi Mahamud* case (*supra*);
 - ii. This court in the said decision emphasized that even with the application of the set principles, the court will only allow additional evidence on a case-by-case basis and even then, sparingly and with abundant caution;
 - iii. It is evident that the additional evidence sought to be introduced is either part of the record before this court or in the public domain both locally and internationally; and
 - iv. Had the applicant's advocates on record exercised due diligence and taken time to peruse the court's record, they would have spared this court's judicial time as well as their client's and other parties' time and resources.
12. Applying these principles to the application, we arrive at the inevitable conclusion that none of the conditions for the grant of leave to adduce additional evidence have been satisfied. Similarly, for reasons aforesaid, we find the instant application frivolous and an abuse of court process.



13. Consequently, we make the following orders:

- i. The motion dated July 6, 2023 and filed on July 10, 2023, is hereby dismissed;
- ii. The costs of this application shall be borne by the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 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

.....
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

