Jirongo v Soy Developers Limited & 9 others (Petition 38 of 2019) [2020] KESC 38 (KLR) (4 August 2020) (Ruling)

Cyrus Shakhalaga Khwa Jirongo v Soy Developers Limited & 9 others [2020] eKLR

Neutral citation: [2020] KESC 38 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 38 OF 2019

DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK IBRAHIM, NS NDUNGU & I LENAOLA, SCJJ

AUGUST 4, 2020

BETWEEN

CYRUS SHAKHALAGA KHWA JIRONGO ..... PETITIONER

AND

SOY DEVELOPERS LIMITED ..... 1ST RESPONDENT

SAMMY BOIT ARAP KOGO ..... 2ND RESPONDENT

ANTOINETTE BOIT ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 5TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 6TH RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 7TH RESPONDENT

CHIEF MAGISTRATES COURT, NAIROBI ..... 8TH RESPONDENT

DEPOSIT PROTECTION FUND (AS LIQUIDATOR OF POST BANK CREDIT LTD) ..... 9TH RESPONDENT

ASL LIMITED ..... 10TH RESPONDENT

(Being an application for leave to adduce new and fresh evidence from the decision of the Court of Appeal (Visram, Karanja & Otieno-Odek JJA) on 19th July 2019 allowing Civil Appeal No. 43 of 2017 and 48 of 2018 and further ordering the setting aside the Judgment of the High Court (G. V Odunga J) in Miscellaneous Application No. 78 of 2016 delivered on 11th January 2017)

Principles applicable in considering leave for additional evidence in an appeal.
In considering an application for leave for additional evidence in an appeal, the Supreme Court had to consider the following principles: 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 that sought to adduce the additional evidence; d) Where the additional evidence sought to be adduced removes 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 could arise from the additional evidence on the other.

Reported by John Ribia

Law of Evidence *– appeals – applicable principles when introducing new evidence in an appeal - what were the principles applicable in considering leave for additional evidence in an appeal - whether the Supreme Court would allow an application seeking leave to admit new evidence in an appeal where the evidence had been the possession of the applicant throughout the trial process*

Brief facts

The petitioner had been charged with counts of obtaining security by false pretences, of making a document without authority, uttering false documents and giving false information to a person employed in the public service. The petitioner approached the High Court in a constitutional petition seeking an order of prohibition seeking to stop the Director of Public Prosecutions and the Magistrate's Court from proceeding with the matter. The petition failed; aggrieved the petitioner filed an appeal at the Court of Appeal. The appeal also failed. Aggrieved, the petitioner approached the Supreme Court. At the Supreme Court the petitioner filed the instant application which sought leave to introduce new evidence. The petitioner alleged that the fresh evidence dating back to more than 27 years ago had only been discovered and retrieved from the archives of the National Bank of Kenya Ltd and could not have been adduced before the High Court or the Court of Appeal.

Issues

i. What were the principles applicable in considering leave to adduce additional evidence during an appeal?
ii. Whether the Supreme Court would allow an application seeking leave to admit new evidence in an appeal where the evidence had been the possession of the applicant throughout the trial process.

Held

1. The Supreme Court had the jurisdiction to hear and determine an application for leave to adduce additional or new evidence. What was also apparent was that the exercise of that jurisdiction could not be whimsical, and the Court would not be in haste in granting the same. It had to consider all the relevant prevailing circumstances and make such order as it would deem fit in the interests of justice.

2. In considering an application for leave for additional evidence in an appeal, the Supreme Court had to consider the following principles:
    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 that sought to adduce the additional evidence;
    d. Where the additional evidence sought to be adduced removes 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 could arise from the additional evidence on the other.
3. Even with the said principles being the basis for grant of such leave, the Supreme Court would still determine each application on a case by case basis, and even so, act with restraint and abundance of caution in allowing additional evidence.
4. The application did not meet the threshold set out above. The petitioner had not shown that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within his knowledge, or could not have been produced at the time of the suit or petition. That was evidenced by the letter written by the bank dated November 20, 2019 addressed to the Director, Banking Fraud Investigation Unit. The letter showed that the petitioner did not satisfy the second ambit of the principle in the following manner: he had knowledge of the documents or evidence that he sought leave to adduce as new and fresh evidence. The letter from the bank stated categorically that the authentication and review of the petitioner's statement of account was on the basis of the vouchers that he had provided them. Quite arguably, that went against the petitioner's averments that he was unable to obtain records of documents as they had been destroyed, or that he had feverishly been searching for evidence, which by all accounts, was all along in his possession. Further it could also be reasonably inferred or deduced that the bank was able to respond to the petitioner's request in a considerably short period of time, contrary to assertions made by the petitioner that the bank had taken several months to recover copies of the missing payments made to the 1st, 2nd and 3rd respondents.
5. The petitioner and the bank exchanged letters between August 2, and August 14, 2019. Had the petitioner shown that he had on several occasions prior to that date written to the bank requesting for the said documents over a considerable period of time, then the instant court would have been inclined

to believe that he had exercised due diligence in trying to retrieve the documents before, during trial and after the initial trial and subsequent appeal. However, the petitioner had only presented one letter which the bank responded to promptly and effectively. In Judicial Review No. 78 of 2016 instituted by the petitioner at the High Court, it was not shown that he had presented to the trial Court that he had engaged the bank in retrieving the documents and letters that he now sought leave to adduce into the instant court. Further, it was not shown that there was a similar letter written to the bank during the period requesting for the said information. It was also not shown that during the appeal to the Court of Appeal, the petitioner had sought out the bank to provide the information and documents that he needed to adduce before the instant Court.

6. The Court of Appeal delivered judgment on July 19, 2019. It was only after the appellate court had rendered its judgment that the petitioner wrote to the bank on August 2, 2019 seeking to have them provide the information that he now sought to introduce as new and fresh evidence. The letter from the Registrar of Companies was also responded to in a relatively short period. That information was within the purview of the petitioner had he made any effort to obtain it earlier. The petitioner was indolent, and in an application premised on discretion, his indolence was his waterloo.
7. The interests of justice dictated that the Supreme Court had to ensure that all parties to a dispute were accorded a fair hearing in order to resolve issues not only amicably, but also judiciously. However, the court was unconvinced that the petitioner was not accorded a fair trial at the Superior Courts below the Supreme Court. The Supreme Court was perturbed, as it was curious at this strange turn of events where the petitioner now wanted to engage the instant court in gerrymandering and cat games in the name of adducing additional evidence in an otherwise straight forward appeal.
8. By seeking leave to admit new evidence, which had all along been in his possession going by the facts of the case, the petitioner would be abusing, not only the discretion of the instant court in exercise of its jurisdiction, but also its processes, and seeking, rather dubiously and ingeniously, to reconstitute his case which had been conclusively determined by the Superior Courts below. The petitioner, being unsuccessful at the Court of Appeal, was now trying to amend and make corrections to his case by seeking to introduce supposed new and fresh evidence.

Application dismissed and costs awarded to the respondents.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. The Petitioner's Notice of Motion before the Court is dated 19th December 2019 and filed on 16th January 2020. It is brought under Articles 24, 48, 50 & 159(2)(d) of the Constitution, Sections 20 & 21 of the Supreme Court Act, Rules 3 & 18 of the Supreme Court Rules and all other enabling provisions of the law. The Petitioner seeks leave of this Court to adduce new and fresh evidence in this matter in which there are allegations of an incomplete sale transaction of property between the Petitioner and several of the Respondents leading to threat of arrest of the Petitioner.

2. The application is premised on the following summarized grounds, inter alia;

(a) That the new and fresh evidence could not, with any due diligence, have been discovered or adduced earlier because the Petitioner's office file in this regard had been stolen meaning that the Petitioner could only look to the National Bank of Kenya Ltd to retrieve from its archives the payment details which the bank could not do during the period the matter was pending before the High Court and the Court of Appeal;

(b) That the new and fresh evidence is exculpatory, totally destroying the very basis for the laying of purported criminal charges against the Petitioner;

(c) That the evidence is credible and has officially been issued by the National Bank of Kenya Ltd and the Registrar of Companies;

(d) That the additional evidence is not voluminous but consists only of five simple letters/ documents and that the Respondents would have no difficulty whatsoever in responding to the new evidence;

(e) That it is in the interest of justice that the new and fresh evidence is adduced for purposes of a just and fair determination of this matter; and

(f) That there is no prejudice that can be occasioned to the Respondents at all but the Petitioner will suffer irreparable damage to his reputation and standing if he were to suffer the ignominy of standing trial for illegitimate criminal charges that should never have been laid at all in the first place.

3. In the affidavit sworn by the Petitioner herein on 19th December 2019 and filed on 16th January 2020 in support of the application, he depones, further to reiterating the grounds adduced in support of his application, that the new evidence is dispositive of this matter as it negates entirely the alleged criminal complaint against him by certifying that there was compliance with the impugned sale agreement.

4. He further deposes that the new and fresh evidence dating back to more that 27 years ago had now only been discovered and retrieved from the archives of the National Bank of Kenya Ltd (the bank) and could not have been adduced or presented to the superior Courts during the initial trial and subsequent appeal to the Court of Appeal.

B. Parties' Submissions And Responses

i) The Petitioner's submissions

5. The Petitioner also filed his submissions dated 10th February 2020 on 12th February 2020. Further to reiterating the grounds and the averments made in his affidavit in support of the application, the Petitioner submits that this Court is vested with the requisite jurisdiction to hear and determine the instant application as his appeal has been brought as a matter of right pursuant to Article 163(4)(a) of the Constitution.

6. The Petitioner also submits that constitutional issues arose following the determination by the Court of Appeal of the question on the constitutional mandate of the Office of the Director of Public Prosecutions (5th Respondent) under Article 157 of the Constitution. He reiterates that this right of appeal further arose out of adjudication and determination of his constitutional rights as pleaded in both superior Courts.

7. With regards to obtaining and presenting the new and fresh evidence, it was the Petitioner's submission that he had been feverishly searching for relevant aforesaid documents, and that it was following

months of archival searches by the bank that he was able to recover copies of documents which he believes are essential evidence to the matter before this Court.

8. He also submits that the evidence he seeks to adduce is directly relevant to the matter before the Court as it completely nullifies the basis of the criminal charges against him. The Petitioner further submits that the evidence is credible and capable of belief as they are certified documents from the bank and the Registrar of Companies (the Registrar) and also, that the evidence removes any vagueness or doubts over the case and in any event, are not voluminous to the extent that the Respondents would find difficulty in responding to them effectively.

ii) The 1st, 2nd & 3rd Respondents' Replying Affidavits

9. In response to the application, the 1st, 2nd and 3rd Respondents filed two Replying Affidavits; the first was sworn on 15th January 2020 and filed on 16th January 2020, whilst the second was sworn and filed 14th February 2020. In the first Replying Affidavit, the 2nd Respondent, deponing on behalf of the 1st and 3rd Respondents, avers that the evidence which the Petitioner seeks leave to adduce as new and fresh evidence does not meet the legal threshold of admissibility.

10. In support of this contention, the 2nd Respondent depones that the additional evidence is of no probative value as the Court of Appeal had determined that all relevant documents in the matter were not missing; that the original documents were available and that all the witnesses were still alive and their witness statements available. Further, he avers that the new evidence creates a fundamental departure from pleadings in the superior Courts.

11. In the latter Replying Affidavit, and further to depositions made in the affidavit dated 15th January 2020, the 2nd Respondent deposes that the alleged new and fresh evidence was evidence that could have been discovered by the Petitioner through basic diligence as they were records readily available and obtainable from the bank aforesaid.

12. Further, the 2nd Respondent avers that the new and fresh evidence fails to meet the admissibility threshold as it is incoherent, inconsistent and contradictory to be of any probative value or capable of being believed.

13. In seeking to demonstrate dishonesty, unscrupulous conduct and deceit on the part of the Petitioner, the 2nd Respondent deposes that the new and fresh evidence had always been in possession of the Petitioner as evidenced by the letter dated 20th November 2019 by the bank to the Banking Fraud Investigations Department (BFID). In the letter, the bank stated that it was reviewing the Petitioner's statements of account against copies of transaction vouchers presented by himself to the bank.

14. The 2nd Respondent further deposes that the proper test for the alleged exculpatory evidence of the Petitioner can only be done at the trial Court, and that this Court cannot be called upon to test the veracity of the evidence, or its probative value, as that mandate falls with the ambit of the trial Court.

iii) The 1st, 2nd & 3rd Respondents' submissions

15. In their submissions dated and filed on 14th February 2020, the 1st, 2nd and 3rd Respondents concede that this Court is vested with the jurisdiction to hear and determine an application such as the Petitioner's seeking to adduce or admit new and fresh evidence.

16. They however submit that this does not mean that a party that makes such an application will have such evidence admitted as a matter of right and that the parameters that the Court has to consider are as set out in Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others SC Petition Nos. 7 & 8 of 2018; [2018] eKLR (Wajir) and Attorney General v. Paul Kawanga Semwogerere & 2

others Constitutional Application No. 2 of 2004; [2004] UGSC 3. They submit in that context that the evidence that the Petitioner seeks leave to adduce does not meet the legal threshold as laid down by this Court in that case.

17. Further, the 1st, 2nd & 3rd Respondents submit that the new and fresh evidence that the Petitioner seeks leave to adduce is not new, and that he was all along in possession of the documents that he now seeks to admit into this Court. They also submit that the Petitioner now seeks to admit evidence to patch up his case on issues which were comprehensively adjudicated and determined by the superior Courts below.

18. In seeking to distinguish the present application from that in the Wajir case, the 1st, 2nd and 3rd Respondents submit that this Court in the Wajir case had determined that the Applicants had not been accorded the right to a fair trial both at the trial Court and the Court of Appeal. This, they submit is a distinct characteristic with the instant matter where the Petitioner was accorded all available judicial processes but chose to engage sloppily in the matter.

19. They also submit that the application falls below the exceptional standards for admissibility of new evidence as reiterated in Ladd v. Marshall [1954] 3 All ER 745; [1954] EWCA Civ 1 where Lord Denning made a determination that new and fresh evidence would be allowed only if there was proof of coercion or bribery, or that there was a mistake on an important matter that needed to be corrected.

iv) The 5th, 6th & 7th Respondents' Replying Affidavit

20. In their affidavit sworn and filed on 14th February 2020, the 5th, 6th & 7th Respondents deposed, through the deponent Inspector Maxwell Otieno, that the said new documents which the Petitioner seeks leave to be admitted into evidence should be subjected to further investigation to determine their authenticity as opposed to being admitted directly into this Court.

v) The 5th, 6th & 7th Respondents' submissions

21. On the issue of jurisdiction, the 5th, 6th & 7th Respondents concede that this Court has jurisdiction under Article 163(4)(a) of the Constitution to hear and determine the instant application.

22. On the merits of the application, the 5th, 6th & 7th Respondents submit that the Petitioner has not demonstrated how he was unable to obtain or discover the new and fresh evidence or that he could not have discovered the same during trial and subsequent appeal at the superior Courts below.

23. They further submit that the Petitioner has not satisfied the parameters and requirement as set out by this Court in Wajir on admissibility of new evidence. They thus submit that the said documents should be subjected to further investigation to determine their authenticity.

C. Issues For Determination

24. Upon considering the application, the affidavits both in support of and in response to the application, and the submissions made by the respective parties, we consider that the following issues arise for determination of this Court;

    i. Whether this Court has jurisdiction to grant leave to the Petitioner to adduce additional evidence;

    ii. Whether leave to admit additional evidence should be granted in this matter?

    iii. What relief(s) are available to the Parties?

D. Analysis

i. Whether this Court has jurisdiction to grant leave to the Petitioner to adduce additional evidence

25. In determining whether this Court has jurisdiction to grant leave to adduce additional evidence, none of the parties contested that this Court is vested with the requisite jurisdiction to hear and determine such an application.

26. The above fact notwithstanding, we deem it fit to restate the law in that regard and as the basis for interrogating the application before us. We thus note that Rule 18 of the Court Rules reads;

(1) The Court may in any proceedings, call for additional evidence.

(2) A party seeking adduce to additional evidence under this rule shall make a formal application before the Court.

(3) On any appeal from a decision of the Court of appeal, or any other court or tribunal acting in the exercise of its original jurisdiction, the Court shall have power—

(a) to call for or receive any record on any matter connected with the proceedings before it;

(b) to re-appraise the evidence and to draw inferences of fact; and

(c) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by the Registrar.

(4) Where additional evidence is taken by the Court, it may be oral or by affidavit, and the Court may allow cross-examination of any witness.

(5) Where additional evidence is taken by the trial court, the trial court shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness giving the additional evidence.

(6) Where evidence is taken by the Registrar, the Registrar shall give statements of opinion on the credibility of the witness.

(7) The parties to an appeal shall be entitled to be present when such additional evidence is taken.

27. Section 21 (3) of the Supreme Court Act furthermore empowers us to make any order necessary for determining the real question in controversy in an appeal. The import of Section 21(3) of the Supreme Court Act was considered in Evans Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others SC Petition No. 18 & 20 of 2014; [2014] eKLR (Kidero). In the concurring Judgment of Njoki Ndungu SCJ at paras. 368-69 she delivered herself thus:

> " The upshot of this is that this Court may make the same kind of orders that the High Court is empowered to make under Articles 22 and 165, when the matter comes to the Supreme Court on appeal, as the Court would find fit. As alluded to earlier on these remedies include declarations of rights, injunctions, conservatory orders, declaration of invalidity of any law, orders for compensation, orders for judicial review or any other appropriate relief where rights and fundamental freedoms have been denied, violated or are threatened.
>
> Taking all these legal provisions into consideration, it is manifest that this Court may make any order that the High Court has jurisdiction to make in the enforcement of rights and fundamental freedoms. This Court also has the latitude to make any order that would be

necessary for determining the real question in issue in this appeal and to ensure that the principles of the Constitution are promoted - including an order for a witness to be cross-examined. I am alive to the fact that this is not a remedy that this Court would hastily grant but in light of the violation of constitutional rights that occurred it is the most appropriate remedy under the circumstances." [Emphasis added]

28. It is therefore, without belaboring the point any further, a fact that this Court has the jurisdiction to hear and determine an application for leave to adduce additional or new evidence. What is also apparent is that the exercise of that jurisdiction shall not be whimsical, and the Court would not be in haste in granting the same. It has to consider all the relevant prevailing circumstances and make such order as it would deem fit in the interests of justice.

ii. Whether leave to admit additional evidence should be granted in this matter

29. In the Wajir case, this Court set out the principles that it would consider in considering an application for leave for additional or new evidence before the superior Courts. We are further minded to state that even with the said principles being the basis for grant of such leave, this Court would still determine each application on a case by case basis, and even so, act with restraint and abundance of caution in allowing additional evidence.

30. The principles as developed in that case are that;

(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.

31. Contrasting these principles against the Petitioner's application, it is manifest that the application does not meet the threshold set out above. We say so because the Petitioner has not "shown that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within his knowledge, or could not have been produced at the time of the suit or petition." This is evidenced by the letter written by the bank dated 20th November 2019 addressed to the Director, Banking Fraud Investigation Unit. In the said letter at para.2, it is stated, inter alia;

> " We wish to clarify that our response dated 14th August 2019 addressed to Mr. S. K Jirongo was on the basis of our review of the client's statement of account against the transaction vouchers (customer copies) presented by the customer. For the avoidance of doubt, the statement of account does not indicate the beneficiaries of the two cheques (no. 853134 for amount KES 7,000,000 and no. 853135 for KES 1,000,000) debited from Cypper Enterprises Ltd's account on 11th May 1992." [Emphasis added].

32. At para. 4(b), the bank further states;

> " In the absence of our records for the above transactions effected 27 years ago, we regret that we are unable to:-
>
> a) ...
>
> b) Certify the vouchers received from Mr. S.K Jirongo since the same did not emanate from the bank as we cannot trace the originals in light of the above." [Emphasis added].

33. The above statement goes to show that the Petitioner did not satisfy the second ambit of the principle in the following manner: he had knowledge of the documents or evidence that he now seeks leave to adduce as new and fresh evidence. The letter from the bank states categorically that the authentication and review of the Petitioner's statement of account was on the basis of the vouchers that he had provided them. Quite arguably, this goes against the Petitioner's averments that he was unable to obtain records of documents as they had been destroyed, or that he had feverishly been searching for evidence, which by all accounts, was all along in his possession.

34. Further, in the letter by the bank dated 14th August 2019 addressed to the Petitioner and annexed to the Petitioner's affidavit and marked as "CSKJ-1", it is noted that the bank was responding to an earlier letter by the Petitioner dated 2nd August 2019. In the last paragraph of the letter, it is stated, inter alia;

> " We have attached the statement of account for the period of your reference. Whereas 27 years have lapsed since the transactions were processed, we hope that the information that we have retrieved will be of help to you. Please do not hesitate to contact us in case the need arises."

35. From that letter, and more particularly the aforementioned paragraph, it can be reasonably inferred or deduced that the bank was able to respond to the Petitioner's request in a considerably short period of time, contrary to assertions made in para. 29 of his submissions that the bank had taken several months to recover copies of the missing payments made to the 1st, 2nd & 3rd Respondents.

36. The Petitioner and the bank exchanged letters between 2nd August and 14th August 2019. Had the Petitioner shown that he had on several occasions prior to that date written to the bank requesting for the said documents over a considerable period of time, then this Court would have been inclined to

believe that he had exercised due diligence in trying to retrieve the documents before, during trial and after the initial trial and subsequent appeal.

37. In this instance, however, the Petitioner has only presented one letter which the bank responded to promptly and effectively. In Judicial Review No. 78 of 2016 instituted by the Petitioner at the High Court, it is not shown that he had presented to the trial Court that he had engaged the bank in retrieving the documents and letters that he now seeks leave to adduce into this Court. Further, it is not shown that there was a similar letter written to the bank during this period requesting for the said information. It is also not shown that during the appeal to the Court of Appeal, the Petitioner had sought out the bank to provide the information and documents that he needed to adduce before this Court.

38. The Court of Appeal delivered judgment on 19th July 2019. It was only after the appellate Court had rendered its judgment that the Petitioner wrote to the bank on 2nd August 2019 seeking to have them provide the information that he now seeks to introduce as new and fresh evidence.

39. There is also the issue of the letter from the Registrar of Companies dated 15th May 2018 and annexed to the Petitioner's affidavit and marked as "CSKJ-2".

    The letter is in response to an earlier letter by Messrs. Wagara, Koyyoko & Co. Advocates dated 9th May 2018. Again, as with the letter from the bank referred to in the above paragraphs, the response time from the Registrar between 9th May and 15th May 2018 was a relatively short period. This information, it would seem, was within the purview of the Petitioner had he made any effort to obtain it earlier. We can only surmise that the Petitioner was indolent, and in an application premised on discretion, his indolence is his waterloo.

40. In stating as above, we are innately aware that the interest of justice dictates that this Court must ensure that all parties to a dispute are accorded a fair hearing in order to resolve issues not only amicably, but also judiciously. However, we are unconvinced that the Petitioner was not accorded a fair trial at the Superior Courts below. We are perturbed, as we are curious at this strange turn of events where the Petitioner now wants to engage this Court in gerrymandering and cat games in the name of adducing additional evidence in an otherwise straight forward appeal.

41. By seeking leave to admit new evidence, which had all along been in his possession going by the facts of the case, the Petitioner would be abusing, not only the discretion of this Court in exercise of its jurisdiction, but also its processes, and seeking, rather dubiously and ingeniously, to reconstitute his case which had been conclusively determined by the Superior Courts below. This Court is convinced that the Petitioner, being unsuccessful at the Court of Appeal, is now trying to amend and make corrections to his case by seeking to introduce supposed new and fresh evidence.

42. Having shown that the Petitioner did not exercise any diligence in obtaining the evidence that he now seeks to adduce before this Court, and that he had prior knowledge to or actual possession of such evidence, this Court would be restrained to continue in examining the other grounds of the application, to wit, whether the evidence would have any relevance to the matter, or indeed of probative value, and that such an exercise would indeed be a frittering of this Court's judicial time. Once it has been established that the Petitioner failed in demonstrating that he was unable, with due diligence to obtain the evidence, or that it was in his possession, as pronounced in the principles in Wajir, then the Court would be left with no other option but to dismiss his application. In stating so as above, our findings are limited to the application before us and not the pending appeal which would ultimately be determined on its merits.

E. Costs

43. Costs, in the usual manner, follow the event, subject to the Court's discretion as enunciated in Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others SC Petition No. 4 of 2013; (2014) eKLR. Costs are therefore hereby awarded to the Respondents.

F. Orders

1. The Petitioner's Application dated 19th December 2019 is hereby dismissed; and

2. Costs in are awarded to the Respondents

44. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2020.

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE

PRESIDENT OF THE SUPREME COUR

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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 COUR

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA