

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Mwilu DCJ & V-P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)*

**PETITION NO. 1 OF 2018**

**BETWEEN**

**THE INSTITUTE OF SOCIAL ACCOUNTABILITY..... 1<sup>ST</sup> PETITIONER**

**CENTRE FOR ENHANCING DEMOCRACY**

**AND GOOD GOVERNANCE..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE NATIONAL ASSEMBLY OF KENYA..... 1<sup>ST</sup> RESPONDENT**

**THE SENATE ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THE CONSTITUENCY DEVELOPMENT FUND BOARD.....4<sup>TH</sup> RESPONDENT**

---

*(Being an application seeking leave to file additional evidence and corresponding leave to the respondents to respond to the additional evidence)*

---

**RULING OF THE COURT**

**A. BACKGROUND**

[1] The petitioners moved to this court vide a petition of appeal dated 29<sup>th</sup> December 2017 seeking to overturn the judgment and orders of the Court of Appeal save for the declaration that sections 24(3)(c) and (f) and 37(1)(a) of the Constituencies Development Fund Act, 2013 violates the principle of separation of powers. In essence, they seek to invalidate the Constituency Development Fund Act 2013 as amended by the Constituencies Development Fund (Amendment) Act 2015 for various reasons stated in the petition. On its part, the 1<sup>st</sup> respondent filed a Notice of Cross Appeal dated 6<sup>th</sup> December, 2019 seeking to uphold the Court of Appeal decision. The parties have since filed their submissions in the petition, the petitioners having filed their submissions on

6<sup>th</sup> February 2021, the 1<sup>st</sup> respondent on 24<sup>th</sup> January 2020 and the 4<sup>th</sup> Respondent on 2<sup>nd</sup> September 2020. The parties were thus awaiting further directions as to the hearing of the petition.

**[2]** On 4<sup>th</sup> May 2021, the petitioners filed a Notice of Motion Application dated 16<sup>th</sup> April 2021 under Article 159(1)(2)(d) of the Constitution, Sections 3(d), 14(5), 20 and 21(2) of the Supreme Court Act 2012 and Rule 26 of the Supreme Court Rules 2020. The application seeks orders that:

- a) *This application is certified urgent;*
- b) *Petitioners be granted leave to produce copies of the National Assembly Hansard of 9<sup>th</sup>, 11<sup>th</sup>, 18<sup>th</sup> and 23<sup>rd</sup> March, 2021 covering debate on supplementary appropriations to the National Government Constituency Development Fund and the Division of Revenue Bill 2021;*
- c) *Respondents be granted corresponding leave to respond to the additional evidence;*
- d) *Costs of this application abide the main cause.*

**[3]** The application is founded on the grounds that the petitioners have discovered recent additional evidence corroborating assertions set out in their petition which they could not obtain earlier through reasonable diligence; that the additional evidence sought to be introduced records Members of Parliament threatening to block the 2021 budget process unless funds said to be arrears from 2019/20 are first released to the National Government Constituency Development Fund; that the evidence is credible material, relevant, decisive and in the public interest. That if admitted, the additional evidence removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit and the respondents can easily respond to and the Court could as well take judicial notice of the said evidence. Further, that the additional evidence fits to the issues framed in the petition relating to the Constituency Development Fund Act offending the division of functions, principles of public finance and division of revenue.

**[4]** This is in line with the petitioners' submission that the Constituency Development Fund Act not only introduces an active conflict in National Assembly's equitable allocation of funds as well as appropriation but also its ability to oversight national

revenue and its expenditure through the Constituency Development Fund, under Article 95(4) of the Constitution. Further, the petitioners state that there is no way they could have been made aware of and procured the additional evidence in the course of the proceedings because the debate has only recently occurred.

[5] The application is supported by an affidavit of Kioko Munguti, the Legal Assistant to the petitioners' counsel assigned to this case. He depones that he was asked by counsel on record to research the National Assembly Hansards of 8<sup>th</sup> to 25<sup>th</sup> March to ascertain any links between the debate on the Division of Revenue Bill 2021, the debate on the Supplementary Appropriation Act, 2021 and this case which has resulted to the present application.

## **B. PARTIES SUBMISSIONS**

### *i) The petitioners*

[6] The petitioners filed submissions on 4<sup>th</sup> May 2021 in respect of their application. They submit that the sole issue arising is whether the court should grant the petitioners leave to file this additional evidence. They state that they meet the conditions set by this Court in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018]eKLR*** (hereinafter referred to as ***Mohamed Abdi case***). The applicable conditions are that the additional evidence is material, relevant, decisive and admissible; the evidence “removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;” the evidence is credible (being a judicially noticeable public record such as the Hansard); the evidentiary detail is small; the respondents can easily respond to it; and the evidence was not available earlier because the debate has only recently occurred.

### *ii) The 1<sup>st</sup> respondent*

[7] The 1<sup>st</sup> respondent opposes the application and filed written submissions on 9<sup>th</sup> June 2021. It submits that the additional evidence sought to be introduced is inadmissible as it relates to parliamentary debates which are privileged under Article 117 of the Constitution and section 9 of the Parliament Powers and Privileges Act which recognizes freedom of speech and debate in parliament. In addition, the 1<sup>st</sup> respondent submits that the

documents sought to be produced as additional evidence offend the provisions of **Part IV (sections 79 to 82)** of the Evidence Act on production of public documents as the purported Hansard is neither certified, an original nor a verifiable document and the deponent has not revealed the source of the said document.

**[8]** The 1<sup>st</sup> respondent also submits that the additional evidence sought to be introduced by the petitioners is not directly relevant to the appeal before court in several respects. First, that the additional evidence relates to parliamentary debate on supplementary appropriations to the National Government Constituency Development Fund and the Division of Revenue Bill 2021 and not the Constituency Development Act 2013 which is subject of the present appeal in this matter. Second, that the petitioners have in any case filed a petition in the High Court to wit: ***High Court Petition No.E129 of 2021 – Katiba Institute & 2 others vs CS, National Treasury & 4 others; Commission on Revenue Allocation (Interested Party)*** in which the applicant alleges that the allocation of monies to the National Constituencies Development Fund was procured through serious conflict of interest, blackmail and threats to stall the Division of Revenue Bill, 2021, the petitioners seeking to rely on the same documents in support of that case. Additionally, that the petitioners are also challenging the National Government Constituency Development Fund in the High Court and that would have been the best forum to produce the documents the petitioners seek to introduce. Thirdly, that the respondent has failed to demonstrate any nexus between the evidence sought to be adduced and the case before Court.

**[9]** Finally, the 1<sup>st</sup> respondent submits that the additional evidence should not be admitted to enable a litigant who has been unsuccessful to patch up the weak points in its case and fill up omissions in the Court of Appeal and that there would be no end to litigation if the Rule on admission of additional evidence were used for the purpose of allowing parties to improve their case by calling further evidence. In any event, the 1<sup>st</sup> respondent submits that it already filed submissions on the main appeal on 24<sup>th</sup> January 2021 and it will be unjust if the petitioners are allowed to steal a match on the 1<sup>st</sup> respondent who has already filed submissions pursuant to the directions of the Court.

[10] Consequently, the 1<sup>st</sup> respondent argues that the application falls below the exceptional standards for admissibility of new evidence as reiterated in ***Ladd v Marshall [1954] 3All ER 745; [1954] EWCA Civ 1*** in which Lord Denning made a determination that new and fresh evidence would be allowed only if there was a mistake on an important matter than needed to be corrected.

iii) 4<sup>th</sup> Respondent

[11] The 4<sup>th</sup> respondent also opposes the application and filed its submissions, digest and list of authorities on 4<sup>th</sup> June 2021. The 4<sup>th</sup> respondent agrees with the 1<sup>st</sup> respondent that the additional evidence is not directly relevant to the matter as was laid down in the ***Mohamed Abdi case*** as that the Hansard sought to be introduced relate to debate touching on the National Constituencies Development Fund Act 2015 and the Division of Revenue Bill 2021 which are not subject of this petition. Further, that the Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions as was set out in ***Mzee Wanje and 93 others vs A.K. Saikwa (1982- 88) 1 KAR 463*** and ***Tana and Athi River Development Authority vs County Government of Tana River [2018] eKLR*** which they seek to persuade this Court with.

[12] The 4<sup>th</sup> respondent urges the court to be guided and persuaded by the decision in ***Raila Odinga & 5 others vs IEBC and 3 others [2013]eKLR*** for the proposition that the Court should consider the nature, context and extent of the new material to be produced and relied upon. In addition, the constitutionality of the National Constituencies Development Fund Act 2015 is subject to a pending petition before the High Court being ***Milimani Constitutional Petition No.178 of 2016 Wanjiru Gikonyo & others vs the National Assembly and others.***

[13] We note that the 3<sup>rd</sup> respondent did not file any response to the application. The petitioners did not also file any submissions in reply to the issues raised by the 1<sup>st</sup> and 4<sup>th</sup> respondents.

### C. ISSUE FOR DETERMINATION

[14] The main issue for determination is whether leave should be granted to the petitioners to adduce additional evidence by way of the *National Assembly Hansard of 9<sup>th</sup>, 11<sup>th</sup>, 18<sup>th</sup>, 23<sup>rd</sup> March, 2021 covering debate on supplementary appropriations to the National Government Constituency Development Fund and the Division of Revenue Bill 2021*.

### D. ANALYSIS

[15] We have considered the grounds in support of the application and the objections thereto by the 1<sup>st</sup> and 4<sup>th</sup> respondents. Rule 26 of our Rules provides for admission of additional evidence. It states:

*“The Court may call or admit additional evidence in any proceedings”*

[16] All the parties rightly appreciate the principles on admission of additional evidence as set out by this Court in *Mohamed Abdi case*. These 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.*

[17] We note that the respondents raised other grounds that warrant our consideration at the onset. These are:

- a) *Whether the proposed additional evidence is admissible*
- b) *The place of the proposed additional evidence in relation to the pending litigation before the High Court in **Milimani Constitutional Petition No.178 of 2016 Wanjiru Gikonyo & others vs the National Assembly and others** and **High Court Petition No.E129 of 2021 – Katiba Institute & 2 others vs CS, National Treasury & 4 others; Commission on Revenue Allocation (Interested Party)**.*

[18] On the first question, the petitioners contend that the additional evidence is admissible as a public record that the Court should in any event take judicial notice of. The 1<sup>st</sup> respondent is adamant that the additional evidence is inadmissible as it is privileged and that the adduced copy is neither the original nor a certified copy and that

the deponent of the affidavit in support of the application has in any event not disclosed the source of this document.

**[19]** Under **section 60(1)(b)** of the Evidence Act, the courts shall take judicial notice of the general course of proceedings and privileges of parliament, but not the transactions in their journals. It is not uncommon for courts to make reference to the Hansard in making their determinations as they have done in the past. As elected representatives of the citizens, there is public interest in allowing citizens to access proceedings of parliament which includes broadcast to the public particularly under the 2010 constitutional dispensation. Such proceedings are reduced into a Hansard that is readily accessible to the public which may explain why the petitioners had ready access to it, notwithstanding that it is not an original or a certified copy.

**[20]** As to whether the contents of the Hansard are privileged, we have previously expressed ourselves on the issue. In ***Republic v Speaker of the National Assembly & 4 Others Ex-parte Edward R.O. Ouko [2017] eKLR***, we, *inter alia*, stated that:

-

*“Parliament in Kenya cannot enjoy privilege, immunities and powers which are inconsistent with the fundamental rights guaranteed in [the Constitution]. Thus, whereas parliamentary privilege is recognized, it does not extend to violation of the Constitution hence Parliament cannot flout the Constitution and the law and then plead immunity; where a claim to parliamentary privilege violates constitutional provisions, the Court’s jurisdiction would not be defeated by the claim to privilege; that the concept of statutory finality does not detract from or abrogate the Court’s jurisdiction in so far as the complaints made are based on violation of constitutional mandates or non-compliance with rules of natural justice; that whereas the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected, the Courts can however interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.”*

In essence, the parliamentary privileges and immunities are not absolute in the event of a valid grievance by a litigant based on the violation of the constitution. The petitioners have brought action against the National Assembly alleging infringement of the

constitution. At this juncture, before the appeal is heard, we cannot say that Parliament has violated the Constitution in debating or expressing itself on any legislative action. That issue must await the hearing and determination of the appeal and parties allowed to respond to the new evidence, if at all it is eventually admitted.

**[21]** On the second issue, it is evident that the proposed additional evidence is subject to litigation before the High Court in which the petitioners are involved. The petitioners have not addressed this issue. Bearing in mind the hierarchical structure of the courts in Kenya, we do not see any justification for destabilizing the same to enable us render ourselves, as the apex court, on an issue that may otherwise end up before us using the normal litigation and appellate channels. We thus are inclined to agree with the respondents that the evidence sought to be introduced would be best interrogated in those pending litigations before the High Court and subsequently through appeal should it come to that.

**[22]** Turning back to the principles on admission of additional evidence, the petitioners argue that they meet the set threshold while the respondents argue otherwise. It is common ground that the Hansard in issue relates to parliamentary debates held on 9<sup>th</sup>, 11<sup>th</sup>, 18<sup>th</sup> and 23<sup>rd</sup> March, 2021 covering supplementary appropriations to the National Government Constituency Development Fund and the Division of Revenue Bill 2021. This inevitably leads to our interrogation of the relevance of the said evidence and its direct bearing on the outcome of the case.

**[23]** At paragraph 7 of the supporting affidavit, the deponent, Munguti Kioko states as follows:

*“Logically, these records of the Hansard debates are a recent occurrence and were not available earlier; yet counsel informs me that they are relevant to the pending appeal.”*

In our mind, it is evident that the relevance of the debates to the appeal was not readily apparent to the deponent. As pointed out by the respondents, the present proceedings do not relate to the constitutionality of the National Government Constituency Development Fund and the Division of Revenue Bill 2021. A perusal of the issues for determination and reliefs sought in the Petition of Appeal and the Notice of Cross Appeal before us reveals

that remedies sought relate to the constitutionality of the Constituency Development Fund Act, 2013.

**[24]** We further note that while the High Court had declared the said Constituency Development Fund Act as unconstitutional, the order of invalidity was suspended for a period of 12 months and the national government was allowed to remedy the defect within the suspension of invalidity period or by repeal whichever came first. This, in our view did not prevent Parliament from subsequent enactment of law that would repeal the impugned Constituency Development Fund Act 2013. In our view, the National Government Constituency Development Fund Act was enacted in that context.

**[25]** The Constitution gives recourse for any party to challenge the constitutionality of any laws to the extent of the contravention. We are made to understand that the petitioners are engaged in challenging the said National Government Constituency Development Fund Act before the High Court as alluded to earlier in this ruling.

**[26]** To this extent therefore, we are unconvinced that the additional evidence should be admitted. Introducing evidence seven years after the time the Constituency Development Fund Act was enacted in 2013 and to seek that such evidence be considered in determining the constitutionality of the 2013 Statute is, in our view, quite inappropriate as it not only introduces fresh facts but also introduces them at the penultimate stage of the proceedings before the apex court. This is compounded by the fact that the main appeal is ready for hearing. We are of the view that the interests of justice are better served in having the appeal disposed with expeditiously.

#### **D. DISPOSITION**

**[26]** Consequently, we make the following Orders:

- i) The Notice of Motion Application dated 16<sup>th</sup> April 2021 is dismissed.
- ii) Costs shall abide the outcome of the main appeal.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of August 2021.**

.....  
**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**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**  
**SUPREME COURT OF KENYA**

