

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, & Ouko, SCJJ)

PETITION NO.11 (E008) OF 2022

-BETWEEN-

HON. MIKE MBUVI SONKO..... APPELLANT

-AND-

**THE CLERK,
COUNTY ASSEMBLY OF NAIROBI CITY1ST RESPONDENT
THE SPEAKER,
NAIROBI CITY COUNTY ASSEMBLY2ND RESPONDENT
THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT
THE CLERK OF THE SENATE OF KENYA.....4TH RESPONDENT
THE SPEAKER OF THE SENATE OF KENYA.....5TH RESPONDENT
THE SENATE OF KENYA.....6TH RESPONDENT
THE HON. ATTORNEY GENERAL.....7TH RESPONDENT
THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....8TH RESPONDENT
THE ASSUMPTION OF THE OFFICE OF THE COUNTY
GOVERNOR COMMITTEE NAIROBI
CITY COUNTY.....9TH RESPONDENT
HON. BENSON MUTURA, THE ACTING GOVERNOR,
NAIROBI CITY COUNTY.....10TH RESPONDENT
ANN KANANU MWENDA, THE DEPUTY GOVERNOR,
NAIROBI CITY COUNTY.....11TH RESPONDENT
OKIYA OKOITI OMTATAH.....12TH RESPONDENT**

(Being and application for leave to adduce new and additional evidence from the Judgment and Order of the Supreme Court (Koome, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, & Ouko SCJJ) delivered on 15th July 2022 in Petition No. 11 (E008) of 2022)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application dated 20th July, 2022 and filed on 21st July, 2022, anchored on Articles 23, 47, 48, 50, 163(1) and (4),

159(2)(d) and (e) of the Constitution, Sections 3 and 21 (2) of the Supreme Court Act (inapplicable) and Rules 3(5) (a) and (8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of the law where the applicant is seeking the following orders that:

1. *The Honourable Court be pleased to grant leave to the Applicant to adduce new and additional evidence in the form of:*

- a) *Videos and Audio recordings pertaining to malpractices by the Presiding Judge of the High Court of Kenya over the conduct and determination of the Applicant's Petition at the High Court of Kenya in Nairobi High Court Constitutional Petition No. E425 of 2020 (as consolidated with Petition No. E014 of 2021) and Nairobi High Court Constitutional No, E005 of 2021 (as consolidated with Petition No. E433 of 2020; E007 of 2020; E009 of 2020; E011 of 2021; E012 of 2021; E013 of 2021; E015 of 2021; E019 of 2021 and E021 of 2021) in regard to his impeachment.*
- b) *Communication and correspondence from the Chief Justice; the Judicial Service Commission and various pleadings and evidence filed and lodged at the Judicial Service Commission and the Tribunal pertaining to the disciplinary proceedings in regard to Honourable Justice Juma Said Chitembwe over his conduct in presiding and determining the Applicant's impeachment proceedings at the High Court of Kenya.*
- c) *Audio and video recordings by the Honourable Chief Justice Martha Koome in her interview at Spice FM wherein she made utterances and comments pertaining to the present Petition of Appeal on the Applicant's impeachment wherein she expressed her views on the impeachment process which directly related to the Applicant and the present Petition.*

- d) *An affidavit duly sworn by Amana Saidi Jirani, nominee and brother to Honourable Justice Said Chitembwe deposing to the existence of an agency agreement between the Honourable Judge and himself and which has a direct bearing on the matter at bar.*
2. *The Honourable Court does issue an order to stay the instant proceedings pending the hearing and determination of the proceedings at the Tribunal pertaining to the conduct of Honourable Justice Juma Said Chitembwe, which has a bearing on the instant proceedings and any such orders and further orders to be granted by this Honourable Court.*
 3. *This Honourable Court be pleased to review/ and or set aside its judgment of 15th July, 2022 in this Appeal.*
 4. *This Honourable Court be pleased to issue any further orders as it may deem fit in the circumstances as shall meet the ends of justice.*
 5. *Costs of this Application be provided for.*

[2] UPON examining the grounds on the face of the application; the supporting affidavit of Hon. Mike Mbuvi Sonko, the applicant, deposed on 20th July 2022; further affidavit in response to the grounds of opposition deposed on 26th July, 2022 and submissions dated 21st July, 2022, all to the effect that *Chitembwe, J.* who was the presiding Judge in **High Court Constitutional Petition E425 of 2020**, the subject of this appeal, is facing investigations by a disciplinary tribunal over his conduct in the manner he influenced the outcome of the applicant's Petition challenging his ouster. The applicant explains that he had planned, prior to the hearing of the appeal in this Court to bring the present application to introduce new evidence and stay proceedings before the Court pending the outcome of the tribunal's determination but for the confusion created by the Court's registry and the tight timelines, he was not able to do so. In the circumstances, he submits that, it is only fair that the judgment be reviewed and/or set aside along the principles enunciated in the decisions in **Cyrus Shakhhalaga**

Khwa Jirongo v. Soy Developers Limited & 9 others [2020] eKLR and ***Mohamed Abdi Mahamud v. Ahmed Abdi Abdullahi Mohamad & 3 Others*** [2018] eKLR; and that leave to present the additional evidence be granted.

[3] UPON considering the 1st respondent's grounds of opposition dated 25th July, 2022, the 2nd, 4th, 5th, 6th, 7th, 8th, 10th, and 11th respondents' grounds of opposition and submissions, the combined effect of which is that the application offends the provisions of Section 106B of the Evidence Act on admissibility of evidence since the certificates relied on have not particularized what video recordings they intend to produce; that the prayer for recusal of the President of the Court is not only *res judicata* but was also never an issue for determination in the judgment of 15th July, 2022 and therefore not the subject of an application for review; that the Court being *functus officio* cannot entertain the instant application or to pronounce itself on the evidence that the applicant seeks to introduce, and particularly after holding that it has no jurisdiction to entertain the main appeal; that the evidence sought to be introduced is irrelevant, not being the subject matter of the removal of the applicant from office, hence their introduction would not have any impact upon the judgment of the Court even if admitted; and that the matters raised in the application are now before the tribunal, where their determination is pending.

In view of the foregoing **WE NOW OPINE** as follows:

[4] **NOTING** the omnibus nature of the application in which three reliefs are sought: leave to admit additional evidence; stay of proceedings pending the hearing and determination of the proceedings pending before the tribunal investigating the conduct of *Chitembwe, J.* and; review and/or setting aside of this Court's judgment of 15th July, 2022. The latter prayer is indeed the subject of a separate ruling to the applicant's application dated 18th July, 2022. We say no more on it; and

[5] **REGARDING** the prayer for stay of proceedings pending the outcome of the tribunal's decision, it cannot be in doubt that the Court delivered its judgment on

15th July, 2022, determining with finality the applicant's appeal contesting his ouster as Governor. All that remains in the matter are the reasons to be rendered in due course in terms of Rule 28(2) of the Supreme Court Rules, 2020. We do not think the applicant's intention in this prayer is to stay his own applications which are the only matters pending ruling before the Court. By the provisions of Rule 2 of the Supreme Court Rules 2020, there are no proceedings capable of being stayed that are pending before the Court; and

[6] CONSIDERING the prayer for leave to admit additional evidence, the applicant is duty bound to satisfy all the elements under the provisions of Section 20 of Supreme Court Act, Rule 26 of the Supreme Court Rules, 2020 (both of which have not been cited in the application) and as propounded by the Court in ***Mohamed Abdi Mahamud Ahmed Abdi Abdullahi Mohamad & 3 Others*** [2018] eKLR as follows:

- 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 would 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 made aware of and procured the further evidence in the course of the 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 the 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 the 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.”***

These principles have now been enacted in Section 20(1) of the Supreme Court (Amendment) Act No. 26 of 2022.

[7] APPLYING these principles to the application, it is evident that the material sought to be introduced, videos and audio recordings over alleged malpractices by *Chitembwe, J.* are the very subject of the tribunal's investigations. The veracity of audio and video recordings of an interview of the President of the Court was determined in the Court's *ex tempore* ruling of 14th July, 2022 followed by detailed reasons on 18th July, 2022. But of great significance is the fact that the applicant has all along been aware of the material he is now seeking to introduce. At the time he lodged the appeal in the Court of Appeal and even in this Court, he was well aware of the gazette notice of 18th May, 2022 in which a tribunal was appointed to investigate the conduct of *Chitembwe, J.* He has so averred himself in his submissions.

[8] NOTING that the applicant has not explained the relevance of the so-called new evidence considering that what was before the Court was his removal from office, whose evidence was quite different from the conduct of *Chitembwe, J.*; in addition, it is noteworthy that the applicant's petition before the High Court was heard by a bench of three judges and further that the first appellate court upheld the conclusion by the High Court.

[9] IN CONCLUSION, none of the ten conditions for the grant of leave to bring additional evidence as reproduced in paragraph 6 (a) to (j) above have been satisfied; and therefore,

[10] FOR THESE REASONS, we find no merit in this application and dismiss it.

[11] COSTS follow the event. The applicant shall bear the costs of the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 10th and 11th respondents who participated in this application.

[12] ACCORDINGLY, we make the following orders:

- i) *The Notice of Motion application dated 20th July, 2022 is hereby dismissed.***
- ii) *The Applicant shall bear the costs of this application.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 8th Day of August 2022.

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M.K KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
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

.....
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

