



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

PETITION (APPLICATION) NO. 34 (E035) OF 2021

-BETWEEN-

KAMPALA INTERNATIONAL UNIVERSITY.....PETITIONER

VERSUS

HOUSING FINANCE COMPANY LIMITED RESPONDENT

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

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)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 17th March, 2023 and filed on 5th May, 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 Basajjabalaba, the Chairman of the Petitioner's Board, sworn on 11th March 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 the 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 17th April, 2023 and filed on 5th May, 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 24th May, 2023 in opposition to the application, and its submissions dated 31st May, 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 21st October 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 27th September, 2019; and

[6] HAVING 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 Githiga & 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 27th January 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 17th March, 2023 and filed on 5th May, 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

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
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