



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E020 OF 2023

-BETWEEN-

KOMBE HARRISON GARAMA.....APPELLANT

-AND-

KENGA STANLEY KARISA1ST RESPONDENT
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....2ND RESPONDENT
AMINA ABUBAKAR SENG (MAGARINI
CONSTITUENCY RETURNING OFFICER)..... 3RD RESPONDENT
MICHAEL THOYAH KINGI.....4TH RESPONDENT

(Being applications for leave to adduce new and additional evidence in respect of the judgment and order of the Court of Appeal (Gatembu, Lesiit & Odunga JJA) dated 28th July 2023 and to strike out submissions for non-compliance with the Directions of the Hon. Deputy Registrar, Supreme Court issued on 18th September 2023)

Representation:

Mr. Wakwaya & Mr. Ometo for the appellant
(Rachier & Amollo LLP)

Mr. Gichaba & Mr. Bwire for the 1st respondent
(Gichaba & Company Advocates)

Mr. Mukele, Mr. Gicheru & Ms. Kiboi for the 2nd & 3rd respondents
(Hassan Mutembei & Company Advocates)

Mr. Busiega for the 4th respondent
(*Mayende & Busiega Advocates*)

RULING OF THE COURT

[1] Before the Court are two separate applications brought by the parties for determination. While not directly related, to ensure judicious use of time, this Ruling will dispose of both. The first application is by the 2nd and 3rd respondents seeking leave to adduce new and additional evidence while the second application is by the appellant seeking orders to strike out the 1st respondent's submissions for non-compliance with the directions of the Deputy Registrar of this Court issued on 18th September 2023 as well as Supreme Court (General) Practice Directions, 2020; and

[2] UPON perusing the 2nd and 3rd respondents' application dated 13th October 2023 brought pursuant to Section 20 of the Supreme Court Act, 2011 and Rule 26 of the Supreme Court Rules, 2020 seeking leave to adduce new and additional evidence; and

[3] UPON considering the grounds in support of the application and the averments contained in the supporting and supplementary affidavits sworn by **Chrspine Owiye**, the Director, Legal, and Public Affairs of the 2nd respondent, wherein he *inter alia* contends that; on 3rd March 2023, the High Court rendered its decision in **Malindi Election Petition No. E001 of 2022** where it among others, determined that there was no evidence to identify the persons who had witnessed the re-opening of the ballot boxes at Mapimo Youth Polytechnic polling station 1 of 6 hence depriving the process of any transparency; the appellant appealed the decision vide **Election Appeal No. E001 of 2023** and on the 28th July 2023, the Court of Appeal rendered its decision where it found *inter alia* that, the act of taking a vote recount in the absence of all the agents of the parties failed to meet the constitutional test of transparency and accountability in light of Article 81 of the Constitution; the said decision was taken by the Court of Appeal despite

the 2nd and 3rd respondents' testimony that over 14 agents witnessed the process of opening the ballot boxes to retrieve the original Form 35A accidentally locked in the wrong ballot box; the High Court at all material times had full access to the polling station diary which was by order deposited with the court; the two judgments of the superior courts question the transparency of the process of re-opening the ballot boxes to retrieve the original Form 35A and the incidental recount of the votes which was at the core of the courts' decision to invalidate the election result of Mapimo Youth Polytechnic polling station 1 of 6; it is therefore necessary for this Court to have the benefit of perusing the polling station dairy for Mapimo Youth Polytechnic polling station 1 of 6 to test the correctness of the superior court's decision; the additional evidence is not for the purpose of removing lacunae and filling gaps in evidence but is needful to assist the Court in making its determination in the interest of justice; and

[4] NOTING the 2nd and 3rd respondents' submissions dated 26th October 2023 where they reiterate the contents of their supporting affidavit and further submit that; the Court has jurisdiction to call or admit additional evidence in any proceedings where it considers necessary; the relevance of the additional evidence they seek to produce is that it is directly relevant to the issue regarding the election result for Mapimo Youth Polytechnic polling station 1 of 6; it is likely to influence the Court's determination of whether the process of opening the ballot boxes to retrieve the original Form 35A and consequential recount met the tests of transparency; and

[5] FURTHER NOTING the 1st respondent's submissions opposing the 2nd and 3rd respondents' application where he submits that; he filed a preliminary objection on 25th August 2023 on the ground that this Court lacks jurisdiction to hear and determine the petition; parties have filed their respective responses to the preliminary objection; that the preliminary objection ought to be disposed of first; the applicants have failed to meet the conditions as provided for by law and in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3*

others, SC Petition No. 7 & 9 of 2018 [2018] eKLR and *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others*, SC Petition (Application) No. 38 of 2020 [2020] eKLR for the Court to exercise its discretion in their favour; the principles set by the Court in the above-quoted cases for admission of new and additional evidence are not disjunctive and must be complied with in totality; and

[6] TAKING INTO ACCOUNT the appellant's application dated 25th October 2023 brought pursuant to Sections 21 and 23 (2B) of the Supreme Court Act, 2011 and Rule 31 of the Supreme Court Rules, 2020, Direction 17 and Part D of the Supreme Court (General) Practice Directions, 2020 seeking an order that the submissions by the 1st respondent be struck out for non-compliance with the directions of the Deputy Registrar of the Supreme Court issued on 18th September 2023 as well as Supreme Court (General) Practice Directions, 2020; and

[7] CONSIDERING the grounds in support of the application and the averments contained in the supporting and supplementary affidavits sworn by *Kevin Wakwaya*, an Advocate practicing with the firm of Rachier & Amollo LLP wherein he contends that: he has had the conduct of the matter on behalf of the appellant and has instructions to swear the affidavit; on 18th September 2023, the Deputy Registrar of this Court issued directions that all parties present do file their submissions within the stipulated timelines; on 28th September 2023, the appellant filed his submissions in total compliance with the Court's directions; the 1st respondent in total disobedience of the Court's directions filed two sets of submissions, one for his preliminary objection and the other for the main petition; the 1st respondent disregarded Direction 17 of the Supreme Court (General) Practice Directions, 2020 by exceeding the limit of 15 pages and the font size requirement of Times New Roman and font size 12; the disregard of the Supreme Court (General) Practice Directions, 2020 was deliberately made to unduly benefit the 1st respondent to the detriment of the appellant who was limited to addressing both the preliminary objection and petition of appeal in 15 pages; and

[8] ALSO CONSIDERING the appellant's submissions dated 25th October 2023 wherein he reiterates the contents in support of the application and submits that; the Deputy Registrar directed that all parties should file one set of submissions to address both the 1st respondent's preliminary objection and the petition of appeal; the appellant, 2nd and 3rd respondents and 4th respondent complied with the Deputy Registrar's direction on the page limit; but the 1st respondent not only filed two sets of submissions but also exceeded the page limit of 15 pages; the submissions also did not follow the set font type, font size or the spacing required; this Court in ***Okoti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others***, SC Application E029 of 2023) [2023] KESC 69 (KLR) struck out the applicants' submissions for non-compliance with the rules and directions and cautioned against exceeding the permissible lengths of submissions; and

[9] FURTHER NOTING the 1st respondent's replying affidavit sworn by ***Wesley Robinson Gichaba***, an Advocate practicing at Gichaba and Company Advocates wherein he contends that; he was present in Court together with Mr. Bwire, Advocate, when the Deputy Registrar issued directions on filing documents including submissions; he does not recall the Deputy Registrar issuing a direction that parties should file a single set of submissions to both the preliminary objection and the petition; the preliminary objection and the petition are independent and special pleadings/documents diametrically opposed to each other and had not been consolidated and the assertion of one the filing of one set of submissions would prejudice the 1st respondent; the appellant chose to file a single set of submissions to his petition and preliminary objection and cannot blame the 1st respondent for not doing so; the appellant was not prejudiced as he had a right to file further submissions in rejoinder; the submissions in support of the preliminary objection and petition did not each exceed 15 pages; the application is an abuse of the court process and the submissions are properly on record; and

[10] **ALSO NOTING** the 1st respondent's submissions dated 6th November 2023 wherein he reiterates the contents in support of the application and submits that; the preliminary objection is an independent and stand-alone document and not inferior to the petition, and therefore attracts its own responses and submissions; the submissions in regard to the petition were 14 pages and therefore did not exceed the limit of 15 pages; the circumstances in ***Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others(supra)*** are different and distinguishable because therein, the Court found it irregular to file joint and separate submissions at the same time and therefore the decision cannot apply to this matter; and

[11] Having considered the applications, responses, and submissions before us, **WE NOW OPINE** as follows:

- i. Section 20 (1) of the Supreme Court Act, 2011 grants the Court the authority to admit further evidence in determining an appeal, where it considers necessary and appropriate. Section 20 (2) provides as follows:

“The Court, in admitting additional evidence, shall consider whether the additional evidence –

- a. is directly relevant to the matter before the Court;***
- b. is capable of influencing or impacting on the decision of the Court;***
- c. could not have been obtained with reasonable diligence for use at the trial;***
- d. was not within the knowledge of the party seeking to adduce the additional evidence;***
- e. removes any vagueness or doubt over the case;***
- f. is credible and bears merit;***
- g. would not make it difficult or impossible for the other party to respond effectively; and***
- h. discloses a case of wilful deception to the Court.”***

- ii. This Court set the governing principles on allowing the filing of additional or new evidence in the case of ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others***, SC Petition No. 7 & 9 of 2018 [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 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.”

- iii. Applying the above set principles, it is evidently manifest that the 2nd and 3rd respondents at all material times had knowledge of the existence of and were in actual custody of the additional or the so-called new evidence during the trial of the matter herein in the superior courts below. They admit that the additional or the so-called new evidence was in their custody and have not reasonably explained to this Court why the said evidence was not produced before the trial court or is not part of the record despite the trial court having custody of the same. In any event, if it is true that, the polling station diary for Mapimo Youth polling station was in the custody of the trial court as alleged by **Chrispine Owiye** in his supporting affidavit, then why seek to adduce it as new and additional evidence at this point? Furthermore, it was upon them to adduce and point out the evidence and its relevance to the trial court- whether or not it was part of the record-and not wait until this second appeal to do so.
- iv. Having found that the 2nd and 3rd respondents not only had prior knowledge of, but were in actual possession of the additional or the so-called new evidence, it is our considered view that their attempt to adduce additional or new evidence before this Court is intended to fill up omissions or patch up the weak points in their case which action, we refuse

to countenance. Consequently, the application seeking to adduce additional evidence fails and is dismissed.

- v. We now turn to the 2nd application which sought striking out of the 1st respondent's submissions. A perusal of the impugned submissions reveal that the 1st respondent filed two separate submissions, the submissions in respect of the appeal are 14 pages while the submissions in support of the preliminary objection are 12 pages.
- vi. We note that the Deputy Registrar's directions issued on 18th September 2023 were clear that the 1st respondent ought to file composite submissions in respect of the appeal and the preliminary objection. The 1st respondent failed to comply with those directions but instead filed separate submissions for the preliminary objection and the appeal. The two add up to 26 pages and the explanation for doing so given is, with respect, escapist. Directions are given to ensure orderly conduct of proceedings and it is not for parties to choose which ones to comply with and which ones to disregard.
- vii. Consequently, as the submissions on the appeal go to the root of the dispute before us, we shall admit them but the 1st respondent's submission in regard to the preliminary objection, filed outside the directions of the court, are hereby struck out.
- viii. As this Ruling is limited to the application seeking leave to adduce additional and new evidence and the striking out of the 1st respondent's submissions, the Court will give directions on the 1st respondent's preliminary objection at the hearing of the appeal and being on points of law only, the 1st respondent can still submit on the issues raised orally.
- ix. As regard costs, in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 others***, SC. Petition No. 4 of 2012; [2013] eKLR it is

settled that costs follow the event and that the Court may in appropriate cases exercise discretion and decide otherwise. Given that the Court has dismissed and partially allowed the applications, we find it judicious for each party to bear its own costs.

[12] ACCORDINGLY, we make the following Orders:

- a. The Notice of Motion dated 13th October 2023 is hereby dismissed.***
- b. The Notice of Motion dated 25th October 2023 is hereby partially allowed.***
- c. The 1st Respondent's submissions dated 12th October 2023 in respect of the preliminary objection are hereby struck out.***
- d. Each party shall bear its own costs.***

[13] It is so ordered.

DATED and DELIVERED AT NAIROBI this 16th Day of February 2024

.....
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

