IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & ASIKE-MAKHANDIA, JJ.A)

CIVIL APPEAL NO 92 OF 2017

BETWEEN

ERNST & YOUNG LLP …..... APPELLANT

AND

CAPITAL MARKETS AUTHORITY ……. 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ….……..2ND RESPONDENT

(Being an application for leave to adduce additional evidence by way of an affidavit to form part of the record of appeal

in

An Appeal against the Judgment and decree of the High Court at Nairobi (Mativo, J.) dated 7th March, 2017

in

PETITION NO. 385 OF 2016)

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RULING OF THE COURT

What is before us is an application by way of notice of motion dated 4th July, 2019 brought by the appellant pursuant to **Rule 29(1) (b) (2) of the Court of Appeal Rules.** The appellant in the main seeks to have additional evidence introduced in this appeal by way of affidavit.

The background to the application is that by a letter dated 31st August, 2016 the 1st respondent issued a Notice to Show Cause letter to the appellant to respond to certain allegations arising from its audit work on Uchumi Supermarkets Ltd. The Notice to Show Cause letter threatened that the 1st respondent would upon consideration of the appellant's detailed written submissions schedule a hearing before it, on a date to be communicated. This prompted the appellant to file **Nairobi Constitutional Petition No. 385 of**

2016 against the Respondents contending that the 1st respondent had infringed or threatened to infringe on its constitutional rights and fundamental freedoms when it issued a Notice to Show Cause letter and refused to supply crucial documents to the appellant that informed the inquiry and the subsequent notice to show cause letter. The appellant complained further that the respondents had failed to grant it a hearing before the Notice to Show Cause letter was issued and was bent on what the appellant termed to be the 1st respondent's resolve to act as an investigator, prosecutor and hangman in the matter.

In response, the respondents denied the claims and pointed out that the alleged breaches were neither factual nor had legal foundation. That it had furnished the appellant with an extract of the draft and its report and even engaged representatives of the appellant over the matter. That contrary to the allegations in the petition, the 1st respondent in taking the steps aforesaid and subsequently issuing the show cause letter was heeding to its constitutional duty under Article 47 of the Constitution and Fair Administrative Action Act.

The petition was heard by Mativo, J. and dismissed for reasons *inter alia* that whereas the appellant's constitutional rights may be violated if the 1st respondent acted as the investigator, prosecutor and hangman in the allegations made against it, the process was at the initial stage and therefore it could not be said with certainty that the 1st respondent was going to perform the said roles. The Court further held that the fear of bias could be cured by invocation of Section 11A of the Capital Markets Authority Act which permitted the 1st respondent to delegate its functions. Following the dismissal of the petition, the 1st respondent moved swiftly and commenced the threatened action against the appellant that culminated in the administrative hearing on 23rd October, 2017.

Aggrieved, the appellant filed the present appeal and successively applied for conservatory orders. The orders restrained the 1st respondent from continuing with the proceedings it had commenced against the appellant. However, a few days to the hearing of the appeal, the appellant mounted the instant application on grounds that the correspondence, proceedings and documents leading to the hearing on 23rd October, 2017 showed that the 1st respondent was keen to still act as an investigator, prosecutor and hangman; the 1st respondent had refused to invoke Section 11A of the Capital Markets Authority Act as suggested by the High Court to allay the appellant's fear of bias; that it had recently come across related cases where the 1st respondent had invoked Section 11A of the Capital Markets Authority Act and allowed cases to be heard by independent organs. One such case was **Kenya Oil Company Limited v Kobil Petroleum Limited** on insider trading. That this was part of the evidence that the appellant intends to introduce. The said evidence was however only available to the appellant after the High Court had determined the petition; that the additional evidence was directly relevant to the matter before court and it was in the interest of justice that the Court admits the said evidence; that the evidence also had a direct influence on the result of the High Court and its credibility cannot be questioned and that the additional evidence will not introduce a new case or fill a gap in the appeal but rather supported the appellant's apprehension that the 1st respondent did not comply with the Constitution and the law in conducting the proceedings.

The application was further supported by the affidavit of **Gitahi Gachahi,** the Chief Executive Officer of the appellant in which he reiterated the grounds in support of the application above. Suffice to state that he introduced another facet of bias, which was that, one of the persons presently working for the 1st respondent, **Reuben Boro Gitahi**, was prior to his engagement by the 1st respondent a senior employee of the appellant and was employed by the 1st respondent in a senior position after his employment with the appellant came to an end. The said Gitahi filed suit against the appellant in the Employment and Labour Relations Court claiming unfair termination. The appellant therefore believed that Gitahi was introduced in the proceedings which the 1st respondent initiated against the appellant and there was therefore a strong perception of bias.

In a Replying Affidavit to the application sworn by one **Abubakar Hassan Abubakar**, the Head of Investigations and Enforcement Department of the 1st respondent, he deposed that the appellant seeks to make a fresh case in the appeal as all the documents sought to be introduced as additional evidence were not in existence at the time of the hearing of the petition; that the said documents could never have been placed before the trial Court and that events which occurred after the impugned judgment

had been delivered could only be subject to fresh proceedings before the High Court as they have never been and could never have been tried in the first instance; that the applicant's purported proof of bias by additional evidence is not a proper basis for this kind of application; that the judgment in the suit filed by Mr. Gitahi without evidence of his involvement in the proceedings against the appellant has no bearing on the appeal. Finally, it was deposed that no case had been made for the adduction of additional evidence and it would be prejudicial to the 1st respondent to face a different case on appeal compared to the one heard and determined by the High Court.

When the application came up for interparties hearing, **Mr. Kiragu** and **Mr. Owiti**, learned counsel appeared for the appellant while **Mr. Imende**, learned counsel represented the 1st respondent. There was no appearance for the 2nd respondent though served with a hearing notice. Counsel relied on their written submissions with limited oral highlights.

Mr. Owiti submitted that the petition giving rise to the present appeal was dismissed by the High Court. In the judgment, the trial Court noted that the 1st respondent could delegate its functions pursuant to Section 11A of the Capital Markets Act in a bid to prevent a presumption of bias. That the 1st respondent proceeded with the hearing until it was stopped by court's conservatory orders. The additional evidence sought to be adduced would demonstrate that the High Court would have reached a different conclusion in proceedings that took place after its decision and that the appellant's fears that the 1st respondent would take a multiplicity of roles were justified. That the additional evidence would show that the 1st respondent had acted differently in another matter by delegating its functions. Counsel submitted further that the said evidence was not available at the time of trial and lastly that the evidence was important and ought to be admitted.

Opposing the application, Mr. Imende submitted that the intended new evidence would make up a whole new case. The case before the High Court was filed after the notice to show cause letter had been issued to the appellant and the appellant went to Court to stop proceedings based on the said notice. The petition was dismissed for being premature. That what the appellant now seeks to introduce in evidence were proceedings after the judgment of the High Court which in his view would change the character of the appeal. That the allegation that the appellant was dealt with differently was not a question before the High Court and in any event the alleged delegation was pursuant to Section 14 of the Capital Markets Authority Act. However, the appellant's case was dealt with under Section 11A of the same Act. Counsel submitted further that the respondent will be prejudiced should the application be allowed as he will be denied an opportunity to put in material to demonstrate that delegation was under Section 14 of the Act. Counsel was of the view that it was only in exceptional circumstances that issues coming to the fore post judgment could be entertained in an application of this nature and such exceptional circumstances do not rise in this application.

In a reply, Mr. Kiragu submitted that there was no bar to admitting evidence post judgment. That Section 3A enjoins this Court to use its time and resources carefully thus the appellant should not be told to go back to the High Court. That this case presents exceptional circumstances such as the apprehension of bias, and that the conduct of the 1st respondent made the present application absolutely necessary. Lastly, that it is the principle of delegation that was in play here and not the provisions of the Capital Markets Act.

We have duly considered the application, the submissions by counsel and the law. The issue for our determination is whether the application has met the threshold or parameters for adducing additional evidence. As already indicated, the motion before us was made under Rule 29(1) (b) of the Rules of this Court. The relevant part of that rule provides that:

"29. (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-

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

(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner."

This court recently had the occasion to determine a similar issue in the case of **Kibos Sugar & Allied Industries Limited & Another v Benson Ambuti Adega & 6 Others, Civil Appeal (Application) No. 153 of 2019 (unreported)** where it quoted with approval the English case of **The National Guild of Removers & Storers Limited v Bee Moved Limited & Others (2018) EWCA Civ. 1302** to the effect that:

"In determining whether an appellate court can admit additional evidence, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result."

As early as 1984 this Court in **Wanje v A.K.Saikwa [1984] eKLR** observed as follows with regard to adduction of further evidence:-

"The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:

(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

Further, the Court added that the power to admit additional and fresh evidence should be exercised very sparingly and with great caution. It stated thus:

"This 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 in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

Additionally, in the case of **Republic v Ali Babitu Kololo (2017) eKLR** this Court stated:-

"It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal."

Not so long ago, the Supreme Court weighed in on the issue and delivered itself in the case of **Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others, Sup Petition No. 7 of 2018** thus:

"We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a) The additional evidence must be directly relevant to the matter before 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 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 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 additional evidence on the other."

Applying the above guidelines to the present application we note that the additional evidence sought to be introduced are proceedings before the 1st respondent during an administrative hearing on 23rd October, 2017 and information regarding how it dealt with a related case before it in May, 2019 in respect of **Kenya Oil Company Limited and Kobil Petroleum Limited** on insider trading. Counsel for the appellant submitted that this was relevant to demonstrate the element of bias by the 1st respondent. The proceedings sought to be introduced relate to a hearing that was conducted after judgment had been delivered by the trial court. To our mind the applicant seeks, through the additional evidence, to make a fresh case in this appeal. This is so because all the documents that the applicant seeks to adduce were not in existence at the time of the hearing of the petition before the High Court. The documents relate to matters that took place after the judgment was delivered by the High Court. From the record, the High Court judgment was delivered on 7th March, 2017 while the documents proposed to be adduced in evidence date from 18th October, 2017 – 20th May, 2019. Consequently, the proposed additional evidence could never have been placed before the High Court Judge when he was sitting to consider the impugned judgment. Consequently, we should be wary to make determination on matters that were never placed before the High Court Judge in the first place. We agree with counsel for the 1st respondent that if we were to allow this evidence, it would constitute a new case on appeal and the respondent will have no occasion to counter it.

Of course this is not to say that matters arising after judgment cannot form the basis for adduction of fresh evidence. Based on the case of **Dick V Koinange [1973] E.A 355**, it is only in exceptional circumstances that issues coming after judgment shall be entertained in an application for adduction of further evidence. We do not see such exceptional circumstances in this case. The appellant has raised the issue of its apprehension of bias and the conduct of the 1st respondent as pointing to exceptional circumstances. We doubt whether those are the exceptional circumstances contemplated. Nor are persuaded or impressed by submissions by the applicant regarding the applicability of the overriding objective in civil litigation.

The application suggests that the additional evidence will prove the applicant's apprehension of bias on the part of the 1st respondent. Specifically, the applicant seeks to demonstrate that the 1st respondent did not exercise its discretion under section 11A of the Capital Markets Act *(which permits the 1st respondent to delegate its functions)* as suggested by the High Court. We doubt whether this is a proper basis for adducing additional evidence. The non-delegation of its powers under section 11A of the Capital Markets Act does not demonstrate bias or conform that the 1st respondent was acting as *"investigator, prosecutor and hangman"*. The Capital Markets Act permits the 1st respondent to discharge dual mandates. This is what this Court held in **Civil Appeal No. 35 of 2017 Capital Markets Authority v Alnashir Popat and others**. The proposed evidence would therefore be irrelevant to the determination of the legal question raised in the appeal, in our view. Again, section 11A of the Act provides the 1st respondent with discretionary power to delegate its functions. It is not a mandatory obligation. Even upon delegation of its functions, the 1st respondent retains residual powers under the Act regarding such delegated functions in terms of section 11A (3) of the Capital Market Act. The proposed reliance by the applicant on the proceedings against Kenol Kobil have no relevance to this appeal therefor. In any event the delegation of powers by the 1st respondent to the Ad hoc Committee was pursuant to section 14 of the Act as opposed to section 11A of the Act, on which the appellant places reliance in this application.

The appellant has also alleged bias based on the composition of the body that heard and determined the show cause proceedings. The evidence proposed to be adduced in this respect are the show cause proceedings that took place on 23rd October, 2017. We do not believe that such evidence should be admitted since it would constitute a new ground of challenge *(indeed, a fresh case in appeal)* that was not before the High Court. The finding by the High Court in the impugned judgment that the petition was premature was premised on the fact that the show cause proceedings were challenged before they had commenced. The applicant now wishes to bring evidence of the show cause proceedings. This would change the character of the case that was before the High Court and indeed the appeal, significantly which in our view would be prejudicial to the 1st respondent.

The applicant states that it believes that Mr. Reuben Boro Gitahi *"Gitahi"*, who was its former employee and subsequently joined the 1st respondent, *"was introduced in the proceedings which the first respondent initiated against the applicant and there was therefore a strong perception of bias"*. The evidence that the applicant proposes to introduce in the appeal is the judgment in a suit filed by Mr. Gitahi against the applicant for unfair termination.

That there was a suit filed by Mr. Gitahi against the applicant for unfair termination is not in dispute. However, the applicant has not alluded to any evidence that Mr. Gitahi was actually introduced into the show cause proceedings against the applicant. All the applicant has done is state that he believes this to be the case. No foundation has been laid for this belief. This suggestion is not only incredible but also incapable of belief. We are persuaded that the judgment in the suit filed by Mr. Gitahi would, without any evidence of Mr. Gitahi's involvement in the show cause proceedings against the appellant by the respondent, not have an important influence on the result of this appeal or indeed the proceedings before the High Court. As a matter of fact Mr. Gitahi was employed by the 1st respondent with effect from 1st August, 2017; after the show cause proceedings against the appellant had commenced if the letter of employment of Mr. Gitahi dated 30th June, 2017 is anything to go by. It would appear to us that Mr. Gitahi was neither involved in the investigations nor the show cause proceedings against the appellant. There is therefore no factual basis for alleging bias.

All in all, we are satisfied that the application is devoid of merit as it has not met the threshold circumscribed by the law. Accordingly, the application is dismissed it with costs.

Dated and delivered at Nairobi this 6th day of December, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

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