REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ.)

PETITION (APPLICATION) NO. 7 OF 2017

—BETWEEN—

PATRICK THOITHI KANYUIRA ..... APPLICANT

—AND—

KENYA AIRPORTS AUTHORITY ..... RESPONDENT

(Being an application to adduce additional evidence in Supreme Court Petition No. 7 of 2017)

RULING OF THE COURT

A. INTRODUCTION

[1] The principles that a party must bring forward his entire case when instituting an action, and that a party should not be vexed twice, are both exemplified by the Latin maxims, *interest reipublicae ut sit finis litium (*it is in the interest of the State that there be an end to litigation) and *Nemo debet bis vexari pro una eteadem causa* (no one shall be twice vexed for the same cause). These principles are the foundation of the doctrine of *res judicata*.

[2] Put differently, once a party brings before the court his entire case, he will be bound by the resulting decision and will not be permitted to re-open that decision

on the basis of matters which could have been raised, but which were not at the trial.

[3] Typically, after analysing all the evidence, the trial court will determine the controversy based on the evidence before it. In an appeal, the appellate court is concerned with the question whether the lower court has appreciated the evidence properly or not and whether the law has been interpreted correctly. But if, subsequent to the judgment, and before the decision of the appellate court, the appellant wishes to present evidence that he ought to have tendered at the trial but did not, certain prescribed conditions must be satisfied.

[4] The English Court of Appeal in the case of ***Ladd v. Marshall*** [1954] 1 WLR 1489 established three-part test, namely, non-availability, relevance and reliability, for the appellate Court to accept fresh evidence in a case on which a judgment has already been delivered. Laying down the definitive rule for the admissibility of new evidence Denning LJ, explained that;

> **"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, 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: thirdly, 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"**.

[5] This criteria, today known as the rule in ***Ladd v. Marshall*** has been applied in many decisions in this country, for instance, by the Court of Appeal in ***CMC***

Aviation Ltd v. Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR and most recently by this Court in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others*** [2018] eKLR, where the original three-part test was refined through the Court's interpretation of Rule 18 of the Supreme Court Rules, 2012 (presently Rule 26 of the Supreme Court Rules, 2020), as shall be shown shortly.

B. BACKGROUND

[6] The cause of action arose when the applicant, who is the registered owner of parcel of land known as L.R No 209/11444, adjacent to the Wilson Airport, sought to develop it after securing financing. Upon commencement of the project, the applicant was served with a cessation order issued by the respondent in exercise of its powers under the Kenya Airports Authority Act (KAA Act). The respondent claimed that the suit land falls within the protected airport aircraft runway protection zone.

C. IN THE HIGH COURT

[7] Aggrieved, the applicant petitioned the High Court in ***Petition No. 83 of 2012, Patrick Thoithi Kanyuira v. Kenya Airports Authority***, challenging the cessation order. In rejecting the petition, the High Court, *Lenaola J (as he then was)*, found that; the respondent had not compulsorily acquired the property but merely restricted the activities that could be carried out on it, which restriction, strictly speaking, did not extinguish the applicant's proprietary rights; that the respondent acted well within its statutory powers; and that the applicant ought to have sought the respondents' prior approval before embarking on the construction.

D. IN THE COURT OF APPEAL

[8] This decision was upheld on appeal by the Court of Appeal, where it was reaffirmed that; the applicant had proceeded with construction without the approval of the respondent; that, because of the restrictions imposed on the applicant's property, the respondent offered to exchange it with another one; and that the respondent's action in issuing a cessation order was within the law, and did not amount to constructive compulsory acquisition.

E. IN THE SUPREME COURT

[9] Unsatisfied, the Applicant has sought redress from this Court on grounds that his Constitutional rights under **Articles 10(a), 24** and **40** of the Constitution had been violated.

[10] Between the 24th May, 2017 and 8th July, 2021 the Appeal was mentioned before the Deputy Registrar to confirm whether parties had complied with directions to file and exchange submission. Up to the day the Appeal came up for hearing on 8th July, 2021, the Appellant had not complied with those directions. Instead, on 7th July, 2021, a day before the hearing, he took out the instant motion.

The submissions were eventually filed on 21st July, 2021.

F. THE NOTICE OF MOTION

(i) The Applicant's Arguments

[11] While the petition was pending hearing, the Applicant, by a Notice of Motion, expressed to be brought pursuant to **Section 21(1) (2) and (3)** of the Supreme Court Act, 2011 and **Rule 26 (1) (2) (3) & (4)** of the Supreme Court Rules, 2020, prayed for orders;

"a)...

b) THAT the honourable court be pleased to grant leave to the appellant/applicant to call and produce on the record, additional evidence by way of documents in support of the petition of appeal herein;

c) THAT this honourable court be pleased to admit on record the following appellant/applicant's additional documents to wit, letter dated 29th January, 2018 by the National Lands Commission, letter dated 8th July, 2019 by the Kenya Airports Authority, letters dated 1st August 2019 and 9th August 2019 by the Kenya Civil Aviation Authority, letter dated 7th December, 2020 from Nairobi City County and the letter dated 3rd December, 2020 by the National Environment Management Authority".

[12] It is the applicant's case that the following authorizing bodies; National Lands Commission (NLC), Kenya Airports Authority (KAA), Kenya Civil Aviation Authority (KCAA), Nairobi City County and National Environment Management Authority (NEMA), have all found that his project was not a threat to the safety and use of the Wilson Airport. On the basis of that finding, those bodies had approved the Applicant's project, clearing the way for its resumption and completion. It is those letters that the Applicant intends to produce at this stage.

[13] He urges that the above additional evidence satisfies the test in ***Mohammed Abdi Mahamud v. Ahmed Abduallahi Mohamd*** (supra) and are likely to settle the factual and legal questions that are in dispute in the pending appeal; that the additional documents relate to the subject matter in the appeal, are valid, have been issued by public bodies that can verify their authenticity, are not voluminous

and are capable of effective response and interrogation by the Respondent; that the additional documents were not available during the hearing in the High Court and the Court of Appeal; and that the decisions by the two superior courts were only to the effect that the cessation order was valid, and no direction was given as to the fate of the suit property.

[14] In the interest of justice, they have urged the Court to allow the Applicant to produce the documents aforementioned as part of their evidence.

(ii) The Respondent's Arguments

[15] In opposition to the Application, the Respondent filed a Replying Affidavit and submissions dated 21st July, 2021, in which it argues, in line with the principles set out in the ***Mohamed Abdi Mahamud Case*** (supra), that the letter from NLC is not attached; and that the additional evidence is not directly relevant to the matter before the Court and would not influence or impact the outcome of the pending petition, as the Applicant has neither challenged the Respondent's mandate under **Section 15(3)** of the KAA Act to issue the cessation order nor has he challenged the concurrent factual findings by the High Court and the Court of Appeal that his development was on the flight funnel and that it posed a risk to the safety of aircrafts.

[16] The Respondent further submits that the letter from KCAA refers to the proposed development on L.R. No 209/12221 and not the suit property, L.R No 209/11444; that the said letter is internal correspondence between two state corporations that is not available to third parties; and that the Applicant ought to have explained how he came into possession of it; that the letter from the KCAA only addresses the height of the development and also clearly indicates that the approval does not override any other government requirements; and that KCAA

cannot interfere or override the statutory functions of the Respondent under **section 15(3)** of the KAA Act.

[17] It is their submission too that the letters from Nairobi City County; NEMA and the certificate of the National Construction Authority are not relevant as none of them are authorized to approve constructions near the airports; and that the google map pictorial presentation does not conclusively demonstrate the danger or obstruction that would be caused on the safety and operations of aircrafts.

[18] Relying on ***Minister for Health & another v. Uasin Gishu Memorial Hospital Limited & another; Attorney General & another (interested parties)*** 2019 eKLR, ***Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*** [2013] eKLR; and ***Pop –In (Kenya) LTD & 3 Others v. Habib Bank AG Zurich*** [1990] eKLR, the Respondent has argued us to find that the Applicant, who has been unsuccessful at the trial and first appellate court, is seeking, through the instant application, to make a fresh case, fill up weak points in his case, is barred by the doctrine of *res judicata*, and has also not demonstrated that the evidence would not have been obtained with reasonable diligence for use at the trial.

[19] Finally, the respondent urge that they stand to suffer great prejudice if additional evidence is adduced at this late stage; that the circumstances under which bodies that were not parties to the proceedings gave approvals with the knowledge that the Respondent had declined to approve the project are not clear. For these reasons, the Respondent prays that the application be dismissed with costs for being misconceived and unmeritorious.

G. ANALYSIS AND DETERMINATION

[20] The only question the motion raises is, whether the Applicant has met the threshold for the grant of leave to present additional evidence pursuant to Rule 18

of the Supreme Court Rules,2012 and in accordance with the strictures established in the ***Mohamed Abdi Mahamud Case*** (supra).

Rule 18 provides that;

> **"18. (1) The Court may in any proceedings, call for additional evidence.**
>
> **(2) A party seeking to adduce additional evidence under this rule shall make a formal application before the Court.**
>
> **(3) On any appeal from a decision of the Court of Appeal, or any other court or tribunal acting in the exercise of its original jurisdiction, the Court shall have power —**
>
> **.....**
>
> **(c) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by the Registrar".** (Our emphasis).

[21] Earlier on, in ***Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others*** [2013] eKLR, this Court cautioned that it will be reluctant to grant leave for the filing of further affidavits and/or admission of additional evidence, if the evidence is such as to make it difficult or impossible for the other party to respond effectively. Therefore, the Court must act with abundant caution and care in the exercise of its discretion under this rule.

[22] In paragraph 79 of our Ruling in ***the Mohamed Abdi Mahamud Case*** (supra), the Court declared the circumstances under which additional evidence

may be admitted, expanding three-part test in ***Ladd v. Marshall*** [supra] as follows;

> ***"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 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."

The Court also stressed that, in exercise of its absolute discretion, it will only allow additional evidence sparingly and with abundant caution on a case-by-case basis.

[23] Applying these principles to the sole question we have posed for determination, it is apparent from this Petition that all the Applicant is seeking is the setting aside of the Appellate Court's decision, a declaration that it violated the

Applicant's rights guaranteed by **Articles 10(a), 24(1)(2)(3)** and **40** of the Constitution and an order allowing his Petition in the High Court, No 7 of 2017.

[24] The central issue at the High Court was whether the Respondent in issuing cessation order, acted within the law and in discharge of its powers, and whether that act amounted to compulsory acquisition. Upon losing in the High Court, the point taken in the Appellate Court was, once again on the violation of the Applicant's rights and whether the cessation order was appropriation or functional acquisition.

[25] Since the Petition is yet to be argued, we shall be circumspect in our approach as we answer the question, whether the Applicant has satisfied the conditions for leave to allow additional evidence.

[26] The proceedings from the High Court all through to this Court, the main question has remained; which body has the authority to approve construction on private land abutting or near an airport. That question was settled in JR No 26 of 2009: ***R v. Managing Director, Kenya Airports Authority ex-parte Patrick Thiothi Kanyuira***, that it is the Respondent. It cannot be re-introduced in the guise of some new evidence.

[27] The original action was instituted in 2012, some ten years ago, while the Petition before this Court was brought four years ago. There is no explanation for this delay. If this so-called additional evidence was indeed crucial to the Applicant's case, why did he have to wait till the 11th hour to seek to introduce it? The bodies from which the documentary have been obtained have been in existence way before the commencement of the proceedings in the High Court, what prevented the Applicant from obtaining this evidence from them in time to present the same to the trial court?

[28] It is our considered view that the Application is an attempt by the Applicant to make a fresh case in this Petition or fill up omissions or patch up his case. We

believe too that if leave is granted for additional evidence, the Respondent will suffer prejudice.

[29] In a nutshell, the Application has not met the conditions precedent enunciated in the ***Mohamed Abdi Mahamud Case***.

[30] For all the reasons we have given, the Notice of Motion dated 5th July, 2021 lacks merit, and is for dismissal.

H. CONCLUSION

[31] The overarching consideration in an application for the production of additional evidence is whether it is in the interest of justice to do so, bearing in mind the broader impact of allowing such evidence to be admitted. To achieve this, and to ensure adherence to the objectives of **Rule 18** aforesaid, the Court will assiduously scrutinize any piece of evidence presented as additional evidence.

I. ORDERS

(i) The Notice of Motion dated 5th July, 2021 is dismissed.

(ii) The Applicant shall bear the costs of the Motion.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this **8th Day** of **October**, **2021.**

.....	.....
M. K. KOOME	**M. K. IBRAHIM**
CHIEF JUSTICE & PRESIDENT	**JUSTICE OF THE SUPREME COURT**
OF THE SUPREME COURT	
.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPEME COURT	**JUSTICE OF THE SUPEME COURT**

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA