REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P, Ojwang, Wanjala, Njoki and Lenaola, SCJJ)

PETITION NO. 20 OF 2019

–BETWEEN–

1. THE MINISTER FOR HEALTH
2. THE HON. ATTORNEY GENERAL **.....APPELLANTS**

–AND–

1. UASIN GISHU MEMORIAL HOSPITAL LIMITED
2. MOI TEACHING AND REFERRAL HOSPITAL **RESPONDENTS**

–AND–

1. THE HON. ATTORNEY GENERAL
2. THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS **....INTERESTED PARTIES**

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*(Being an Appeal from the Judgment of **Hon. A. Makhandia, W. Ouko** and **A. K. Murgor, JJA** delivered at Nairobi on the 6th day of October 2017*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion Application by the 2nd Respondent/Applicant The Moi Teaching and Referral hospital, dated 2nd July 2019 and filed on 10th July 2019 premised upon the provisions of Articles 159(3)(d), 164(3) of the Constitution, Sections 3(e) and 31 of the Supreme Court

Act, 2011, Rules 3(2), (4), 5, 18(1) and 53 of the Supreme Court Rules, 2012 seeking leave to adduce additional evidence prior to the hearing of the Petition herein and;

[2] **UPON** reading the 2nd Respondent's/Applicant's Affidavit sworn by one Sylvia Nyariki, its Legal Officer on 2nd July 2019 and;

[3] **UPON** reading the 1st Respondent's Grounds of Opposition dated 2nd August 2019 and filed on 5th August 2019 and;

[4] **UPON** considering the 2nd Respondent's/Applicant's written submissions dated and filed on 2nd July 2019 wherein it submits that it intends to adduce additional evidence before this Court, the nature of which relates to the question whether the parcels of land, subject of the Appeal, and the developments thereon, have been public property, acquired, developed and maintained at the expense of the public and using tax payers' resources;

[5] **AND** which evidence, it was argued, could not be obtained with reasonable diligence for use at the trial; was not within its knowledge nor could it be produced at the time of filing the original suit at the High Court and the Appeal at the Court of Appeal; and that its officers had not been able to access its archives until Sylvia Nyariki aforesaid suggested a visit to the Hospital Archive and therefore the oversight was inadvertent and bonafide: and that the additional evidence does not introduce new substance to the dispute but would remove vagueness or doubt on issues already on trial by providing additional examples, details and particulars; and that the application has met the threshold for grant of orders to adduce additional evidence and;

[6] **FURTHER,** upon considering the 1st Respondent's submissions filed on 5th August 2019 in which it was submitted that the 2nd Respondent/Applicant has

failed to bring proof that it could not have obtained the documents, now sought to be produced, with reasonable diligence; and that since both the Appellant and 2nd Respondent/Applicant have admitted that the 1st Respondent is the proprietor of the disputed land and premises thereon and therefore additional evidence would not change that fact; and that the 2nd respondent/applicant is attempting to introduce fresh matters in the appeal before this Court and also patch up the weak points in its case thus prejudicing the 2nd respondent as the new evidence will not be subjected to the test of veracity in cross-examination and;

[7] **FURTHERMORE,** noting the Appellants' submissions dated 5th August 2019 in support of the Application and wherein they submit that, upon admission of the additional evidence, the 2nd Respondent will have the opportunity to consider the same and even cross-examine the relevant parties and that the additional evidence in any event raise issues of great public interest and of law which may well reverse the outcome of the Appeal;

[8] We **NOTE** that:

(i) The additional evidence sought to be adduced relates to letters, some dating to the 1930's, loan applications, resolutions of meetings, reports and Board Minutes all intended to boost the 2nd Respondents'/Applicant's case in this second appeal.

(ii) The reason given for non-production of the documents at the Courts below is that, until Sylvia Nyariki suggested a visit to the 2nd Respondent's archive, no other officer had imagined that useful documents were to be found there;

(iii) The 2nd Respondent/Applicant has given no other explanation for the non-production of the documents at the Courts below or why it took more than 10 years to introduce them as evidence.

[9] In the above context, **WE NOW OPINE** as follows:

(a) The law regarding the introduction of additional evidence before this Court was settled in Petition No. 7 of 2018 ***Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*** where the Court stated as follows regarding the principles for allowing such evidence:

> ***"...we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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 wilful 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." [Emphasis added]

(b) Noting that it is largely principles (b) and (c) above that the 2nd Respondent/Applicant has relied on, we see no evidence that save for Sylvia Nyariki's **"suggestion",** on an unknown date, that the Hospital Archive may have useful and relevant information, no other evidence is given as to how, over the last 7 years when the appeal before the Court of Appeal was pending and prior to that, while the matter was before the High Court, the 2nd Respondent's officers acted to secure its case to the highest possible level. Where then is the evidence of diligence? We submit none and we agree with the 1st Respondent's submission in that regard.

(c) It is also our opinion that the evidence sought to be adduced is certainly meant to fill gaps in evidence and remove *lacunae* in the 2nd Respondent's case in a second appeal where the issues to be addressed are matters of law and not of fact.

(d) Having read the additional evidence, we doubt that it would be of any use to this Court in reaching a fair and final decision on the dispute between the parties.

[10] HAVING therefore considered the Application and submissions by the respective parties, by a unanimous decision of this Bench, we make the following orders under Section 23(2)(b) of the Supreme Court Act and Rules 21 and 23 of the Supreme Court Rules, 2012:

ORDERS

(a) The Notice of Motion Application dated 2nd July 2019 and filed on 10th July 2019 is hereby dismissed.

(b) Each Party shall bear its costs of the Application.

[11] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **29th** day of November, **2019**

.....	.....
D. K. MARAGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**J. B. OJWANG** **JUSTICE OF THE SUPREME COURT**
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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