



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; (CJ & P), Mwilu; (DCJ & V-P), Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PETITION NO. 17 (E021) OF 2022 AS CONSOLIDATED WITH  
PETITION NO. 24 (E027) OF 2022**

**–BETWEEN–**

**ZEHRABANU JANMOHAMED S.C**

*(Suing as the Executrix of the Estate of the Late*

**H.E. DANIEL TOROITICH ARAP MOI).....1<sup>ST</sup> APPELLANT**

**RAI PLYWOOD (K) LTD .....2<sup>ND</sup> APPELLANT**

**–AND–**

**NATHANIEL K. LAGAT.....1<sup>ST</sup> RESPONDENT**

**SUSAN CHERUBET CHELUGUI & DAVID K. CHELUGUI**

*(Suing as the Administrators of the Estate of the Late*

**NOAH KIPNGENY CHELUGUI).....2<sup>ND</sup> RESPONDENT/APPLICANT**

**DISTRICT LAND REGISTRAR UASIN GISHU.....3<sup>RD</sup> RESPONDENT**

**THE REGISTRAR OF TITLES.....4<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....5<sup>TH</sup> RESPONDENT**

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*(Being an application for leave to adduce additional evidence to the appeal)*

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## **Representation:**

1. Mr. Ahmednasir M. Abdullahi S.C..... for the 2<sup>nd</sup> Respondent/Applicant  
(*Ahmednasir Abdullahi Advocates LLP*)
2. Mr. Julius Kemboy..... for the 1<sup>st</sup> Appellant  
(*Kemboy Law Advocates*)
3. Mr. Kibe Muigai..... for the 2<sup>nd</sup> Appellant  
(*Kinoti & Kibe Company Advocates*)
4. Mr. Odongo Advocate.....for the 3<sup>rd</sup> and 4<sup>th</sup> Respondent  
(*State Counsel*)
5. Mr. Niuster Advocate.....for the 5<sup>th</sup> Respondent  
(*National Land Commission*)

## **RULING OF THE COURT**

**[1] UPON** reading the Notice of Motion by the applicant dated 13<sup>th</sup> January 2023, and lodged on 18<sup>th</sup> January 2023 pursuant to Article 163 (4) (a) of the Constitution, Sections 21 (1) (a) and 24 (1) of the Supreme Court Act and Rules 3(5), 31 and 32 of the Supreme Court Rules, seeking the following Orders, that: *the court be pleased to admit as additional evidence to the appeal herein, the affidavit in support of this application and its annexures; and costs of this application be in the cause;*

**[2] UPON** examining the grounds on the face of the application, supporting affidavit sworn by **David K. Chelugui** on 13<sup>th</sup> January 2023, and the applicant's written submissions dated 17<sup>th</sup> January 2023, both filed on 18<sup>th</sup> January 2023 to the effect that **H.E. Daniel Toroitich Arap Moi's** tenure as President of the Republic of Kenya from 1978 to 2002 was characterized by forceful acquisition of both public and private land; that the additional evidence he seeks to adduce is of

cardinal importance, necessary and dispositive of the case before court; that it seeks to contextualize the dispute between the parties, the evidence underpinning the appeals and legal derivatives thereto; and that as the evidence to be adduced is in public domain; that the estate of President Moi is well aware of the same hence no prejudice will be suffered by the 1<sup>st</sup> appellant;

**[3] FURTHER**, noting the applicant's submissions, wherein he argues that the Will and Codicil of President Moi as drawn by the Executrix of the Estate did not list assets to be shared between the beneficiaries, and that a separate confidential Trust Document was drafted, in effect hiding the deceased's assets and omitting the total value of his estate; and that the wealth he left to his heirs is stolen public and private property. Furthermore, that the evidence the applicant seeks to adduce is not additional evidence in the conventional sense of the term and if allowed, it will not change the evidential or legal dynamics or the trajectory of the appeal; and that where a successful party seeks to adduce additional evidence to fortify the decisions of the superior courts below, this Court should be more lenient in allowing it; that omission of the additional evidence in the trial court was a failure of imagination on the part the applicant's advocate at the time as to the relevance of the tenure and record of President Moi; and that the application satisfies the requirements in *Hon. Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamed & 3 Others* Sup. Ct. Petition No. 7 of 2018 [2018] eKLR;

**[4] UPON** considering the 1<sup>st</sup> appellant's replying affidavit sworn on 23<sup>rd</sup> January 2023 and submissions dated 25<sup>th</sup> January 2023, both filed on 27<sup>th</sup> January 2023, whereby she opposes the application seeking leave to adduce additional evidence, for reasons *inter alia* that the additional evidence the applicant seeks to adduce has no direct bearing or relevance to the issues before this Court; that the applicant is attempting to convolute facts of the case to engender an unfounded perception that the entire estate of President Moi was illegally acquired which is an entirely different cause of action; that the applicant is inviting this Court to alter its status as the final appellate court and transform itself into a court with original

jurisdiction to give a determination on whether President Moi's assets were legally acquired; and that the applicant has not shown he could not have obtained the said documents which were readily available or produced the same at the trial court or that they were not within his knowledge;

**[5] FURTHER**, noting the 1<sup>st</sup> appellant's submission whereby she urges that the applicant has failed to meet the conditions in *Hon. Mohamed Abdi Mahamud (supra)*; that the applicants' assertion, a successful party in the superior courts below ought to be allowed as a matter of course to adduce additional evidence to perfect the appeal as opposed to an unsuccessful party seeking to overturn a decision, is a distinction that this Court has never made; that the applicant's attempt to blame his advocate for lack of imagination in omitting the said documents from the trial court is without basis, as his present advocates were on record at the Court of Appeal and still failed to adduce the additional evidence;

**[6] NOTING** that the Court of Appeal made a determination on the issues *inter-alia*: whether the applicant's claim was time barred under the Limitation of Actions Act; whether the Constitution of Kenya 2010 applied retrospectively to events that occurred in the 1980s; whether the applicant was entitled to special damages as assessed in their valuation report; whether the learned Judge was biased and made an unjust determination;

**[7] WE NOW DETERMINE** as follows:

- (i) That the applicant is duty bound to satisfy all the elements under the provisions of Section 20 of the Supreme Court Act, Rule 26 of the Supreme Court Rules, 2020 (both of which have not been cited in the application) and the principles set out in this Court's decision in *Hon. Mohamed Abdi Mahamud (supra)*.
- (ii) This Court in *Hon. Mohamed Abdi Mahamud (supra)* emphasized that even with the application of the set principles, the Court

will *only* allow additional evidence on a case-by-case basis and even then, sparingly with abundant caution.

**[8] APPLYING** these principles to the application, it is clear that the additional evidence sought to be introduced, namely: three land reports on irregular allocation of public land; a book titled “***Kenya Looters and Grabbers: 54 years of Corruption and Plunder by the Elites, 1963 -2017*** published in 2018; a Kenya National Human Rights Commission Report published in 2006; Judgments and rulings in the Malcolm Bell case concerning the land on which Moi High School Kabarak is situate, is not directly relevant to the matter before Court. Of great significance is the fact that the applicant has been aware of the evidence he now seeks to introduce which in his own words “*are in the public domain both locally and internationally*”. Furthermore, the applicant has not sufficiently explained the relevance of the additional evidence which he submits “*does not change the trajectory of the appeal or add to or subtract the defining evidential matrix of the appeals before Court*”.

The application is unusual in the sense that, the applicant does not seek to deploy the additional evidence, in support of his appeal (he being the respondent), but to *perfect the judgments of the two lower superior courts*.

In conclusion, none of the conditions for the grant of leave to adduce additional evidence have been satisfied;

**[9] HAVING** carefully considered the application, responses and submissions by the parties herein, we find no merit in the application and make the following Orders:

***(i) The motion dated 13<sup>th</sup> January 2023 and filed on 18<sup>th</sup> January 2023, is hereby dismissed;***

***(ii) The costs of this application shall be borne by the applicant.***

It is so ordered.

**DATED and DELIVERED AT NAIROBI this 16<sup>th</sup> Day of June 2023.**

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**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**