



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Njoki, Lenaola, & Ouko, SCJJ)

PETITION (APPLIC) NO. E009 OF 2024

-BETWEEN-

FREEDOM LIMITED..... APPELLANT/APPLICANT

-AND-

OMAR AWADH MBARAKRESPONDENT

(Being an application for leave to adduce additional evidence)

Representation:

Ms. Cindy Salim h/b for Mr. Abbas Esmail for the appellant
(Anjarwalla & Khana LLP)

Mr. Muturi Gakuo for the respondent
(Muturi Gakuo & Kibara Advocates)

RULING OF THE COURT

[1] UPON READING the Notice of Motion dated 28th August, 2024 and filed on 29th August, 2024, expressed to be brought pursuant to Sections 3A and 20 of the Supreme Court Act, Cap 9B, Rules 3(2), 26 and 31 of the Supreme Court Rules, 2020, the inherent powers of the Court and all other enabling provisions of the law, in which the applicant is seeking orders that:

- i. *The Honourable Court be pleased to grant leave to the applicant to adduce additional evidence being documents to be introduced through an affidavit supporting the Petition.*
- ii. *Upon grant of leave, this Honourable Court be pleased to admit the following additional documents to be filed through an affidavit sworn by the applicant:*
 - a) *Letter dated 26th March 2023, by the applicant to the Chief Land Registrar requesting for certified copies of documents, plans and correspondence in relation to land parcel No. 287/V/MN (the Original Parcel) and the subsequent subdivisions thereof.*
 - b) *An inventory of documents dated 9th April 2024 prepared by the Directorate of Land Administration in the Ministry of Lands, Public Works, Housing and Urban Development in respect of land parcel No. 287/V/MN.*
 - c) *Various documents annexed to the aforementioned inventory of documents dated 9th April 2024.*
 - d) *Letter dated 8th April 2024 by the applicant to the Director of Survey requesting for certified copies of survey records, correspondence and any documents relating to the original parcel No. 412/Section V/MN, Parcel No. 1948/Section V/MN and Parcel No. 2028/ Section V/MN.*
 - e) *Survey report dated 15th April 2024 by the Director of Surveys in respect of the original parcel, Parcel No. 412/Section V/MN, Parcel No. 1948/Section V/MN, Parcel No. 2028/Section V/MN and Parcel No. 2838/Section V/MN.*
- iii. *The costs of and incidental to this application be provided for; and*

[2] UPON EXAMINING the grounds on the face of the application; the supporting affidavit of Harji Govind Ruda, the applicant's director, deposed on 28th August 2024; his supplementary affidavit sworn on 12th September 2024; and

the applicant's submissions dated 28th August 2028, all to the effect that: the central issue for determination before the Environment and Land Court (ELC) was the contested ownership of the suit property between the applicant and the respondent with the ELC finding in favour of the applicant; the Court of Appeal in setting aside that decision, termed all the title documents presented by the parties before the ELC as unreliable and instead, proceeded to determine the appeal based on an unpleaded doctrine of *seisin* thereby overturning the ELC's decision; while doing so, the Court of Appeal highlighted multiple uncertainties and doubts over the rival title documents that had been sighted and analyzed by the ELC; it is these uncertainties that the additional evidence, if allowed to be adduced, is intended to clarify; the additional evidence is of relevance to the issues in the appeal and will assist the Court to determine the legality of the transactions recorded on the mother title and the authenticity of the root title to the suit property which the Court of Appeal avoided to address even after expressing doubts over the competing title documents that were before it; that the evidence intended to be presented is likely to settle the factual and legal questions that are in dispute in the appeal; the documents in question comprising the correspondence file, together with the survey report and records, will enable the Court to fully appreciate the ownership trajectory of the original parcel and to determine whether indeed the respondent's grandfather acquired the suit property and was in possession; and

[3] FURTHER, that the intended additional evidence could not be obtained with the exercise of reasonable diligence for use at the trial as the applicant neither had possession nor access to the inventory of documents, the original parcel's correspondence file or the survey report and records, prior to the filing of the petition; that as a point in fact, at the time of the hearing before the ELC, the deed file in respect of the original parcel that was supposed to be domiciled at the Mombasa land registry was lost; moreover, all other documents relating to the historical ownership of the original parcel had been lost; that in initiating the suit before the ELC, the applicant depended on a file which had been reconstructed on

the strength of a court order on the basis of the applicant's title documents which were in its possession; that the new evidence does not introduce new substance to the dispute rather, it is aimed clarifying the authenticity of all the documents presented before the trial court; that the evidence is credible as it emanates from official public documents from the Ministry and is not voluminous; that the introduction of this evidence is needed to forestall the injustice occasioned to the applicant by the Court of Appeal as the court disregarded title documents and relied on unpleaded issues thereby denying parties a fair trial; that the introduction of this additional evidence will not prejudice the respondent; and that the applicant has satisfied the threshold under Section 20 of the Supreme Court Act and the principles for additional evidence as enunciated in the case of ***Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others***, [2018] KESC 62 (KLR) (***Mohamed Abdi Mahamud Case***); and

[4] UPON REVIEWING the respondent's replying affidavit sworn by Omar Awadh Mbarak on 6th September, 2024 and his submissions dated 9th September, 2024 in opposition to the Motion to the effect that: the estate of the late Mbarak Awadh Salim is the legal owner of the suit property and that the respondent claims ownership on behalf of his grandfather (the deceased); that the Court of Appeal rightfully declared him as the owner of the suit property; that he was neither party nor privy to the proceedings granting to the applicant an order of reconstruction of the parcel file; that it was false for the applicant to aver that all other documents relating to the history of ownership of the original parcel had been lost or could not be established, given that the respondent produced the original title to the suit property at the ELC; that it is equally false for the applicant to aver that it was not required to go to the root of the title to the original parcel before purchasing it; and that if the applicant is allowed to adduce the additional evidence, the respondent stands to suffer immense and irreversible prejudice; and

[5] FURTHER NOTING the fact that the respondent maintains that the applicant has not met any of the conditions precedent under Section 20 of the

Supreme Court Act and the principles for adducing additional evidence in the ***Mohamed Abdi Mahamud Case*** for the reasons that: the documents sought to be adduced are irrelevant to the appeal before this Court and are unlikely to influence or impact upon the result of the verdict; that the applicant has been indolent in advancing its case and the new evidence is meant to fill gaps in the applicant's evidence whereas this is a second appeal which should purely be on matters of law and not points of fact; that admission of the documents listed in the applicant's Motion is tantamount to sanctioning litigation by installments; and that given the applicant's indolence, it is undeserving of leave to adduce additional evidence; and

[6] HAVING CONSIDERED the Motion, affidavits and rival arguments summarized in the preceding paragraphs **WE NOW OPINE** as follows:

i) As a general rule, parties to litigation must bring forward their whole case, and will not (except under special circumstances) be permitted to open the same subject of litigation in respect of matters which might have been brought forward at the trial.

ii) The admission of additional evidence on appeal before this Court is regulated by the provisions of Section 20 of the Supreme Court Act and Rule 26 of the Supreme Court Rules, 2020. The former empowers the Court to admit further evidence, which the Court considers necessary and appropriate in the circumstances. The section requires that, in admitting additional evidence, the Court 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”.

iii) To these strictures, the Court has espoused the following further criteria to be considered in an application of this nature:

- “a. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;***
- b. 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;***
- c. where the additional evidence discloses a strong prima facie case of willful deception of the court;***
- d. 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;***
- e. 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;***
- f. 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.”

See the ***Mohamed Abdi Mahamud*** case (*supra*).

iv) Applying these principles to the Motion, it is evident that the material sought to be introduced consists of documents, plans, and correspondence in relation to land parcel No. 287/V/MN (the Original Parcel) and the subsequent sub-divisions thereof. These documents are aimed at addressing certain questions raised by the Court of Appeal as to the authenticity of the applicant’s Certificate of Ownership; and the propriety of the process which was adopted by the Registrar of Titles to facilitate the reconstruction of file to the suit property, based on documents supplied solely by the applicant.

v) The applicant, having initiated the action, first before the High Court for the reconstruction of the file and subsequently before the ELC claiming ownership of the suit property as against the respondent’s rival claim was expected, indeed, required to bring the entire evidence at that initial stage to support that claim.

vi) The applicant has not demonstrated that the additional evidence it seeks to adduce could not have been obtained with reasonable diligence for use at the trial or could not have otherwise been produced earlier. To the contrary, within a short time of the applicant writing to the relevant government departments, the documents were supplied, confirming that they were always available.

vii) By its admission, the applicant pleads that the additional evidence it wishes to present could not have been obtained and introduced before the trial court “*because its necessity has only been brought about by the*

skewed decision of the Court of Appeal which has decided to disregard documents of title and instead determine a matter concerning property on a medieval doctrine of seisin... that the applicant had no way of predicting that the Court of Appeal would render such a skewed decision and veer away from the title documents which had been produced and analysed by the ELC”.

viii) The documentary evidence sought to be introduced is therefore in direct answer to the questions raised by the Court of Appeal in its impugned judgment. Parties cannot use the window provided for by Section 20 and Rule 26 aforesaid to fill the lacuna or patch up parts of the evidence of the unsuccessful party. The rule of thumb is that additional evidence will be required to do justice between the parties.

ix) It is on record that the only file that could not be traced at the Mombasa Land Registry during the proceedings before the trial court, was the Deed File in respect of the original parcel. Nothing has been said about the status of that file. There is, however, no evidence of any attempts by the applicant, prior to the delivery of the Court of Appeal judgment, to procure the multiple documents in the Correspondence File that it now wishes to produce.

x) Further, the applicant has averred that the Correspondence File and Survey Report, *“were not necessary documents that needed to be submitted before the ELC because the applicant was not required to go to the root of the title of the suit property.”* That, since the applicant was successful in the ELC, its title to the suit property was valid, and there was no necessity or requirement for it to introduce any document before the Court of Appeal as proof of the transactions that took place in the Original Parcel prior to the applicant acquiring it.

xi) It is a requirement under Section 20, Rule 26 aforesaid and the *ratio decidendi* in **Mohamed Abdi Mahamud** (*supra*) that only evidence that is directly relevant to the matter before the Court would be considered for admission. The applicant has not illustrated how the new evidence will assist the Court in determining the authenticity of the root title of the suit property, over and above the material already on record and upon which the two superior courts below based their respective decisions.

xii) For the foregoing reasons, it is our considered opinion that the evidence sought to be adduced does not meet the established threshold as the documents in question will lead to the Court considering in a second appeal matters of fact; their relevance to this appeal is doubtful; their introduction will be tantamount to filling the gaps identified in the judgment of the Court of Appeal; the evidence has always been available and could have easily been obtained; and it has not been demonstrated in what way it will impact on the decision of this Court.

xiii) Looking at the nature of 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. The two superior courts below based their respective decisions upon the evidence presented by the parties, the ELC finding in favour of the appellant and the Court of Appeal for the respondent. Based on this fact, we are being asked in this appeal to determine, on the basis of the material on record, whether or not the Court of Appeal erred in its determination as to the ownership of the suit property. We believe this question is capable of being answered without the introduction of further evidence.

xiv) On costs, we underscore the fact that an award of costs is an exercise of discretion and follows the principle set out by this Court in **Rai & 3 others vs. Rai & 4 others** [2014] KESC 31 (KLR) that costs follow the

event. In exercise of our discretion, we direct that the applicant shall bear the costs of this Motion.

[7] **ACCORDINGLY**, we make the following orders:

- i) The Notice of Motion application dated 28th August, 2024 be and is hereby dismissed.***
- ii) The Applicant shall bear the costs of this application.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 13th Day of December, 2024.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
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