

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu, Ag. CJ & Ag. P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION NO.1 OF 2020**

**—BETWEEN—**

**THE ATTORNEY GENERAL .....APPLICANT**

**—AND—**

**ZINJ LIMITED.....RESPONDENT**

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

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**RULING OF THE COURT**

**A. THE APPLICATION**

**[1]** The Notice of Motion dated 30<sup>th</sup> October 2020 is premised on Rule 18 of the Supreme Court Rules, 2012 (now repealed) and seeks the following orders:

- 1.** *The Honourable Court be pleased to direct that additional evidence be taken by the trial Court to establish the level and extent of the continuing encroachment of the suit property L.R. No.25528.*
- 2.** *The Director of Survey be directed to undertake a site visit and inspection, locus in quo, of the suit property, L.R. No.25528 and file with the trial Court a report showing the current level of encroachment in the suit property.*

**3.** *Upon and consequential to Orders 01 and 03 above being granted, the notes and observations made thereon by the trial Court do form part of this Court's proceedings.*

**4.** *This Honourable Court do issue such further Orders as may serve the ends of justice.*

**5.** *The costs be provided for.*

**[2]** The Applicant, Zinj Limited, claims that the additional evidence being sought is intended to show the current level of encroachment into the disputed property, L.R. No.25528, and to remove any vagueness or doubt over the substantive issue of encroachment and the compensation payable to it.

## **B. BACKGROUND**

**[3]** In **ELC Petition No.2 of 2010** (Malindi) the Applicant had claimed that its parcel of land, L.R. No.25528, had been unlawfully interfered with by the State which action amounted to unlawful compulsory acquisition of the said parcel of land. In agreeing with the Applicant, the Environment and Land Court (*Olola, J*) found that the State had indeed unlawfully acquired 51.129 hectares of land belonging to the Applicant and assessed damages arising therefrom at Kshs.413,844,248.70 being the value of the land and general damages of Kshs.51,129,000. The Applicant was dissatisfied and filed an appeal at the Court of Appeal being **Civil Appeal No.56 of 2018**.

**[4]** In its Judgment, rendered on 20<sup>th</sup> March 2019, the Court of Appeal (*Visram, Karanja and Musinga, JJA*) partly allowed the appeal with the result that compensation was pegged at the whole of L.R. No.25528 and not a portion of it and the value stated to be Kshs.2,996,232 plus 15% thereof (Kshs.449,434,800) and general damages assessed at Kshs.42,570,000. The Attorney General filed an appeal to this Court which appeal is still pending hearing and determination.

### **C. CASE FOR THE APPLICANT**

[5] According to the Applicant, while the two Courts below were unanimous that L.R. No.25528 had been unlawfully encroached upon, the level and extent of the continuing encroachment is unknown. And that therefore, additional evidence should be taken, by the trial Court, on that single issue.

[6] Relying on *Hon. Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others*, Sup. Ct. Petition No.7 of 2018, the Applicant has submitted that the evidence sought to be introduced is directly relevant to the appeal before us and that it would be in the interest of justice to admit that additional evidence.

### **D. CASE FOR THE RESPONDENT**

[7] The Respondent, on its part, has stated that, an order granted to the Applicant in respect of additional evidence would greatly prejudice his case as it would in essence re-open the whole dispute before the appeal before us is determined on its merits and in any event, the relevance of the new evidence has not been established. That, in the survey report dated 11<sup>th</sup> January 2012, the extent of encroachment of the suit land was determined and the appeal before us has the same issue as a contested matter arising from the decision of the Court of Appeal.

[8] Furthermore, the Respondent has submitted that it has no notice or possession of the additional evidence and re-opening the whole case at the trial Court would only but serve to defeat the jurisdiction of this Court as the final Court in the land.

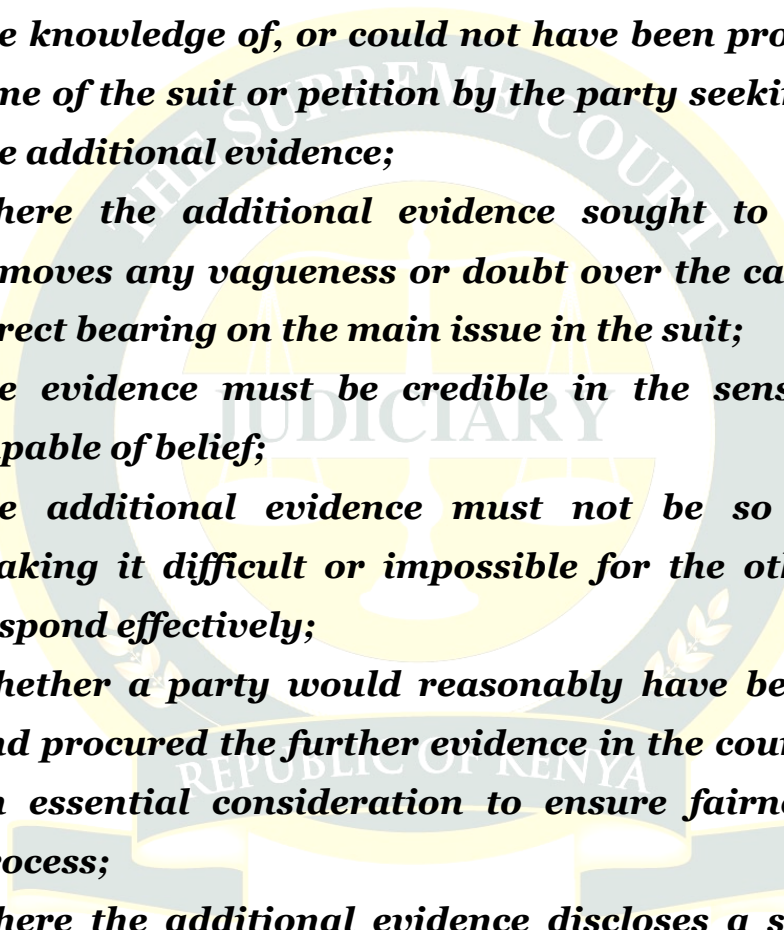
[9] Lastly, in seeking dismissal of the Motion, the Respondent has submitted that the principles set out in *Hon. Mohamed Abdi Mohamud* have not been met and the Motion therefore ought to be dismissed with costs.

## E. ANALYSIS AND DETERMINATION

[10] We have perused the Judgments of both the Environment and Land Court as well as the Court of Appeal. In determining that the State encroached upon the Applicant's property, the Courts largely relied on a report by Maritim Wedon, Malindi/Magharini District Land Surveyor, dated 12<sup>th</sup> January 2012. In that report, it was established that there was "*an overlap between Ngomeni Settlement Scheme, L. R. No.24853 and L. R. No.10754*". The latter parcel of land was amalgamated with another to create L. R. 25528 registered in the name of the Applicant. The same report also indicated in detail, the acreages of the overlap/encroachment including "*an additional area/marked E on the [sketch map] of approximately 22.47 Ha (55.5 acres)*". Olola J, in his Judgment, specifically determined that 28.659 hectares of land belonging to the Petitioner had been encroached upon by the Department of Defence (6.318 Ha), Ngomeni Settlement Scheme (15.869 Ha), public road (6.189 Ha) and a Muslim cemetery (0.2827 Ha). An additional 22.47 Ha was also found to have been encroached upon by squatters. In total, he found that 51.129 Ha of land had been unlawfully disposed from the Applicant.

[11] The Court of Appeal, on its part, disagreed with the learned Judge of the trial Court and found that the Applicant had been dispossessed of the entire parcel of land, L. R. No.25528, and was entitled to compensation in the terms we have expressed above.

[12] The divergence of the findings by both Courts is now the subject of the appeal before us and the question that we must ask is whether the alleged additional evidence would run afoul of the principles we established in **Hon. Mohamed Abdi Mohamad**. Those principles, flowing from an interpretation of Rule 18 of the Supreme Court Rules 2012 (now Rule 26 of the Supreme Court Rules 2020) are as follows:

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- (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 could 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 aware of and procured the 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 the additional evidence on the other.**

[13] We have, in applying the above principles noted firstly, that in fact the additional evidence is not before this Court. For a Court to interrogate additional evidence, it would be expected, generally, that the evidence is available to the Court and the opposing party. How can this, or any Court, determine the relevance, credibility, volume and disclosure of a *prima facie* case if the evidence is speculative or unknown? How can any Court determine that the evidence is not meant to fill up gaps in evidence, if the additional evidence itself is not available? How can we determine the prejudice to be caused to the Respondent if all we have is the Applicant's claim that the evidence will assist the Court remove any doubts or vagueness in the case?

[14] Our clear finding is that, in the present case, without the additional evidence being placed before us, we cannot properly invoke the above principles in favour of the Applicant.

[15] Secondly, we have endeavoured to show that, contrary to the Applicant's assertion, *Olola J* and later, the Court of Appeal, having found and determined what acreage of land had been encroached upon, went ahead to award the

Applicant compensation as a result thereof. The Applicant to our knowledge, has not appealed against the decision of the Court of Appeal and is deemed to be satisfied with it. The Respondent is not satisfied with that decision and in the Memorandum of Appeal before this Court has challenged the decision to award compensation on alleged compulsory acquisition of the whole parcel of land as opposed to part of it as found by *Olola J.* It would be a travesty of justice for this Court to allow the Applicant to go on a fishing expedition and create evidence of unknown relevance or value whose import in determining the above question is a mystery to us.

[16] Thirdly, and lastly, this Court has a very limited mandate and to allow parties to reopen their cases, seek the taking of evidence afresh by trial Courts and worse, direct new evidence to be created by ordering site visits and inspections as is prayed by the Applicant, would negate the purpose for which this Court was created. The present Motion, with respect, is a clear abuse of the processes of this Court and must be dismissed.

#### **F. DISPOSITION**

[17] For reasons given above;

- i) The Motion dated 30<sup>th</sup> October 2020 is dismissed.***
- ii) Costs thereof shall be paid by the Applicant to the Respondent.***

[18] It is so ordered.

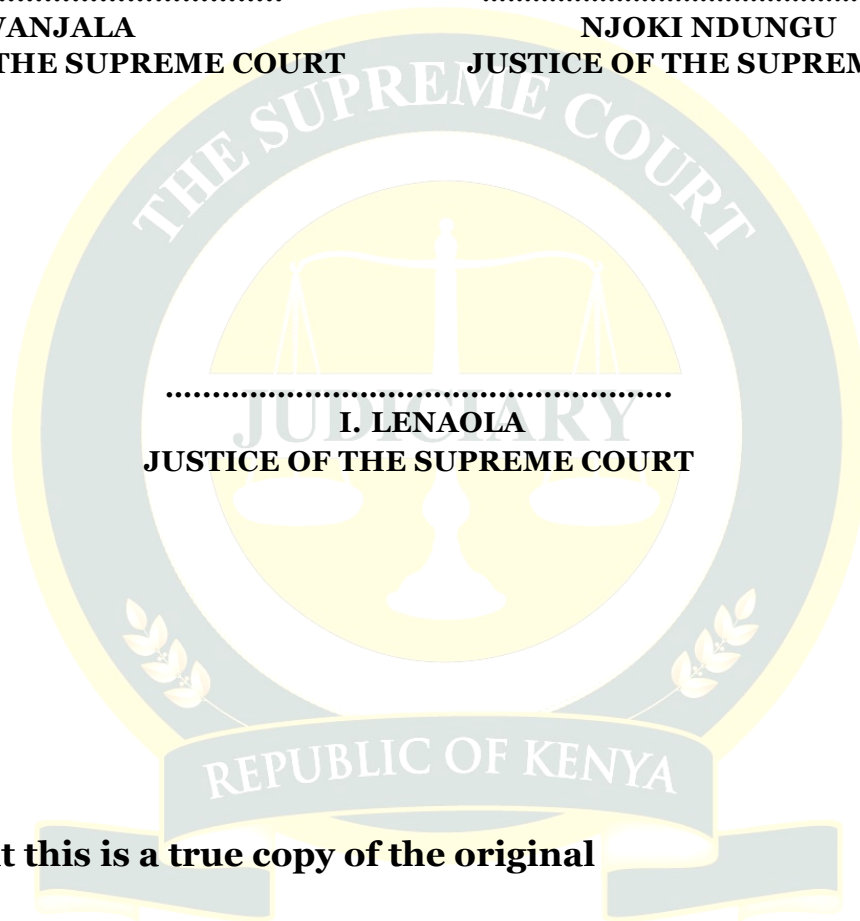
**DATED and ISSUED AT NAIROBI this 5<sup>th</sup> day of March, 2021.**

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**P. M. MWILU**  
**Ag. CHIEF JUSTICE &**  
**Ag. PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**



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**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**