



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E009 OF 2024

–BETWEEN–

FREEDOM LIMITED.....APPELLANT

–AND–

OMAR AWADH MBARAK.....RESPONDENT

*(Being an Appeal from the Judgment and Orders of the Court of Appeal at Mombasa
(Murgor, Laibuta & Odunga, JJ.A.) delivered on 23rd February 2024 in Civil Appeal No. E028 of 2022)*

Representation

Mr. Kioko Kilukumi, SC & Mr. Abbas Esmail for the Appellant
(Anjarwalla & Khanna LLP)

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

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before the Court is the Petition dated 20th March 2024 and filed on even date. It is brought under Article 163(4)(a) of the Constitution,

Section 3A of the Supreme

Court Act, 2011, and Rules 3(5), 38(1)(a) & (2) and 39 of the Supreme Court Rules, 2020. The appeal challenges the Judgment of the Court of Appeal (*Murgor, Laibuta & Odunga, JJ.A.*) delivered in Civil Appeal No. E028 of 2022, which set aside the decision of the Environment and Land Court (*Matheka, J*) in ELC No. 358 of 2016. In essence, the Court of Appeal determined that the root of the appellant's title was questionable, tainted with irregularity, and on the other hand, the respondent had the right of claim over the suit property under the doctrine of *seisin*.

B. BACKGROUND

[2] The first allottee of Plot No. 287 Section V Mainland North situate in 'the Province of Seyidie' at S.E. of Mazeras Station, measuring approximately 983 acres, and more particularly described and delineated on Deed Plan No. 21108 (***the suit property***) was David Gibson (the then administrator of the estate of Sevi Mwagoma). It is not in contention that the suit property was first registered at the Coast Registry in Mombasa as No. CR 6302/1. The first allottee transferred the suit property to Mohamed Afzal Khan on 6th July 1944. Thereafter, various dealings and transactions took place, resulting in changes to the title number and size.

C. LITIGATION HISTORY

i. Proceedings at the Environment and Land Court (ELC)

[3] The appellant through its counsel, applied to the Chief Land Registrar and the County Land Registrar of Mombasa County for an official certificate of search over plot No. 1948 (Original No. 412/20) Section V Mainland North, CR 32564 allegedly demarcated from plot No. 287 of Section V Mainland North situate in the Province of Seyidie

at S.E. of Mazeran Station, and more particularly described and delineated on Deed Plan No. 21108 (*a portion of the suit property*). When the concerned parties failed to furnish the appellant with an official search, the

appellant petitioned the High Court in HC Petition No. 58 of 2015, ***Freedom Limited Vs the Chief Land Registrar, the County Land Registrar, Mombasa County & AG Mombasa*** seeking to compel the Chief Land Registrar and the County Land Registrar, Mombasa County, to furnish it with an official search, in line with Sections 34 of the Land Registration Act, 2012. As per the Decree on record dated 29th June 2016, the High Court granted the orders sought and directed that registry records be reconstructed based on the title documents presented by the appellant. The file was reconstructed.

[4] Thereafter, the appellant instituted a claim against the respondent in ELC No. 358 of 2016. The fulcrum of the appellant's case was that, by an Agreement for Sale dated 24th September 2009, it had purchased and was registered proprietor of the Plot No. 1948 (Original No. 412/20) Section V Mainland North, C.R. No. 32564, (*a portion of the suit property*) for a consideration of Kshs. 20,000,000 and US \$1,935,897. The appellant stated that the suit property was demarcated from the mother title through entry no. 53. The portion demarcated was first registered to Mohamed Jaffer Abdulrasul Panju, Abdul Manan Abdul Rehaman Keher Qureshi and Abdul Sultani Chaudhry (the vendors); and the appellant purchased the said portion from the vendors and was therefore the registered proprietor.

[5] The appellant sought the following:

- i. A declaration that the respondent had no right or interest in or over the land comprised in the property known as Plot No.1948 (Original No. 412/20) Section V Mainland North registered as C.R. No. 32564, which belongs to the appellant;*

ii. *A permanent injunction to restrain the respondent whether by himself or through his contractors, employees, servants and/or agents or otherwise howsoever from interfering with the appellant's proprietary rights and quiet occupation and possession of the property known as*

Plot No. 1948 (Original No. 412/20) Section V Mainland North and registered at the Land Titles Registry, Mombasa as C.R. No. 32564 or in any manner howsoever else dealing with the said property under the pretext that he has any right or interest therein;

iii. Costs of and incidental to the suit; and

iv. Any other proper or other relief which the Court deemed fit to grant.

[6] In response, the respondent filed a defence denying all the allegations and a counterclaim asserting proprietary rights over the suit property. According to the respondent, his late grandfather, Mbarak Awadh Salim, purchased the suit property from the then registered owner, Mohamed Afzal Khan, for the consideration of Kshs. 878,000.00; a transfer document was duly executed, attested but was not registered; the suit property had never been subdivided; the respondent's grandfather died before a formal transfer of the suit property, and that he (respondent) only became aware of the transaction between his deceased grandfather and Mohamed Afzal Khan in the year 2012; and that, upon confirmation of a grant in the Kadhi's Court at Mombasa in *Succession Cause No. 68 of 2013* on 18th June 2013, he applied for the Grant to be registered against the title deed, but was unsuccessful because the land's office file could not be traced. It was the respondent's further case that the appellant's claim must fail because it ought to have conducted due diligence at the time of purchase, which would have confirmed that the property was, at the time, still registered in the name of Mohamed Afzal Khan.

[7] In its counterclaim, the respondent reiterated its arguments and sought the following orders;

- i. *Mandatory injunction to compel the appellant by itself, its agents, servants and/or any other person under instructions of the appellant to give vacant possession of the suit property and to demolish the*

structures constructed thereon and to remove all the materials falling and/or in the alternative the structures be demolished and removed at its cost;

- ii. A declaration that the purported transfer effected on 12th November 2010 in respect of the sale of Plot No. 1948 (Original No. 412/10), Section V Mainland North, registered as C.R. No. 32564, was fraudulent, illegal, null and void as Title Deed Number 6302 has never been subdivided;*
- iii. A declaration that the title deed issued in favour of the appellant was null and void;*
- iv. An order directing the Land Registrar Mombasa to cancel the purported title issued to the appellant in respect of all that piece or parcel of land containing by measurement Nine Hundred and Eighty-Three (983) acres or thereabouts known as Plot No. 287 of Section V Mainland North situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plan No. 21108;*
- v. A declaration that the estate of the late Mbarak Awadh Salim is the true, genuine and lawful owner of all that piece or parcel of land containing by measurement Nine Hundred and Eighty-Three (983) acres or thereabouts known as Plot No. 287 of Section V Mainland North situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plan No. 21108;*

vi. *A declaration that the estate of the late Mbarak Awadh Salim is the beneficial owner of all that piece or parcel of land containing by measurement Nine Hundred and Eighty-Three (983) acres or thereabouts known as Plot No. 287 of Section V Mainland North,*

situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plan No. 21108;

- vii. Such other relief as this Honourable court may deem fit to grant;*
- viii. General damages; and*
- ix. Costs of this suit and interest at Court rates.*

[8] In reply, the appellant reiterated its claim and denied the counterclaim. It contended that the respondent had no legal capacity to file a counterclaim and that the same should be struck out; the succession cause was fraudulent and intended to sanitize the conduct of the respondent or Mohamed Afzal Khan; the respondent's claim lacked lawful justification; the land registry copy of the title relating to the subject property was at some stage missing or interfered with, and it appeared that the respondent and/or the said Mohamed Afzal Khan had been complicit with the interference with the land records; and the respondent had been charged in *Principal Magistrate Criminal Case No. 1278 of 2017* at Mombasa for allegedly giving false information on the ownership of the suit property.

[9] By a Judgment dated 19th January 2022, the ELC (*Matheka, J.*) allowed the appellant's claim and dismissed the respondent's counterclaim with costs to the appellant. The trial court held that the appellant had proved its case on a balance of probabilities while the respondent had failed to prove his counterclaim. The learned Judge reasoned that the appellant had established the root of the title it held and therefore was a *bona fide* purchaser. The trial court was convinced that from the record, when the file went missing from the

land registry, the appellant filed *petition No. 58 of 2015, **Freedom Limited Vs Chief Land Registrar & Others*** and was issued with the decree dated 29th June 2016 to reconstruct the Lands Registry records, which was done affirming the appellant as the rightful proprietor. In conclusion, the court granted the following orders:

- i. *A declaration that the respondent has no right or interest in or over the land comprised in the property known as Plot No. 1948 (Original No. 412/20) Section V Mainland North registered as Mombasa C.R. No. 32564, which belonged to the appellant;*
- ii. *A permanent injunction restraining the respondent, whether by himself or through his contractors, employees, servants and/or agents or otherwise, from interfering with the appellant's proprietary rights and quiet occupation and possession of the property known as Plot No. 1948 (Original No. 412/20) Section V Mainland North registered as Mombasa C.R. No. 32564; and*
- iii. *Costs to the appellant.*

ii. Proceedings at the Court of Appeal

[10] Aggrieved by the Judgement of the ELC, the respondent filed *Civil Appeal No. E028 of 2022*, premised on nine grounds, *inter alia*, that the learned Judge erred in both law and fact:

- i. *In failing to consider the issues raised by the respondent;*
- ii. *In failing to appreciate the testimony tendered by the respondent's witnesses;*
- iii. *In failing to consider and appreciate the documentary evidence tendered by the respondent;*
- iv. *In failing to appreciate that the respondent had demonstrated on a balance of probability that all that land known as Plot No. 287 of Section V Mainland North situate in the province*

of Seyidie at S.E of Mazeras Station, being CR Number 6302, had not been subdivided since the same had been purchased by the respondent's grandfather from the previous registered owner;

- v. *By failing to appreciate the facts laid down before the court by the respondent, but instead proceeded to re-state its own version of facts in complete departure from the pleadings before the trial court;*
- vi. *In dismissing the respondent's Counter-claim despite the overwhelming evidence presented by the respondent's witnesses in support of the counter-claim;*
- vii. *In finding that Plot No. 287 of Section V Mainland North situated in the province of Seyidie at S.E of Mazeras Station, being CR Number 6302 had been subdivided, resulting in Plot No. 1948 (Original No. 412/10) Section V Mainland North registered as CR. No. 32564, yet there was no evidence of such subdivision from the mother title tendered in evidence by the respondent;*
- viii. *In failing to appreciate documentary evidence produced in court in support of the counter-claim and defence; and*
- ix. *In failing to consider and appreciate the submissions and authorities cited by the respondent's advocates.*

[11] In a Judgment delivered on 23rd February 2024, the Court of Appeal (*Murgor, Laibuta & Odunga, JJ. A*) allowed the appeal, overturning the ELC, albeit highlighting various questions whose answers it noted were not provided. The appellate court identified the following issues for its determination; *whether the parties' conflicting claims relate to the same property; if the answer is in the affirmative, what constitutes the suit property; on the fundamental conception of seisin in relation to the suit property, who as between the appellant and the respondent has established seisin as the root of title thereto;*

put differently, who, as between the estate of Mbarak Awadh Salim (represented by the respondent) and the appellant company, has indefeasible proprietary right over the suit property; whether the learned Judge was correct in allowing the respondent's

claim and dismissing the appellant's counterclaim; and, finally, what reliefs were available.

[12] On *whether the parties' claims related to the same property*, the learned Judges held that the competing claims relate to the same property despite the unexplained disparity in the original number and the series of the alleged subsequent transactions and subdivision, on which the appellant's claim on the residual part thereof is founded.

[13] On *what constitutes the suit property*, the appellate court determined that the property registered as CR 32564 and being Plot No. 1948 (Original No. 412/20) Section V Mainland North constituted the suit property, whose original number was altered from Original No. 287/3, which the appellant sought to recover from the deceased's estate. The court reasoned that the respondent's contention that the original property had never been subdivided, or otherwise surrendered to the State, put into question the propriety of the entries in the Certificate of Ownership dangled by the appellant.

[14] On the issue of *whether the suit property was ever subdivided*, the court held that the change of the suit property from its original No. 287/3 to No. 412/20 claimed by the appellant was an irregularity that remained unexplained. It was further determined that the connection between the two Plots Original Nos. 287/3 (suit property) and No. 412/20 (a portion of the suit property claimed by the appellant) raised questions as to the propriety of the impugned subsequent entries reflected in the appellant's version of the certificate of ownership.

[15] As to *who as between the appellant and the respondent, had*

an indefeasible proprietary right over the suit property, the court evaluated the principles of sanctity of title, the right to property under Article 40 and the principle of indefeasibility of title. Thereafter, it was determined that the disparity in the original number, compounded by the deceased's household's vacant possession

and occupation of the suit property for a period spanning 22 years, and the disappearance of all records in respect of the alleged transactions, raised questions as to the propriety of those transactions, and of the appellant's root of title thereto. Turning to the question as to whether the appellant's root of title stands, the Court of Appeal determined that the transactions leading to the subdivision and transfer of the portion of the suit property to the appellant were affected by irregularities.

[16]As for the respondent's title, the court invoked the doctrine of *seisin* and determined that in the face of documentary evidence of purchase by the respondent's deceased grandfather; the duly executed, but unregistered transfer; vacant possession; occupation by the deceased and his household of the suit property as of right for an uninterrupted period of 22 years, there was *prima facie* evidence of ownership, defeasible only on evidence of illegality, irregularity in acquisition of the suit property or corrupt dealing. In the circumstances, the Court of Appeal found that the trial court decision allowing the appellant's suit and dismissing the respondent's counterclaim was made in error. It overturned the trial court and awarded the respondent general damages in the sum of Kshs. 5,000,000/-.

ii. Proceedings at the Supreme Court

[17]Aggrieved by the said Judgment, the appellant has now filed the instant appeal, challenging the decision of the Court of Appeal on 14 grounds summarized as follows: that the learned Judges erred in law in;

i. Invoking Article 40 of the Constitution to invalidate the

- appellant's title without evidence of fraud, irregularity or illegality on the part of the appellant;*
- ii. *Misapplying Article 40 of the Constitution to award the respondent title to the suit property while the transaction creating proprietary rights had been voided by the operation of section 6 of the Land Control Act;*

- iii. *Applying Article 40 of the Constitution to guarantee proprietary rights of a non-registered proprietor against a legally registered proprietor;*
- iv. *In misapplying Article 40 of the Constitution as read with section 3 of the Judicature Act, giving the hierarchy of laws, in ignoring registered rights and upholding proprietary rights relying on the doctrine of seisin;*
- v. *In proceeding to render Judgment in a matter concerning contesting ownership of land after admitting multiple doubts and unresolved questions, in breach of Articles 47 and 50 (1) of the Constitution;*
- vi. *Failing to remit the matter back to the ELC to receive evidence and resolve the doubts and questions;*
- vii. *Awarding the suit property to the estate of Mbarak Awadh Salim when the claim was not instituted by any personal representative of that estate;*
- viii. *Ignoring that the purported vendor (to Mbarak Awadh), one Mohamed Afzad Khan, had died in 1967 while the alleged transfer was signed in 1978, and notwithstanding that the original parcel did not exist as it had been subdivided over the years;*
- ix. *Ignoring evidence that the appellant was in possession of the suit property; and*
- x. *Issuing eviction and demolition orders while the same had not been sought by the respondent.*

[18] The appellant seeks the following reliefs;

- i. *The Judgment of the Court of Appeal be set aside and the Judgment of the ELC be affirmed;*

- ii. *A declaration that Plot No. 287 Section V Mainland North no longer exists and the title deed in possession of the respondent is incapable of giving ownership over the land;*

- iii. *A declaration that the appellant is the legal owner of Plot No. 1948 (Original No.412/20 Section V Mainland North) as delineated on Land Survey Plan Number 223946, measuring 376 Ha (approximately 929.1 acres)*
- iv. *An order restraining the respondent or anyone claiming under him from interfering with the appellant's possession and quiet enjoyment of Plot No. 1948 (Original No.412/20 Section V Mainland North);*
- v. *Costs of the appeal and the proceedings before the Court of Appeal; and*
- vi. *Any other orders or reliefs the Court may deem fit to grant.*

[19] In response, the respondent filed his replying affidavit sworn on 16th April 2024, urging mainly that his grandfather was the legal and beneficial owner of the suit property. The respondent also filed a notice of preliminary objection dated 16th April 2024, challenging the court's jurisdiction to hear the appeal. He contends that the appeal neither raises issues of constitutional interpretation or application nor was it certified as raising matters of general public importance.

[20] In rejoinder, the appellant filed a supplementary affidavit sworn by Harji Govind Ruda on 24th April 2024, wherein it contends that this Court has jurisdiction under Article 163(4)(a) of the Constitution as the appeal involved the interpretation and application of Article 40 of the Constitution. It further reiterates its arguments in support of the appeal.

D. PARTIES' SUBMISSIONS

i. Appellant's Case

[21] The appellant has filed two sets of submissions, dated 24th April 2024 in opposition to the preliminary objection and 17th February

2025 in support of the appeal. On *jurisdiction*, it submits that its appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution, for reasons that in arriving at the impugned Judgment, the Court of Appeal directly invoked and applied

Article 40 of the Constitution to invalidate the appellant's title to the suit property. The appellant relies on ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] eKLR to argue that this Court's jurisdiction has been properly invoked.

[22] Without prejudice to the foregoing, it is also the appellant's submission that in arriving at the impugned decision, the Court of Appeal took a constitutional trajectory as evidenced in the appellate court's heavy reliance on Article 40 of the Constitution in its Judgment. It relies on ***John Florence Maritime Services Limited & another Vs Cabinet Secretary Transport & Infrastructure & 3 others*** (Petition 17 of 2015) [2021] KESC 39 to support this argument. The appellant further argues that, in any event, this court has inherent powers to hear and determine the appeal to prevent a miscarriage of justice and infringement of its rights to a fair hearing.

[23] On the substantive issues, the appellant submits on six issues. On *misinterpretation and misapplication of Article 40 of the Constitution*, the appellant relies on the doctrine of indefeasibility of title and urges that the respondent failed to demonstrate the appellant's title was acquired unlawfully to warrant revocation under Article 40(6) of the Constitution as read with Section 26 of the Land Registration Act. In these circumstances, the appellant submits that having been conferred a certificate of title by the government, it was presumed the rightful owner, a presumption that could only be rebutted if cogent evidence was led to demonstrate fraud, illegality or corruption.

[24] On the *doctrine of seisin*, the appellant argues that the Court of Appeal wrongfully elevated the common law doctrine to defeat Section 26 of the Land Registration Act, which establishes a

rebuttable presumption of land ownership for registered proprietors, contrary to Section 3 of the Judicature Act and Article 24 of the Constitution. It cites this Court's decision in ***Shah & 7 others Vs Mombasa Bricks & Tiles Limited & 5 others*** [2023] KESC 106 to urge that

any restriction on property rights beyond those enshrined in the Constitution must comply with Article 24 of the Constitution.

[25] On the *requirements of the Land Control Act*, it is the appellant's case that the respondent's claim on the suit property was voided by Section 6 of the Land Control Act. The appellant submits that the purported purchase by the respondent's deceased grandfather was of agricultural land, which was not approved by the relevant Land Control Board.

[26] As regards *allegations of unfair trial*, the appellant urges that the Court of Appeal violated Article 50(1) of the Constitution by issuing a Judgment without first resolving all the doubts and gaps in the evidence before it. It reiterates its contention that justice requires a court of law to address all unanswered questions before making a final decision. To this end, it submits that the appellate court repeatedly acknowledged that it had several unanswered questions regarding the title documents and dealings in the suit land presented by both parties. In conclusion, on *damages*, the appellant submits that the Court of Appeal was not justified in quantifying damages in the absence of any evidence tendered before the trial court.

ii. Respondent's Case

[27] The respondent also filed two sets of submissions, dated 16th April 2024 and 27th February 2025, in support of the preliminary objection and opposition to the appeal, respectively. On *jurisdiction*, the respondent submits that this Court lacks jurisdiction because the impugned decision did not involve the interpretation and application of the Constitution. It is urged that neither the trial court nor the Court of Appeal specifically or directly interpreted and/or put

meaning, tenor or effect to Article 40 of the Constitution. The respondent emphasizes that the Court of Appeal only relied on Article 40(6) of the Constitution in arriving at the impugned

decision. In the alternative, the respondent contends that the matters raised in the appeal were not certified under Article 163(4)(b) of the Constitution.

[28] On the substantive issues, the respondent submits that *the Court of Appeal did not misinterpret Article 40 of the Constitution*. It urges that, contrary to the appellant's contention, the establishment of the root title is crucial where there are competing claims to land ownership. It is the respondent's further case that the law, as encapsulated in Section 26 of the Land Registration Act and affirmed by this Court in ***Dina Management Limited Vs County Government of Mombasa & 5 other*** (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), is that no party can enforce any rights over property when the root title is tainted. To this end, it is submitted that the suit property was never lawfully subdivided to demarcate the portion of the suit property claimed by the appellant. The respondent further urges that it has always been in possession of the suit property, and the appellant has not adduced evidence to prove its alleged subdivision and occupation of the suit property

[29] On the *issue whether the respondent had locus standi*, the respondent submits that he was appointed a legal representative of his late grandfather's estate in ***Mombasa Kadhi's Succession Case No. 68 of 2013*** and therefore has the requisite standing.

E. ISSUES FOR DETERMINATION

[30] From our consideration of the pleadings, the findings of the superior courts below, and the submissions of the parties before us, we consider the following issues as falling for our determination:

- i. Whether this Court has jurisdiction to hear and determine this*

appeal;

- ii. Who as between the estate of Mbarak Awadh Salim (the respondent herein) and the appellant company has a valid title to the Suit Property?*

i. On Jurisdiction

[31] Following the institution of this appeal, the respondent filed a Preliminary Objection challenging the jurisdiction of this Court to hear and determine the appeal. It was the respondent's contention that the appeal did not raise any issues of constitutional interpretation or application as envisaged under Article 163(4) (a) of the Constitution. The reference to Article 40 in its view, was merely tangential, hence not capable of bringing the appeal within the threshold of the court's jurisdiction. The appellant on the other hand, submitted that its appeal falls squarely within the appellate architecture of Article 163 (4) (a) of the Constitution, based on the pronouncements of this Court in a long line of authorities.

[32] In an extensive ruling for stay dated 26th July 2024, delivered in ***Supreme Court Application No. E014 of 2024 Freedom Limited Vs Omar Awadh Mbarak*** and on the basis of reasons stated therein, we held that this Court had jurisdiction to hear and determine the appeal. After hearing the substantive submissions of the parties in support of and opposition to the appeal respectively, we see no reason to depart from our conclusion as pronounced in the said ruling. This, therefore opens the way for us to expend our judicial focus on the determination of the second issue.

ii. Who as between the Estate of Mbarak Awadh Salim and the appellant company, has a valid title to the Suit Property

[33] In determining this question, we remain cognisant of the fact that, this being a second appeal, we are to be guided by the evidence on record, and the law. Indeed, this has been the consistent posture of

this Court in appeals such as this, unless one of the parties, has been allowed to adduce additional evidence in those rare circumstances. Towards this end, it is important to recall that after the filing of this appeal, the appellant herein sought to adduce additional evidence *vide **Petition (Application) No. E009 of 2024***. The Application was however

dismissed in a ruling dated 13th December 2024. In dismissing the application, the Court opined thus:

- 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.***
- iv) ... 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 the 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** [emphasis added].

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.

[34] In keeping with the foregoing ruling, we note that in considering the issue as to who among the parties, had a valid title, the Court of Appeal, being the appellate forum of first instance, re-evaluated the evidence (both documentary and oral) on record. In so doing, the

appellate court took issue with the conclusions of the trial court regarding the authenticity of the appellant's Certificate of Ownership. It is on record that at the behest of the appellant through a constitutional petition, the Chief Land Registrar of Mombasa was ordered to

reconstruct the lands registry records so as to establish the status of ownership of the suit property. It is also on record that the resultant reconstruction was effected based solely on various documents produced by the appellant in the absence and without the knowledge of the respondent.

[35]The Court of Appeal observed that the origin of these documents was never established, yet they yielded a title known as Plot Number 1948 (Original Number 412) Section V Mainland North registered as Mombasa C.R No. 32564 (portion of the suit property); a title that had been issued to the appellant as the indefeasible owner. It is instructive to note that this title could only have come into existence following an excision from, or subdivision of yet another title known as Plot Number 287 of Section V Mainland North situate in the Province of Seyidie at SE of Mazeras Station being CR Number 6302 (suit property). As observed by the Court of Appeal, there was no evidence of such sub-division or excision. Given these findings, the appellate court held that the trial court had acted in error in concluding that the appellant had established the root of its title so as to be declared the indefeasible owner of the suit property.

[36]We have carefully examined the record and considered the Court of Appeal's conclusions. We are in agreement with the appellate court's criticism of the trial court's findings. Why was the reconstruction of the land registry records based solely on documents produced by the appellant, whose origins was never established? It was incumbent upon the trial judge to carefully interrogate the material placed before her, including the counter-claim, before arriving at a momentous conclusion. In view of our impressions and

agreement with the Court of Appeal, and in light of our ultimate determination of this appeal, we shall say no more.

[37]What about the claim to title by the Estate of Mbarak Awadh Salim? The record reveals that the claim is based on an uncompleted sale of Plot Number 287 of Section V Mainland North situate in the Province of Seyidie at SE of Mazeras

Station, being CR Number 6302. As held by the Court of Appeal, based on its re- evaluation of the evidence on record, this Plot was the one from which the now impugned Plot number 1948 was alleged to have been subdivided. It is also on record that the original owner of this plot sold it to the late Mbarak Awadh Salim as evidenced by the Certificate of Transfer. However, the sale was never finalized through registration as the transferee passed away before the same could be done. The late Salim took vacant possession of the same and his family has remained in possession for the last twenty two years. The original Title CR 6302 was produced at both superior courts by the representative of the Estate of Mbarak Awadh Salim. Fundamentally, there is nothing on record to show that this Title was ever subdivided. Nor is there any material on record to show that part of this Plot was ever surrendered to the Government.

[38] Based on the foregoing facts, and its re-evaluation of the evidence before it, the Court of Appeal came to the conclusion that as between the appellant company and the Estate of Mbarak Awadh Salim, it was the latter who had valid title worthy of protection under Article 40 of the Constitution. The appellate court held that, in the circumstances, the legal basis for validation of the respondent's title was the common law *doctrine of Seisin*. The appellant faults the Court of Appeal for relying on such a doctrine to suppress its indefeasible title acquired through registration.

[39] What are we then to make of all this? We have no basis upon which to question the appellate court's conclusions following its evaluation of the evidence. There is nothing on record to show that the court ought to have arrived at a different finding. What we have difficulty with is the court's reliance on the *doctrine of Seisin* as the

basis for validating the respondent's title. Even at common law, the doctrine of seisin long fell into disuse as early as the 19th century at the advent of land registration systems in English property transactions. In its feudal connotation, the doctrine was applied to draw a distinction between

freeholders and leaseholders. In this regard, only a freeholder had *seisin*. A man who was put in *seisin* of land was “set” there and continued to “sit” there. *Seisin* therefore denoted quiet possession of land, but of a particular kind. It meant that a man was “seised” of the land such that he could be said to “own” the land. Although at first the term was applied to the possession of a leaseholder as well as that of a freeholder, during the fifteenth century, it became confined to those who held an estate of freehold. A leaseholder merely had possession; his landlord as the freeholder, was “seised”. Since it was essential that someone should always have *seisin*, it followed that a freeholder remained “seised” even after he had granted a leasehold (a term of years) and given up physical possession of the land.

[40] Thus understood, *seisin* does not mean “physical possession” of land. In general, it was the person seised and he alone, who could exercise an “owners” rights over the land, hence the phrase “*Fee Simple, absolute in possession*”. The Law of Property Act of 1925 simplified the “incidents of tenure” in English property law by providing that henceforth, the only estates in land capable of being conveyed or created in law were two; namely, *Freehold* (an estate in *fee simple, absolute in possession* and *Leasehold* (a term of years *absolute*). *Seisin* is no longer of importance, for the distinctions which gave it its peculiar meaning no longer exist. (See NIGEL P. GRAVELLS, *Land Law: Text and Materials*; London, Sweet and Maxwell 1995; pp 46-47) and MEGARRY & WADE, *The Law of Real Property*; 6Th Ed. Pp 44-46) For all practical intents and purposes, this doctrine is at best, sterile, and at worst, obsolete. It cannot therefore be the legal basis for validating the respondent’s title to the suit property.

[41] In the circumstances, we are faced with a situation where the title produced by the appellant company is of doubtful validity, while the one produced by the respondent is yet to be perfected through registration. To the extent that the claim to the suit property by the Estate of Mbarak Awadh Salim is based on an uncompleted sale, what we are faced with in the circumstances is a registrable but

an unregistered interest in the said property. Therefore, the legal position would be that, the respondent holds only an equitable or beneficial interest in the suit property. Such an interest would be susceptible to a superior claim by *a bona fide purchaser for value without notice* as long as the purchase is not tainted by an illegality. However, the equitable interest can be perfected into a legal estate by completing the registration, barring any legal impediments.

[42] But, as observed by the Court of Appeal, many questions still remain un- answered. The crux of the case is who between the appellant and the respondent is the owner of the suit property. For instance, with different title numbers being submitted by the respective litigants, the ELC proceeded by first making a finding on what amounted to the suit property, affirming the one held by the appellant. On the other hand, the Court of Appeal affirmed the title details as submitted by the respondent, observing that the appellant's portion had been subdivided from the respondent's title under unclear circumstances. In effect, the appellant's details of the property were held to be invalid at the Court of Appeal.

[43] Among the gaps from the record is that, it is not clear who is/was in occupation/possession of the property. One of the prayers sought by the appellant before the Environment and Land Court (ELC) was:

- ii. *A permanent injunction to restrain the respondent whether by himself or through his contractors, employees, servants and/or agents or otherwise howsoever **from interfering with the appellant's proprietary rights and quiet occupation and possession of the property** known as Plot No. 1948 (Original No. 412/20) Section V Mainland North and registered at the Land Titles Registry, Mombasa as C.R.*

No. 32564 or in any manner howsoever else dealing with the said property under the pretext that he has any right or interest therein;

[44] On the other hand, the respondent in his counter-claim sought orders including:

*“Mandatory injunction to compel the appellant by itself, its agents, servants and/or any other person under instructions of the appellant **to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all the materials falling and/or in the alternative the structures be demolished and removed at its cost.**”*

[45] Unlike the ELC judgment, the Court of Appeal analysed the record including the evidence given by one of the respondent’s witnesses who narrates that he worked for the deceased as a caretaker on the suit property, and knew him as the owner. He further averred that; in 2018 the appellant paid them to demolish the houses they had put up on the suit property; that they were forcibly removed and their houses demolished; the appellant interfered with their quiet possession of the suit property; and that it proceeded to put up a fence around it.

[46] The appellate court also pointed out the contradictions at paragraph 11 and

12. It stated:

*“47. How two title numbers are said to relate to the same property **remains unexplained**. We have not been told how this can be in light of the glaring disparity in the original numbers, which ordinarily remains unaltered except, perhaps, by reason of irregularity or other misdealing or infractions in the*

*management of, or mis-dealings in, records relating to the suit property. **Yet those who ought to have explained these puzzling eventualities, such as the County Land Registrars and District Surveyors, did not testify in***

that regard or otherwise feature as parties to the proceedings leading to the impugned judgment.”

[47] As earlier stated, we are in agreement with the appellate court, for having faulted the trial judge for arriving at momentous conclusions based solely on documents produced by the appellant. But we are equally not free from discomfiture, with the Court of Appeal’s conclusion regarding the authenticity of the documents produced by the respondent, in the absence of affirmation by critical offices such as the County Surveyors and Registrars. We also note that one of the appellant’s grounds of appeal is that, the purported sale of the suit property to Salim Awadh, was defeated by failure to obtain the consent of the Land Control Board, pursuant to the provisions of Section 6 of the Land Control Act. Is the suit property “agricultural land” so as to bring it within the purview of the provisions of the Land Control Act? It would appear none of the superior courts addressed this question.

[48] Given these glaring yet unanswered questions, we find ourselves unable to arrive at definitive conclusions regarding the nature, and ownership of the suit property. It bears repeating that the Court of Appeal itself acknowledged these factual lacunae. In the circumstances, and in the interests of justice for both parties, it is inevitable that this dispute be remitted to the court of first instance, i.e, the Environment and Land Court for rehearing and determination guided by the following questions:

- (i) What is the current legal status of Plot Number 287 of Section V Mainland North Situate in the Province of Seyidie at SE of Mazeras Station being CR Number 6302?

(ii) At what stage and through what legal process did the respondent (deceased) come into vacant possession of the suit property and for how long?

- (iii) When, if at all, and through what legal process was the suit property subdivided, surrendered to the Government, and/ or transferred to the appellant?
- (iv) When, if at all, did those who are said to have transferred the suit property to the appellant, and through what legal process, acquire the same?
- (v) What is the explanation for the existence of two different title numbers relating to the same property?
- (vi) Is the suit property agricultural land, within the meaning of the Land Control Act?

[49] In seeking answers to the foregoing questions, the trial court should endeavour to diligently call for and examine evidence, both oral and documentary, from all the relevant Public Offices. We therefore make the following consequential orders:

F. ORDERS

- i) *The Appeal dated 20th March 2024 is hereby dismissed.***
- ii) *The Judgment of the Court of Appeal dated 23rd February 2024 is hereby partially confirmed in view of the observations in paragraphs 36, 42 and 47 of this Judgment.***
- iii) *The case is hereby remitted to the Environment and Land Court for re-hearing and determination on a priority basis, before a different Judge of the court, other than N. Matheka, J.***

JUSTICE OF THE SUPREME COURT

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

**REGISTRAR
SUPREME COURT OF KENYA**