Dari Limited & 5 others v East African Development Bank (Petition (Application) E012 of 2023) [2024] KESC 18 (KLR) (Civ) (26 April 2024) (Ruling)

Neutral citation: [2024] KESC 18 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

PETITION (APPLICATION) E012 OF 2023

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ

APRIL 26, 2024

BETWEEN

DARI LIMITED .... 1ST PETITIONER

RAPHAEL TUJU .... 2ND PETITIONER

MANO TUJU .... 3RD PETITIONER

ALMA TUJU .... 4TH PETITIONER

YMA TUJU .... 5TH PETITIONER

SAM COMPANY LIMITED .... 6TH PETITIONER

AND

EAST AFRICAN DEVELOPMENT BANK .... RESPONDENT

(Being applications for leave to adduce additional evidence and to strike out the Respondent's Replying Affidavit sworn by Carol Luwaga on 31st January 2024)

Grant of leave to adduce additional evidence had not been satisfied
The suit involved an application for leave to adduce additional evidence and an application to strike out a response for being filed outside the stipulated statutory timelines. The court held that it was apparent that the petitioners, dissatisfied with the Supreme Court's ruling that declined to strike out the respondent's replying affidavit, sought, rather ingeniously, a second bite of the cherry through the instant application. The further witness statement they sought to introduce was intended to counter the averments made in that affidavit. Grant of leave to adduce additional evidence had not been satisfied. The court found it inappropriate to strike out the respondent's response for being filed 4 hours and 40 minutes after the Court's stipulated time of 9.00 am.

Reported by Robai Nasike

Civil practice and procedure *– pleadings – filing of additional evidence – seeking leave to adduce additional evidence before the Supreme Courts – guidelines to be considered before an application to adduce additional evidence is allowed – whether the application to adduce additional evidence met the legal threshold set by the Supreme Court, hence it ought to be allowed – Supreme Court Act, section 20 (2)*

Civil practice and procedure *– limitation of time – time within which to file a response to an interlocutory application – where the response to an interlocutory application was filed 4 hours after the stipulated time – whether a response to an interlocutory application filed outside time, by a margin difference of approximately 4 hours, ought to be struck out – Supreme Court Rules, rule 31 (4)*

Brief facts

Before the Supreme Court were two notices of motion applications filed by the petitioners. The first application sought leave to adduce additional evidence while the second one sought to strike out the respondent's replying affidavit sworn by Carol Luwaga on January 31, 2024 in response to the petitioners' first application.

On the first application, the petitioners affirm that the further witness statement adduced by the respondents was not within their knowledge and allowing additional evidence from the petitioner would remove the vagueness of the slanted historical narrative contained in the respondent's response.

On the second application, the petitioners contended that they effected service of their application to adduce additional evidence upon counsel on record for the respondent on January 30, 2024 at 8. 30AM in compliance with the Court's directions issued on January 29, 2024. That the respondent without any justifiable cause and in total disregard of the Court's directions purported to effect service of its unfiled response upon the petitioners electronically on February 1, 2024 at 11. 43AM; then proceeded to attempt to serve their duly filed response together with their submissions upon the petitioners on the same day at 1:40PM, which was 4 hours and 40 minutes after the Court's stipulated time of compliance, that was 9.00AM on even date. Pursuant to rule 12 as read with rule 16 of the Supreme Court Rules, filing was only deemed to be completed upon the actual filing of documents and / or pleadings both physically and electronically. The respondent neither provided viable reasons as to the non – compliance nor was leave sought to file its response out of time; therefore, the only redress to maintain the sanctity of the Supreme Courts' records was striking out the response.

Issues

i. Whether the application to adduce additional evidence met the legal threshold set by the Supreme Court, hence it ought to be allowed.

ii. Whether a response to an interlocutory application filed outside time, by a margin difference of approximately 4 hours, ought to be struck out.

Held

1. Whereas rule 31 (4) of the Supreme Court Rules stipulated that a response to the interlocutory application together with written submissions shall be filed and served within seven days, Rule 3 (5) affirmed the unlimited inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
2. The first application dated January 26, 2024, for adducing additional evidence, was filed under certificate of urgency and certified as such by the duty judge necessitated the Deputy Registrar to issue the directions of January 29, 2024 to facilitate its expeditious disposal in line with rule 3(5) thereby varying the time provided under rule 31 (4). The Court may vary that time frame as provided under rule 3(5) to succor the furtherance of expeditious administration of justice.
3. It was not appropriate to strike out the respondent's response for being filed 4 hours and 40 minutes after the Court's stipulated time of 9.00am. The respondent used best efforts under the circumstances with part of the delay being attributable to the Judiciary e -filing system, a fact which was uncontroverted.

4. Conversely, the petitioners alleged that there was no evidence that the deponent of the respondent's response, who was a resident of Uganda, was in Nairobi at the time neither was the signature witnessed by a Ugandan Notary Public. It was trite law that whoever alleged must prove. In the instant, case the petitioners who had alleged had not validated their averments with any proof to justify their allegations. Therefore, those were bare allegations that were unsubstantiated.
5. The governing principles on the Supreme Court's jurisdiction to grant leave to adduce additional evidence was laid down in case law and later incorporated under section 20 (2) of the Supreme Court Act. The Court, in admitting additional evidence, shall consider whether the additional evidence –
    1. was directly relevant to the matter before the Court;
    2. was capable of influencing or impacting on the decision of the Court;
    3. could not have been obtained with reasonable diligence for use at the trial;
    4. was not within the knowledge of the party seeking to adduce the additional evidence;
    5. removed any vagueness or doubt over the case;
    6. was credible and bore merit;
    7. would not make it difficult or impossible for the other party to respond effectively; and disclosed a case of wilful deception to the Court.
6. It was not in dispute that the further witness statement that sought to be adduced propounded the history of engagements between those parties and the nature of the Facility Agreement. The petitioners alleged that the further witness statement would clear the conflicting factual contestations between the parties. As a matter of course, the petitioners had not explained the relevance of the further witness statement in relation to their appeal. It was apparent that the petitioners, dissatisfied with the Supreme Court's ruling that declined to strike out the respondent's replying affidavit, sought, rather ingeniously, a second bite of the cherry through the instant application. The further witness statement that they sought to introduce was intended to counter the averments made in that affidavit. Grant of leave to adduce additional evidence had not been satisfied.
7. Costs follow the event. The party in default in instituting the appeal shall be liable to pay the costs arising. Since the substantive dispute was still pending, it was only proper that the costs abide the outcome of the appeal.

Orders

i. *The notice of motion dated and filed on January 26, 2024 was dismissed.*
ii. *The notice of motion dated and filed on February 2, 2024 was dismissed.*
iii. *Costs of the applications shall abide the outcome of the appeal.*

Citations

Cases

Kenya

1. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Petition 15 of 2020; [2023] KESC 14 (KLR) - (Mentioned)
2. *Kanyuira v Kenya Airports Authority* Petition 7 of 2017; [2022] KESC 30 (KLR) - (Mentioned)
3. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014; [2014] eKLR - (Explained)
4. *Mini Cabs & Tours Company Limited v Attorney General, Inspector General & 2 others* [2022] KEHC 11207 (KLR) - (Mentioned)
5. *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* Petition 7 of 2018; [2018] eKLR - (Mentioned)
6. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] KESC 2 (KLR) - (Mentioned)
7. *Nairobi Bottlers Limited v Ndung'u & another* Application E030, E034 & E038 of 2023 (Consolidated); [2023] KESC 96 (KLR) - (Mentioned)

8. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR) - (Mentioned)
9. *Sonko v Clerk, Nairobi City County Assembly & 11 others* Petition 11(E008) of 2022; [2022] KESC 27 (KLR) - (Mentioned)

United Kingdom

TUI UK Ltd (Respondent) v Griffiths (Appellant) [2023] UKSC 28 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 25, 50(1)(2)(k) - (Interpreted)
2. Supreme Court Act (cap 9B) sections 3A, 20 - (Interpreted)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 3, 12, 15(1); 16, 26, 31(4); 32; 46(2) - (Interpreted)

Advocates

Mr Paul Muite, Senior Counsel and Mr Nyamodi for applicants
Prof Githu Muigai Senior Counsel, Mr Wakhisi and Mr Nkarichia for respondent

RULING

Representation:

Mr Paul Muite, SC and Mr Nyamodi for the Applicants (VA Nyamodi & Co Advocates)

Prof Githu Muigai SC, Mr Wakhisi and Mr Nkarichia for the Respondent (Mohammed Muigai LLP)

1. Before this Court are two notices of motion applications filed by the petitioners. The first application seeks leave to adduce additional evidence while the second one seeks to strike out the respondent's replying affidavit sworn by Carol Luwaga on January 31, 2024 in response to the petitioners' first application. The correlation of the applications, as will be seen, has necessitated joint disposition in this composite ruling to ensure judicious use of time.

a. First Application

2. In the notice of motion dated January 26, 2024 and filed on even date pursuant to rules 3, 26 and 32 of the *Supreme Court Rules*, sections 3A and 20 of the *Supreme Court Act* and articles 50 (1) and (2) (k) of the Constitution of Kenya, the petitioners seek, *inter alia*, leave to adduce as additional evidence for purposes of the hearing and determination of the appeal, a further witness statement recorded with the Directorate of Criminal Investigation (DCI) by one David Washington Barnabas Ochieng (hereinafter David) dated 21st December, 2023 .
3. The application is predicated on the 2nd petitioner's affidavit sworn on January 26, 2024 and written submissions dated and filed on January 26, 2024.
4. The petitioners contend that upon complying with the requisition to compel attendance issued by the DCI and served on the 2nd, 3rd, 4th and 5th petitioners, they were furnished with copies of statements and documents collected in the course of investigation into their alleged criminal conduct, upon their request. This included copies of witness statements by Justa Kiragu, Isaac Nyongesa Okwara, and David. The petitioners argue that in David's further witness statement, he retracts his earlier assertions as captured in his prior witness statement and corroborates the petitioners' position on the nature of the Facility Agreement as well as the history of engagements between the parties. That the conflicting factual positions

as contained in the replying affidavit sworn by one Justa Kiragu on 12th May 2023 as the respondent's response, particularly at paragraphs 10, 11 and 19, alongside David's further witness statement necessitates that both positions be presented to this Court for scrutiny, analysis and interrogation for purposes of hearing and determining the Petition of Appeal to obviate any possibility of violating the petitioners' rights under article 50 (1) and 2 (k) of the *Constitution*. Otherwise, that the respondent's false and inaccurate averments would remain uncontroverted and unchallenged. They affirm that the further witness statement was not within their knowledge and will remove the vagueness of the slanted historical narrative contained in the respondent's response.

5. It is the petitioners' contention that their application satisfies all the requirements set out under section 20(2) of the *Supreme Court Act* adding that if allowed, no disadvantage would accrue to the respondent as enunciated in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*; SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR; in that instance, this court may ensure that any chance to challenge the evidence would be accorded so as not to prejudice any party as expressed in *TUI UK Ltd (Respondent) v Griffiths (Appellant)* [2023] UKSC 28. That being so, the respondent would have no difficulty in responding to the evidence as the document being adduced runs only up to four pages which lays bare the respondent's attempt to deceive this Court as to the true nature of the relationship between the parties. Consequently, in support thereof, the petitioners cite *Kanyuira v Kenya Airports Authority* (Petition 7 of 2017) [2021] KESC 7 (KLR) (Civ) (8 October 2021) (Ruling) urging that it would be in the best interest for this Court to allow the application.

6. In response and in opposition to the application, the respondent filed a replying affidavit sworn on January 31, 2024 by Carol Luwaga, senior legal officer employed by the respondent; and written submissions dated January 31, 2024 and filed on 1st February 2024.

7. The respondent argues that by the Court declining to strike out the replying affidavit sworn by Justa Kiragu *vide* its Ruling dated November 7, 2023, the same issue has been replicated in the present application challenging paragraphs 10, 11 and 19 of the said replying affidavit, which merely gives a historical account and background of events which preceded the execution of the Facility Agreement. The respondent asserts that the further witness statement concerns pre-contractual engagements which are immaterial; and in any event, all the issues concerning and in relation to the Facility Agreement are *res judicata* having been fully resolved by the English courts. Furthermore, there has been no demonstration on the relevance of the evidence in the further witness statement if adduced, and how it will influence or impact the result of the verdict in the Petition; and remove any vagueness or doubt. Consequently, that the document has not satisfied the requisite threshold to be adduced as additional evidence as expressly provided under section 20 of the *Supreme Court Act* as read together with rule 26 of the *Supreme Court Rules* and in consideration of this court's decision of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR.

8. Moreover, the respondent submits that in so far as credibility and capability of the further witness statement is concerned: it is a personal statement that has not been demonstrated to have been made on behalf of or on authority of the respondent; the same has been made in the course of ongoing criminal investigations which has not been demonstrated to have been concluded and prosecution commenced by the Director of Public Prosecution; and bearing in mind that at the investigations stage, a party subject to investigations is not entitled to the documents and information during the information stage other than the said party being informed of the case and charge against it as highlighted in *Mini Cabs & Tours*

Company Limited vs. Attorney General, Inspector General, National Police Service and Director of Criminal Investigation [2022] KEHC 11207 (KLR) then any formal supply of documents whilst investigations are ongoing is premature and irregular.

9. Furthermore, the respondent argues that this courtlacks the constitutional and statutory jurisdiction to interrogate and or consider the further witness statement since the document does not disclose an issue of constitutional interpretation within the purview of this Court's appellate jurisdiction under article163(4)(a) of the *Constitution* as read together with section 15A of the *Supreme Court Act*. It relies on *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) and *Mike Mbuvi Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) to bolster their argument. Subsequently, the respondent submits that the application lacks merit and ought to be dismissed with costs.

b. Second Application

10. In the notice of motion dated 2nd February 2024 and filed on even date pursuant to rules 31 and 40 (3) of the *Supreme Court Rules*, section 3A of the *Supreme Court Act* and all enabling provisions of the law the petitioners seek amongst other orders, that this Court strikes out the respondent's replying affidavit sworn on January 31, 2014 by Carol Luwaga (hereinafter referred to as the respondent's response) filed in response to the petitioners' application to adduce additional evidence; and in striking it out, issue a ruling on the petitioners' application to adduce additional evidence.

11. The application is grounded on the supporting affidavit of Raphael Tuju sworn on February 2, 2024; and written submissions dated and filed on February 2, 2024.

12. The petitioners contend that they effected service of their application to adduce additional evidence upon counsel on record for the respondent on January 30, 2024 at 8. 30am in compliance with the Court's directions issued on 29th January 2024. That the respondent without any justifiable cause and in total disregard of this Court's directions purported to effect service of its unfiled response upon the petitioners electronically on 1st February, 2024 at 11. 43am; then proceeded to attempt to serve their duly filed response together with their submissions upon the petitioners on the same day at 1:40pm, which was 4 hours and 40 minutes after the Court's stipulated time of compliance, that is 9.00am on even date. Pursuant to rule 12 as read with rule 16 of the *Supreme Court Rules* and as enunciated in Hon. *Mike Mbuvi Sonko vs. The Clerk, County Assembly of Nairobi & 11 others*, Petition (Application) No. 11 (E008) of 2022 filing is only deemed to be completed upon the actual filing of documents and / or pleadings both physically and electronically. The respondent neither provided viable reasons as to the non – compliance nor was leave sought to file its response out of time; therefore, the only redress to maintain the sanctity of this Courts' records is striking out the response. They rely on the decision in *Nairobi Bottlers Limited v Mark Ndumia Ndung'u & another*, SC Application Nos E030, E034 & E038 of 2023 to support this contention.

13. Moreover, the petitioners further contend that the respondent's response in the form of a replying affidavit sworn by Carol Luwaga, a resident of Kampala, Uganda is incompetent. This is because it was purportedly sworn in Nairobi before a Commissioner for Oaths without any evidence that the deponent was in Nairobi at the time. In addition, the signature of the deponent is not witnessed by a Ugandan Notary Public. That these are sufficient reasons to strike out the respondent's response as it would be prejudicial and unfair to determine the petitioners' application with the affidavit on record.

14. The respondent opposes the application through the replying affidavit sworn on February 14, 2024 by Carol Luwaga; and written submissions dated February 14, 2024 and filed on February 15, 2024.

15. The respondent argues that their advocates were physically served with *ex parte* directions of the court made on January 29, 2024, application and submissions on the evening of January 30, 2024, and not at 8.30am as claimed. According to these Directions, the respondent was expected to have the remainder of 30th and the whole of 31st January 2024, to prepare its response. The timeframe of less than two days, which is an extremely short period and contrary to the leave expressly provided in rule 31(4) of the *Supreme Court Rules, 2020*, the respondent managed to file electronically its response on February 1, 2024 at 11.02am due to challenges in accessing the Judiciary e- filing portal for purposes of filing; however, once the replying affidavit and submissions were filed, service was effected electronically by email on the petitioners' advocates at 11:43am on February 1, 2024 and attempted physical service of the said documents at the petitioners' advocates chambers at 1:40 pm on the same day at which point the petitioners' advocates declined to accept physical service.

16. The respondent submits that there is a real danger that its right to a fair hearing would be severely impeded and breached in the event this courtrejected its replying affidavit and written submissions which are properly on record having been filed in time as per rule 31 (4) of the Supreme Court Rules; owing to the fact that no prejudice has been demonstrated to have been suffered by the petitioners as a consequence of the service of the respondent's replying affidavit. As elucidated in *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, the respondent affirms that this court recognised the importance of the Court's Rules and the obligation of a party to comply with the same; therefore, for all intents and purposes, these documents as filed by the respondent's advocates are properly on record having been filed within the time prescribed by the Rules.

17. Moreover, the respondent contends that there is a real danger in striking out the replying affidavit as key issues will be left unaddressed; if the application is allowed the consequence will be that the further witness statement is likely to be admitted into the record of this Court for purposes of the determination of the Petition. In addition, that there is no requirement whatsoever in law which requires proof of physical location of a deponent who has sworn an affidavit; and that it is preposterous for the petitioners to now hinge on the circumstances of the execution of the replying affidavit by Carol Luwaga sworn on 31st January 2024. Accordingly, the application lacks merit and ought not to be allowed.

18. In rejoinder, the petitioners filed an affidavit sworn on February 21, 2024 by the 2nd petitioner; and written submissions dated February 21, 2024, and filed on February 22, 2024. The petitioners in rehashing the averments they had earlier submitted added that the respondent's reasons cannot be sustained as the same are being raised too late in the day. Furthermore, it is untrue, false and misleading allegation that the petitioners effected service in the evening of 30th January 2024. The petitioners aver that they effected electronic service upon the respondent at 6. 19 pm on 29th January 2024 and then the following day on 30th January 2024 effected physical service; the same was not raised when the parties appeared in Court on February 2, 2024 before the Hon. Deputy Registrar. The petitioners submit that under rule 3(5) as read with rule 15(1) (c) of the *Supreme Court Rules*, this Court has inherent and unencumbered powers to apply its discretion and give directions that would best enable it to exercise its duties, timelines laid down by this Court's Rules notwithstanding; therefore, the respondent's lament as to the unfairness

of the court directions for their supposed deviation from Rule 31 is therefore, respectfully misguided.

19. Cognizant of the Deputy Registrar's directions of January 29, 2024 as reproduced below:

> " The notice of motion dated January 26, 2024 having been certified as urgent by the duty judge, I issue the following directions;
>
> 1. The notice of motion dated January 26, 2024 and the written submissions to be served upon the respondent by 9.00 am of January 30, 2024.
> 2. The respondent to file and serve a response together with written submissions by 9.00 a.m. of February 1, 2024.
> 3. The petitioners/applicants are at liberty to file and serve a rejoinder (if need be) which may include supplementary submissions upon service of the respondent's response and submissions by 9.00 a.m. of February 2, 2024.
> 4. Documents to be filed both electronically and by way of hard copies (8 copies).
> 5. There be a virtual mention on Friday February 2, 2024 at 9.00 a.m. before the Honourable Deputy Registrar of the Court for compliance."

20. Considering the foregoing, we hold the considered view that it is apposite to deal with the striking out of the respondent's response to the petitioners' application to adduce additional evidence first, for its seminal connection with the latter application. Having considered the applications and responses before us, We now opine as follows:

    i. Whereas rule 31(4) of the *Supreme Court Rules* stipulates that a response to the interlocutory application together with written submissions shall be filed and served within seven days, rule 3(5) affirms the unlimited inherent power of the court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the court.

    ii. The first application dated January 26, 2024, for adducing additional evidence, was filed under certificate of urgency and certified as such by the duty judge necessitated the Hon Deputy Registrar to issue the directions of January 29, 2024 to facilitate its expeditious disposal in line with rule 3(5) thereby varying the time provided under rule 3(4), the Court may vary this time frame as provided under rule 3(5) to succour the furtherance of expeditious administration of justice.

    iii. We do not find it appropriate to strike out the respondent's response for being filed 4 hours and 40 minutes after the Court's stipulated time of 9.00am. We are persuaded that the respondent used best efforts under the circumstances with part of the delay being attributable to the Judiciary e -filing system, a fact which is uncontroverted.

    iv. Conversely, the petitioners alleged that there is no evidence that the deponent of the respondent's response, who is a resident of Uganda, was in Nairobi at the time neither was the signature witnessed by a Ugandan Notary Public. It is trite law that whoever

alleges must prove, in this case the petitioners who have alleged have not validated their averments with any proof to justify their allegations. Therefore, these are bare allegations that are unsubstantiated and we say no more.

v. Turning to the application for leave to adduce additional evidence, this court settled the law on its jurisdiction to grant leave to adduce additional evidence and laid down the governing principles in the *Mohamed Abdi Mahamad* case *supra* which are now incorporated under section 20(2) of the *Supreme Court Act* as follows:

> "The Court, in admitting additional evidence, shall consider whether the additional evidence –
>
> i. is directly relevant to the matter before the Court;
>
> ii. is capable of influencing or impacting on the decision of the Court;
>
> iii. could not have been obtained with reasonable diligence for use at the trial;
>
> iv. was not within the knowledge of the party seeking to adduce the additional evidence;
>
> v. removes any vagueness or doubt over the case;
>
> vi. is credible and bears merit;
>
> vii. would not make it difficult or impossible for the other party to respond effectively; and discloses a case of wilful deception to the Court."

vi. Applying these principles to the application, it is not in dispute that the further witness statement that seeks to be adduced propounds the history of engagements between those parties and the nature of the Facility Agreement. The petitioners allege that the further witness statement will clear the conflicting factual contestations between the parties. From our ruling dated October 6, 2023 we pronounced that:

> "The applicants hinge their appeal on the question of recognition and enforcement of foreign judgments in Kenya that violate article 50 as read with article 25 of the Constitution. This is an issue that has transcended through the superior courts below as the petitioners pursued their quest to set aside the adoption of a foreign judgment as a judgment of the High Court of Kenya."

vii. As a matter of course, the petitioners have not explained the relevance of this further witness statement in relation to their appeal. In our view, it is apparent that the petitioners, dissatisfied with our ruling dated November 7, 2023 declining to strike out the respondent's replying affidavit sworn by Justa Kiragu, now seek, rather ingeniously, a second bite of the cherry through this application as the further witness statement that they seek to introduce is intended to counter the averments made in Justa Kiragu's affidavit.

viii. In conclusion, we inevitably find that grant of leave to adduce additional evidence has not been satisfied.

ix. On the issue of costs, bearing in mind that costs follow the event as enunciated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR and rule 46(2)

that the party in default in instituting the appeal shall be liable to pay the costs arising; since the substantive dispute is still pending, it is only proper that the costs abide the outcome of the appeal.

21. Consequently, and for the reasons aforesaid we make the following orders:

i. The notice of motion dated and filed on January 26, 2024 is hereby dismissed.

ii. The notice of motion dated and filed on February 2, 2024 is hereby dismissed.

iii. Costs of the applications shall abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

..

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

..

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a

a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA