Fanikiwa Limited v Sirikwa Squatters Group & 20 others (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 57 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KESC 57 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 32 (E036) & 35 (E038) OF 2022 (CONSOLIDATED)

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

JUNE 16, 2023

BETWEEN

FANIKIWA LIMITED ..... PETITIONER

AND

SIRIKWA SQUATTERS GROUP ..... 1ST RESPONDENT

THE COMMISSIONER OF LANDS ..... 2ND RESPONDENT

THE CHIEF REGISTRAR OF TITLES ..... 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 4TH RESPONDENT

DIRECTOR OF SURVEY ..... 5TH RESPONDENT

DISTRICT LAND OFFICER, UASIN GISHU DISTRICT ..... 6TH RESPONDENT

LONRHO AGRI BUSINESS (EA) LTD ..... 7TH RESPONDENT

MARK KIPTARBEI TOO ..... 8TH RESPONDENT

DAVID KORIR ..... 9TH RESPONDENT

HIGHLAND SURVEYORS ..... 10TH RESPONDENT

KENNEDY KUBASU ..... 11TH RESPONDENT

AHMED FEREJ & 60 OTHERS ..... 12TH RESPONDENT

RICHARD KIRUI & 15 OTHERS ..... 13TH RESPONDENT

STANBIC LIMITED ..... 14TH RESPONDENT

KENYA COMMERCIAL BANK LTD ..... 15TH RESPONDENT

ECO BANK LIMITED ..... 16TH RESPONDENT

MILLY CHEBET ..... 17TH RESPONDENT

NATIONAL BANK OF KENYA ..... 18TH RESPONDENT

KENYA WOMEN MICRO-FINANCE BANK ..... 19TH RESPONDENT

COMMERCIAL BANK OF AFRICA ..... 20TH RESPONDENT

CO-OPERATIVE BANK OF KENYA ..... 21ST RESPONDENT

(Being an application for admission of additional evidence in Petition No. 32 (E036) of 2022 consolidated with Petition No. 38 (E038) of 2022 pending the hearing and determination of an appeal from the judgment of the Court of Appeal at Eldoret in Civil Appeal 45 & 44 of 2017 (consolidated) P.O Kiage, K.M'inoti & M.Ngugi JJ.A delivered on 18th November 2022.)

Principles governing admission of additional evidence in appellate courts

The application sought for admission of additional evidence to be adduced by the applicant. The court highlighted the principles governing admission of additional evidence in appellate courts.

Reported by Kakai Toili

Evidence Law *– evidence - admission of evidence – admission of additional evidence in appeals - what were the principles governing admission of additional evidence in appellate courts.*

Brief facts

The application was filed by the appellant (applicant) and sought for among other orders; that the court admit additional evidence to be adduced by the applicant. The application was premised on the grounds that the trial court issued an order to cancel the proprietorship of the 7th respondent, in respect to the suit properties and also ordered that the title deeds for those parcels be issued to the 1st respondent. It was stated that the suit properties were awarded to the 1st respondent on the basis that the 7th respondent had surrendered the parcels to the Government for onward settlement of the 1st respondent's members.

The applicants claimed that the decision by the trial court was founded upon a perceived legitimate expectation purportedly arising from a letter by the Director of Land Adjudication and Settlement and an approval by the late President Moi. The applicant claimed that the Court of Appeal held that: the 1st respondent was indubitably entitled to the suit properties on the basis of express conferment by the 7th respondent and that the express conferment alluded to was a letter by the General Manager of the 7th respondent of the suit properties.

According to the applicants, the additional evidence sought to be introduced related to; whether the 7th respondent could have surrendered land which had already been sold and transferred to purchasers; and whether the co-administrator of the estate of the 8th respondent was the chairman of the 7th respondent at the time of the sale agreement dated September 30, 2003. The applicants further claimed that the additional evidence could not have been tendered earlier for the reasons that the applicant was not a party in the trial court.

Issues

What were the principles governing admission of additional evidence in appellate courts?

Held

1. The court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence. The principles governing admission of additional evidence in appellate courts in Kenya were as follows;
    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 needed not be decisive;
    c. it was 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 removed any vagueness or doubt over the case and had a direct bearing on the main issue in the suit;
    e. the evidence must be credible in the sense that it was 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 was an essential consideration to ensure fairness and due process;
    h. where the additional evidence disclosed a strong *prima facie* case of willful deception of the court;
    i. the court must be satisfied that the additional evidence was 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 had 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 would consider the proportionality and prejudice of allowing the additional evidence. That required 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.
2. The court would only allow additional evidence on a case-by-case basis and even then, sparingly with abundant caution. Even though it had been deposed that the evidence to be tendered was neither bulky nor argumentative and that it was specific, direct and extremely concise, that evidence had not been produced thus the court was left merely speculating as to its contents.
3. The additional evidence outlined in the 7th respondent's General Manager's affidavit was a letter dated November 9, 2000 (the letter), from him to the Chairman of the 1st respondent requesting him to pursue the surrender by the 7th respondent of the titles to the suit properties with the relevant Government ministry for the final resettlement of the squatters, relied on by the appellate court. That letter formed part of the court record. It was nonetheless deponed that the letter was a forgery.
4. Both superior courts relied on the letter to make a finding that the 1st respondent was entitled to the five properties on the basis of express conferment by the 7th respondent. The letter had been a running theme in both superior courts, it was the first time a claim of forgery was being made with regards to it. Even though the applicant was not a party in the trial court, the 7th respondent and the former employer of 7th respondent's General Manager, had been a party in the matter since the trial court and had never raised the issue of the letter being a forgery. The court could not fathom why the applicant would wait until the 11th hour to make that claim. As such, the court was not convinced that the evidence could not be adduced earlier.

5. The issue of surrender of the properties was a common thread in the matter and the 7th respondent had been a party from the onset of the matter at the trial court. Accordingly, the court was unconvinced that the additional evidence sought to be adduced by the applicant was not being utilized for the purpose of removing *lacunae* and filling gaps in evidence. As such, the application was an attempt by the applicant to make a fresh case in the petition. The applicant had not met the threshold for the grant of an order for admission of additional evidence.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

1. Chris Munga N Bichage v Richard Nyagaka Tong'i, Independent Electoral and Boundaries Commission & Robert K Ngeny (Petition 17 of 2014; [2015] KESC 5 (KLR)) — Mentioned
2. Cyrus Shakhalaga Khwa Jirongo v Soy Developers Limited, Sammy Boit Arap Kogo, Antoinette Boit, Attorney General, Director of Public Prosecutions, Director of Criminal Investigations, Inspector General of Police, Chief Magistrates Court, Nairobi, Deposit Protection Fund (as Liquidator of Post Bank Credit Ltd) & ASL Limited (Petition 38 of 2019; [2020] KESC 38 (KLR)) — Mentioned
3. Deynes Muriithi & 4 others vs Law Society of Kenya & another (Civil Application 12 of 2015) — Mentioned
4. Evans Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 Others (Petition 18 & 20 of 2014) — Mentioned
5. Kanyuira v Kenya Airports Authority (Petition 7 of 2017; [2021] KESC 7 (KLR)) — Mentioned
6. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral and Boundaries Commission (Election Appeal 2 of 2018; [2018] KECA 677 (KLR)) — Explained
7. Raila Amollo Odinga & anor vs IEBC & others (Petition 5, 3 & 4 of 2013 (Consolidated)) — Mentioned
8. Attorney General vs Paul Kawanga Ssemwogerere & another ([2004] UGSC 3) — Mentioned
9. Sanjay Kumar Kanani v Nisha Shah & Sujay Shah (Environment & Land Case 1192 of 2013; [2022] KEELC 1654 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) — article 10, 20, 24, 25, 159,259 — Interpreted
2. Registration of Titles Act (Repealed) (cap 281) — section 44 — Interpreted
3. Supreme Court Act (No. 7 of 2011) — section 20,21 — Interpreted
4. Supreme Court Rules (No. 7 of 2011 Sub Leg) — rule 3,6,26 — Interpreted

Advocates

Ngatia & Associates Advocates for Applicant
Arusei & Company Advocates for 1st Respondent

RULING

A. Introduction

1. The notice of motion before the court is dated January 9, 2023 and filed by the appellant, Fanikiwa Limited, pursuant to articles 10, 20, 24, 25, 159 and 259 of the *Constitution*, sections 20 and 21 of the *Supreme Court Act* and rules 3 and 26 of the *Supreme Court Rules* and prays for orders that;

    i. That this honourable court do admit additional evidence to be adduced by the appellant as outlined in the affidavits by Sophia Chemengen Too and Jeremy Paul Henry Hulme in such manner as this court may direct and/or direct that the evidence of Sophia Chemengen Too and Jeremy Paul Henry Hulme be taken by the trial court or the Registrar of this court;

    ii. That the costs of this application be in the cause.

2. The application is supported by the affidavit of Sophia Chemengen Too, co-administrator of the estate of the 8th respondent Mark Kiptarbei Too, a former director of the applicant, and is premised on the following, summarized, grounds:

    i. That the Judgment delivered on February 9, 2017 by the Environment and Land Court, at Eldoret, in Constitutional Petition No 4 of 2016, issued an order to cancel the proprietorship of Lonrho Agribusiness (EA) Ltd, the 7th Respondent, in respect to title numbers 9606, 9607, 9608, 745, 745/2, 7739/7R, 12398, 10793 and 10794 (hereinafter the suit properties) and also ordered that the title deeds for these parcels be issued to the 1st respondent, Sirikwa Squatters Group.

    ii. That the suit properties were awarded to the 1st respondent on the basis that the 7th respondent had surrendered the parcels to the Kenya government for onward settlement of the 1st respondent's members.

    iii. That the decision by the trial court was founded upon a perceived legitimate expectation purportedly arising from "a letter dated October 11, 2001 by the Director of Land Adjudication and Settlement" and "an approval by the late President Moi on October 28, 1998".

    iv. That the trial court further ordered "cancellation of all resultant titles or any title issued and/or emanating" from the suit properties. That this order annulled the titles to the properties lawfully purchased by the applicant by way of a Sale Agreement dated September 30, 2003.

    v. That the applicant was not a party before the trial court but subsequently lodged an appeal before the Court of Appeal challenging the decision of the trial court.

    vi. That the Court of Appeal by a judgment delivered on November 18, 2022 held that: the 1st respondent "was indubitably entitled to the five properties on the basis of express conferment by Lonrho Agribusiness (EA) Ltd;" that the express conferment alluded to is a letter by Jeremy Paul Henry Hulme,

the General Manager of the registered owner of the suit properties and; that "Mr. Hulme had power and authority to surrender the land and specify the purpose of the surrender"; that the "the true basis of Sirikwa's claim is the voluntary surrender of these parcels by the registered owner, not the approval or concurrence by the former President".

vii. That Mr. Hulme did not testify in the superior courts and the conclusion reached by the Court of Appeal was not based on any evidence.

viii. That the additional evidence sought to be introduced relates to; whether Lonrho Agribusiness (EA) could have surrendered land which had already been sold and transferred to purchasers; and whether Mr Too was Chairman of Lonrho Agribusiness (EA) at the time of the Sale Agreement dated September 30, 2003.

ix. That the additional evidence could not have been tendered earlier for the reasons that the appellant was not a party in the trial court, had no notice that the constitutional right to its properties were at risk of impeachment; that the focal point before the trial court was whether the land was surrendered to the Kenya government for settlement of the 1st respondent's members not conferment by Mr Hulme and that the evidence of Mr Hulme became a core issue due to the determination by the Court of Appeal.

x. That the evidence to be tendered is specific, direct, concise, and not argumentative; that the evidence could not be adduced earlier; and the evidence has only been established after the Court of Appeal judgment where the evidence of Mr Hulme became a core issue for determination.

xi. That the evidence will be beneficial for the court to render a judgment that is fair and just to both the parties herein and the numerous land owners whose ownership is impacted by the judgment.

xii. That no prejudice will occur to any party.

xiii. That the court has discretion to admit additional evidence and for this discretion to be exercised in the appellant's favour for substantive justice to be advanced.

3. Sophia Chemengen Too's supporting affidavit sworn on January 11, 2023 states that the additional evidence the applicant seeks admitted relates to four distinct issues namely:

a. Evidence by Mr Jeremy Hulme to the effect that he did not write or sign the letter dated November 9, 2000.

b. Evidence by Mr Jeremy Hulme that the surrender of the leasehold titles under Registration of Titles Act (RTA) was in consideration of Lonrho Agribusiness (EA) Ltd obtaining freehold titles under Registered *Land Act* (RLA).

c. Evidence by Mr Jeremy Hulme of the impact that the judgment has on numerous purchasers.

d. Evidence that the late Mark K Too held one (1) share in the applicant company and he ceased to be the Chairman of Lonrho in September 2000.

4. A perusal of the affidavit sworn by Jeremy Paul Henry Hulme January 9, 2023 annexed to the instant application shows that the applicant seeks to adduce the following additional evidence:

    a. A copy of a letter produced as annexure 'JPHH 1 in paragraph 19 of the affidavit. The letter is dated November 9, 2000 from the deponent to the Chairman of Sirikwa Squatters Group informing him that the titles to land reference numbers 9608,745/2, 12398, 7739/7 and 9607 was surrendered to the Kenya Government on November 2, 2000 and requesting him to pursue the matter with the relevant ministry for the final resettlement of the squatters. It is deponed that this letter is a forgery. The other additional evidence sought to be adduced is;

    b. A bundle of surrender instruments from Lonrho Agribusiness Group to the Government of Kenya for Land Reference numbers 745, 9607, 9608, 9609,10793, 10794/2, 11481 and 12398 produced as annexure 'JPHH-2' in paragraph 32 of the affidavit.

5. The 2nd to 21st respondents signed a consent in support of the application. The application is opposed by the 1st respondent who filed a replying affidavit sworn by Benjamin Chepng'otie Ronoh on January 18, 2023. The deponent contends that the applicant is engaging in a re-enactment of the case which is being presented as 'additional evidence;' that the issue that the titles to parcels of land reference numbers 9606, 9607, 9608, 745, 742/2, 773917R, 10793 and 10794 was not surrendered in the year 2000 is incorrectly guised as additional evidence since the factual position was determined in the plethora of correspondence produced in the records of appeal and determined by the Court of Appeal; that the applicant was aware of the matter before the Environment and Land Court but did not deem it necessary to join or participate in it; that when the applicant joined the matter before the Court of Appeal and was granted leave to file additional evidence, it chose to introduce evidence in a piecemeal manner.

6. The 1st respondent further contends that the Agreement for Sale dated September 30, 2003 between Lonrho Agribusiness (EA) Limited and Mark K Too provided that Too was the majority shareholder and director of Lonrho Agribusiness (EA) Limited; that the applicant was granted an opportunity to be heard and that the new evidence lacks any credibility, and should not be admitted.

7. Additionally, the 1st respondent contends that the Court of Appeal already analysed the issues regarding the sale and purchase of the suit properties, the 'approval' by the former President, the 'surrender' of the parcels of land for the purpose of resettlement and whether Mr. Hulme had the power and authority to effect conferment. It is contended that these issues do not form the core of the appeal and are not matters for the Supreme Court's determination at this stage. It is also urged that the Court of Appeal arrived at the finding that the 1st respondent was entitled to the legitimate expectation to be allocated the land based on several documents and this finding was not based on the sole document allegedly written by Jeremy Paul Hulme.

A. Background

The proceedings before the Environment and Land Court

8. The 1st respondent, Sirikiwa Squatters Group, filed a constitutional petition in the High Court against the 2nd to 11th respondents herein. The petition was subsequently transferred to the Environment and Land Court for determination. The 1st respondent prayed inter alia for a declaration that its

constitutional right to property and/or interest over the suit properties be protected and also prayed in particular for;

a. An Order directing the Commissioner of Lands and the 2nd to 5th respondents to perform their constitutional duties and abide with the letter reference No DS/C/1/10/1/Vol.11/01 dated 11th Day of October 2001 by the Director of Land Adjudication & Settlement, Mr A Shariff, on behalf of the Ministry of Land and Settlement and communication by His Excellency the President of the Republic of Kenya (Retired) directing the approval and issuance of Title deeds for parcel Nos 9606, 9607, 9608, 745, 742/2, 7739/7R 12398, 10793 and 10794 all in Uasin Gishu District for resettlement and allocation to Sirikwa Squatters Group.

b. A declaration for the protection of Sirikwa Squatters Group's right to property as it was in real danger of being arbitrarily acquired by the 6th, 7th, 8th ,9th and 10th respondents and their beneficiaries to the detriment of the petitioners.

c. Damages as against the 1st, 2nd, 3rd ,4th , 5th , 6th , 7th , 8th , 9th and 10th respondents for breach and/or violation of the petitioners constitutional right to properties and protection of the same.

d. A declaration that the acts of the 9th and 10th respondents of carrying out survey works on the suit parcel of land Ref Nos 9606, 9607, 9608, 745, 742/2, 7739/7R 12398, 10793 and 10794 all in Uasin Gishu without the authority of the Director of Surveys either generally or specifically was thus an illegality, and the said works are of no legal effect and the 9th and 10th respondents are liable in damages and/or compensation to the petitioners for their illegal acts on terms and/or quantum to be assessed by the court.

e. That together with the grant of the orders above, the honourable court hereby forthwith cancels all the titles or any title issued and/or emanating from LR Nos 9606, 9607, 9608, 745, 742/2, 7739/7R 12398, 10793 and 10794 all in Uasin Gishu to the 6th, 7th respondents and all other beneficiaries and their registers be rectified accordingly.

f. Costs and any other relief.

9. The issues delineated by the court for determination were:

a. Whether the petitioners had legitimate expectation to acquire and be allocated the property.

b. Whether the disputed parcels of land were private or public land upon surrender.

c. Which remedies should the court grant?

10. By a judgment delivered on February 9, 2017, the Court, (A Ombwayo, J), relying on the presidential approval to Sirikwa Squatters Group application dated October 22, 1998, the letters from the Commissioner of Lands dated July 17, 2007 and the letters from the Director of Land Adjudication and Settlement dated June 22, 2007, November 9, 2005 and May 20, 2006 held that all these proved availability of the land for resettlement of the group. The court found that the events as captured in

the letters proved that the members of the group had the legitimate expectation to be registered as the owners of the suit properties.

11. In addition, the trial judge found that the lands in dispute were registered under the R*egistration of Titles Act*-RTA (repealed), and therefore the surrender of the lease was governed by the RTA which did not provide for conversion from leasehold to freehold. The trial judge cited section 44 of the RTA on surrender of land to the Government and found that the lands in dispute reverted to the government upon surrender and were to be managed under the regime of the Government Lands Act (GLA) and not to be converted to the regime of RLA as had happened. The court held that the conversion from GLA to RLA was not lawful and therefore all transactions that followed were a nullity.

12. Ultimately, the court issued an order directing the 1st, 2nd, 3rd, 4th and 5th respondents (the 2nd to 6th respondent herein) to perform their constitutional duties and abide with the letter reference No DS/C/1/VOL 11/01 dated the 11th day of October, 2001 by the Director Land adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Land and Settlement, His Excellency the President of the Republic of Kenya (Retired) direct approval of the [transfer?-see note above]October 28, 1998 and issue Title Deeds for parcel Nos 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District into the names of the 1st respondent for them to resettle and allocate their members.

13. The trial court further found that the actions of the 6th, 7th & 8th respondents (7th -9th respondents herein) were illegal and an attempt to deprive the 1st respondent of their allocated parcels of land. It also held that the work of the surveyors was illegal and of no legal effect. It proceeded to cancel all the resultant titles or any title issued and/or emanating from LR No 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all issued to the 7th and 8th respondents herein and all other beneficiaries and ordered for the Registers to be rectified accordingly.

14. The trial court also found that the registration of the 7th respondent, Mr Too, as the owner of approximately 27 ha of the suit land having paid approximately ksh 30,000,000, did not offend the 1st respondent's legitimate expectation as the 7th respondent had not been found to be involved in any fraud or wrongdoing. Therefore the court ordered that he be allocated not less than 27 hectares of the suit land and that in the meantime status quo to be maintained in respect of the approximately 27ha occupied and utilized by him.

The proceedings before the Court of Appeal

15. The judgment by the trial court prompted the following appeals:

    a. Eldoret Civil Appeal No 44 of 2017, lodged by Lonrho Agribusiness and Mr Korir (the 7th and 9th respondent respectively herein) who faulted the learned judge for; finding that Sirikwa squatters Group had legitimate expectation to the suit properties; holding that conversion of the titles to the suit properties was unlawful; failing to hold that the suit properties were private property; and for failing to hear many affected parties.

    b. Eldoret Civil Appeal No 45 of 2017 filed by Fanikiwa Limited (the applicant herein), where the learned judge was faulted for canceling the applicants 44 titles carved out of the suit properties and registered in its name, without affording it an opportunity to be heard.

    c. Eldoret Civil Appeal No 68 of 2017 filed by Mary Jepkemboi Too and Sophie Jelimo Too, the administrators of the estate of Mr Too. They faulted

the learned judge for holding that the suit properties were surrendered for purposes of settling members of Sirikwa and for canceling indefeasible titles.

d. A notice of cross-appeal filed by Sirikwa's Squatters Group, dated dated June 24, 2017, challenging the learned judge's finding that Mr Too had legitimately purchased 27 hectares from the suit properties and that no fraud or wrongdoing had been proved against him.

16. The three appeals were consolidated with Civil Appeal No. 45 of 2017 being the lead file. It was then brought to the attention of the Court that many parties were likely to be affected as a result of the judgment of the trial court which canceled resultant titles emanating from the suit property. The court of Appeal issued an order dated October 1, 2018 and directed Fanikiwa Limited to publish within 14 days a notice in one of the daily newspapers with wide circulation notifying the public of the judgment issued by the trial court, its effect, and the existence of the three appeals.

17. Following the public notice and applications for joinder, 78 individuals and 7 financial institutions were enjoined as respondents in the appeal. The individual applicants based their applications for joinder on the assertion that they were innocent purchasers for value without notice and that their titles were canceled without being heard. On their part, the financial institutions hinged their applications on the fact that they were not afforded an opportunity to be heard, and that they stood to suffer massive loss because they held valid charges over some of the nullified titles on the strength of which they had advanced substantial loans to the registered owners.

18. The Court of Appeal delineated the following issues for determination;

i. Whether Fanikiwa's right to be heard as well as that of the enjoined respondents was violated.

ii. Whether Sirikwa's legitimate expectation could override express provisions of the law.

iii. Whether, upon conversion from the *Registration of Titles Act* to the Registered *Land Act*, the titles acquired by Fanikiwa and the enjoined respondents were indefeasible.

iv. Whether the allocation of the suit properties to Sirikwa was legitimate; and

v. Whether the titles held by Fanikiwa and the enjoined respondents arising from the suit properties were legitimate.

19. By a judgment delivered on November 18, 2022, the court, (Kiage, M'inoti, Mumbi Ngugi JJA), held as follows: on violation of the right to be heard, the court held that the 12th to 21st respondent's right to be heard before an adverse decision was made against them was violated when titles to their properties or to properties over which they held charges, as the case may be, were canceled. It found that the evidence shows that they only became aware of the proceedings and the impugned judgment, only after publication of the public notice as ordered by the court. As regards Fanikiwa Limited, the court found that Mr. Too in his replying affidavit indicated that 8 parcels excised from the suit properties were registered in his name and also disclosed that he is a majority shareholder and director of Fanikiwa hence one of the main beneficiaries of 68 parcels of land measuring approximately 2,756.94 ha. The court found that Mr Too, being fully aware that Sirikwa's petition sought nullification of all titles that had originated from the suit properties, did absolutely nothing to ensure that Fanikiwa Limited was heard. In these circumstances, and taking into account the close nexus and intimate relationship

between Mr Too and Fanikiwa Limited, the court held that Fanikiwa had the opportunity to be heard through its director and majority shareholder, Mr Too, but for reasons best known to itself, declined to take it up.

20. On the issue of legitimate expectation and specifically whether Sirikwa were entitled to the entirety of the suit properties delineated to five properties being LR Nos 9608, 742/2, 12398, 7739/7 and 9607, the court found that at the time of Sirikwa's application and approval, the five properties were registered as private property in the name of Lonrho Agribusiness. They could only be allocated to Sirikwa by the registered owner, Lonrho Agribusiness, rather than the President under the GLA. The court then found that the letter dated November 9, 2000 by JP Hulme, the General Manager of Lonrho Agribusiness was a clear manifest that Lonrho Agribusiness surrendered the suit properties to the Government was for the purpose of settling the squatters. The court opined that if indeed the suit properties were surrendered merely for conversion of tenure and transfer to beneficiaries who excluded Sirikwa, it would have been expected that the General Manager would have said so upfront. It is on this basis that the Court of Appeal held that Sirikwa were indubitably entitled to the five properties on the basis of conferment by Lonrho Agribusiness Limited.

21. As regards the rest of the properties, the court found that Sirikwa's request to the President was on the basis of nine (9) properties only. The basis of their request was anchored on the fact that they have lived on the land for over 30 years; the suit properties were their ancestral land, and the same were being allocated to the public without consideration. The President approved their request. The same followed a chain of correspondence from various government offices regarding settlement of Sirikwa members.

22. It was the appellate court's determination in that regard that, the correspondence in the letters dated May 26, 2006, June 22, 2007, July 19, 2007, September 10, 2008 and September 22, 2010 was clear enough that (given their reference to all the suit properties), they were surrendered to the government by Lonrho Agribusiness; the purpose of the surrender was to settle members of Sirikwa, and the Government was in the process of formalizing settlement of the Sirikwa squatters. The court disputed the narrative that the purpose of the surrender of the suit properties was for the conversion of the tenure from leasehold to freehold. It found that the narrative was belated and started some twelve years after the surrender of the lands. The court, after analysis, held that Sirikwa's expectation with regard to all the suit properties was equally legitimate and enforceable. The court was of the view that the promise and commitment to allocate the suit properties in and to itself violated no law. In addition, that the correspondence revealed the Commissioner of Lands' commitment to expedite the formalization and regularization of Sirikwa's allocation and occupation of the suit lands. As such, it would be unconscionable and untenable for the Government, in the face of such express, unambiguous and consistently repeated promises and representation to be allowed to resile therefrom on account of some formal or procedural steps its relevant officers ought to, but failed to take, to actualize the promise and meet the legitimate expectation.

23. Lastly, on the issue of legitimate expectation, the court of Appeal in construing Fanikiwa and Mark Too's argument that the former President allocated to Sirikwa private land which he did not have power to allocate, found that the true basis of Sirikwa's claim is the voluntary surrender of those parcels by the registered owner, not the "approval" or concurrence by the former President.

24. On the issue of indefeasibility of the titles created out of the five surrendered properties and registered in the names of Fanikiwa, the Court of Appeal debunked the assertion that Mr Too, Lonrho Agribusiness Group and Fanikiwa Limited were bona fide purchasers of the surrendered properties for settlement of Sirikwa members for value without notice. The court held that it was difficult to believe that they were unaware that the suit properties were specifically surrendered to settle the

members of Sirikwa. The court also found that Mr Too was not a purchaser under the Agreement dated September 30, 2003 – more than 3 years after Lonrho Agribusiness surrendered the suit properties to the Government. On Mr Too's claim that he purchased the said parcels of land for a consideration and "paid the full consideration of the purchase of the said parcels of land", the court held that there was no evidence of how the money was paid and on which dates.

25. On the contention by Mr Too and Mr Korir that all genuine squatters of Lonrho Agribusiness's lands were settled and that Sirikwa was an amorphous group of self-seekers, the court found three basic problems with the contention. First, Mr Korir gave a paltry list of 73 people as the squatters who were settled, begging the question whether those were the people working on Lonrho Agribusinesses' huge estates of approximately 25,000 acres. Second, whilst Mr Too was very meticulous in identifying the parcels of land that had been acquired by himself and Fanikiwa, there was no such specificity about the parcels of land on which the genuine squatters were settled. Lastly, if indeed the genuine squatters were settled, how could Government officers, shortly before Sirikwa lodged its petition, have been confirming that they were at an advanced stage of settling the Sirikwa squatters? The court found the contention by Mr Too and Mr Korir incredible and rejected the same.

26. Turning to the respondents and the financial institutions who were joined to the appeal, the court was satisfied that they were true innocent purchasers for value without notice. It held that there was no evidence that they were party to the scheme to take over for themselves the five parcels of land that were surrendered for settlement of Sirikwa members. They conducted due diligence and there was nothing to alert them that there was anything amiss with the titles to the properties they were purchasing or charging. The purchasers paid good money and the financial institutions advanced substantial sums of money to the innocent purchasers of the properties excised from the suit properties on the security of their titles. There being no evidence that they were party to any fraud, misrepresentation or mistake in the registration of the impugned titles, the court upheld the validity of their titles.

27. Having found that Mr Too was part and parcel of the misrepresentation and fraudulent allocation and transfer to himself and Fanikiwa of the parcels of land that were expressly surrendered for settlement of the Sirikwa squatters, the superior court held that there was no basis or justification for the award of the 27 hectares to Mr Too. The transaction relating to the 27 hectares was tainted by fraud and misrepresentation and was completely unworthy of protection by the court. Accordingly, the court allowed the cross-appeal and set aside the part of the order that awarded 27 hectares to Mr Too. The final orders of the Court of Appeal were as follows:

    i. The consolidated appeals, namely Civil Appeals No 44 of 2017, 45 of 2017 and 68 of 2017 are dismissed.

    ii. The judgment of the Environment and Land Court dated 9th February 2017 is varied to the extent that the nullification of the titles of the individual and financial institution respondents who were joined to this appeal is set aside.

    iii. The cross-appeal by Sirikwa is allowed.

B. Submissions

28. Having set out the background of this matter before the superior courts we now turn to the instant application. The applicant seeks to adduce additional evidence. The applicant relies on its submissions dated January 9, 2023 and January 21, 2023 where it submits that this court has jurisdiction to admit additional evidence; that the evidence by Mr Hulme captured by a letter dated November 9, 2000 is relevant to the dispute as the issue of "conferment" of land by him arose in the Court of Appeal judgment. The applicant further submitted that although the 1st respondent had tendered the letter as

part of a series of letters which allegedly supported the position of the surrender, its authenticity and legal validity is in question. Additionally, the applicant submitted that there is real need for additional evidence to be tendered on what was surrendered, whether it was land or titles for conversion from one statute to another and whether Mr Mark K Too was a majority shareholder and his position as Chairman of Lonrho Agribusiness Ltd which conclusion, it was urged, was arrived at by the Court of Appeal without any evidence.

29. To buttress its case, the applicant relies on the following cases *Evans Kidero & 4 others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, *Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, *Cryus Shakhalaga Khwa Jirongo vs Soy Developers Limited & 9 others* [2020]eKLR, *Attorney General v Paul Kawanga Ssemwogerere & another* [2004] UGSC 3, *Sanjay Kumar Singh v the State of Jharkhand* [2022] Supreme Court of India, *Kanyuira vs Kenya Airports Authority* [2021] KESC 7 (KLR) and *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] eKLR.

30. The 1st respondent relies on its written submissions dated January 9, 2023 wherein it contends that the applicant has not met the principles governing the admission of additional evidence in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR. It submits that the affidavit by Jeremy Paul Henry Hulme is full of deception and is irrelevant. Further, that the evidence contained therein could have been adduced by Lonrho Agribusiness Limited which was a party in the matter since the year 2012. It also submits that the affidavit by the applicant Sophie Chemengen Too is an afterthought and does not satisfy the threshold set the case of *Mohamed Abdi Mahamud* (*supra*). It is also the 1st respondent's assertion that this court is sitting as a second appellate court which limits the admission of new evidence and it reinforces this assertion with the finding in the caseof *Chris Munga N Bichage v Richard Nyagaka Tong'i, IEBC &others* [2015] eKLR.

C. Analysis

31. This motion raises the question of whether the applicant has met the threshold for the grant of leave to present additional evidence pursuant to rule 26 of the *Supreme Court Rules,2020*. In particular, rule 26 (1) and 2 provide:

> "(1) The court may call or admit additional evidence in any proceedings.
>
> (2) A party seeking to adduce additional evidence shall make a formal application to the court."

32. This court has previously pronounced that it 'must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence'. (*Raila Amollo Odinga & another v IEBC & others* [2013] eKLR.)

33. Further, the principles governing admission of additional evidence in appellate courts in Kenya were enunciated by this court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR as follows:

> "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."

34. Additionally, the court re-affirmed that it "will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

35. Noting the applicable principles enumerated we now turn to consider the prayer sought by the applicant to adduce additional evidence. It bears restating the additional evidence sought to be adduced in this matter. The applicant through Sophia Chemengen Too's affidavit seeks to adduce additional evidence that relates to four distinct issues namely; evidence by Mr Jeremy Hulme to the effect that he did not write or sign the alleged letter dated November 9, 2000; evidence by Mr Jeremy Hulme that the surrender of the leasehold titles under *Registration of Titles Act* was in consideration of Lonrho Agribusiness (EA) Ltd obtaining freehold titles under Registered *Land Act*; evidence by Mr Jeremy Hulme of the impact that the judgment has on numerous purchasers and evidence that the late Mark K. Too held one (1) share in the applicant company and he ceased to be the Chairman of Lonrho in September 2000. We pause here to point out that even though it has been deposed that 'the evidence to be tendered is neither bulky nor argumentative and that it is specific, direct and extremely concise', this evidence has not been produced to us thus we are left merely speculating as to its contents.

36. The additional evidence outlined in Jeremy Paul Henry Hulme's affidavit is a letter, marked 'JPHH 1' dated November 9, 2000, from Mr Hulme to the Chairman of Sirikwa Squatters Group requesting him to pursue the surrender by Lornho Agribusiness Limited of the titles to LR Nos 9608, 745/2,

12398, 7739/7 and 9607 with the relevant government ministry for the final resettlement of the squatters, relied on by the appellate court. This letter forms part of the court record. It is nonetheless deponed that this letter is a forgery.

37. It is evident that both superior courts relied on this letter to make a finding that the 1st respondent was entitled to the five properties on the basis of express conferment by Lonrho Agribusiness. Indeed, the appellate court delivered itself on the following terms:

> "....one would have expected the General Manager of the registered owner, writing barely a week after the surrender, to indicate as much. But what does Mr Hulme really say? He emphatically states that the five properties had already been surrendered to the Government and requests Sirikwa to liaise with the relevant Government Ministry 'for final resettlement' of its members 'on the land already surrendered to the Government.' The clear intent manifest in the letter is that the surrender was for purposes of settling the squatters. If indeed the suit properties were surrendered merely for conversion of tenure and transfer to beneficiaries who excluded Sirikwa, it would be expected that the General Manager of the company surrendering the properties would say so upfront. Instead, he states the contrary.It should also be borne in mind that in an affidavit sworn on April 26, 2007 by David Kiptanui Yego, the Vice Chairman of Sirikwa, he deposed that there was a tripartite agreement between Lonrho Agribusiness, Sirikwa and the Government regarding surrender of parcels of land by Lonrho Agribusiness for settlement of Sirikwa squatters. Taking the above into consideration, we are satisfied that the trial court did not err in holding that Sirikwa had legitimate expectation that it would be allocated the suit properties. Those properties were surrendered to the Government for the express purpose of settling members of Sirikwa. The surrender was not contrary to the law because it was by the registered owner, who had power and authority to surrender the land and to specify the purpose of the surrender, which was to settle members of Sirikwa."

38. This letter has been a running theme in both superior courts. We note that this is the first time a claim of forgery is being made with regards to it. Even though the applicant was not a party in the trial court, Lonrho Agribusiness EA, the 7th respondent and the former employer of Mr Hulme, has been a party in this matter since the trial court and has never raised the issue of the letter being a forgery. We cannot fathom why the applicant would wait until the 11th hour to make this claim. As such, we are not convinced that this evidence could not be adduced earlier.

39. The applicant also seeks to adduce evidence that the surrender of the leasehold titles was made for the issuance of freehold titles under the RLA as produced in his evidence marked 'JPHH2'. This evidence relates to LR Nos 745, 9607, 9608, 9609, 10793, 10794/2, 11481 and 12398. The issue of surrender of the properties is also a common thread in this matter and the 7th respondent, Lonrho Agribusiness Limited, has been a party from the onset of this matter at the trial court. Accordingly, we are unconvinced that the additional evidence sought to be adduced by the applicant is not being utilized for the purpose of removing lacunae and filling gaps in evidence. As such, it is our considered view that the application is an attempt by the applicant to make a fresh case in this petition. In a nutshell, the application has not met the conditions precedent enunciated in the *Mohamed Abdi Mahamud* case (*supra*). Consequently, we find that applicant has not met the threshold for the grant of an order for admission of additional evidence.

Orders

40. Having considered the application dated January 9, 2023 and submissions and the response and submissions by the 1st respondent we find as follows:

    a. The application dated January 9, 2023 is dismissed.

    b. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

.....

P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. NJOKI

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