



**Janmohamed (Suing as the Executrix of the Estate of the Late HE Daniel
Toroitich Arap Moi) & another v Lagat & 3 others (Petition 17 (E021) & 24
(E027) of 2022 (Consolidated)) [2023] KESC 59 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KESC 59 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 17 (E021) & 24 (E027) OF 2022 (CONSOLIDATED)**

**MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

JUNE 16, 2023

BETWEEN

**ZEHRABANU JANMOHAMED SC (SUING AS THE EXECUTRIX OF
THE ESTATE OF THE LATE HE DANIEL TOROITICH ARAP
MOI) 1ST APPELLANT
RAI PLYWOOD (K) LTD 2ND APPELLANT**

AND

**NATHANIEL K LAGAT 1ST RESPONDENT
SUSAN CHERUBET CHELUGUI & DAVID K CHELUGUI (SUING AS THE
ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY
CHELUGUI) 2ND RESPONDENT
DISTRICT LAND REGISTRAR UASIN GISHU 3RD RESPONDENT
REGISTRAR OF TITLES 4TH RESPONDENT**

(Being an application for leave to adduce additional evidence to the appeal)

Conditions precedent to adduce additional evidence before the Supreme Court

In an application to adduce additional evidence before the Supreme Court, the court held that the applicant was duty bound to satisfy all the elements under the provisions of section 20 of the Supreme Court Act and rule 26 of the Supreme Court Rules, 2020.

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – application for review of decision to reject application for waiver of costs – where an applicant filed a second review - whether the Supreme Court had the jurisdiction to consider a second review for a decision to deny an application for waiver of fees - rules 6 (2) and (3), and 62(3)



Brief facts

The plaintiff had filed an application for waiver of fees that had been dismissed by the Registrar of the Supreme Court. Aggrieved the plaintiff filed for review before a single judge of the Supreme Court that was aggrieved. Further aggrieved, the plaintiff filed the instant application.

Issues

Whether the Supreme Court had the jurisdiction to review a decision by a single judge of the Supreme Court in a review of a decision by the Registrar of the Supreme Court to deny waiver of fees.

Held

1. Rule 63 (2) of the conferred powers on the Registrar to entertain an application for request for waiver of fees. Any party aggrieved by the decision of the Registrar was permitted to apply for review to a single judge whose decision shall be final by dint of rule 6(2) and (3) of the . The applicant had failed to invoke that procedure and instead filed a motion directly to the court seeking waiver of court fees to prosecute his application. While aware that the applicant was acting in person and may not be aware of the correct procedure, the Supreme Court was constrained not to grant his application.
2. The instant application sought to review the decision of a single judge emanating from a decision of the Registrar. The Deputy Registrar of the Supreme Court had dismissed the applicant's plea to lodge his pleadings and a single judge of the Supreme Court had on February 17, 2023 declined to review that decision. That decision was final. Granting the instant application would be an action in vain. The Supreme Court had no jurisdiction to revisit that decision. The application lacked merit.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

1. Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohammad & 4 others (Petition 7 of 2018; [2018] eKLR) — Applied

Statutes

1. Constitution of Kenya (2010) — Article 163 (4) (a) — Interpreted
2. Limitation of Actions Act (cap 22) — In general — Cited
3. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 20, 21 (1) (a), 24 (1) — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 3 (5), 26, 31, 32 — Interpreted

Texts

1. Khamisi, J., (Ed) (2018), Kenya: Looters and Grabbers: 54 Years of Corruption and Plunder by the Elite 1963-2017 (Plano, Texas: Jodey Book Publishers)

Advocates

Mr. Ahmednasir M. Abdullahi S.C for 2nd Respondent/Applicant

Mr. Julius Kemboy for 1st Appellant

Mr. Kibe Muigai for 2nd Appellant

Mr. Odongo Advocate for 3rd and 4th Respondent

Mr. Niuster Advocate for 5th Respondent

RULING

Representation:

1. Mr Ahmednasir M Abdullahi SC.....for the 2nd Respondent/Applicant



(Ahmednasir Abdullahi Advocates LLP)

2. Mr Julius Kemboy.....for the 1st Appellant

(Kemboy Law Advocates)

3. Mr Kibe Muigai.....for the 2nd Appellant

(Kinoti & Kibe Company Advocates)

4. Mr Odongo Advocate.....for the 3rd and 4th Respondent

(State Counsel)

5. Mr Niuster Advocate.....for the 5th Respondent

(National Land Commission)

1. Upon reading the notice of motion by the applicant dated January 13, 2023, and lodged on January 18, 2023 pursuant to article 163(4)(a) of the Constitution, sections 21(1)(a) and 24(1) of the Supreme Court Act and rules 3(5), 31 and 32 of the Supreme Court Rules, seeking the following orders, that: the court be pleased to admit as additional evidence to the appeal herein, the affidavit in support of this application and its annexures; and costs of this application be in the cause;
2. Upon examining the grounds on the face of the application, supporting affidavit sworn by David K Chelugui on January 13, 2023, and the applicant's written submissions dated January 17, 2023, both filed on January 18, 2023 to the effect that HE Daniel Toroitich Arap Moi's tenure as President of the Republic of Kenya from 1978 to 2002 was characterized by forceful acquisition of both public and private land; that the additional evidence he seeks to adduce is of cardinal importance, necessary and dispositive of the case before court; that it seeks to contextualize the dispute between the parties, the evidence underpinning the appeals and legal derivatives thereto; and that as the evidence to be adduced is in public domain; that the estate of President Moi is well aware of the same hence no prejudice will be suffered by the 1st appellant;
3. Further, noting the applicant's submissions, wherein he argues that the Will and Codicil of President Moi as drawn by the Executrix of the Estate did not list assets to be shared between the beneficiaries, and that a separate confidential Trust Document was drafted, in effect hiding the deceased's assets and omitting the total value of his estate; and that the wealth he left to his heirs is stolen public and private property. Furthermore, that the evidence the applicant seeks to adduce is not additional evidence in the conventional sense of the term and if allowed, it will not change the evidential or legal dynamics or the trajectory of the appeal; and that where a successful party seeks to adduce additional evidence to fortify the decisions of the superior courts below, this court should be more lenient in allowing it; that omission of the additional evidence in the trial court was a failure of imagination on the part the applicant's advocate at the time as to the relevance of the tenure and record of President Moi; and that the application satisfies the requirements in Hon Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others Sup Ct Petition No 7 of 2018 [2018] eKLR;
4. Upon considering the 1st appellant's replying affidavit sworn on January 23, 2023 and submissions dated January 25, 2023, both filed on January 27, 2023, whereby she opposes the application seeking leave to adduce additional evidence, for reasons *inter alia* that the additional evidence the applicant seeks to adduce has no direct bearing or relevance to the issues before this court; that the applicant is attempting to convolute facts of the case to engender an unfounded perception that the entire estate of President Moi was illegally acquired which is an entirely different cause of action; that the applicant is inviting this court to alter its status as the final appellate court and transform itself into a court with



- original jurisdiction to give a determination on whether President Moi's assets were legally acquired; and that the applicant has not shown he could not have obtained the said documents which were readily available or produced the same at the trial court or that they were not within his knowledge;
5. Further, noting the 1st appellant's submission whereby she urges that the applicant has failed to meet the conditions in *Hon Mohamed Abdi Mahamud (supra)*; that the applicants' assertion, a successful party in the superior courts below ought to be allowed as a matter of course to adduce additional evidence to perfect the appeal as opposed to an unsuccessful party seeking to overturn a decision, is a distinction that this court has never made; that the applicant's attempt to blame his advocate for lack of imagination in omitting the said documents from the trial court is without basis, as his present advocates were on record at the Court of Appeal and still failed to adduce the additional evidence;
 6. Noting that the Court of Appeal made a determination on the issues inter- alia: whether the applicant's claim was time barred under the *Limitation of Actions Act*; whether the *Constitution of Kenya 2010* applied retrospectively to events that occurred in the 1980s; whether the applicant was entitled to special damages as assessed in their valuation report; whether the learned Judge was biased and made an unjust determination;
 7. We now determine as follows:
 - i. That the applicant is duty bound to satisfy all the elements under the provisions of section 20 of the *Supreme Court Act*, rule 26 of the *Supreme Court Rules, 2020* (both of which have not been cited in the application) and the principles set out in this court's decision in *Hon Mohamed Abdi Mahamud (supra)*.
 - ii. This court in *Hon Mohamed Abdi Mahamud (supra)* emphasized that even with the application of the set principles, the court will only allow additional evidence on a case-by-case basis and even then, sparingly with abundant caution.
 8. Applying these principles to the application, it is clear that the additional evidence sought to be introduced, namely: three land reports on irregular allocation of public land; a book titled "*Kenya Looters and Grabbers: 54 years of Corruption and Plunder by the Elites 1963 -2017*, published in 2018; a *Kenya National Human Rights Commission Report* published in 2006; Judgments and rulings in the *Malcolm Bell* case concerning the land on which Moi High School Kabarak is situate, is not directly relevant to the matter before court. Of great significance is the fact that the applicant has been aware of the evidence he now seeks to introduce which in his own words "are in the public domain both locally and internationally". Furthermore, the applicant has not sufficiently explained the relevance of the additional evidence which he submits "does not change the trajectory of the appeal or add to or subtract the defining evidential matrix of the appeals before court".

The application is unusual in the sense that, the applicant does not seek to deploy the additional evidence, in support of his appeal (he being the respondent), but to perfect the judgments of the two lower superior courts.

In conclusion, none of the conditions for the grant of leave to adduce additional evidence have been satisfied;

9. Having carefully considered the application, responses and submissions by the parties herein, we find no merit in the application and make the following orders:
 - i. The motion dated January 13, 2023 and filed on January 18, 2023, is hereby dismissed;
 - ii. The costs of this application shall be borne by the applicant.

It is so ordered.

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



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**M. K. KOOME CHIEF JUSTICE &
PRESIDENT OF THE SUPREME COURT**

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

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

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

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

.....
**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**

