



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**PETITION NO. E2 OF 2020**

**PROGRESS WELFARE ASSOCIATION OF MALINDI**

**KENYA NATIONAL CHAMBER OF**

**COMMERCE AND INDUSTRY**

**MALINDI RESIDENTS DEVELOPMENT GROUP**

**KENYA ASSOCIATION OF HOTEL KEEPERS AND CATERES.....PETIONERS**

**VERSUS**

**COUNTY GOVERNMENT OF KILIFI**

**COUNTY EXECUTIVE COMMITTEE**

**MEMBER, LANDS, HOUSING,**

**PHYSICAL PLANNING & URBAN DEVELOPMENT**

**MALINDI MUNICIPAL BOARD**

**MUNICIPAL MANAGER, MALINDI MUNICIPAL BOARD**

**SOUTHWARK CONNECTIONS LIMITED.....RESPONDENT**

**RULING**

The application vide notice of motion dated 21.12.2020 expressed to be brought under Article 50 (1) as read with Rule 20 of the Constitution seeks leave of the court to set aside, vary otherwise review case management direction that the entire petition be disposed of by way of written Submissions and the same be substituted with an order for viva voce evidence.

As indicated by the recital in the affidavits of the application for the admissibility of the evidence orally and matters connected there with, the subject matter adjudication be by means of live witnesses. The respondents were generally opposed to the application to vary the mode of disposal of the petition from that of written submissions to viva voce evidence.

**Determination**

The question is whether there is a risk of unfair trial if the court reviews the earlier order on written submissions to that of viva voce. It is a fundamental principle that a party to a litigation should be allowed to present his or her case in a public hearing under Article 50 (1) of the Constitution in an effective manner. This right is an expression of the audi alteram partem principle and part and parcel of the right to a fair trial.

**“In Rex vs Deferral 1937 AD 370 and 373, the court observed that the audi alteram partem principles literary means, “hear the other side’. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present ones evidence to the dispute or claim”.**

Kenya is a common law jurisdiction operating in an adversarial system of justice. It follows that the primary form of proof in our courts is oral evidence, usually given on oath or affirmation in open court before a Judge or Magistrate and in the presence of the parties or their respective counsels.

In the context of the constitution read under Article 50 on the right to a fair hearing, it must be understood to import more than the two well established models and the right to be heard and present one case before a court of Law or tribunal. What courts regard as an adequate opportunity within the principle of natural justice will very much depend on the peculiar circumstances of each case. Parties to a suit are therefore free to call any witnesses and to tender viva voce evidence in the order of their choice and for the defendant to challenge that evidence by way of cross examination.

The central philosophy is that by testing the statement of one against the questions of an adversality, the fact finder may determine the truth (see **Alabama Law Review (1968) 227 and 268**). There is no dispute that the position in our legal system is that all witnesses who have been identified as competent to testify in a court of Law are subject to be called upon to give oral evidence and thereafter be subjected to cross examination, unless in exceptional cases justice is best served in an open court where the judicial process can be scrutinized not in order to satisfy the parties to the dispute but as an essential feature of our constitutionalism. The true principle to be derived from the facts of this application is the anchor in our adversarial system of justice, which means that the primary method of proving a case is by way of oral evidence presented directly to the court. In my view, it remains to be the best model of determining the facts of the case and its distinct nature.

**“Healy on the law of evidence extrapolated the following principles on the weighty to be attached to specific testimonies of witnesses, thus the weight of evidence by contrasts refers to the factual cogency or probative force of the evidence in light of the facts in issue at the trial. This is ultimately a question of degree to be assessed having regard to all the evidence, inferences, submissions in the case. The weight is not scientifically assessed and much depends upon the credibility of witnesses and the accumulation and combinations of evidence finally, generated in the trial.”**

Therefore, in light of Article 50 of the Constitution, Section 1A,1B and 3A of the Civil Procedure Act in the Interest of administering justice fairly and balancing the scales in this matter, I find merit in the notice of motion and in effect of that grant the relief to the applicant by allowing the petition to proceed by way of viva voce evidence.

Costs of the application to abide the outcome of the petition.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>th</sup> DAY OF JANUARY, 2021.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Ole kina
2. Mr Atiang for the Petitioners
3. Mr Ngoya for the Respondents