



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL PETITION NO. 9 OF 2014
BENJAMIN K. KIPKULEI.....PETITIONER
VERSUS
THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT
AND
MUSK DEER LIMITED.....PROPOSED INTERESTED PARTY

RULING

THE APPLICATION

1. This is a ruling on an application by the Interested Party for leave to file a Supplementary Affidavit in response to the replying affidavit filed by the Respondent in answer to the petition subsequent to its (Interested Party's) replying affidavit filed on 24th March 2015 upon its joinder to the suit as Interested Party.

SUBMISSIONS BY THE PARTIES

2. The Interested Party submitted that in the Respondent's Replying Affidavit sworn by Hamisi Mwanguya of 9th April 2015 had raised new and substantial issues relating to the conduct of the interested party, alleging collusion between the interested party and the auctioneer who conducted the sale of the suit property. In submission of Counsel the replying affidavit "*cast aspersions on the interested party and we submit that in fairness, the interested party should be given an opportunity to respond to these allegations.*"

3. Both Counsel for the Respondent and for the Petitioner, while conceding discretion of the court to grant leave opposed the application on the grounds chiefly that the issue of the alleged fraud in the sale of the suit property was not a new matter as it was already set out in the petition and the Interested party should have dealt with the same in its Replying Affidavit upon being joined as a party to the petition, and that it was an attempt to delay the determination of the petition. Moreover, it was urged, if the petition proceeded by way of *viva voce* evidence the parties would be able to put forward their respective positions by oral evidence and there was no need for further affidavits to be filed.

4. At the end of the hearing of the application for leave, ruling thereon was reserved and the parties agreed that the petition do proceed by way of *viva voce* evidence, among other orders as follows:

“22/4/15

Order by Consent:

1. **Ruling on 5/5/15 on the question of leave.**
2. **Hearing on 3 & 4 June 2015 on the basis of *viva voce* evidence.**
3. **Witness statements for witnesses who have not filed affidavits in the Petition to be filed and served by two weeks before the hearing date.”**

ISSUE FOR DETERMINATION

5. The parties having concurred on the discretion of the court to grant leave to file further affidavits, the question that remains for determination is whether the Court will grant such leave where the hearing is to proceed on the basis of oral evidence.

DETERMINATION

Discretion of the Court as to mode of hearing

6. The Court made the directions for *viva voce* evidence pursuant to Rule 20 of *The Constitution of Kenya (Protection of Rights Fundamental Freedoms) Practice and Procedure Rules 2013* which provide as follows:

“20. (1) The hearing of the petition shall unless the Court otherwise directs, be by way of –

- a. Affidavits;***
- b. Written submissions; or***
- c. Oral evidence.***

(2) The Court may limit the time for oral submissions by the parties.

(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.

(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the Court to arrive at a decision.

(5) A person summoned as a witness by the Court may be cross examined by the parties to the petition.”

7. It is clear that hearing by way of affidavits, submissions or oral evidence are alternative modes of hearing as the Court may direct for the hearing of constitutional petitions, save where under Rule 20 (3) the Court has ordered that only **part of the petition** be heard by oral evidence, where therefore the other parts of the Petition may be heard by way of any of the other two modes of affidavit and or written submissions.

Role of affidavits in hearing by way of Oral Evidence

8. With respect, to permit the filing of additional affidavits after the court has given directions for *viva voce* evidence is a redundancy and may lead to the delay in the hearing and determination of the petition which may be occasioned by subsequent applications by the other parties, in the interests of equality of

arms, for leave to file further affidavits to respond to matters raised in the further affidavit.

9. There is ample and wider opportunity than that availed by a further affidavit for the Interested Party herein to present its case and to cross-examine adverse witnesses and discredit its accusers in the forum presented by a hearing on the basis of oral evidence. I am satisfied that the Interested Party will not be denied such opportunity as may be necessary to challenge or rebut any prejudicial contents of Respondent's Replying Affidavit. Were the hearing to proceed on the basis of affidavit evidence, I would agree that in fairness, for equality of arms, the Interested Party should be afforded opportunity to file a further affidavit to respond to the affidavits of the Respondent and the Petitioner to its affidavit, in the same way that the Respondent and the Petitioner were by the ruling of 12th March 2015 granted leave to file supplementary affidavits upon the Interested Party's Replying Affidavit.

10. As the hearing of this petition is to proceed by way of oral evidence, it would be a time wasting redundancy to permit the filing of other affidavits in the matter. What may usefully be filed, in accordance with the contemporary case management practices under the Civil Procedure Rules 2010, is witness statements by persons who shall be called as witnesses so that the respective parties know the cases of the other parties that they are required to meet. The affidavits already filed will only serve this role of notifying the other parties of the position of the party for whom they are filed, as the hearing will now proceed on the basis of oral hearing.

ORDERS

11. Accordingly, for the reasons set out above, the Interested Party's oral application for leave to file a further affidavit in the Petition is declined with costs in the cause. The Petition will proceed to hearing on the basis of *viva voce* as scheduled on the 3rd and 4th June, 2015.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF MAY 2015.

M. MUYA

JUDGE

In the presence of: -

Kiarie for Khagram for the Petitioner

Mr. Buti for the Respondent

Mr. Oloo for the Proposed Interested Party

Linda - Court Assistant.