REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 398 of 2006

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

N THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 75 OF THE CONSTITUTION OF KENYA

BETWEEN

JOHN PETER MUREITHI

SHADRACK MUTERU GITONGA

JAMES NDUNG'U THEURI

(All suing for and on behalf of MBARI YA MURATHIM CLAN).....PETITIONERS

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER FOR LAND AND SETTLEMENT.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE DISTRICT LAND REGISTRAR, NYERI DISTRICT.....4TH RESPONDENT

THE CATHOLIC ARCHDIOCESE OF NYERI

(THROUGH ITS REGISTERED TRUSTEES).....5TH RESPONDENT

THE ARCHBISHOP OF THE CATHOLIC ARCHDIOCESE OF NYERI.....6TH RESPONDENT

RULING

The contested application is dated 11th January 2007 is brought under Order 36 Rule 8A and 12 of the Civil Procedure Rules and all other enabling provision of the law. It seeks directions as follows:

(a) That the matter be placed before the Honourable Chief Justice to appoint a 3 judge bench to hear the matter

(b) That the matter be heard by way of viva voce evidence

(c) .....

I have considered the written submissions by Counsel for the parties including the oral submissions.

The subject matter of the suit is said to have been the subject matter of an agreement or agreements dating back to the turn of the last century in the year 1912 and also transfers, acquisition or grants issued in 1950's and the early 1960's.

I intend to be brief in view of the fact that the area of contention can now be said to be a well trodden path. Constitutional applications are intended to secure speedy determination and seeking to give viva voce evidence going back to the turn of the last century, the irrestible presumption is that the parties are likely to be prejudiced because of the impossibility of calling witnesses due to the considerable lapse of time since the turn of the last century. The more prejudiced party is likely to be the Interested Party and the Government in that theirs is only institutional memory which is more likely to be written records if any. Moreover the subject matter of the suit is registered land and the records which are likely to have been kept are titles. The real issues will most likely turn on land law and the provisions of the Constitution.

I would therefore like to reiterate my reasoning in the case of ***PAUL MUITE v ATTORNEY GENERAL (2006) e KLR*** concerning a similar application to adduce viva voce evidence and which I rejected.

I further wish to reconfirm a Constitutional Court ruling on the same point in the case of ***INGE ANNA IDA BROWN v MINISTER FOR ROADS AND 4 OTHERS Civil Suit No. 1298 of 2003 OS*** where again, I had the privilege and honour of being part of the panel of judges. With such a big gap in terms of the time the acquisitions were said to have been made, oral evidence will most likely turn on hearsay upon hearsay which is an obvious source of prejudice.

The other reasons for rejecting viva voce evidence are:-

i. Constitutional applications and references must be heard and determined expeditiously

ii. There is no application to convert the affidavits into pleadings

iii. The main application is by way of petition and rule 32 provides:-

"The hearing of all applications and references to the High Court shall be given priority over all other cases and shall be heard and determined expeditiously."

iv. In the ***INGE ANNA*** a Constitutional court held:

"Not only are constitutional references intended to be heard and disposed of expeditiously, but the very principle behind the Originating Summons by which the court had been moved is that expedition is of the

essence."

v. The finding of a Constitutional Court in the case of ***JAMES JORAM NYAGA v ATTORNEY GENERAL & ANOTHER HC Misc Civil Case No. 1732 of 2004*** repeats the same considerations as above including prejudice due to lapse of time. Viva voce evidence must be in very exceptional cases especially on proof of damages.

Finally on the prayer of the appointment of a three judge bench, I wish to associate myself with the reasoning of Chief Justice Chunga in the case of ***KENYA BANKERS ASSOCIATION v MINISTER FOR FINANCE & ANOR No. 3 [2002] I KLR*** where he observed:-

"**I have in my previous rulings, set out factors for consideration to determine the number of judges to hear an application of this nature. These factors would include, in my view, the nature of the application, the issues raised and their complexity or otherwise, the importance of the application as a whole, or in any of the issues raised ..."**

This aspect can be left to the good office of the Honourable the Chief Justice to consider and give directions as he may deem fit.

The upshot is that the orders sought in prayer 2(a) are granted except the direction concerning a three judge bench and prayer 2(b) is declined or refused. I order that costs of the application be in the cause.

DATED and delivered at Nairobi this 14th day of December, 2007.

J G NYAMU

JUDGE