



Kalii & 2 others (Suing as Chairman, Secretary and Treasurer of Mamukii Society on behalf of 2500) v National Land Commission & 4 others (Environment & Land Petition E004 of 2021) [2022] KEELC 14932 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14932 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION E004 OF 2021
TW MURIGI, J
NOVEMBER 16, 2022

BETWEEN

JOSEPH MUTUKU KALII 1ST PETITIONER
PETER KISOLO MWAVU 2ND PETITIONER
PAULINE MWIKALI KAAZOO 3RD PETITIONER
SUING AS CHAIRMAN, SECRETARY AND TREASURER OF MAMUKII
SOCIETY ON BEHALF OF 2500

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
ATTORNEY GENERAL OF KENYA 3RD RESPONDENT
MAKUENI COUNTY GOVERNMENT 4TH RESPONDENT
STANLEY & SONS LIMITED 5TH RESPONDENT

RULING

1. By a Notice of Motion dated 30th of June, 2022 brought pursuant to the provisions of Section 3A of the [Civil Procedure Act](#), Order 51 Rule 1 of the Civil Procedure Rules and Section 78 of the [Evidence Act](#), the Applicant the following orders: -
 1. Spent.
 2. This Honourable Court be pleased to allow the Petitioners/Applicants to file electronic evidence in the form of CD Discs or flash disks in these proceedings.



3. Costs of this application be provided for.
2. The application is premised on the grounds on its face together with the supporting affidavit of Pauline Mwikali Maanzo sworn on the even date.
3. It is the Applicant's case that the proceedings herein relate to historical injustices where members of the Akamba community living around Kiima Kiu were forcefully removed from their land in 1940s by Robin Woodfall, a Colonial Settler. The Applicant averred that some of their witnesses are over 100 years old and that there is a grave danger that they may die before giving evidence in Court. She argued that in addition to the statements recorded and filed by the said witnesses, it is necessary to preserve their evidence in a CD disk.
4. Mr. Njiru for the Petitioners submitted that the witnesses should be allowed to file electronic evidence in the form of a CD disk since some of them are over 100 years old and may die before they testify. He maintains that electronic evidence is permissible under the law. He further argued that it is necessary to buttress the statements recorded by the said witnesses with their visual evidence contained in a CD disk. He contended that it is not necessary to produce the photographer's certificate at this stage as the same would be produced during the hearing of the Petition. He stated that it was up to the Court to decide whether or not to accept the electronic evidence. He further submitted that the witnesses should be seen by Court while they are giving evidence.
5. To buttress his argument Mr. Njiru relied on the following authorities: -
 1. [*Jackline Vusewa Senge Vs Oliver Guiguemde \(2021\)*](#) eKLR.
 2. [*Republic Vs Abdallah Kabi \(2019\)*](#) eKLR.
6. The 1st – 3rd Respondents did not respond to the application although they were duly served.
7. In opposing the application, the 4th Respondent filed grounds of opposition dated 13th of July, 2022 on the following grounds: -
 - i. That the Petitioners have not produced a certificate of electronic evidence referring to the CD or the video clip information contained therein and the manner in which it was produced. Further, that the particulars of the device that was used to record the video clip and the computer used in the production of the CD have not been provided. The make, type or model of the devices and their serial numbers are not given as per section 106B(4) of the [*Evidence Act*](#).
 - ii. That the reliability of the manner in which the Compact Disk was generated, stored or communicated, maintained and the unidentified person responsible for producing the CD is highly questionable in the absence of a certificate of electronic evidence to prove the authenticity and integrity of the CD pursuant to Section 78(A) of the [*Evidence Act*](#).
 - iii. That the Petitioners have not adduced any evidence to demonstrate that the Petitioners witnesses are very old and some over 100 years old. Further, the Petitioners have not produced any medical reports to demonstrate the grave danger alleged to be occasioned on the lives of the witnesses pursuant to section 107 of the [*Evidence Act*](#).
 - iv. That if the application is allowed the 4th Respondent would be highly prejudiced as it would be denied an opportunity to test the veracity of the Petitioners intended witnesses by way of cross examination.
 - v. That the application is a nullity, misconceived, lacks merit and is intended to mislead this Honourable Court and as such it ought to be dismissed with costs.



8. In addition to the grounds of opposition, Mr Katisya for the 4th Respondent argued that if the Court is inclined to allow the application they would be requesting for time to file further responses if need be. To buttress its submissions, the 4th Respondent relied on the following authorities: -
1. [*Republic Vs Barisa Wayu Mataguda \(2011\)*](#) eKLR.
 2. [*William Othiambo Oduor Vs IEBC & 2 Others \(2013\)*](#) eKLR.
 3. [*Nonny Gathoni Njenga & Another Vs Catherine Masitsa & Another \(2014\)*](#) eKLR.
9. The 5th Respondent opposed the application vide the grounds of opposition dated 13th of July, 2022. These grounds are: -
- i. That the application is incompetent and totally defective as it is premised on the wrong provisions of the law. That under the practice of this Court, this Court can only entertain an application for the taking of evidence de bene esse and may not entertain the application as drafted.
 - ii. That pre-recorded testimony in electronic media format by a litigant in judicial proceedings is not only inadmissible under the rules of this Court but it is also not envisaged under Rule 20 of [*the Constitution*](#) of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013 and therefore the Court has no jurisdiction to grant the orders sought.
 - iii. That based on the provisions of Article 50 of [*the Constitution*](#) of Kenya as read together with Section 145(2) of the [*Evidence Act*](#) and Rule 20 of [*the Constitution*](#) of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013 the application if allowed will abrogate the 5th Respondent's right to fair trial. That furthermore, the application if allowed would deny the 5th Respondent the opportunity to test the veracity of the Petitioners intended witnesses by way of cross examination.
 - iv. The application does not contain any sufficient cause or comprehensible evidence to show that the Petitioners witnesses are old and/or over 100 years old as alleged or otherwise that they will not be available to provide oral testimony. Further, the Petitioners have failed to provide any medical report to show that their proposed witnesses are suffering from ailments as alleged for their testimony to be taken on a priority basis de bene esse.
 - v. The application is misconceived and only serves to waste precious judicial time and resources and should therefore be dismissed with costs.

ANALYSIS AND DETERMINATION

10. Having considered the application, the grounds of opposition and the oral submissions by the parties herein, I find that the only issue that arises for determination is whether the oral witness statements contained in the CD disk will prejudice the Respondents right to fair trial.
11. Counsel for the Petitioners argued that some of the Petitioner's witnesses are advanced in age and may die before they testify in Court. Counsel contended that although the witnesses had recorded and filed their statements, it is necessary to buttress their evidence with the visual recordings.
12. In opposing the application, the 4th Respondent argued that the Applicant has not complied with the provisions of Section 78A and 106 of the [*Evidence Act*](#). He went on to state that the Applicant has not produced any evidence to demonstrate that the witnesses are over 100 years old nor produced a medical report to demonstrate that their lives are in any grave danger.



13. On the other hand, the 5th Respondent argued that the pre-recorded evidence is not admissible or contemplated under Rule 20(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules or in Article 50 of *the Constitution*. Counsel submitted that if the application is allowed, the 5th Respondent right to fair trial will be prejudiced as he will not be accorded an opportunity to test the veracity of the evidence by way of cross examination. He further submitted that the Applicant did not tender any evidence to demonstrate that the Petitioners witnesses are over 100 years or that they are incapable of testifying before the Court.
14. From the foregoing, it is clear that the Applicant filed this application as she is apprehensive that some of their witnesses who are advanced in age may die before they present their evidence in Court.
15. The 4th and 5th Respondents on the other hand argued that the Applicant has not demonstrated that some of their witnesses are over 100 years old nor presented any medical evidence to demonstrate that they are facing any grave danger to their lives.
16. Section 125(1) of the *Evidence Act* deals with the competency of witnesses and provides as follows;

“ All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.”
17. Section 125(2) of the *Evidence Act* provides as follows;

“ A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”
18. It is clear from the above provisions that all persons are competent witnesses. It is for the person alleging incompetence to demonstrate or provide proof of incompetence. This includes persons who are advanced in age.
19. As to the averments of the Applicant that some of the witnesses are over 100 years old and may die before they testify, the Respondents argued that this is a mere allegation since it is not supported by any evidence.
20. Section 107 of the *Evidence Act* provides as follows;

“ Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove that those facts exist.”
21. Although Mr. Njiru submitted that some of the witnesses are over 100 years old, that alone does not make them infirm. The Court was not told that the witnesses are unable to testify due to their old age. The Court is in agreement with the Respondents that the allegation that some of the witnesses are over 100 years which compromises their ability to testify in Court or that their lives are in grave danger is not supported by any evidence.
22. Going by the submissions presented by the Applicant, I am of the view that, the Applicant ought to have made an application to have the said witnesses testify de bene esse.



23. Mr. Kuyo for the 5th Respondent submitted that the Mutunga rules provides for the avenues in which Constitutional Petitions should be heard and determined. Rule 20(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules provides as follows: -

The hearing of the petition shall, unless the court directs otherwise, be by way of: -

- a. Affidavits
- b. Written submissions.
- c. Oral evidence.

24. It is crystal clear from the above provisions that a Petition can only be heard by way of affidavits, written submissions or Oral evidence. Pre-recorded statements is not envisaged as a mode of hearing in Constitutional Petitions.

25. The Respondents argued that they will be prejudiced if the evidence contained in the CD disk is admitted as they will not have an opportunity to test the veracity of the evidence by way of cross examination. Mr. Njiru argued that the purpose of application is to allow the Petitioners to file electronic evidence and thus, the issue of admissibility will come in later during the hearing of the Petition.

26. The question that begs for answers is whether the Respondents will have an opportunity to test the veracity of the evidence contained in the CD disk in the event that the application to file electronic oral statements is allowed.

27. The manner of examination of witnesses in a trial is regulated by the *Evidence Act*, Cap 80, Laws of Kenya. The relevant provisions, for the purpose of this ruling, are Section 146 of the *Evidence Act* which provides for the order and direction of examination. Section 146(1) provides as follows;

“Witnesses shall first be examined in chief, then if the adverse party so desires, cross examine then if the party calling them so desires re-examined.”

28. The Applicant will not be filing this electronic evidence contained in a CD disk for the sake of filing. As submitted by Mr. Njiru, the evidence is meant to buttress the statements recorded by the said witnesses. It is clear that the witnesses intend to rely on the evidence contained in the CD disk in support of the Petition. The statements of the said witnesses can only be buttressed with the statements contained in the disks during the examination in chief. Will the Respondents have an opportunity to cross examine the evidence contained in the CD disk? Section 145 (2) of the *Evidence Act* defines cross-examination as examination of a witness by the adverse party. Cross-examination of a witness whether for the defence or for the prosecution is meant to test the credibility of the witness.

29. The right to cross examination is one of the rights to a fair trial as set out in Article 50(2)(k) of *the Constitution* which provides as follows;

- (2) Every accused person has the right to a fair trial which includes the right to-
- (k) to adduce and challenge evidence.

30. The party who is denied the chance to cross-examine and test the veracity of the evidence would be prejudiced.



31. If this Court were to allow the application, the Respondents will not have an opportunity to test the veracity of the evidence by way of cross examination. I am of the view that the Applicant ought to move this Court with speed to have the evidence of the said witnesses taken on a priority basis.
32. In light of the foregoing, I find that the application is devoid of merit and the same is dismissed with no orders as to costs.

.....
HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF NOVEMBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Mr. Boniface Njiru for the Petitioners.

Dr. Benjamin Musau appearing together with Deya for the 5th Respondent.

Ms. Mango the 4th Respondent.

<i>RLG MKN ELC PET NO. E004 OF 2021</i>
--

0

