



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 5 OF 2017

**IN THE MATTER OF ARTICLES 2(2), 10, 19, 20, 21, 22, 23, 27, 29, 39, 40, 47, 64, 67, 165(3)(b),
176, 179, 183, 186 AND THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 27, 29, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
64, 67, 183 AND 186 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 5
AND 6 OF THE NATIONAL LAND COMMISSION ACT, 2012**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF PART
VIII AND SECTIONS 134 AND 135 OF THE LAND ACT, 2012**

AND

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT,
CHAPTER 281 OF THE LAWS OF KENYA (REPEALED)**

BETWEEN

UATHIMO FARM LIMITED.....1ST PETITIONER

PETER KIILU.....2ND PETITIONER

AND

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

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

HON. GOVERNOR PROF. KIVUTHA KIBWANA.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF MAKUENI.....4TH RESPONDENT

GEORGE ONYANGO,

THE OCS EMALI POLICE STATION.....5TH RESPONDENT

NICK MUTHOKA.....6TH RESPONDENT

ALOIS MUIA.....7TH RESPONDENT

MULANDI MBALU,

NDETI LAVU,

DAVID KIOKO,

STEPHEN MUTUKU

(All sued as the named officials of

Mukambita Ranching Cooperative Society.....8TH RESPONDENT

RULING

1. The application for determination is dated 20th July, 2020 filed by the 8th Respondent/Applicant under certificate of urgency on 28th July, 2020. It is brought under Rule 20(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the Law.

2. The Applicant seeks the following Orders: -

i) Spent.

ii) This Honourable Court be pleased to review its directions directing that the matter herein be disposed of by way of submissions without the parties calling any oral evidence.

iii) This Honourable Court be pleased to grant orders that the Applicants be allowed to give oral evidence in court.

iv) The costs of this application be in the cause.

3. The application is supported by the affidavit of Peter Kimanthi Maluki sworn on 20th July, 2020 on his behalf and that of the officials of the 8th Respondent. The basis of the application is that by virtue of this Court's directions issued on **18th July, 2019** that the Petition be disposed of by way of written submissions, the 8th Respondent/Applicant is no longer at liberty to adduce oral testimony in the matter. That the said directions have completely locked out the Applicant from adducing viva voce evidence that would be crucial for determination of the dispute. That the Applicant cannot effectively set out its case without adducing oral evidence.

4. The application is opposed by the 1st Petitioner through grounds of opposition dated 6th October, 2020. The 1st Petitioner contends *inter alia* that Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provided for affidavit evidence being on the same pedestal as oral evidence. That the Applicant has not demonstrated any special grounds, factual context or basis with regards to viva voce evidence. That the Applicant has not demonstrated any prejudice to be suffered if the Petition is determined on the basis of affidavit evidence nor has the Applicant presented any reason why the evidence so to be adduced can only be tendered orally. That the facts giving rise to the Petition are incontestable thus no serious issues of credibility arise to warrant an oral hearing.

5. Initially, the 1st and 5th Respondents had filed grounds of opposition dated 24th August, 2020 which were later abandoned on 8th December, 2020. The 3rd and 4th Respondents elected to support the application in entirety.

6. The 8th Respondent/Applicant filed submissions dated 17th November, 2020 in support of the application. They have submitted at length on what constitutes a fair hearing. They rely on two Court of Appeal authorities in support thereof: -

i) Peter M. Kariuki -Vs- Attorney General [2014] eKLR.

ii) Aggrey Chiteri -Vs- Republic of Kenya [2017] eKLR.

7. The 1st Petitioner/Respondent also filed submissions dated 8th December, 2020. It relies on four authorities for its assertions as to what

constitutes natural justice and the instances when a court of law may be called upon to allow viva voce evidence to be tendered. These authorities are: -

i) Russell -Vs- Duke of Norfolk and Others [1949] 1 ALLER 109.

ii) Daniel Kibet Mutai & 9 Others -Vs- Attorney General [2019] eKLR.

iii) Kibos Distillers Limited & 4 Others -Vs- Benson Ambuti Adegga & 3 Others [2020] eKLR.

iv) Uathimo Farm Limited & Another -Vs- Attorney General & 7 Others [2019] eKLR.

8. I have perused the application, the grounds of opposition and submissions filed by the counsel of the parties on record. The only issue arising for determination is whether this Court's directions dated 18th July, 2019 ought to be varied to allow the 8th Respondent an opportunity to give oral evidence.

9. From the Court record, I have seen the 8th Respondent's Replying Affidavit sworn on 22nd December, 2017 in reply to the Petitioner's application dated 24th October, 2017. I have also seen the 8th Respondent's Reply to Petition dated 9th January, 2018. There is also a Replying Affidavit sworn on 12th January, 2018 on behalf of the 1st and 5th Respondents in response to the Petition. I have seen a Replying affidavit sworn on 12th March, 2018 on behalf of the 2nd Respondent. There is also a Replying affidavit sworn on 19th March, 2018 on behalf of the 3rd and 4th Respondents in reply to the Petition. The Petitioner filed a Supplementary affidavit sworn on 24th April, 2018 in support of the Petition.

10. In addition, I have seen written submissions in respect of the Petition by Counsel for the 1st and 5th Respondents, the Petitioners' submissions and the 3rd and 4th Respondent's submissions. I am also satisfied that on 18th July, 2019 when directions for filing of any supplementary documents in favour of or against the Petition were issued, the 8th Respondent was represented served with the requisite notice but did not appear in court.

11. The mode for hearing constitutional petitions is clear under Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It is either by affidavits, written submissions or oral evidence.

12. At this stage, I am inclined to agree with the Court of Appeal decision of Daniel Kibet Mutai & 9 Others v Attorney General [2019] eKLR which the Petitioner has relied on. The learned judges of the Superior Court aptly held therein as follows: -

“[36] It is evident that the learned Judge treated oral evidence (which in this case was not available), as superior to affidavit evidence and thereby dismissed the appellants' affidavits as bare allegations. With due respect, the learned Judge failed to appreciate that what is sworn under oath is not a simple matter but a serious issue, for which a deponent can be charged with perjury if it turns out that the deponent has lied under oath. In other words, the consequences are the same as that for a witness who testifies orally and perjures himself by lying on oath. In our view, affidavit evidence is legally admissible evidence in a court of law. It occupies the same place as any other evidence that is admissible in a court of law.”

13. The Court of Appeal proceeded further to hold thus: -

“[38] It is evident from the above that affidavit evidence is provided for on the same pedestal as oral evidence, and that the learned Judge had the discretion to direct that the hearing of the petition proceeds by way of oral evidence if he deemed it necessary to do so. The parties sought to proceed by way of affidavit evidence, and the learned Judge having not exercised the discretion to direct the parties to proceed by way of oral evidence, or to call any of the deponents of the affidavits for cross-examination, he had no reason to disparage the affidavit evidence.”

14. For this reason, I find no substance in the allegation that failure to accord the Applicant an opportunity to give oral evidence will occasion a miscarriage of justice.

15. To this point, it is unclear from the application the nature of evidence the Applicant wishes to give at an oral hearing. Be that as it may, the Applicant has had the liberty to file a supplementary affidavit in support of its defence to the Petition since 18th July, 2019. Again, the Applicant has not disclosed the witnesses it has sought for purposes of tendering evidence for cross-examination as required under Rule 20(4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Court of Appeal in Kibos Distillers Limited & 4 Others -Vs- Benson Ambuti Adegga & 3 Others [2020] eKLR held as follows: -

“In duplication, the three appellants further contend that their right to a fair hearing and trial were violated because no viva voce evidence was adduced before the trial court. It is a settled principle of law that a right to a hearing is not exclusively and primarily a right to be heard by way of oral evidence. The courts are unanimous on the point that oral or personal hearing is not an integral part of fair hearing unless circumstances are so exceptional that without oral hearing, a person cannot put up an effective defence or advance his/her/its case.”

15. The upshot of the foregoing is that the application is devoid of merit and is accordingly dismissed. Costs shall abide the outcome of the Petition.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 19TH DAY OF APRIL, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi