



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI - MILIMANI

ELC PETITION NO. E009/2020

IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER CHAPTER FOUR ARTICLES 22 AND 23 (1) AND (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS UNDER ARTICLE 40, 43 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LAND ACQUISITION ACT

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF PLOT

NOS. C61 & C66, KARIOBANGI SOUTH/KCC VILLAGE

BETWEEN

SILAS JACKSON NJERU..... 1ST PETITIONER

FLORENCE GATAVI NJERU.....2ND PETITIONER

AND

NAIROBI CITY COUNTY.....RESPONDENT

JUDGEMENT

Background

1. The Petition in this matter was filed on 1st September 2020 through the Judiciary e-filing portal. The Petition was filed alongside a “supporting affidavit” and annexures. The Respondent, Nairobi City County responded to the petition by way of a replying affidavit sworn by one Eric Odhiambo Obwao on 18th January 2021. With leave of the court, the petitioners filed a supplementary affidavit sworn by Silas Jackson Njeru on 20th April 2021.

2. I have keenly perused the court record in regard to the directions on the hearing of this matter. On 14th October 2021, both sides appeared before my brother Judge Angote and agreed to dispose of the matter by way of written submissions. By the time they appeared before me on

24th November 2021, the petitioners had already filed their submissions. The Advocate for the Respondent on that day requested for one more day to file his submissions. His request was allowed and a judgement date given.

Defective Supporting Affidavit

3. It is in the cause of writing this judgement that the court noted that the “supporting affidavit” filed alongside the petition has not been signed by the person who is said to be the deponent neither was it commissioned before a Commissioner for Oaths or any other authorized person. It is also not dated. The court then has to contend with the question of the implication of the defective supporting affidavit on the Petitioners’ case even before going into the merits of the case.

Determination

4. In the case of **Gideon Sitelu Konchellah Vs Julius Lekakeny Ole Sunkuli & 2 others (2018) eKLR**, the Supreme Court was faced with a similar scenario. In the course of preparing a ruling the court realized that the “*replying affidavit*” filed in the case had not been signed, dated or commissioned. The court held that the said affidavit was fatally defective for contravening all the legal requirements for the making of an affidavit. The court was categorical that such an affidavit had no legal value in the case before the court. The court concluded that the matter before it would be considered as if there was no replying affidavit.

5. Similarly, in the petition before me, the supporting affidavit is not signed by the person who is said to be the deponent nor is it dated, neither is it commissioned. Consequently, and guided by the above Supreme Court decision, I find that the so called “supporting affidavit” has no legal value in this matter. It does not qualify to be an affidavit.

6. This court notes that it is not mandatory that a constitutional petition be supported by an affidavit. Rule 11(1) of ***the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***, is not coached in mandatory terms. It states that, “***the petition filed under these rules may be supported by an affidavit.***” However, under sub rule (2), where a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition, where there is no supporting affidavit.

7. In the instant petition, the Petitioners are relying on a total of 13 documents all of which were annexed to the “*supporting affidavit*”.

The “*supporting affidavit*” was an integral part of the petitioners’ petition. Actually it was the bedrock of the petition. Unfortunately, as I have already pointed out in paragraph 2 above, that the parties in this matter, on 14th October 2021, agreed to dispose of this petition by way of written submissions. This meant the Petitioners would not get an opportunity to adduce oral evidence in support of their petition. The petition would be determined on the basis of the affidavit evidence. The consequence therefore of the court’s finding that the “*supporting affidavit*” is fatally defective, by implication means that the Petitioners’ petition is not supported by any material evidence. The supplementary affidavit they had filed was merely in response to allegations by the Respondent in its replying affidavit.

Consequently, this court has no alternative but to strike out the petition at this point. The Petition is hereby struck out with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Mwalimu for the Petitioners

N/A for the Respondent

Court Assistant: Hilda

M.D. MWANGI

JUDGE