



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC PETITION NO. 11 OF 2015

IN THE MATTER OF ARTICLES 165(3) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED AND/OR THREATENED CONTRAVENTION OF FUNDAMENTAL
HUMAN RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47, 48 AND 50 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE GOVERNMENT LANDS ACT CAP 280 (REPEALED)

AND

IN THE MATTER OF THE TRUST LAND ACT CAP 288 (REPEALED)

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT CAP 281 (REPEALED)

BETWEEN

NORTHERN CONSTRUCTION COMPANY LIMITED.....PETITIONER

VERSUS

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

THE CHIEF LAND REGISTRAR2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

NATIONAL HOUSING CORPORATION.....4TH RESPONDENT

RULING

1. This matter was coming up today for mention to confirm filing of submissions in respect of the petition herein. Mr. Karani appeared for the petitioner while Mr. Motari appeared for the 1st, 2nd and 3rd Respondents. There was no appearance for the 4th Respondent.
2. Mr. Karani informed court that the matter was coming up for highlighting submissions as the parties had filed their submissions. He also informed court that this matter was being heard alongside Machakos ELC Petition No. 12 of 2015.
3. In response, Mr. Motari informed court that he had filed a notice to cross examine the petitioner and sought for a date to cross examine the deponent of the affidavits sworn in support of the petitioner's claim which involves a claim of Kshs 2 billion.

4. The application to cross examine the petitioner was opposed by Mr. Karani Advocate who argued that the matter had substantially progressed and that at no point did the respondents indicate they wanted to cross examine the petitioner. Counsel contended that the prayer to cross examine the petitioner was a delay tactic and that there is no basis for the cross examination as what is sought to be tested can be tested by way of submissions and not necessarily by cross examination.

5. In a rejoinder Mr. Motari argued that this matter involves a subject matter worth a substantial value. He contended that the authenticity and veracity of the petitioner's documents ought to be tested by cross examination and that the petitioners has not shown the prejudice they stand to suffer by the cross examination which seeks to ensure the court gets to the truth of the matter and arrives at a just decision bearing in mind that the value of the subject matter is over Kshs. 2 billion and the same is public land.

6. I have considered the record and I note that on 23rd November 2021, the 1st Respondent filed a Notice to cross examine Mohamed Koriow Nur and sought for his attendance at the hearing for purposes of cross examining him on the entirety of the contents of the supporting affidavit sworn on 26th March 2015, supplementary affidavit dated 11th May 2015 and the replying affidavit to the cross petition sworn on 27th September 2019.

7. In response to that notice to cross examine, the petitioner filed grounds of opposition dated 19th October 2021 whereof they contend that the notice has not disclosed the basis for seeking cross examination and that no material has been placed before court to justify the cross examination; that the 1st Respondent has not demonstrated any special circumstance warranting the grant of an order to cross examine the deponent; that the intended cross examination will not resolve the key issues in dispute and hence it is not essential in the enhancement of the cause of justice; that the cross examination is likely to prejudice the hearing and determination of the petition which has substantially progressed; that the intended cross examination will amount to assisting the 1st Respondent prosecute his case thereby undermining the course of justice; that the cross examination will amount to a mini trial within a trial by the court, leading to wastage of judicial time, and that the notice is misconceived, bad in law, fatally defective and an abuse of the court process.

8. Having considered the Notice to cross examine, the grounds of opposition filed, the submissions by counsel and the pleadings, the issue that arise for determination is whether it will serve the interests of justice to allow the 1st Respondent to cross examine one Mohamed Koriow Nur in respect of his affidavits filed in this matter.

9. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Part III thereof and more specifically Rule 20 provides as follows;

“Hearing of the Petition

(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)

(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.”

10. This court is enjoined by Article 159 of the Constitution to dispense substantive justice to all the parties in this suit.

11. I have considered the pleadings and I note that petitioner's claim is premised on the allegation that the revocation of his title to the suit land was unlawful and contrary to his legitimate expectation as he is the absolute and indefeasible proprietor thereof. He contends that the revocation of his title by the respondents was contrary to Articles 47, 48 and 50 of the Constitution as the same contravened his right to a fair hearing and a fair administrative action.

12. On the other hand, the respondents have argued that the suit property was public property and the same was irregularly and unlawfully allocated to the petitioner as the Commissioner of Lands had no authority to allocate land that was not available for allocation. Both Parties have produced several documents in support of their respective cases. As the constitutional practice rules allow for the court to hear constitutional petitions by oral evidence and allow the court to allow cross examination of witnesses, I do not see any prejudice that will be suffered by the petitioners if cross examination of the deponent is done. I do not agree with the petitioner that special circumstances must be demonstrated before an order for cross examination can be allowed.

13. The concern of this court is to dispense justice to the parties. The respondents have argued that they need to test the veracity and authenticity of documents of the petitioner. Ours being an adversarial system of justice, every party ought to be given opportunity to test the veracity of the opponents evidence. The issues raised in this petition require that the deponent of the supporting affidavits be cross examined to assist the court arrive at a just decision.

14. It is therefore my finding that the petitioner will have opportunity to also re-examine his witness and call for cross examination of any other witness/deponent he deems fit.

15. I therefore find and hold that the prayer to cross examine Mohamed Koriow Nur as stated in the Notice to cross examine him filed on 23rd November 2021 is merited and the same is allowed as prayed.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF MARCH 2022

THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Karani for the Petitioner

Mr. Motari for the 1st, 2nd and 3rd Respondents

Josephine Misigo – Court Assistant