



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL PETITION NO. 44 OF 2012

VITALIS LUMUTI & 54 OTHERSPETITIONERS

VERSUS

THE REVEREND OLAF KONNERUP & 2 OTHERS.....RESPONDENTS

RULING

1. Sometime in 2012, Vitalis Lumuti and 54 Others brought the present Petition against the Respondents/Applicants. The Petition seeks certain declarations grounded on the equality provisions of the Constitution. In material terms, the Petition also seeks to bar the Respondents/Applicants from evicting them from certain church premises and an order requiring the registration of the premises to the names of the Petitioners.

2. The path to perfecting the hearing of the Petition has been, in a word, torturous. There have been many applications. It is not clear how many were heard and determined. And the Court file has gone missing for long durations of time. Indeed, the Court is now operating on a skeletal file. Thus, I have no benefit of the previous proceedings. Indeed, I am left to hazard a guess as to the directions the present application seeks review of! The parties have exchanged accusations on who is to blame for engineering the loss of the Court file. That is immaterial for purposes of the present Application.

3. In the midst of all these, it appears from the material placed before me in the skeletal file that the parties appeared before the Court on 25/06/2014 for directions on hearing of the main Petition. So far as I can tell, the Court gave two directions:

a. That the hearing should be by way of *viva voce* evidence given the nature of the subject matter and dispute: a constitutional petition involving dispute over land ownership; and

b. That the parties to exchange witness statements within twenty one days of the date of the directions (25/06/2014).

4. These are the directions that the Respondents/Applicants, vide their Application dated 28/02/2016, wish to be set aside. In their stead, the Respondents/Applicants want directions that the Petition be disposed by way of Written Submissions and/or oral submissions.

5. Why do the Respondents/Applicants want the directions varied? Because, they say, the Petition is a fairly straightforward one that does not require *viva voce* evidence to dispose off. Indeed, they argue that the Petition will be disposed of vide a Preliminary Objection pivoted on the doctrines of *res judicata* and *locus standi*. It would be, they argue, needlessly costly and time-consuming to take *viva voce* evidence when the matter could be disposed off by submissions.

6. These are arguments the Respondents/Applicants should have made before the Learned Judge who made the directions. It is unclear to me whether they did. What is clear is that the Court took cognizance of the nature of the dispute and gave its directions that *viva voce* evidence will be necessary to equitably and justly determine the controversy. I find no legitimate and justifiable reasons to depart from those directions. There has been no new material discovered and brought to the Court's attention that would warrant this Court to depart from the Learned Judge's directions. Indeed, as couched, the Present Application comes perilously close to mutate into an appeal against the directions by the Learned Judge. Needless to say, as a High Court Judge I cannot sit on appeal against an order or directions by my brother sister or brother of the High Court.

7. There are three other reasons why it would be imprudent to grant the orders sought. First, as alluded to above, I do not have the full record and proceedings of what has transpired in this matter. This is because the original court file went missing some time back. I am working from a skeletal file which, obviously, does not contain proceedings of the Court.

8. Second, this is an old matter. It was filed in 2012. It ought to be concluded as quickly as possible. Revising directions on hearing given more than four years ago is the anti-thesis of expediting the conclusion of this old matter.

9. Third, the Petitioners have already complied with the Court's directions to supply witness statements. It would seem a tad unfair to pull the rug from under their feet at this late hour and declare their efforts to record those statements as wasted energy. This, after the Respondents/Applicants have not filed any witness statements.

10. In the circumstances, therefore, I find the Application dated 28/02/2016 to be without merit. I hereby dismiss it. I do understand, though, that the Application was actuated by the need to expedite the hearing of this long standing Petition. I will, consequently, not penalize the Respondents/Applicants for their desire to expeditiously conclude the matter. I will, instead, direct that costs be in the cause.

11. In view of the age of this matter, this Petition will be listed for hearing on a priority basis.

12. Orders accordingly.

Dated and delivered at Nakuru this 15th day of January, 2019

JOEL NGUGI

JUDGE