Likizo Ltd v Mumbo & 5 others (Environment & Land Petition 19 of 2017) [2024] KEELC 7009 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7009 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 19 OF 2017

FM NJOROGE, J

OCTOBER 24, 2024

BETWEEN

LIKIZO LTD ..... PETITIONER

AND

NASIB KASHURU MUMBO ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

COUNTY LAND REGISTRAR KILIFI ..... 4TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 5TH RESPONDENT

GIDJOY INVESTMENTS LIMITED ..... 6TH RESPONDENT

RULING

1. By a notice of motion application dated 29th February 2024, the Petitioner/applicant sought the following orders: -

    a. That this court be pleased to make directions that:

        i. The petition be heard by way of viva voce evidence;

        ii. That parties file witness statements and documents for trial;

        iii. Any further or other directions as the court may deem fit and just to grant.

    b. That the costs of this application be in the cause.

2. The application, which was brought under Rule 20 of *the Constitution* of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules and Order 51 of the Civil Procedure

Rules, is premised upon the grounds outlined on the face of the motion and supported by the affidavit sworn by Amit Shah on 29th February 2024.

3. According to Amit Shah, the court of appeal remitted the issue of legality and validity of the allocation of land titles issued with respect to the property known as Chembe/Kibabamshe /407 back to the ELC at Malindi for re-hearing and determination by the judge other than Olola J. He further avers that for the court to be able to make a correct finding as to who the legitimate allottee is between the petitioner and the 1st respondent herein, an oral hearing is required so that parties may interrogate the evidence before the court.

4. The 1st respondent filed a replying affidavit dated 15/4/2024. He avers that according to Rule 20 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules affidavit evidence is also capable of disposing of the matter just as viva voce evidence would; that the petition had been heard and determined by way of affidavit evidence without demur on the applicant's part, and no justification has been given for the proposal for the taking of viva voce evidence; that the applicant has failed to state clearly the matters he desires to examine witnesses on and that the belated filing of the present application is just but a delaying tactic.

5. The 2nd respondent filed an affidavit sworn by Bellinda Akello, its acting director legal affairs and dispute resolution on 17/5/2024. The deponent avers that there was no directive that the matter be re-heard by way of oral evidence, that the applicant is attempting to redraft pleadings yet it is a cardinal rule of law that parties are bound by their pleadings. She favours determination on the basis of affidavit evidence.

6. The interested party filed a replying affidavit sworn by its operations manager one Mark Munge on 11/4/2024. The deponent's stance is that there was no specific direction by the Court Of Appeal that new evidence be brought into the matter and the applicant's apparent attempt to reopen the matter is ill founded; that the appeal in CA No E005 of 2020 was in its nature an appeal after a judgment given after a full hearing of the present petition and nothing emanating from the Court Of Appeal warrants the reopening of the procedural aspects of the case and in any event no procedural aspect of the case was under appeal in CA No E005 of 2020; that re-hearing of the case means hearing of the parties based on the pleadings, all concluded interlocutory steps and all directions; that this court now only needs to re-examine the evidence contained in the affidavits filed and determine the outstanding issue in dispute which is ownership and rights over the property; that the court is able to make a determination based on the documentary evidence on the record; that hearing of the petition by viva voce evidence is tantamount to reviving previous civil suits filed by the petitioner, to wit Malindi Civil Case No 123 of 2012- Likizo Ltd Vs Yeri Kombe & 3 Others. And HCCC No 41 of 2011 –Likizo Ltd Vs Yeri Kombe & 2 Others. Therefore, avers the deponent, the court should re-hear the petition in the format prescribed at the pre-trial stage.

7. The applicant the 1st respondent and the interested party all filed their submissions on the matter. I have considered those submissions as well as the application and the replying affidavits.

8. The issue that arises is simply whether the petition should be disposed of by way of affidavit evidence or by way of oral evidence in respect of the issue that the Court of Appeal remitted back to this court for determination.

9. Usually the facts in a petition are straightforward and undisputed and the court is required to apply the constitutional provisions to the facts to come up with a determination. Petitions have been struck out in the past when the court realized that they sought to litigate over contentious issues such as ownership of the land or validity of a disputed title, which issues by their very nature would be favoured by an ordinary trial by way of plaint.

10. In this case, besides the issue of legality of titles issued to the petitioner and the 1st respondent, there was the additional issue of legality and constitutionality of the action of the 2nd respondent, a public body established under and drawing its basic mandate from *the Constitution*. The Court of Appeal indeed found that the action of the 2nd respondent was ultra vires for having been undertaken outside the statutory period set out by the Act that created it. That Act was a manifestation of the provisions of *the constitution* with regard to review of dispositions of public land in Article 67 of *the Constitution*. There was justification in joining the 2nd respondent in the petition for a resolution of the constitutional issue arising and therefore, as legality of the titles issued to the disputants in this case also arose with respect to the land the 2nd respondent pronounced itself upon in Gazette Notice no 6866. This court is thus of the view that inclusion of the dispute regarding the legality of title between the petitioner and the 1st and 6th respondents was justified. Indeed the court of appeal in its decision never singled out the inclusion of the 2nd respondent as irregular. That court also did not question the propriety of trial of the issue of ownership or legality of titles issued to the petitioner and the 1st respondent, in regard to which there would have to be a test of legality; it is generally recognized that the process of proving legality involves calling of evidence including oral evidence as to the procedure employed in inter alia the issuance of the title in question.

11. This court finds merit in the applicant's statement that the issues involved at the hearing will be factual in nature and also its reliance on the SC Petition No 32, 35, & 36 Of 2022- Fanikiwa Ltd & 3 Others Vs Sirikwa Squatters Group & 17 Others and the case of Kibos Distillers Ltd & 4 Others V Benson Ambuti Adega & Others 2020 eKLR. I will replicate herein for greater effect the passage in the Fanikiwa Ltd Case (supra) where it was held as follows:

> "This matter entails disputed ownership of land. In other words, there are competing claims as to the ownership of the suit parcels. Therefore, it behoves a court to make a just determination on the same, procedurally. In doing so, it has to, on the basis of the law and evidence before it, decide who the owner is and thoroughly interrogate how such ownership was conferred. In the present scenario, a trial process involving examination, cross-examination and re- examination of the witnesses is the only way of resolving the competing allegations and counter allegations. We recognize that the superior courts below relied on rule 20(1)(a) of the Mutunga Rules to hear the matter by way of affidavit evidence. However, we are of the view that a court is required to make a special endeavour to unravel all the competing claims and in particular, by calling for viva voce evidence from witnesses, especially those who have sworn depositions, and cross-examination done. This is particularly important because its decision will have a far-reaching impact especially upon the party(ies) whose ownership may end up being nullified. In taking this view, we are fortified by rules 20(3), (4), and (5) of the Mutunga Rules which allow a court to admit oral evidence, examine and cross-examine parties.
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> In the circumstances of this case therefore, we are not convinced that it was prudent and judicious, considering the highly contentious nature of the claims and circumstances of each of the numerous parties involved to determine this matter by affidavit evidence only. The authors of the said affidavits ought to have been called and cross-examined to test the veracity of the affidavits and documentary evidence. To our minds, this would have presented the best available evidence for the learned trial judge to make his decision fairly."

12. In the Kibos Case (supra) the Court of Appeal held as follows:

> " In the instant matter, the record shows that the trial court gave directions that the petition was to be heard by way of affidavit evidence and written submissions. No application was made by any party that the petition or part thereof be heard by oral evidence. No objection was raised by the three appellants or any party on the propriety of the directions given by the judge. In the absence of any challenge to the directions given by the judge, it is my finding that the directions given was in conformity and consonance with Rule 20 (1) of the Mutunga Rules.
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> I am cognizant that in the persuasive case of in Re Estate of Joseph Mapesa Nakuku (Deceased) [2019] eKLR it was stated that it would have been wiser for the parties to give viva voce evidence since the same has a way of bringing out the facts more clearly, particularly in a contested matter.
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> Comparatively, in the South African case of S - v- J. Sibanda (Judgment No. CCZ 4/17, Const. Application No. CCZ 14/15) [2017] ZWCC 4 (17 March 2017), it was expressed that "there are cases where the leading of evidence would not be necessary, particularly where the facts giving rise to the request are common cause. In such a case, it would serve no meaningful purpose for the parties to be required to give viva voce evidence. Where, however, the facts are not common cause, the parties must, as a general rule, be required to give evidence."
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> In the Lesotho case of Zwelakhe Mda v Minister of Home Affairs and Others (Constitutional Case No.4 of 2014) [2014] LSHC 30 (24 September 2014); it was expressed that where there is no real, substantial and material dispute of fact which makes it impossible to dispose of a matter without resort to viva voce evidence, the factual differences can be decided on the papers by affidavit evidence.
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> In the instant matter, I am persuaded by the merits of the principles enunciated in the foregoing comparative jurisprudence. I approve and adopt the same. I have considered whether in the instant matter there are real contested matters of fact that could not be resolved by way of affidavit evidence and that would require viva voce evidence."

13. There is no hard and fast rule that affidavit evidence is the sole evidence to be used in determination of constitutional petitions. They may be heard by way of viva voce evidence, submissions or affidavit evidence.

14. Concerning the claim by the respondents that the Court of Appeal never prescribed a viva voce hearing and so the original pretrial directions should hold fast, this court is of a different view. The Court of Appeal in remitting back the matter for re-hearing also ordered that the matter be re-heard by a judge other than the one who delivered the judgment impugned before it. The very implication of that specific direction as to who ought to hear the matter is that it would not be proper for the subsequent court that hears the matter to be shackled to the very procedure that led to the judgment successfully appealed against. It is only logical that a fresh hearing implies by necessity that the court that re-hears the matter will be entitled to issue fresh directions within its discretion as to the re-hearing of the matter. Indeed, this would accord well with Rule 20(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.

15. I am persuaded that in the special circumstances of the present petition, its disposal solely on the basis of affidavit evidence regarding the very contentious issue that the Court of Appeal remitted back to

this court would not aid the parties or the court to the fullest extent in unravelling the mystery of which is the valid title to the suit land, and the fairest hearing would be by way of viva voce evidence.

16. The apprehensions of protracted delay by the respondents in the event the matter is disposed of by viva voce evidence of can be taken care of by ensuring scrupulous adherence to discipline in terms of compliance with directions which this court is keen to enforce in the matter. Further, there is no rule that prohibits any of the parties who is extremely averse to delay to be occasioned by viva voce evidence from merely appearing in court to adopt the contents of the affidavit they have sworn, but this course of action must be taken together with its concomitant: inevitable cross examination. This court hence finds no other reasonable or just way of disposing the issue for trial before it other than by way of viva voce evidence.

17. The final conclusion of this court is that there is merit in the application dated February 29, 2024 and the same is hereby allowed in terms of prayers Nos 1.1, 1.2 and (2) thereof. The matter shall be mentioned on November 26, 2024 for a pretrial conference for issuance of more specific directions as to hearing. All parties must examine their records and be ready for and attend that pretrial session. This does not preclude the petitioner from filing the documents as allowed in the present motion before then.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 24TH DAY OF OCTOBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI