



Kipkorir v Kenya National Highway Authority; Anti-Corruption Commission (Interested Party) (Environment and Land Constitutional Petition 8 of 2021) [2023] KEELC 123 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEELC 123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 8 OF 2021
FM NJOROGE, J
JANUARY 20, 2023**

BETWEEN

HILLARY MWAITA KIPKORIR PETITIONER

AND

KENYA NATIONAL HIGHWAY AUTHORITY RESPONDENT

AND

ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. This ruling is in respect of the respondent/applicant's Notice of Motion application dated 11/10/2022. It has been brought under articles 22,23, 47, 50(2) and 159 of *the Constitution* of Kenya, section 13 of the *Environment and Land Court Act*, Rules 19, 20(1), (c), (3) and 25 of *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure Rules*, 2013 and seeks the following prayers:
 - a. This honorable court be pleased to review, vary and/or set aside its directions and orders issued on May 12, 2022 and substitute the same with an order allowing this petition to be heard and determined through viva voce evidence.
 - b. The respondent be granted leave to file a cross-petition and the cross-petition filed herein be deemed properly filed and served upon payment of the requisite court fees.
 - c. The Honorable court be pleased to grant any further orders it may deem fair and appropriate for a just and conclusive determination of the dispute herein.
 - d. Costs of this application be provided for.



2. The application is supported by the affidavit of Eng. Fredrick Oyugah Onyango sworn on October 12, 2022. The grounds on the face of the application and the supporting affidavit are that the petitioner filed the present petition on April 12, 2021 seeking for orders to permanently restrain the respondent from trespassing on land parcel No. Nakuru/Municipality Block 20/232 and another order seeking that the respondent gives the suit property to the petitioner; that the Respondent filed its reply to the petition on 17/11/2021 together with a Replying Affidavit and contended that the suit property is public land having been given to the Respondent by the Government of Kenya by virtue of the Kenya Roads(Kenya National Highways Authority Vesting) Order, 2011; that on 26/01/2022 the court through its ruling delivered on the same date allowed the Ethics and Anti-Corruption Commission to be joined in these proceedings as an interested party; that the interested party filed its replying affidavit where it confirmed that the suit property is public property; that he is advised by his advocates on record that the dispute before the court is for determination of the actual owner of the suit property between the respondent and the petitioner herein; that on 12/05/2022, the court issued directions that the petition be determined through written submissions; that given the nature of the dispute before this court, it is only fair that the court takes evidence in a manner that allows witnesses to be cross-examined with a view of establishing the actual truth and to administer substantive justice; that the respondent has procured an external counsel who upon reviewing the matter has determined that it is necessary for the Respondent to file a cross-petition seeking to revoke the title document held by the petitioner; that the cross-petition will enable the court to administer substantive justice by determining all the related claims with respect to the suit property; that the application is brought in good faith and that the petitioner will not be prejudiced in any way.
3. In response to the application, the petitioner filed his grounds of opposition dated 3/11/2022 on 7/11/2022 as follows:
 1. Before the court gave its direction, it was guided by the nature of the petition, the procedure of its presentation, the pleadings and relief sought and came to decision that the petition is property before the court to be heard by way of affidavit and written submissions.
 2. The direction were given in the presence and concurrence of all parties to the petition with no objection and there is no new compelling ground advanced before the court to vary the said direction.
 3. All the parties to the petition indicated their willingness to comply with the courts direction, the petitioner had complied and served their submission to other parties. The Respondent has sought adjournment to comply only to change it mind after going through the petitioner's submission and realized gaps & weakness in their pleading. The present application is brought to defeat unfairly the cause of justice and to steal a match against the petitioner. To that extent to grant prayer 'a' would violate the petitioner constitutional right to a fair hearing and fair procedure provided under article 50 of the constitution.
 4. The main contention of the petition is whether the Respondent had constitutional justification in dispossessing the petitioner from the suit property without due process as provided under article 40(6) and 47 of the Constitution and if so whether the petitioner is the registered proprietor of the suit.
 5. The intended cross petition is inept, an afterthought to defeat cause of justice, inordinately filed and should be disallowed.
 6. In so far as the intended cross-petition challenges the validity of the suit property based on fraud and illegality the same is incompetently filed, an abuse of court process and violates the



procedure of challenging title of land provided under Direction 16 of Practice Direction on Proceedings in the Environment & Land Courts and procedure of filing civil suit under order 2, order 4, order 7 of the [Civil Procedure Rules](#), 2010.

4. Neither of the parties filed their written submissions.

Analysis and determination

5. After considering the application and the response thereto the issues that arise for determination are whether the court should review its orders issued on 12/05/2022 and whether the respondent should be granted leave to file a cross petition.

6. I will first address the issue of whether the court should review its orders issued on 12/05/2022 and allow the petition to be heard by way of viva voce evidence.

7. Section 80 of the [Civil Procedure Act](#) provides as follows:

“ Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

8. Order 45 rule 1 of the Civil Procedure Rules provides as follows:

1. Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

9. In the case of [Republic v Public Procurement Administrative Review Board & 2 others](#) [2018] eKLR, the court held as follows:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on



account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

10. The respondent/applicant sought for the court to review its orders issued on 12/05/2022 which were to the effect that the court hears the matter by way of written submissions and substitute the same with an order that the petition be heard through viva voce evidence. The Petitioner/Respondent on the other hand opposed the application and stated that the directions were given in the presence of the Respondent/Applicant who did not object to the same. Further that no new ground has been advanced before the court to vary the said directions. The Petitioner also stated that the respondent/applicant only filed the present application after service of the petitioner’s submissions and the application is therefore only meant to defeat the course of justice.
11. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* (supra), held that the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the order was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
12. The basis upon which the respondent/applicant is seeking for the review orders is that the nature of the dispute is land ownership and that it is only fair that the court takes evidence and allows witnesses to be cross-examined. As pointed out by the petitioner/respondent, counsel for the respondent/applicant was present in court when the court issued directions that the petition would be heard by way of written submissions but did not raise any objection.
13. It is this court’s view that the reasons advanced by the respondent/applicant in seeking for orders of review do not fall under the grounds upon which orders of review can be granted under order 45 rule 1 as there has been no discovery of new or important evidence nor is there an error apparent on the face of the record.
14. The second issue for determination is whether the respondent/applicant should be granted leave to file a cross-petition. The basis upon which the respondent/applicant is seeking for leave to file a cross-petition is that it had procured external counsel to represent it who upon review of the matter determined that it is necessary for it to file a cross-petition in the matter seeking to revoke and cancel the title document held by the petitioner. The petitioner/respondent on the other hand argued that the intended cross-petition is an afterthought meant to defeat the course of justice and is an abuse of the court process.
15. It is this court’s view that the petitioner/respondent will not be prejudiced in any way if the respondent/applicant is granted leave to file a cross-petition as he can be granted corresponding leave to file a response if any.
16. In conclusion therefore, the respondent’s application dated 11/10/2022 is hereby allowed in terms of prayer 2. Costs of the application shall be in the cause. The petition shall be listed for a mention for further directions on 31/1/2023 by way of Microsoft Teams.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

