



Magor v Kenya Electricity Transmission Co. Ltd & 2 others (Environment and Land Constitutional Petition 2 of 2014) [2022] KEELC 4911 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 4911 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 2 OF 2014
L WAITHAKA, J
JUNE 16, 2022
IN THE MATTER OF ARTICLES 19, 20, 22, 23, 40, 42,
70 AND 159 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF
THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE
AND PROCEDURE RULES 2013

BETWEEN

SUSAN GILLIAN THOMASIN MAGOR PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO. LTD 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD RESPONDENT

RULING

1. The petitioner herein, filed this petition seeking various reliefs against the respondents for alleged contravention of her constitutional rights and freedoms. Alongside the petition, the petitioner brought the notice of motion dated May 30th, 2014 seeking conservatory/interim reliefs pending the hearing and determination of the application and the petition.



2. Upon hearing the application, ex parte, the court certified it urgent and temporarily restrained the respondents from interfering with the petitioner's quiet possession, use and enjoyment of the property known as LR No 8722 (IR 21756) pending inter partes hearing of the application. Those interim orders have been extended on various occasions.
3. On October 4, 2018, the 1st respondent filed the notice of motion dated October 3, 2018 seeking to set aside/discharge the interim orders referred to in paragraph (2) above. The application is premised on the grounds that the 1st respondent/applicant has formally settled the petitioner's complaint; that it's in public interest to set aside the orders in order to pave way for the 1st respondent to implement the project it sought to implement in the suit land (construction of national grid's high voltage transmission lines) and that the parties had filed a consent for adoption by the court as an order of the court, among other grounds.
4. The application is supported by the affidavit of the 1st respondent's company secretary, Duncan Macharia, in which the grounds on the face of the application are reiterated. Besides reiterating the grounds on the face of the application, the deponent of the supporting affidavit has annexed a copy of the order sought to be set aside and a copy of a consent filed on October 4, 2018, marked DM 1 and DM 2 respectively.
5. On February 19, 2019, when the application came up for hearing, the court was told that the application was served on all respondents and none of them had opposed it. Mr Gitau, who was holding brief for Mr Gikonyo for the petitioner, informed the court that Mr Gikonyo was unable to file a response to the application. For that reason, he sought leave to file his response. The application was opposed by Mr Nderi.
6. Mr Mahinda who was holding brief for counsel for the 3rd respondent informed the court that the 3rd respondent was not opposed to the application and would abide by the directions given by the court.
7. Not satisfied with the explanation offered for failure by counsel for the petitioner to file a response to the application, the court declined to grant the orders sought and ordered that the application proceeds for hearing at 10.30 am.
8. when the application was called for hearing later on, Mr Mahinda who was holding brief for Mr Nderi for the applicant/respondent informed the court that they had a consent to record.
9. Regarding the consent, Mr Mahinda addressed the court as follows:-
 - i. The orders dated June 4, 2014 be and are hereby discharged;
 - ii. The consent order dated March 1, 2018 filed on March 5, 2018 be adopted as the order of the court."
10. Mr Njuguna who was holding brief for Mr Gikonyo Gitau for the petitioner confirmed the terms of the consent. However, because the consent order sought to be adopted as an order of the court was signed between the 1st respondent and the petitioner only, the court declined to adopt it as an order of the court and reserved the application dated October 3rd, 2018 for a ruling.
11. As pointed out hereinabove, the application is unopposed.
12. During hearing of the application, all parties to the application except the 2nd respondent (National Land Commission), were represented by counsel. There is evidence that the 2nd respondent was served



with a hearing notice of the application as attested by the affidavit of service of Jacob Okore filed on February 19, 2019.

13. There being evidence that the 2nd respondent was served with the application and failed to attend court on the date set for hearing of the application, the consequences of none attendance contemplated under order 17 rule 3 as read with order 12 rule 5 of the Civil Procedure Rules attach in the circumstances of this case. The rules provides as follows:-

“Order 17 rule 3: Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order 12 or make such other order as it thinks fit.

Order 12 rule 2 subrule 5-If on the day fixed for hearing, after the suit has been called on for hearing outside the court, if only some of the defendants attend, the court may proceed with the suit and may give such judgment as is just in respect of the defendants who have not attended.”

14. The application being unopposed and being of the view that the 2nd respondent’s interest in the application is taken care of in the consent order filed between the petitioner and the 1st respondent (in my considered view the 2nd respondent interest in the application/suit is limited to an order for costs), I find the application dated October 3, 2018 to be merited and allow it in the following terms:-
- i. Subject to the consent order executed between the petitioner and the 1st respondent and filed on March 5, 2018, the interlocutory/conservatory order and/or interlocutory injunction orders issued herein dated June 4, 2014 restraining the respondents from interfering with the petitioner’s quiet possession, use and enjoyment of the property known as land reference number 8722 (IR 21756) or otherwise howsoever altering the property in any manner howsoever to the detriment of the petitioner be and are hereby set aside and/or discharged.
 - ii. Subject to the consent order executed between the petitioner and the 1st respondent/applicant and filed on March 5, 2018, the temporary injunction orders issued herein dated June 4, 2014 restraining the respondents from entering upon, remaining thereon, removing from, wasting, digging on, excavating, fencing, damaging, erecting or building any structure whatsoever or demolishing, pulling down, flattening or removing any structures built and fence erected or otherwise dealing with that property known as land reference number 8722 (IR 21756) or otherwise howsoever altering the property in any manner howsoever to the detriment of the petitioner be and are hereby set aside and/or discharged.
 - iii. The consent signed between petitioner and the 1st respondent/applicant, dated March 1, 2018 and filed on March 5, 2018 be and is hereby adopted as an order of the court.
 - iv. The application being unopposed no costs are awarded.
 - v. Parties be at liberty to apply.

DATED AND SIGNED AT ITEN THIS 30TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O OLOLA



JUDGE

