



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NYERI

ELC PETITION NO. 2 OF 2014

(FORMERLY NYERI PETITION NO. 7 OF 2014)

IN THE MATTER OF ARTICLES 22(1), (2) AND 23 (1),(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 19, 20, 21, 23, 40, 42, 70 AND 159 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM

UNDER ARTICLE 40 AND 42 OF THE

CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM)
PRACTICE AND PROCEDURE RULES 2013

BETWEEN

SUSAN GILLIAN THOMASIN MAGOR.....PETITIONER

-VERSUS-

KENYA ELECTRICITY TRANSMISSION CO. LTD.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By notice of motion dated **19th May, 2016** and amended on **8th July 2016**, the 1st respondent/ applicant *inter alia* seeks to vary, set aside and/or discharge the interlocutory or conservatory orders issued on 4th June, 2014; compel the petitioner to provide security for costs of the Petition; strike out the Petition and/or any other order(s) that may be necessary for the ends of Justice.
2. The application is premised on the grounds that this court lacks jurisdiction to hear and determine the issues raised in the Petition; that the Petition is fatally defective; that some of the orders sought cannot issue; that the petitioner has failed to prosecute the Petition expeditiously and that the petitioner has not provided security for costs and losses incurred by the petitioner.
3. It is the applicant’s case that the orders sought to be varied, set aside or discharged have interfered with the operations of the applicant

which operations are of great public interest.

4. The applicant accuses the Petitioner of taking advantage of the conservatory orders.

5. Contrary to the applicant's contention that the delay in prosecution of the Petition is caused by the petitioner, the petitioner has deposed that the delays in prosecution of the Petition has been caused by the the 1st respondent by bringing multiple applications.

6. The application was disposed of by way of written submissions.

7. In the submissions filed on behalf of the applicant, the following issues are framed for the courts determination:-

i. Whether this court has jurisdiction to hear and determine issues touching on alleged violation of constitutional rights and fundamental freedoms?

ii. Whether the petition is fatally defective?

iii. Whether an order of certiorari can issue in the circumstances of this case?

iv. Whether the petition as framed discloses any violation of the petitioners constitutional rights and fundamental freedoms?

v. Whether the public interest in this matter outweighs the petitioner's private rights or interest in the subject matter of the suit.

8. Concerning the first issue, reference is made to the case of **Karisa Chengo, Jefferson Kalama Kengha Kitsao Charo Ngati V. The Republic** and submitted that this court lacks jurisdiction to entertain the dispute preferred before it.

9. Owing to the alleged lack of jurisdiction, it is submitted that the impugned orders were a nullity.

10. In addition to the alleged want of jurisdiction, the petition is said to be defective for failing to comply with **Rule 10 (2)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter the Mutunga Rules).

11. Maintaining that the Petition is fatally defective, the applicant contends that the applicant should have pursued the dispute through ordinary civil processes as opposed to filing a constitutional petition.

12. Concerning the public interest in the matter, it is submitted that the large public interest in the subject matter of the Petition outweighs the petitioner's private interests.

13. On behalf of the petitioner it is submitted that under **Article 162(2)(b)** of the Constitution as read with **Section 13 Rules 2(e)** and **(7)** of the Environment and Land Court Act, this court has jurisdiction to hear and determine Petitions concerning alleged violations of rights and fundamental rights concerning ownership, occupation and use of land.

14. Concerning the alleged failure to succinctly or sufficiently set out the provisions violated as required by **Rule 10(2)** of the Mutunga Rules, it is submitted that the Mutunga Rules do not provide that failure to comply with **Rule 10(2)** thereof renders a Petition fatally defective.

15. With regard to the contention that an order of certiorari cannot issue in a Petition, it is submitted that the current constitution, **Article 22** thereof, permits issuance of any appropriate orders including an order for judicial review.

16. Concerning the cases cited by the applicant to wit, Speaker of the **National Assembly v. James Njenga Karume (1992) eKLR; Karisa Chengo, Jefferson Karama Kengha and Kitsao Charo Ngali v. Republic (2015) eKLR**, it is submitted that those cases are distinguishable in that the circumstances obtaining in those cases are different from those obtaining in this case.

17. The contention that an order of certiorari has to be sought under the Law Reform Act and **Order 53** of the Civil Procedure Rules is said to be based on a misapprehension of the emerging jurisprudence in Judicial Review matters.

18. Maintaining that the cases cited by the applicant are inapplicable to the circumstances of this case, counsel for the petitioner/respondent has submitted that the applicable procedure in this case is that contemplated in the Mutunga Rules.

19. It is pointed out that the applicant did not address the contention that the Petition raises no constitutional issue.

20. On the contention that the public interest in the activities of the applicant that have stalled owing to the conservatory order hereto outweighs the respondent's private interest; reference is made to the case of **Machareus Obaga Anunda v. Kenya Electricity Transmission Co. Ltd (2015) eKLR** and submitted that the public interest in the matter must be gauged as against the petitioner's guaranteed legal rights and whether the right legal processes have been followed in seeking to limit the respondent's rights.

Analysis and determination

21. I have carefully read and considered the rival arguments concerning the cases of the parties to this dispute. I have also read and considered the authorities cited in support and against the cases of the respective parties.

22. In my view, the cases cited in support of the applicant's case are inapplicable to the circumstances of this case. I say so because it has been held in many cases that this court has jurisdiction to hear and determine constitutional issues arising out of its area of jurisdiction. In this regard see **David Ramogi & 4 others v. Cabinet Secretary, Ministry of Energy & Petroleum & 7 others** (2017)e KLR.

23. Having determined that this court has jurisdiction to determine the Petition, I now turn to the contention that the Petition is fatally defective for, *inter alia*, failing to clearly plead that of which is complained about contrary to **Rule 10(2)** of the Mutunga Rules.

24. Concerning that contention, having perused the petition, I am satisfied that it sufficiently informs the respondent/applicant of that which is urged against it. That being the case, the alleged defect in the Petition cannot form a basis for striking it or granting the applicant the orders sought.

25. Concerning the reliefs sought, a reading of **Articles 22 and 23** clearly shows that the Constitution allows the applicant to seek those reliefs. There is nothing unlawful in seeking those orders through a constitutional petition as opposed to the normal civil processes.

26. On whether the public interest involved in the matter outweighs the petitioner's private interest in the matter, I can do no better than adopt the decision in the case of **Machareus Obaga Anunda v. Kenya Electricity Transmission Co. Ltd** (*supra*) where it was held:

“...Article 40 (3) (b) of the Constitution provides that one can be deprived of property or interest in or right over property for public purpose or in the public interest. There is however a rider that such deprivation must be carried out in accordance with the constitution and any act of parliament that requires prompt payment of just compensation and allows access to a court of law. the manner in which the defendant purported to acquire a wayleave over the suit properties falls far way below the constitutional threshold...”

27. In the circumstances of this case, it is contended that the applicant did not comply with the law in its bid to acquire a wayleave over the suit property, an issue which can only be determined through trial.

28. The evidence on record shows that to fasttrack the hearing and determination of the dispute over the suit property, parties conceded to have conservatory orders issued in favour of the petitioner.

29. Whereas the the applicant accuses the petitioner for delaying the hearing and conclusion of the dispute, the evidence on record shows that both parties are responsible for the delay in prosecution of the dispute by filing a multiplicity of applications.

30. There being no evidence that the delay in prosecution of the matter is purely attributable to the petitioner, I decline to issue the orders sought and instead direct the parties, with the help of the registry, to ensure that the Petition is heard and determined within nine (9) months from the date of delivery of this ruling failing which the conservatory orders issued in favour of the petitioner shall stand automatically vacated.

31. The costs of this application to abide the outcome the Petition.

32. Orders accordingly.

Dated, signed and delivered at Nyeri this 30th day of May, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Ms Mureithi h/b for Mr. Gikonyo for the petitioner

Ms Wanjira h/b for Mr. Wachira for 1st respondent

N/A for the 2nd – 4th respondents

Court assistant - Esther