



County Government of Mombasa v Kenya Railways Corporation & another (Environment & Land Petition E002 of 2023) [2024] KEELC 4341 (KLR) (29 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E002 OF 2023**

**SM KIBUNJA, J
MAY 29, 2024**

BETWEEN

COUNTY GOVERNMENT OF MOMBASA PETITIONER

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

CHINA ROAD & BRIDGE CORPORATION 2ND RESPONDENT

RULING

1. The petitioner filed the application dated the 21st November 2023 seeking for conservatory order restraining the respondents “from continuing development and or in any other manner interfering with the nature of the land vis-a-vie developments being carried on plot No. X1V/362 located within Mombasa County pending the hearing and determination of this instant petition.” The application is based on the eight (8) grounds on its face, and supported by the affidavit of Paul Manyala, Director Physical Planning, sworn on the 21st November 2023.
2. The application is opposed by the 1st respondent through the replying affidavit of Gerald Malele, Regional Civil Engineer with the 1st respondent, indicated to have been sworn on the “8th day of November 2023” which date must be an error as it was before the notice of motion dated 21st November 2023 was drawn and filed.
3. The court gave directions on filing and exchanging replies and submissions on the 4th December 2023 and 8th February 2024. The learned counsel for the petitioner filed their submissions dated the 5th February 2024, which the court has considered.
4. The issues for the determinations by the court are as follows:
 - a. Whether the petitioner has made a *prima facie* case for the conservatory order to be issued at this interlocutory stage.



b. Who pays the costs in the application?

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions filed, superior courts decisions cited thereon and come to the following findings:

a. That simply put, the petitioner’s case is that the respondents are carrying out developments on the suit property, which is within its jurisdiction, without obtaining prior approvals and or permissions in accordance with the Constitution and Physical and Land Use Planning Act. That pursuant to section 72 of the said Act, the petitioner on the 18th November 2023 asked from the respondents to furnish it with the;

- i. “Approved drawings(Architectural and Structural),
- ii. PLUP/DC/8 (Approval/deferment/rejection of development),
- iii. Inspection Forms,
- iv. Site Board.”

The respondents did not respond to the request and on the 20th November 2023, the petitioner issued an enforcement notice against them, but when the petitioners’ officers went to enforce it, they were attacked by police officers, and hence this petition filed on or about 21st November 2023. The record confirms that the court issued the initial directions in the matter on the 22nd November 2023.

b. The 1st respondent’s has in its reply not denied that it is undertaking the alleged development on the suit land. Its case as seen in paragraphs 8 of the replying affidavit is that the developments it is undertaking of constructing station buildings and necessary facilities shall benefit the petitioner at large. At paragraph 9 to 11 thereof, the 1st respondent has deposed that it submitted the development plans to the petitioner on the 22nd November 2023 but it has not received any response. The court has perused the copy of the forwarding letter dated the 22nd November 2023 that is attached to the replying affidavit and it bears a stamp indicating it was received by the petitioner’s Department of Lands Planning & Housing on the 23rd November 2023.

c. That it is not disputed that under section 8 of Part 2 of Fourth Schedule of the Constitution 2010, and section 56 of the Physical and Land Use Planning Act 2019, the petitioner has the powers and responsibilities to control planning and development within the borders of the County. Going by the finding in (a) and (b) above, the respondent only submitted its drawings on the 23rd November 2023 and to date there is no evidence of any approvals or permissions having been issued by the petitioner.

d. That it is without doubt that by the time the 1st respondent was submitting its drawing to the 1st respondent on the 23rd November 2023, through its forwarding letter dated the 22nd November 2023, the works on the suit property had already commenced. The said works were therefore commenced in contravention of section 57 of the Physical and Land Use Planning Act that provides that:

“ A person shall not carry out development within a county without development permission granted by the respective county committee member.”

e. In their submissions, the learned counsel has cited the following superior courts decisions;



- i. [*Gatirau Peter Munya versus Dickson Mwenda Githinji & 2 Others*](#) [2014] eKLR;
- ii. [*Wilson Kaberia Nkunja versus The Magistrates and Judges Vetting Board & Others*](#) [2016]eKLR; and
- iii. [*Board of Management of Uhuru Secondary School versus City County Director of Education & 2 Others*](#) [2015] eKLR;

which I find are relevant in determining whether or not to issue the conservatory order sought.

- f. That in view of the finding in (d) above, I find the petitioner’s application is with merit. It is however the court’s hope that the parties herein, will find it worthwhile for all of them to urgently consult and address the outstanding issue with a view of ensuring fidelity to the Constitution and the Law, and hopefully settle the issues herein without delay. If no settlement is forthcoming within 30 days from today, the court will in the next mention date, issue directions on fast tracking the hearing of the petition.
 - g. That due to the nature of the application, I find it fair and just to order that the costs abide the outcome of the petition.
6. That flowing from the foregoing, the court finds and orders as follows:
- a. That the petitioner’s notice of motion dated the 21st November 2023 has merit.
 - b. That conservatory order in terms of prayer 3 is granted.
 - c. The costs to abide the outcome of the petition.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF MAY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the Presence of:

Petitioner: Mr. Tajbhai

Respondents: Mr Willy for 1st Respondent.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

