



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 209 OF 2018

FLORA IMPEX LIMITED.....PLAINTIFF

VERSUS

KENYA RURAL ROADS AUTHORITY & 4 OTHERSDEFENDANTS

RULING

(Application seeking leave to amend plaint to join two other parties and seeking orders of status quo on the disputed land; plaintiff having filed suit seeking orders to stop the defendants from encroaching on her land and simultaneously filing an application for injunction; position of the defendants being that the land was declared by the National Land Commission to be public land under the ownership of the Kenya Airports Authority; plaintiff now seeking to join the National Land Commission and the Kenya Airports Authority as parties and further plead that the decision of the National Land Commission was unlawful; this aspect of amendment allowed; order of status quo declined as the court had earlier pronounced itself on the issue of an injunction)

1. The application before me is that dated 27 February 2020 filed by the plaintiff. It seeks the following orders :-

(i) *Spent (certification of urgency).*

(ii) *Kenya Airports Authority and National Land Commission be joined as defendants and they be given leave to file their pleadings in this case.*

(iii) *Leave be granted to the plaintiff to amend its pleadings dated and filed on 20th September 2018.*

(iv) *Spent (interim orders pending hearing of the application).*

(v) *An order of status quo be granted restraining all the parties from further dealing or interfering with the suit property and in particular to restrain the 4th defendant from continuing with the unlawful demolition of the plaintiff's boundary wall and dumping materials on the suit property being CR 49417 (LR No. MN/VI/3868) pending the inter partes hearing and determination of this suit.*

(vi) *Any other order or relief that this Honourable Court may deem fit to grant.*

(vii) *Costs of this application be provided for.*

2. The application is premised on various grounds and is opposed by the Kenya Airports Authority and the 2nd & 3rd defendants.

3. The background is that through a plaint filed on 20 September 2018, the applicant commenced this suit against three defendants, respectively being, Kenya Rural Roads Authority, Kenya Power & Lighting Company Limited, and The National Government Constituency Development Fund. In the plaint, the applicant pleaded that it was at all material times the registered grantee of the land title No. CR 49417 on the Plot No. MN/VI/3868 situated in Mombasa County (hereinafter referred to as 'the suit property'). It pleaded that in the month of August 2018, the defendants unlawfully entered the suit property and demolished a section of the wall and commenced road works and erection of electricity poles which it pleaded has caused her loss and damage. In the suit, the applicant asked for a declaration that she is the rightful owner of the suit land; a permanent injunction to restrain the defendants from the suit land; a mandatory injunction compelling the defendants to vacate the suit land; special damages for the destroyed wall; general damages; costs, interest and any further relief deemed fit to grant.

4. Together with the plaint, the applicant filed an application seeking orders inter alia to have the defendants restrained from the suit

property pending hearing and determination of the suit. That application was heard but was dismissed through a ruling delivered on 25 September 2019 by Omollo J. Part of the reason why the application was dismissed was the finding that the road and electric works, which involved the erection of electricity poles for street lighting, had already been done. Within that application it also arose that the question of ownership of the suit land had been heard and determined by the National Land Commission which held that the land is public land belonging to the Kenya Airports Authority and that the applicant participated in those proceedings. It will be observed that in this application the plaintiff wishes to join the National Land Commission and the Kenya Airports Authority as defendants and also seeks restraining orders against the Kenya Airports Authority (named in the application as 4th defendant, which is erroneous as the entity is yet to be a party to this suit).

5. The application is based on the grounds inter alia that the determination by the National Land Commission (hereinafter referred to as 'the NLC') was illegal and that the applicant wishes to challenge the same within this case; that the defendants proceeded with demolition of the applicant's wall and installed electricity poles; that some contractors under instruction of the Kenya Airports Authority (hereinafter referred to as 'KAA') continue to demolish the applicant's wall and that it is fair that leave to amend be granted so that all issues can be determined conclusively. The application is supported by the affidavit of Ali Kinuthia Hassan, the property manager of the plaintiff who has more or less elaborated on the above. He has averred that if the applicant is successful in the suit, it might be impossible to undo the road and electricity project and recourse will be to seek compensation. He has annexed a photograph of the suit land and the draft amended plaint.

6. The 1st defendant/respondent filed a replying affidavit sworn by Eng. T.K. Kendagor its Deputy Director for Mombasa Region. He has averred that the applicant had filed an application (for injunction) which was dismissed and this is another attempt at re-litigating the same issues. It is his view that if aggrieved, the applicant should appeal. He has deposed that the determination by the NLC is lawful. He has further deposed that the construction of the road is complete.

7. The 2nd defendant/respondent filed Grounds of Opposition where it was averred that the order of status quo cannot issue restraining the parties from further dealing with the suit property as a ruling was delivered on 28 October 2019 dismissing the plaintiff's application for injunction.

8. The 3rd defendant/respondent opposed the application and filed Grounds of Opposition. It contended that the application is res judicata as the court ruled on a similar application.

9. KAA (the 4th respondent) opposed the application by filing a Notice of Preliminary Objection. In it, it contends that the dispute was fully heard by the NLC which had the requisite authority, and in light of that, this suit is res judicata and the court lacks jurisdiction to entertain it or join the 4th respondent as a party.

10. NLC, the 5th respondent, did not file anything towards the application.

11. At the hearing of the application, Mr. Shiundu, learned counsel for the applicant relied on the affidavit in support of the motion. Ms. Kabole, learned counsel for the 2nd respondent and Mr. Otieno, learned counsel for the 3rd respondent, relied on their Grounds of Opposition. Mr. Wafula, learned counsel for the 4th respondent, argued that the dispute between the applicant and the 4th respondent was heard and determined and that this court cannot join the NLC so as to hear the dispute afresh. He also submitted that the application for status quo is res judicata as ruling on the application for injunction had already been made. Mr. Otieno, learned counsel for the 3rd respondent, held the same view and added that his client is wrongfully joined in the suit. I have considered the above.

12. There are two limbs to the application. The first seeks orders of status quo to restrain all parties and particularly the 4th respondent from further demolishing the applicant's wall. The objection to this prayer is mainly on the ground that this is res judicata, as the court already pronounced itself in the ruling 25 September 2019, delivered on 28 September 2019. There was no supplementary affidavit to challenge this and Mr. Shiundu did not make any submissions on the point that the application is res judicata. I am persuaded to agree with the respondents. What is being described in this application as a prayer for status quo is simply a disguised prayer for an injunction, and the court already pronounced itself on the issue of injunction. I am barred, through the doctrine of res judicata, from revisiting the issue of whether or not the applicant is entitled to interlocutory orders of preservation of the suit land pending hearing of the suit.

13. The second limb of the application seeks to amend the plaint so as to join two parties, KAA and the NLC to this suit. The reason why the applicant wishes to join the two is because there was a dispute over ownership of the suit land which was heard by the NLC and a finding made in favour of KAA. It appears as if the applicant wishes to challenge that finding, although I have not seen any prayer, in the draft amended plaint that seeks any order to quash that award of the NLC. Mr. Wafula strongly opposed this prayer of joinder, arguing that the dispute has already been heard by the NLC and this court cannot rehear it. He may have a point, but I think that the applicant should be allowed an opportunity to argue her case as she wishes. If she thinks that the NLC did not properly annul her title, I would not wish to shut her out from saying so. I see no prejudice to the 4th respondent because she will still have an opportunity to challenge the pleadings upon amendment. An appropriate application, with support of evidence and the law, can even be filed to have the plaint struck out.

14. I will thus allow the prayer for amendment of the plaint and the joinder of KAA and NLC to the suit. The plaintiff is thus at liberty to amend the plaint within 14 days though she needs to be careful so that some mistakes in the draft amended plaint, such as a mix-up in the description of the KAA and NLC as 4th or 5th defendant, are not repeated in the amended plaint that will be filed.

15. On costs, the applicant had opportunity to plead its case in the first instance. The prayer for status quo was also not merited. I will thus award costs to the respondents.

16. Orders accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA