



Vulpine Investments Limited v Posstone Limited & another (Environment & Land Case E064 of 2021) [2023] KEELC 424 (KLR) (7 February 2023) (Ruling)

Neutral citation: [2023] KEELC 424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E064 OF 2021
CA OCHIENG, J
FEBRUARY 7, 2023**

BETWEEN

VULPINE INVESTMENTS LIMITED PLAINTIFF

AND

POSSTONE LIMITED 1ST DEFENDANT

GEORGE MUNENE 2ND DEFENDANT

RULING

1. What is before court for determination is the plaintiff's notice of motion application dated the August 20, 2022 and the 2nd defendant's notice of preliminary objection dated the September 13, 2022. In the said notice of motion, the plaintiff seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That this honourable court be pleased to make a site visit, in the company of the county surveyor Machakos, of the suit property known as land reference number 15050/16 to determine the following:
 - a. The location of the plaintiff's suit property LR No 15050/16 vis a vis the defendant's parcel of land No LR 12610/5;
 - b. Whether there is any encroachment and activities of quarrying and mining being carried out on the plaintiff's suit property LR No 15050/16;
 - c. Whether the defendant is the one carrying out the said activities on the land; and



- d. The status quo of LR No 15050/16;
 - e. Any other matter that the court may deem to be relevant to establish at the locus in quo.
- iv. That based on the site visit conducted by the court and pending the hearing and determination of this application and the main suit, the court be pleased to review its ruling and orders issued on April 26, 2022 and issue an order of injunction restraining the 1st and 2nd defendants whether by themselves or through their agents, workers, servants or employees from trespassing, entering into, taking possession, excavating, mining, destroying or in any other manner interfering with the quiet and peaceful possession of the plaintiff's property known as land reference number 15050/16.
 - v. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Bhupinder Singh Dogra where he deposes that the plaintiff is the owner of LR No 15050/16 hereinafter referred to as the 'suit land'. He avers that this court delivered its ruling on April 26, 2022 dismissing the plaintiff's application dated the June 16, 2021 where it had sought orders of injunction. He claims the plaintiff has now obtained a report by the County Surveyor dated the August 5, 2022 confirming encroachment on the suit land and stone mining being undertaken thereon. Further, that there is hence a need to review the court's ruling and orders should be issued restraining the 1st and 2nd defendants' including their agents from interfering with the plaintiff's possession of the suit land. He explains that the survey report could not have been obtained at the time of filing the application which was dismissed by the court due to the urgency of the matter. He contends that the defendants' had argued in response to the application that they settled on a different parcel of land where they were undertaking quarrying. He insists that the court should undertake a site visit to ascertain the location of the suit land vis a vis LR No 12610/5; whether there is encroachment on suit land and if the defendants are undertaking any quarrying or mining activities thereon. Further, that the site visit will give the court an opportunity to appreciate the issues in controversy.
 3. The application is opposed by the defendants who filed a notice of preliminary objection dated the September 13, 2022 insisting that the instant application is res judicata. The defendants further filed a replying affidavit sworn by George Munene where he deposes that he is a member of Village D Self Help Group in excess of 15 years and are settled on LR No 12610/5 where he has been carrying out some economic activities including quarrying and mining. He insists that the land in which he has been carrying out the mining activities belongs to Kando Enterprises Limited and not the plaintiff herein. He explains that owing to the long, peaceful and uninterrupted stay on the suit property, his association together with others filed a suit on adverse possession being ELC No OS 11 of 2021 which is pending for hearing. He denies being in possession of the plaintiff's alleged land. He reiterates that the plaintiff's application is merely speculative and does not meet the legal threshold for review of the court's decision dismissing its application. Further, that it will be a travesty of justice if this court would issue an injunction as prayed.

The application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the notice of motion application dated the August 20, 2022 and the notice of preliminary objection dated the September 13, 2022 including the respective affidavits as well as



the submissions, the following are the issues for determination: Whether the notice of preliminary objection is merited. Whether the court should conduct a site visit on suit land. Whether the court should review its ruling delivered on April 26, 2022, and grant an order of injunction pending outcome of suit.

5. As to whether the notice of preliminary objection is merited. The defendants have filed the instant notice of preliminary objection claiming the instant application is res judicata which fact is disputed by the plaintiff.
6. On *res judicata*, section 7 of the [Civil Procedure Act](#), stipulates as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
7. In the case of [Stephen Wanganga Njoroge v Stanley Ngugi Njoroge & another](#) (2017) eKLR where the court cited the decision of [Uburu Highway Development Ltd v Central Bank & others](#), CA No 36 of 1996 where the Court of Appeal stated that:-

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”
8. Further, in the case of [Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited](#) (1969) EA 696; the court held that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
9. Based on the facts as presented, while relying on the legal provisions I have quoted above as well as associating myself with the cited decisions, I find that the instant application is not res judicata as claimed as it deals with issues of site visit and review which had not been determined in the ruling delivered on April 26, 2022.

Whether The Court Should Conduct A Site Visit On Suit Land.

10. The plaintiff has sought for the court to conduct a site visit to confirm the status quo of the suit land and if there is alleged encroachment as well as mining/quarrying activities being undertaken thereon. The defendants have denied undertaking any activities on the suit land and insist that they are on a different parcel of land. Order 18 rule 11 of the [Civil Procedure Rules](#) provides that:-

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise.”



11. In this instance, the plaintiff insists the defendants are on its land which fact the defendants deny and I believe it is only by undertaking a site visit that this issue can be resolved. In relying on the legal provision, I have cited, I will allow this prayer and direct that the plaintiff do organize with the Deputy Registrar on the suitable dates and time for the site visit.
12. As to whether this court should review the orders dismissing the plaintiff's application for injunction after the site visit.
13. The grounds upon which an order of the court may be reviewed is set out in section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act provides that:-

“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.”

14. While order 45 rule 1(1) of the Civil Procedure Rules stipulates thus:-

“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.”

15. In the case of *Muyodi v Industrial and Commercial Development Corporation and another* EALR (2006) EA 243, the Court of Appeal while dealing with issues of review held as follows:-

“For an application for review under order 45 rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”

16. I note the order sought to be reviewed emanated from a ruling delivered on April 26, 2022 where the plaintiff's application for injunction was dismissed. The plaintiff thereafter proceeded to obtain a report from the county surveyor on the status of the suit land and filed the instant application. I note this was done almost four months later. Further, the plaintiff is seeking an order of review after this court has conducted a site visit. Order 45 rule 1(1) that I have cited above, is quite explicit on when a party can seek review which I opine has not been met in this instance. I opine that the findings from the site visit can only be presented as *viva voce* evidence. It is my considered view that the application for review is speculative as it is pegged on the outcome of the site visit which is yet to be conducted. In the circumstances, I will decline to grant the said prayer.



17. It is against the foregoing that I find the notice of preliminary objection unmerited and will disallow it. As for the instant notice of motion application, I find it partially successful and will allow prayer No (iii) only.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF
FEBRUARY, 2023**

CHRISTINE OCHIENG

JUDGE

