



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CASE NO. 209 OF 2018

FLORA IMPEX LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA RURAL ROADS AUTHORITY.....1ST DEFENDANT/RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED....2ND DEFENDANT/RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCIES

DEVELOPMENT FUND.....3RD DEFENDANT/RESPONDENT

RULING

1. The Plaintiff herein filed an Application dated and filed on 20th September 2018. It is brought under Article 40 of the Constitution of Kenya, Part 8 of the Land Act 2012, Sections 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act and Orders 40 and 51 of the Civil Procedure Rules.

The orders sought are:

a) Spent

b) Spent

c) That pending the hearing and determination of this suit, the Court be pleased to issue a temporary injunction to restrain the Defendants/Respondents by themselves, their servants, agents, employees and/or assigns or any person acting under them or on their behalf from trespassing, entering, constructing roads, erecting electricity poles, digging trenches, pouring building materials, demolishing the perimeter wall or in any other way interfering with the Plaintiff/Applicant’s quiet possession, use, development and proprietorship of the suit property CR 49417 on Plot Number MN/VI/3868.

d) That pending the hearing and determination of this application the Honourable Court be pleased to issue a mandatory injunction to compel the Defendants /Respondents by themselves, servants, agents, employees and or assigns or any person acting under the Defendants/Respondents or on their own behalf whatsoever howsoever (or any one of them) to vacate the suit property CR 49417 on Plot Number MN/VI/3868 and to restore the suit property to its original state.

e) Costs be borne by the Defendants/Respondents.

2. The Application is supported by facts and documents in the affidavits of Ali Kinuthia Hassan sworn on 20th September 2018 and 19th March 2019 together with the grounds listed on the face of it. He deposes that the Plaintiff is the registered grantee of the property known as CR 49417 on Plot Number MN/VI/3868 located in Changamwe, Mombasa County.

3. That sometime in August 2018 the Defendants unlawfully entered upon the suit property, demolished a section of the Plaintiff’s perimeter wall and began construction of a road thereon. They also erected electricity poles. By the Plaintiff’s estimates the Defendants unlawfully trespassed and encroached upon a 0.25 acre portion of the property. The deponent contends that the Defendants did not follow due process. They trespassed on the suit property without notice and justifiable cause occasioning irreparable loss to the Plaintiff.

4. The Respondents filed the following documents in opposition to the Application:

- a) Replying Affidavit sworn by Richard Ngaru on behalf of the 1st Defendant on 23rd November 2018
- b) Replying Affidavit sworn by Richard Ottaro on behalf of the 2nd Defendant on 28th November 2018
- c) Replying Affidavit sworn by Simon Ndweka on behalf of the 3rd Defendant on 8th October 2018
- d) Further Affidavit sworn by Simon Ndweka on behalf of the 3rd Defendant on 20th March 2019.

5. The 1st Defendant's case was that the Plaintiff had been fraudulently registered as the proprietor of the suit property when it belonged to the Kenya Airports Authority which property was reserved for public use. That during the review of grants in Mombasa County, the Plaintiff's title was revoked by the National Land Commission vide the determination dated 13th October 2016. It is further deposed that the 1st Defendant completed construction of the road in question on 10th September 2018 which exercise the 1st Respondent carried out lawfully within its mandate hence the injunctive orders sought have been overtaken by events.

6. The deponent averred that the Plaintiff had all along had notice and participated in the proceedings of the National Land Commission pertaining to the suit property. That the Plaintiff was also aware of the resultant determination which went unchallenged and by withholding this information from the Court, the Plaintiff is guilty of material non-disclosure.

7. The 2nd Defendant's version was that sometime mid-2018 it received a request from the 1st Defendant to provide street lights for the road leading to Mwingo Technical Institute. From survey of the site undertaken together with the area Member of Parliament it was confirmed that the road which had just been completed existed. The 2nd Defendant conducted due diligence and established that the road passed through land belonging to the Kenya Airports Authority.

8. It is the 2nd Defendant's case that it was brought to their notice that part of the land had been illegally alienated and a title deed issued to the Plaintiff which title was later reviewed and the title revoked by the National Land Commission. The deponent stated further that the 2nd Defendant is a stranger to the alleged demolitions as they erected street lights on a completed road constructed on public land which exercise was complete and the lights operational.

9. The 3rd Defendant is of the view that these proceedings are inapplicable to it as it does not deal with project implementation. Its mandate as per the National Government Constituencies Fund Act is to receive project proposals and approve funding for them. Once the said funds are disbursed its mandate with respect to the project is complete. The 3rd Defendant is therefore a stranger to the proceedings as it has no knowledge of the location of the property, who its registered owners are and has not engaged in the alleged trespass. The 3rd Defendant has challenged the jurisdiction of the Court to entertain the claim because the Plaintiff had not exhausted alternative dispute resolution mechanisms prescribed by statute before rushing to Court.

10. The Application was canvassed by way of written submissions. The Plaintiff submitted that it was entitled to the orders sought as its Application met the essentials spelt out in the celebrated case of *Giella Vs Cassman Brown (1973) EA 358*. On the requirement of prima facie case, with a probability of success, the Plaintiff relied on the case of *Nguruman Limited Vs Jan Bonde Nielson & 2 Others (2014) eKLR* to the effect that the Court is not required to examine the merits of the case too closely at this stage. Title need not be established, that a fair and bona fide question as to the existence of the right alleged is sufficient. It was further submitted that the Plaintiff would suffer irreparable harm from dispossession of the property and that the quantified costs of Kshs. 1,650,000 only covered the reconstruction costs of the perimeter wall.

11. The Plaintiff further contended that the Application was rightfully before Court and all parties rightfully enjoined. That the 3rd Defendant is liable for approving and funding a project infringing on the Plaintiff's proprietary rights. Moreover, statutory dispute resolution mechanisms under section 56 of the National Government Constituencies Development Fund Act were not ignored as alleged by the 3rd Defendant.

12. The Plaintiff submitted that she served all parties with a demand letter but the same was ignored and the trespass continued necessitating this Application under Certificate of Urgency. Further, section 56 does not oust the Court's unlimited original jurisdiction under Article 162(2) (b) of the Constitution. Counsel for the Plaintiff urged that the Plaintiff only needed to show that it had been rebuffed. To buttress this point she quoted the cases of *Peter Ochara Anam & Others Vs Constituency Development Fund CDF Board & Others KISII Petition No. 3 of 2010* and *James Cheruiyot Vs National Government Constitution Development Fund Manager & 2 Others (2018) eKLR*.

13. The 1st Defendant's submissions were largely in tandem with the 2nd Defendant's. They submitted that the Plaintiff had failed to establish a prima facie case with a probability of success as the suit property was classified as public land. Further, the Application was overtaken by events as the road works and street lighting had already been completed thus its determination would amount to an academic exercise, a waste of judicial time and an abuse of Court process. The cases of *Uganda Corporation Creameries Ltd Vs Reameter Ltd Case No. 11 of 1999* and *Fredrick Karisa Shungu & 3 Others Vs Rev. Geoffrey Gidyo Dida (2012)* were cited in support.

14. On irreparable injury, it was submitted that the Plaintiff fell short by failing to demonstrate how the perceived loss was continuous and irreversible. The balance of convenience also tilted towards public interest as the road was completed in accordance with the holding in *Priscilla Ndinge Kiilu Vs Machakos County Government & 2 Others (2018) eKLR*.

15. The 3rd Defendant mainly rehashed its case as per its pleadings that it was wrongfully enjoined and that the Court lacked jurisdiction to hear the Application. Moreover, the Applicant being guilty of material non-disclosure had approached a Court of equity with unclean hands thus was not entitled to reliefs sought. Counsel for the 3rd Defendant cited the case of *Mrao Vs First American Bank of Kenya Ltd (2003)*

KLR 125 in this regard.

16. The Applicant has not denied the 1st and 2nd Defendants contention that the construction of the road and the power lines are completed and in use. In paragraph 4 of the Applicant's affidavit in support of the motion, it is deposed that, "*on or about August 2018, the defendants unlawfully entered upon the suit property and demolished a section of the parameter wall and commenced construction on road and erection of electricity poles*".

17. This court takes judicial notice of the fact that the construction of a road cannot go side by side with erection of electricity poles. The road can only be done first. The 2nd defendant in his replying affidavit filed on 28th November 2018 stated at paragraph 3 *that it received a request in the middle of the year from Changamwe CDF to provide street lights for the road leading to Mwingo Technical Institute. That the area Member of Parliament took them to the area to do ground survey where they confirmed there was an existing road which the 1st defendant had finished constructing.*

18. The Applicant filed a further affidavit in March 2019 and generally denied the facts contained in the Respondents' replying affidavits. The Applicant's denial in details was with regard to the validity of the process of acquisition of her title deed. She made no mention of the finished works of the road and the electricity poles. Why do I find this as important? In prayer 3, the Applicant is seeking orders of temporary injunction restraining the Respondents from entering on, constructing roads, erecting poles (all of which are already done). The prayer for injunction has thus been over taken by events.

19. The remaining prayer for my determination is No. 4; whether or not the order of mandatory injunction can issue. It is well settled in law that a mandatory injunction can only be issued in special circumstances or in simple and clear cases see the decision of **Locabil International Finance Ltd Vs Agroexport & others (1986), ALL ER 901**. Has the Applicant demonstrated that this is a clear, simple and/or special case? The Applicant did not address the court on this issue in her submissions.

20. I will however endeavour to determine whether the obtaining circumstances are special to warrant the issuance of the orders of a mandatory injunction. The Applicants deposes that she is the grantee of the title to the land in dispute. The 3rd Respondent pleaded that the title to the suit property was revoked because it is in respect of public land i.e. that the land belongs to Kenya Airports Authority. A copy of the determination by National Land Commission was attached. The 3rd Respondent pleaded that the Applicant had participated in the proceedings before the National Land Commission. The Applicant did not deny participating in those proceedings except that she was not notified of the determination by the Commission.

21. The Applicant although is entitled to protection of her right to property under article 40 of Constitution; the legality of her title has been put to question by all the Respondents in the pleadings filed through the replying affidavits & defence to the claim. Consequently until the matter is heard and determined on its merit, it is difficult to state at this interlocutory stage that the case is simple or clear.

22. Further, the Applicant did not elaborate to the court what activities she has been undertaking on the land which has been disrupted by the construction of the road to justify/explain that there exists special circumstance. In the absence of such explanation, I am unable to find that blocking/causing to be undone the already completed road is necessary at this interlocutory stage.

23. In conclusion, I determine that the Applicant has failed to meet the threshold for granting the temporary injunction for coming to court late. She also failed to satisfy the threshold to merit the grant of an order of mandatory injunction sought. The end result is my finding that the motion is without merit. The same is dismissed with costs ordered in the cause.

Dated and signed at BUSIA this 25th day of September 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 28th Day of October, 2019

C. YANO

JUDGE