



**Gori Investment Limited v Apostolic Faith Church & another (Environment & Land Case E004 of 2022) [2023] KEELC 20750 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20750 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE E004 OF 2022  
DO OHUNGO, J  
OCTOBER 17, 2023**

**BETWEEN**

**GORI INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**APOSTOLIC FAITH CHURCH ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Hearing of this suit commenced on November 21, 2022 when PW1 testified. The plaintiff then sought and was granted an adjournment to call one last witness. When the matter next came up for further hearing on February 20, 2023, the plaintiff closed its case without calling any other witness. Defence hearing then started, with Mr David Masila Kimauro, the Deputy Land Registrar Kakamega testifying as DW1 and partly being cross examined by counsel for the plaintiff. Upon an application by the plaintiff, the matter was adjourned to May 10, 2023 for further cross examination of DW1.
2. In the meantime, the plaintiff filed Notice of Motion dated March 6, 2023, seeking the following orders:
  1. [Spent]
  2. That this Honourable Court be pleased to grant the plaintiff leave to re-open its case for the sole purpose of calling the land registrar Kakamega to produce all the documents contained in the parcel file for all that property known as Kakamega/Municipality Block II/42.
  3. That consequent to the grant of order 2 above, the court be pleased to issue summons to the land registrar to produce the documents.
  4. That the court be pleased to issue any other order it deems fit and just to grant.



5. That the costs of the application be in the cause.
3. The application is supported by an affidavit sworn by Ngujiri Gichari an advocate acting for the plaintiff. He deposed that during cross examination of DW1, it became apparent that there were several documents in the parcel file of Kakamega/Municipality Block II/42 (the suit property), included but not limited to a copy of the transfer to the plaintiff, which had not been produced. That it is in the interest of justice that the application be allowed.
4. In opposing the application, the first defendant filed grounds of opposition dated 9<sup>th</sup> March 2023 wherein it took the position that the application does not disclose reasonable grounds upon which it can be sustained, that the application is overtaken by events since the applicant had already closed its case and that the application is an afterthought aimed at filling loopholes in the plaintiff's case. It therefore urged the court to dismiss the application with costs.
5. The second defendant did not file any response to the application.
6. The application was canvassed through oral submissions. Mr Michuki, learned counsel for the applicant argued that the application simply seeks to meet the end of justice by getting the Land Registrar to produce documents and that the evidence of DW1 would not render justice to all parties unless the court has a look at all the documents in the parcel file. He relied on the *Constitution*, the overriding objective and case law in the plaintiff's list of authorities dated March 20, 2023 and added that no prejudice will be occasioned if the orders are granted.
7. In response, Mr Abok, learned counsel for the first defendant opposed the application and relied on the grounds of opposition and the first defendant's list of authorities dated March 9, 2023. He argued that the application is an afterthought meant to cure loopholes, a fishing expedition and that it goes against the mandatory provision that the plaint should be accompanied by all the documents that the plaintiff intends to rely on. He added that the discretion sought can only be exercised if the evidence was not within the reach of the applicant. That the application is too open ended and will embarrass the court since there is no telling what angle the case will take. In conclusion, he argued that since DW1 is still in the stand, the plaintiff has a chance to put to him all questions that it may have. In sum, he urged that the application be dismissed with costs.
8. On her part, Ms Adwar, learned state counsel appearing for the second defendant associated herself with Mr Abok's submissions and added that litigation should come to an end. That any issues should be articulated through cross-examination of DW1. She equally urged the court to dismiss the application with costs.
9. In response, Mr Michuki argued that the evidence sought to be produced was not in the plaintiff's possession but in the sole custody of the land registrar and that the plaintiff could not therefore have been able to bring the evidence together with the plaint. That the application identifies the documents to be produced since it refers to "all the documents in the parcel file" and that the law is clear on what should be in a parcel file. He further contended that expediency in litigation cannot be at the expense of justice.
10. I have considered the application, the grounds of opposition and the submissions. Considering the stage which the matter has reached, the application obviously puts the respondents and even the court in an awkward position since the plaintiff seeks to reopen its case while DW1 is in the middle of cross examination.
11. The foregoing notwithstanding, the courts now have a wider latitude to ensure that substantive justice prevails, and that judicial time is better utilized. Article 159 (2) (b) and (d) of the *Constitution* and



Section 3 of the *Environment and Land Court Act* emphasise that mission. The Court of Appeal emphasised as much when it stated in *Coast Development Authority v Adam Kazungu Mzamba & 49 others* [2016] eKLR as follows:

"... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In *Salat v IEBC & 7 Others*, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in *Lamanken Aramat v Harun Maitamei Lempaka*, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:

"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice."

As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. ...."

12. I take into account that this suit concerns ownership of the parcel of land known as Kakamega/Municipality Block II/42 (the suit property). Of all the possible witnesses, the evidence of the land registrar and the contents of the parcel file are central to a just determination of the dispute. The application is limited to getting the land registrar to produce "all the documents contained in the parcel file." I find that it is in the interest of justice that the court considers the whole of the parcel file. I see no prejudice to the defendants beyond what can be compensated by an award of costs. To guard against throwing the case open, I will not re-open the plaintiff's case but will order that DW1's evidence in chief is re-opened to enable him produce contents the parcel file.
13. I find merit in the application, and I will allow it in a modified form. I therefore make the following orders:
  - a. The evidence in chief of DW1 is re-opened.
  - b. DW1 to produce certified copies of all the documents in the parcel file in respect of the parcel of land known as Kakamega/Municipality Block II/42. The original of the said parcel file to be availed in court for inspection and return to DW1.
  - c. Costs of Notice of Motion dated March 6, 2023 shall be in the cause.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF OCTOBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Ngunjiri holding brief for Mr Michuki for the Plaintiff

Mr Abok for the First Defendant

No appearance for the Second Defendant

Court Assistant: E. Juma

