



**Opere v Attorney General & 2 others (Environment & Land Case
3 of 2012) [2022] KEELC 12686 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 3 OF 2012
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

ZACHARY OTIENO OPERE PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

LAND REGISTRAR 2ND DEFENDANT

LUCAS PETER HAINJA 3RD DEFENDANT

JUDGMENT

1. The petitioner filed his petition on October 15, 2012 against the 3 respondents claiming breach, violation and or threat to violation of his rights. He pleaded the particulars of the violations thus;
 - i. That on September 9, 2012 he was subjected to undignified treatment and harassment by agents of the 1st and 3rd respondents when his homestead was demolished and he was humiliated.
 - ii. On the same date, his freedom and security was breached as he was threatened with violence and his property including kitchen and bathroom demolished under the watch of officers from Port Victoria police station.
 - iii. Protection of his right to property under article 40 was breached as his property on LR Bunyala/Bukoma/1823 were destroyed in total disregard of a court order granted in Civil Suit No 50 of 2011.
 - iv. That the petitioner's unlawful eviction from his property resulted in his being rendered homeless.



- v. That the impugned order was never served on relevant state agencies to support the petitioner for alternative housing, resettlement or access to productive land and mitigate any violations of his rights.
2. The petitioner further pleaded that his right to a fair hearing under article 50 of the Constitution was also breached. He prayed for orders that:
 1. A Declaratory Order that your petitioners constitutional rights and freedoms as enshrined in articles 28, 29, 31, 40, 47, 48 & 50 of the Constitution have been violated, denied and or are threatened with imminent violation and threat.
 2. A declaratory order that in the instant case judicial authority and power was abused, negligently applied and these facilitated the violation, infringement or breach of your petitioner's constitutional rights and freedoms.
 3. A declaratory order that the entire proceedings, orders, emanating therefrom in land suit number 50 of 2007 to the extent that the said violates, infringes or threatens the rights of your petitioner are a nullity and thus invalid.
 4. An order of permanent injunction against the respondents, their agents and servants from interfering with, entering or in any other manner interfering with your petitioners occupation of land parcel number Bunyala/Bukoma/1823.
 5. An order for the compensation and restoration of the petitioner against the respondents jointly and severally.
 6. Order for costs of this suit.
 7. Any such other order.
 3. The petition was supported by the affidavit of the petitioner sworn on October 11, 2012 together with copies of documents annexed to the said affidavit. He deposed that he was the registered owner of LR Bunyala/Bukoma/1823 and issued with a title on 9/11/2004 following the sub-division of Bunyala/Bukoma/307. The petitioner deposed further that the 3rd respondent and his kin own LR No 309. That the 3rd respondent in April 2005 filed a claim before the Budalangi Land Disputes Tribunal claiming that LR No 307 belonged to him and by which time, the land parcel 307 had been sub-divided into LR Nos 1823 and 1824. The petitioner added that the dispute before the tribunal was between William Odiaga Mwoya and the 3rd respondent.
 4. The petitioner stated that the award of the Tribunal was adopted in Court vide PMCC case No 45 of 2007 in its ruling delivered on August 8, 2007. According to the Petitioner, the order then extracted was different from what the Tribunal awarded as paragraph 5 of the order now mentioned LR No 1823. That the anomaly was deliberate and arbitrary and intended by the 3rd respondent to maliciously acquire a portion of the petitioner's land despite the fact that he was not a party to the case before the Tribunal.
 5. The petitioner said that the 3rd respondent again introduced the name of Onyango Ouma Festus in his application dated November 18, 2009 before the principal magistrate's court and also filed the application dated 11/4/2011 which sought an order to excise 0.23ha from parcel No 1823 in favour of the 3rd respondent. It is the petitioner's case that the application dated April 11, 2011 and amended on 16/5/2011 was dismissed on July 20, 2011. That despite the dismissal, the 3rd respondent yet again filed the application dated January 23, 2012 seeking to enforce non-existent orders purportedly granted on



July 8, 2007 (annex ZOO-0015). The petitioner deposed that he filed an application dated May 8, 2012 seeking to review the impugned order but his application was dismissed on September 26, 2012.

6. It is the petitioners contention that the eviction order dated October 1, 2012 was issued with his name where he is listed as an agent of William Odiaga Mwoya in respect of parcel number 1823, a fact which was false. That it was on the basis of this order and without any reasonable notice that he was forced out of his land, had his home demolished and he has suffered loss. That as the registered owner of the suited title, which has not been revoked, he is entitled to possession. He urged the court to grant the orders prayed for in this petition.
7. The 3rd respondent filed a replying affidavit dated February 4, 2013 and deposed inter alia that the dispute between the parties was heard and determined in Land Case No 45 of 2007 in which LR No Bunyala/Bukoma/1823 was ordered to be divided amongst the contestants and 0.90ha was awarded to him. He swore that the original order dated September 24, 2008 was in his favour and he annexed a copy thereof which order has not been set aside or even appealed. The 3rd respondent deposes that this suit is an abuse of the court process and is res judicata. Further deposed is the fact that the petitioner has already been evicted from the suit portion of LR No 1823 and the decree fully executed as shown in annexures LPH 5. He urged the court to dismiss the petition with costs.
8. I did not find on record the responses filed by the 1st and 2nd respondents. The court deems it that none was filed. On November 23, 2021, counsels for the petitioner and for the 3rd respondent agreed on the following directions;
 - a. The petition be heard by filing of written submissions.
 - b. Parties had liberty to file further affidavits within 14 days from November 23, 2021.
 - c. Submissions were to be filed approximate one month after the date of November 23, 2021.
9. By February 2022 none of the parties had complied with the directions. On February 16, 2022, Mr. Siganga advocate for the petitioner sought more time as they were tracing a crucial document to be annexed to the yet to be filed supplementary affidavit. The court gave them one month to comply. The 3rd respondent filed his further affidavit on 17th March 2022 and by which times, none had been filed by the petitioner.
10. In the further affidavit, the 3rd respondent annexed the proceedings and judgment in PMCC 45 of 2007. He deposed that the executive officer of the court had signed the application for Land Control Board consent and transfer on behalf of the petitioner and he consequently received his title for the suit property. That he legally owns the suit property and the prayers in the petition cannot issue against him.
11. I am proceeding to determine the petition based on the pleadings filed. I frame two questions derived from the pleadings;
 - (a) Whether or not the petition is an abuse of the court process and is res judicata.
 - (b) Whether or not the petitioner has demonstrate violations and or threats to violations of his constitutional rights to fair administrative action, property, privacy et al.
12. The 3rd respondent deposed that this petition is res judicata and an abuse of the court process as the subject matter between the parties had already been heard and determined. In the petition, the issues raised in my view were a consequence to the execution of a court decree. To this extent they are not *res judicata*. However the grounds raised in the supporting affidavit filed in support of the petition were concerned with the proceedings that took place in Busia PMCC 45 of 2007. The petitioner kept



referring to the irregularity in the manner in which parties were introduced later in that suit and how non-existent orders were extracted. This court has not been moved as an appellant court hence the contents of the supporting affidavit are partially res judicata.

13. To the extent that the violations raised are new matters, this court find the grounds of res judicata does not lie. Instead, I will proceed to determine the petition on its merits. The petitioner has itemized his rights that were violated and how the same was done. In his defence, the 3rd respondent argued there was no violation as the orders issued in his favour were regularly executed and there has been no successful appeal against the said order.
14. The green card for LR 307 shows the land was first registered in the name of Muoya Khamba. On June 13, 2001, William Odiaga Mwoya and Onyango Ouma became registered owners as personal representatives of Muoya Khamba. In 2004, this title was closed on sub-division to create LR 1823 and 1824. In 2007, the 3rd respondent sued William Odiaga Muoya in Budalangi Land Disputes Tribunal whose award was adopted in court in land case No 45 of 2007 on August 8, 2007. The award of the Land Dispute read thus;
 1. The homestead and all planted various trees within the fenced area should remain to the late Obiba's family anyone should not interfere.
 2. Also the land holder should survey to demarcate that area immediately and get the parcel number to avoid some embarrassment.
 3. Mr. Onyango Ouma Festus who bears certificate of search – Bunyala/Bukoma/1824 dated September 11, 2004 should be given land title deed by William Odiaga Mwoya.
 4. Since the prayer for the plaintiff was to retain the parcel which his uncle had been given by Mwoya 44 years back and in which they have been living in we find no reason why they should be removed.
 5. That the limitation of *land Act* (Cap 22) respectively states that a person once he stayed adversely in the parcel for more than 12 years and above should not be removed. It is therefore our ruling that sub-division should be done and Obiba's family be given a title deed for the piece of land that they have been living on since 1961 as a home.”
15. This award after adoption was extracted as a court order dated September 24, 2008 (ZOO-008). The petitioner argues that the 3rd respondent executed a non-existent order of eviction dated October 1, 2012. The impugned eviction order read thus;

“To the officer in charge

Port Victoria Police station

Port Victoria

Whereas Lucas Peter Hainja (hereinafter called the decree holder has successfully disputed occupation of the suit land parcel No Bunyala/Bukoma/1823 against William Odianga Mwoya (hereinafter called the Judgment Debtor to which expression shall include all his servants, tenants, agents or any other person authorized by him or claiming through him to operate in the suit premises.

And whereas the said William Odianga Mwoya together with his servants, tenants, agents or any other persons authorized by the said William Odianga Mwoya to occupy any part of



the suit premises have been ordered to vacate possession thereof to Lucas Peter Hainja the decree holder hereof.

You are therefore notified that the court ordered on the August 8, 2007 the said Lucas Peter Hainja to be put back in possession of the land.

And further take notice that this honourable court shall on the day of 2012 EVICT the said William Odiaga Mwoya together with all this servants, tenants, agents, personal representatives and any other person authorized and particularly Otieno Opere by him to occupy the said premises.

Therefore you are commanded to arrange for such reasonable force as may be deemed necessary to meet any resistance at the time of effecting this order.

Given under my hand and seal of this honourable court this 1st day of October 2012.

Dated, signed and sealed at Busia this October 1, 2012.

Resident Magistrate, Busia law courts”

16. The petitioner pleaded that his right to a fair hearing and the right to property was violated by this order. It is not in dispute that he was not a party to the case before the Land Disputes Tribunal. The first time his name is introduced is vide the amended notice of motion amended on July 16, 2011. The trial magistrate ruled that no leave had been sought in court to introduce him and he had not been served with the application. That application was dismissed (annex ZOO-0015). The 3rd respondent filed another application dated 23rd January 2012 which was granted on April 11, 2012 and the following orders made:
 - i. Orders of August 8, 2007 be executed.
 - ii. Otieno Opere be served with court process.
17. It is not clear which court process Otieno Opere (petitioner) was to be served with. Somehow, he was served and he filed an application for review of the orders issued on April 11, 2012. An order of stay was also granted pending determination of the petitioner’s application. The orders of stay were subsequently vacated on September 26, 2012 after the dismissal of the application dated May 8, 2012. The 3rd respondent then proceeded to evict the Petitioner. The 3rd respondent argues that there was an order which had not been set aside or reviewed.
18. What was the content of the order being executed? Definitely it is the order arising from the award of Budalangi Land Disputes Tribunal and adopted in court on August 8, 2007. In the ruling of the elders, there was no mention of granting orders of eviction. In their findings, no mention is made of any one occupying land due to Obiba’s family. The 3rd respondent was given permission to execute the decree which did not provide for eviction. Therefore the decree as extracted and dated October 1, 2012 was indeed not founded on the proceedings on record in case PMCC No 45 of 2007. Further, the decree that was issued was against the parties to that suit. The introduction of the petitioner’s name in the order dated April 2012 could not make him a party to the proceedings without due process being followed.
19. Therefore, on the basis of the documents filed in support of the petition, I am persuaded to find that the eviction carried out against the petition was illegal, null and void because there had been no eviction order issued. Secondly, the execution of the decree breached the rights of the Petitioner as his right to be heard was violated and his right to property abused since the execution of the decree resulted in his property being taken without first being heard. However, the Petitioner had the opportunity to vary



or set aside the impugned orders vide his application dated August 5, 2012 in the former suit which seemed to have died a natural death. I find the decision of Kemei J in *Gitau Kamau v ndungu Kamau & Ano*, (2018) eKLR at paragraph 37 of quoting the Court of Appeal in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* Civil Appeal No 184 of 2011 apt. the Court of Appeal stated thus;

“

It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

20. The petitioner was under obligation to discharge that he was not an agent of the defendant in case No 45 of 2007. Taking into account that he acquired title to the impugned land when the Tribunal had awarded the 3rd respondent a portion thereof. Alternatively he was under a duty to demonstrate that at the time of acquiring the land, he was not aware of the decree issued in Busia PMCC 45 of 2007. He did not elaborate on either of these twin issues. Was the 3rd respondent responsible for the violations? The petitioner got registered as the owner of title No 1823 on April 8, 2008. This was after the Tribunal award was adopted as an order of the court in the previous year. The petitioner does not state how he acquired title to the suit land. An inference is drawn that it was transferred to him by William Mwoya who was the previous registered owner. William Mwoya was the defendant in PMCC 45 of 2007 and was aware of the decree issued since the court record show it was adopted in his presence.
21. Therefore an inference can be drawn that the registration of the petitioner as the owner of LR No 1823 was to defeat the award and decree in place. The transaction between William and the petitioner was thus contrary to the doctrine of lis pendens. The petitioner having chosen to put on the shoes of William Mwoya, does the defence of right to property become available to him as against the 3rd respondent? This defence would have become available to him had he given the history as to the root of his title and not just dangle a certificate of title to the court. It is this court’s considered opinion that having taken ownership of the suit land with an order in place, there was no good title William Mwoya was transferring to him. In the circumstances, the 3rd respondent was not obligated to file a fresh claim against the petitioner as such a suit would be declared res judicata.
22. Consequently, I find the breaches complained of by the petitioner does not lie against the 3rd respondent but against the person who caused the transfer of the suit title No Bunyala/Bukoma/1823 in his name while aware of a court decree. It is the transferor who also transferred the liabilities on that title to him from when he ought to seek compensation for any damage suffered. In the foregoing analysis, I find that the orders sought cannot issue against the three respondents for non-joinder of parties. The petition is dismissed with an order for each party to bear their costs.

DATED, SIGNED AND DELIVERED IN BUSIA THIS 27TH DAY OF SEPTEMBER, 2022.

A. OMOLLO

JUDGE

