



**Mid Migori Mining Company Limited v Cabinet Secretary, Ministry of Petroleum & Mining
& another; Lands Registrar, Migori Lands Registry (Interested Party) (Environment &
Land Petition E033 of 2021) [2022] KEELC 15522 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND PETITION E033 OF 2021
MN KULLOW, J
DECEMBER 19, 2022**

BETWEEN

MID MIGORI MINING COMPANY LIMITED PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF PETROLEUM &
MINING 1ST RESPONDENT**

THE DIRECTOR OF MINES 2ND RESPONDENT

AND

THE LANDS REGISTRAR, MIGORI LANDS REGISTRY INTERESTED PARTY

***(IN THE MATTER OF THREATENED CONTRAVENTION AND VIOLATION OF THE
NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES
1(1), 2 & 3, 10(2), 47, 69, 70, 73(10b), 129(1)&(2), 153(4), 232(10d,e & f AND 259 (1 & 3) OF
THE CONSTITUTION AND IN THE MATTER OF AN APPLICATION BY MID MIGORI
MINING COMPANY LIMITED FOR INJUNCTIVE ORDERS AGAINST THE CABINET
SECRETARY, MINISTRY OF PETROLEUM & MINING AND THE DIRECTOR OF MINES)***

JUDGMENT

1. The Petitioner herein filed the instant petition dated December 2, 2021, wherein it sought the following reliefs: -
 - a. A declaration that the protection of the right to property and interest in the property under article 40, is likely to be contravened by failing to verify the ownership of LR No Muhuru/ Kadem/ Macalder/345 and make any adverse decision based on letters dated October 25,



2021 and November 10, 2021; affecting the Prospecting Licenses PL/0203 and PL/2018/0202 legally issued to the Petitioners;

- b. A declaration that the reliance on unverified, unvetted and unconfirmed contents of the complaint letter dated October 8, 2021 and any further action based on this complaint letter with the intention of carving out, freeing up or removing LR No Muhuru/ Kadem/ Macalder/345 from Prospecting Licence PL/2018/0202 without affording the Petitioner a chance to verify, vet and thereafter engage the registered owners is a contravention of their right to protection of law and their right to property and in contravention of the Fair Administrative Actions Act as the same has resulted in the Petitioner being denied a chance and opportunity to enjoy its rights as conferred by the Prospecting Licences issued, to wit PL/2018/0203 and PL/2018/0202;
- c. A Declaration that the process of obtaining the Land Owners Consents under the *Mining Act*, in the delimited area is a continuing process and that the License Holder be allowed to pursue and finalize any pending licenses within the areas of license.
- d. A declaration that any decision or act of the Respondents that alters the Prospecting Licenses issued to the Petitioners without giving the Petitioners a chance to engage with complainants violates the constitution and law.
- e. An Order restraining the 1st and 2nd Respondents from rendering any decision to free-up, removing or carving out LR No Muhuru/ Kadem/Macalder/345 from the Petitioners' License PL/2018/0202.
- f. An Order restraining the 1st and 2nd Respondents from altering the License Area captured in Prospecting License PL/2018/0202 to the detriment of the Petitioners during the term of the License Period of Prospecting License PL/2018/0202.
- g. An Order directing the Interested Party to make available to the Petitioner its register of Land within the License area to enable the Petitioners verify, proof check and align the registered owners with the Land Owners consents currently held by the Petitioners.
- h. An Order that the Petitioner be allowed to proceed with its Prospecting undeterred as long as it does a verification and obtains verifiable consents from the registered Land Owners based on the Interested Party's register or legally authorized persons under the law.
 - i. The 1st and 2nd Respondents do pay the costs of this Petition.
- j. And the Petitioner will further and forever continue praying to this court for in general for appropriate reliefs as this court may deem fit and just to grant over and concerning its quiet use and enjoyment of rights accruing from its Prospecting License PL/2018/0203 and PL/2018/0202.

Petitioners' case

2. The petitioners' case is contained in his petition dated December 2, 2021, the affidavit in support of the petition sworn on November 30, 2021 by the Director of the Petitioner Company and the written submissions dated February 6, 2022.
3. The petitioner's case is that the 1st and 2nd Respondents issued him with 2 Prospecting Licences; authorizing it to prospect for precious metals within a specified area. The said prospecting licenses were issued pursuant to the *Mining Act* upon meeting all the prerequisites.



4. He however avers that one of the prerequisites is the relevant Consent from the Registered Land Owners within the specified areas; it is his contention that obtaining 100% of the said consents from the registered land owners within the specified area under the Licenses was not possible at the time of applying for the Prospecting Licenses, given the vast area of the land covered under the License. Further, he contends that some persons in possession of the land within the area had no physical titles and therefore consents were procured from the residents and inhabitants of the villages. He maintains that full compliance is therefore a gradual process.
5. It is his claim that sometimes around November 10, 2021; the 2nd Respondent wrote to him asking him to respond to a complaint by someone who was claiming to be the legal representative of the estate of the registered owner of the subject land LR No Muhuru/ Kadem/ Macalder/ 345. He avers that the 2nd Respondent misrepresented that they had received a complaint from the registered owner and indicated their intention to remove, carve out and exclude the subject land from the Licence Area of PL/2018/0202; without satisfying himself on the law and whether the said complainant was indeed an heir or had any succession letters to that effect, for purposes of confirming the basis of the said complaint.
6. That as a result of the said actions of the 2nd Respondent; his rights as an investor who has spent enormous outlay towards prospecting precious metals and legitimate expectation accruing from the Prospecting Licenses issued by the Respondent have been violated and thus sought the redress of the court.
7. He further stated that his right to fair administrative action as envisaged and guaranteed by Article 47 of the constitution has been infringed and he is therefore apprehensive that unless the Respondents are restrained; his rights to property and exclusive use and enjoyment of the proprietary rights over the mining area and thus stands to suffer irreparable loss and damage; without having been accorded an opportunity to make reparation and meet compliance. He thus urged the court to allow the petition as prayed.

1st and 2nd respondent's case

8. The 1st and 2nd respondents filed a Replying Affidavit sworn on January 3, 2022 by Raymond Mutiso, the acting Director of the 2nd Respondent in response to the petition. In explaining the process of obtaining and issuance of Prospecting Licenses; he relied on sections 37(i) and 72 of the *Mining Act* and stated that no license can be issued in respect to a private land without the express consent of the registered owner and it is the obligation of the Applicant of the license to seek and obtain such consents for consideration and issuance of the license.
9. It is his contention that on June 8, 2018; the Petitioner applied for the re-grant of their former prospecting license, which application was assigned No PL/2018/0202. The Petitioner provided several land owners consents among other requirements for consideration and consequently; pursuant to section 31(1)(a) of the *Mining Act*; the Mineral Rights Board recommended to the 1st Respondent for the approval of the application. On October 17, 2019, the 1st Respondent approved the Application as recommended.
10. It is his claim that vide a letter dated October 25, 2021; one Mr Richard Ogoye Ooro, complained that the Prospecting License PL/2018/0202 granted to the Petitioner included/covered their family land even though they had never granted consents to the said company. The said complainant thus appealed to the 1st Respondent for the removal of their family land LR No Muhuru/ Kadem/ Macalder/ 345



from the coverage of license No PL/2018/0202; for the reason that they had entered into an agreement over the said subject land with a different investor Periodics Elementals Limited.

11. He further avers that the said complaint was communicated to the Petitioner vide a letter dated November 10, 2021 and marked RM-8; whereupon the petitioner was requested to respond to the claims by the complainant and to provide any consent that the petitioner may have obtained from the land owner in respect to the subject land No 345; for purposes of decision making on the complaint and to ensure a fair administrative action.
12. That the Petitioner responded to the said letter vide their letter dated “St. Andrew’s Day, 2021 which was received by the 2nd Respondent on the December 2, 2021 and marked RM-9; wherein they raised several concerns and later filed the instant suit.
13. He maintained that the Ministry acted fairly and within the confines of the Fair Administrative Actions Act; by informing the Petitioner of the complaint and requesting for their response before any decision or action was taken on the complaint and appeal of Richard Ooro; it was fair and open in its communication to the parties.
14. He further maintained that the 1st Respondent has not made any decision on the matter.
15. Only the petitioner filed their submissions which I have duly considered. Despite being given an opportunity to file their submissions, the Respondents did not file the same and I therefore find that they waived their right to file the same. Be that as it may, I will proceed to render my decision as hereunder;

Analysis and determination

16. I have carefully considered the petition as well as the response thereto, the respective exhibits and submissions. On that account, it is this court’s opinion that the issues for determination that arise therefrom are: -
 - a. Whether the rights of the Petitioners (if any) have been violated;
 - b. Whether the Petitioner is entitled to the reliefs sought;
17. Section 37 of the *Mining Act, 2016* outlines the prerequisites of obtaining mineral rights on a private land and states as follows: -

“37.

- (1) A prospecting and mining rights shall not be Mineral rights on granted under this Act with respect to private land without the express consent of the registered owner, and such consent shall not be unreasonably withheld.
- (2) For the purpose of subsection (1), consent shall be deemed to be given for the purposes of this Act where the owner of private land has entered into - a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows for the conduct of prospecting or mining operations; or an agreement with the applicant for the prospecting and mining rights concerning the payment of adequate compensation.



(3) Where consent is granted prior to any change in land ownership, such consent shall continue to be valid for as long as the prospecting and mining rights subsists.

18. The petitioner contends that the Respondents did not act in accordance with the provisions of the Fair Administrative Act; by acting on the complaint of one Richard Ogoye Ooro and as a result he is apprehensive that an adverse decision is likely to be made and which will occasion him irreparable loss and damage given the sums of money that has been invested in the project. It is his claim that upon being issued with the respective Prospecting Licenses, there was a legitimate expectation that he will enjoy the exclusive possession and use of the area specified within the said licenses for a period of 3 years.
19. The Respondents on the other hand maintained that they acted in accordance with the provisions of the Fair Administrative Act and has maintained an open communication between all the parties involved over the subject land No Muhuru/ Kadem/ Macalder/ 345. He contends that upon receiving the complaint, he informed the Petitioner of the same and sought his response over the said complaint. He further asked the Petitioner to provide any Land Owners Consent in respect to the parcel of land in dispute. he further reiterated that no final decision has been made with regards to the said complaint by Richard Ooro.
20. I have carefully looked at the annexures provided by the parties herein and I have taken note of the steps taken by the 2nd Respondent, through the various communications between the petitioner and the complainant over the said issue. By the letter dated November 10, 2021 and marked RM-8; the 2nd Respondent clearly and unequivocally advised the Petitioner as follows: -

“...the purpose of this letter is therefore to request you to respond to the issues raised by Mr. Richard Ogoye Ooro and forward to this office copies of any consent that you may have obtained from the land owner (Ooko Ooro Family) for our necessary action within 21 days from the date of this letter.”
21. I have also looked at the response issued by the petitioner in its letter dated “St Andrew’s Day, 2021 and marked RM-9; wherein the Petitioner raised several concerns about the complainant and the rival company Periodics Elementals which are not at the centre of the dispute herein and I will therefore refrain from delving into the details thereof. I must however point out that from the said response, the petitioner neglected, disregarded and/or failed to address the issue of the land owner’s consent with regards to the subject land in dispute, no such consent was availed to the 2nd Respondent as requested.
22. Section 4 of the Fair Administrative Actions Act provides that before an adverse decision which is likely to affect the rights and freedoms of a person is made; such a person must be given prior and adequate notice of the nature and reasons for the proposed administrative action. Further, such a person must also be given an opportunity to be heard and to make representations in that regard.
23. In view of the above section, I accordingly find that vide the letter dated November 10, 2021, the 2nd Respondent acted within the law by informing the Petitioner of the complaint raised in respect to its Prospecting License PL/ 2018/0202 and gave the Petitioner an opportunity to respond to the said complaint and to forward any consents obtained from the complainant’s family, Ooko Ooro Family. He thus acted as per the requirements of the Fair Administrative Actions Act.
24. It is common ground that one of the prerequisites in issuing a Prospecting License and mining rights over a private land; is for the Applicant to obtain the respective Land Owners Consents; the same has been confirmed by both the Petitioner and the Respondent in their Affidavits attested to the same. The onus is on the Applicant of a Prospecting License to obtain the said consents from the registered



land owners within its License Mining Area before the said License is issued. Therefore, the Petitioner cannot now allege that obtaining the said consents cannot be achieved fully and that the same is a gradual process that can only be achieved/realized over a period of time, the law is clear in this regard.

25. The complainant's, Richard Ogoye Ooro, claim was that he is the heir and representative of the estate of the deceased registered owner of the suit land and that he did not give his consent for the inclusion of the suit land in the Petitioner's Prospecting License. In his letter to the Petitioner dated November 10, 2021; the 2nd Respondent sought his response to the said allegations and asked him to forward the Land Owner's Consent in relation to the land in dispute; the same was not provided.
26. The questions that therefore arise from the rival positions taken by the parties herein with regards to the complaint of Richard Ogoye Ooro; is whether a Land Owner's Consent was obtained in respect of the suit land No Muhuru/ Kadem/ Macalder/345 and if so, has the same been adduced. The onus was on the Petitioner to obtain the requisite registered land owners consent and by failing to obtain the same, he cannot now come to court seeking to sanitize its inaction and further calling upon the court to ascertain whether or not the complainant is an heir or hold proper representation documents. The first point of reference would be to ascertain whether consent was obtained upon which the Respondent would then be required to interrogate the claims by the complainant.
27. I have considered the steps taken by the 2nd Respondent in addressing the complaint received and in the circumstance I find that he acted within the confines of the law and no arbitrary decisions were made and further, both parties were given an opportunity to respond to the allegations.

Conclusion

28. I find that the Petition dated December 2, 2021 is not merited and the same is hereby dismissed with costs to the 1st and 2nd Respondents.

DATED, SIGNED AND DELIVERED Electronically via Email on this **19th DAY of DECEMBER, 2022.**

MOHAMED N. KULLOW

JUDGE

In the presence of; -

Court Assistant- Tom Maurice/ Victor

