



Gori Investment Limited v Land Registrar, Kakamega District & 2 others (Environment & Land Petition E002 of 2022) [2024] KEELC 262 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION E002 OF 2022
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

GORI INVESTMENT LIMITED PETITIONER

AND

LAND REGISTRAR, KAKAMEGA DISTRICT 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

FLORENCE NDUITA 3RD RESPONDENT

JUDGMENT

1. The petitioner moved the court through petition dated 22nd February 2022 wherein it averred that it is the registered proprietor of the parcel of land known as Kakamega/Municipality/Block 1/583 (the suit property) and that it learnt in November 2018 that the third respondent was claiming the suit property. That it made an application for replacement of the register in respect of the suit property which and gone missing and that despite issuing a gazette notice on 5th November 2021 and after lapse of the 60 days specified in the gazette notice, the register was not replaced. It further averred that its rights to access to information under Article 35, right to protection of property under Article 40 and right to fair administrative action under Article 47 had been violated.
2. The petitioner therefore prayed for judgment for the following orders:
 - a. A declaration that the Petitioner's Constitutional right to Fair Administrative Action was violated by the 1st Respondent.
 - b. A declaration that the 1st and 3rd Respondent have violated the Petitioner's right to acquire and own property.
 - c. An order of mandamus do issue consequent to the above declarations compelling the 1st Respondent to issue a land register for Title No Kakamega/ Municipality/ Block 1/583.



- d. A declaration that the 3rd Respondent is trespassing on all that property known as Title No Kakamega/ Municipality/ Block 1/583.
 - e. An order of compensation do issue against the 3rd Respondent through payment of mesne profits to the Petitioner for trespass on the suit premises.
 - f. That this Honourable Court be pleased to issue a permanent injunction restraining the 1st and 3rd Respondents either by themselves, their agents, servants and/or personal representatives from leasing out, selling, auctioning, disposing of, advertising for sale, offering for sale, transferring or in any way divesting, and/or in any other manner whatsoever interfering with or otherwise dealing with all that property known as Title No Kakamega/ Municipality/ Block 1/583.
 - g. The Honourable Court be pleased to grant any other relief that it may deem fit and just to grant in the interests of justice and/or that may become apparent and necessary in the course of the proceedings.
 - h. The costs of the Petition.
3. The petition is supported by an affidavit sworn by Gopal D. Patel, a director of the petitioner. He deposed that the petitioner is the proprietor of the suit property, having been so registered on 18th November 1996 and issued with a certificate of lease on 16th November 2011. That about November 2018, the petitioner learnt that the 3rd respondent was claiming ownership of the suit property and that consequently, the petitioner wrote to the Director of Land Administration at the Ministry of Land and Physical Planning complaining about irregular dealings in the suit property. That the Director of Land Administration wrote to the first respondent seeking a report on the registration status of the suit property and copied the petitioner. He added that the petitioner never received the report and that despite following up with the first respondent with a view to establishing what right to the suit property the third respondent was claiming, no information was forthcoming. That late in the year 2018, the third respondent established a carwash on the suit property and placed two 40 feet containers which she proceeded to rent out to five tenants. He added that on 18th October 2021, the petitioner made an application for replacement of the register or white card of the suit property which had gone missing and that subsequently, the first respondent advertised the loss of the register in the Kenya Gazette of 5th November 2021 under Gazette Notice Number 11836. That despite the sixty days that were provided in the gazette notice lapsing, the register was yet to be replaced, thus creating ambiguity which the third respondent was relying on to continue trespassing on the suit property. He annexed copies of certificate of lease dated 16th November 2011, letter dated 16th November 2018 from the Director of Land Administration to the first respondent and Gazette Notice Number 11836.
 4. The first and second respondents opposed the petition through a replying affidavit sworn by George O. Nyangweso, the County Land Registrar Kakamega County. He deposed that according to records held by the first respondent, the suit property was first registered in the names of Francis Lekolol on 26th October 1994 and that on 5th November 2012 it was transferred to the third respondent herein and a certificate of lease issued thereafter. He added that other documents in the first respondent's records in support of the third respondent's ownership are copies of consent by Municipal council of Kakamega to transfer the suit property dated 2nd April 2012, certificate of search dated 19th May 2011, certificate of search dated 2nd August 2012, valuation requisition for stamp duty dated 3rd August 2012, memorandum of registration of transfer of land dated 7th July 2012 and decree in Kakamega High Court Civil Suit No 41 of 2011. He annexed copies the documents he referred to above and added that the register in respect of the suit property was misplaced at some point in the first respondent's



office leading to gazettelement the loss. He also deposed that the certificate of lease in possession of the petitioner is not genuine.

5. The third respondent opposed the petition through a replying affidavit in which she deposed that she is the registered proprietor of the suit property and that she purchased it from one Francis William Lekolool after which it was transferred to her, and a certificate of lease issued. That she is the recognized rates and rent payer in respect of the suit property and that she is in occupation having constructed structures being used as a car wash. She denied the petitioner's claims over the suit property and added that the petitioner's title is a forgery. She annexed a copy of the register in respect of the suit property and certificate of lease dated 5th November 2012 in her name both certified by the first respondent on 24th March 2022 as true copies of the originals, and rates demand notice dated 17th January 2022 addressed to her.
6. The petitioner filed a supplementary affidavit sworn by Edward Kinyanjui, Advocate, whose contents I have noted. Among others, he deposed that George O. Nyangweso's affidavit relates to land parcel number Kakamega/Municipality/Block 1/583 whereas the petitioner is the registered owner of land parcel number Kakamega/Municipality/Block I/583. I note however that the petitioner's case as pleaded in the petition refers to land parcel number Kakamega/Municipality/Block 1/583 where Block 1 is typed with the digit 1 (one) as opposed to Kakamega/Municipality/Block I/583 where Block I is typed with the Roman I. Mr Kinyanjui further deposed that he was aware that there is no block within Kakamega County known as Block 1 and that consequently, existence of the third respondent's land parcel number Kakamega/Municipality/Block 1/583 is called into question. That the Director Land Administration who is superior to the first respondent directed the first respondent through letters dated 16th November 2018 and 13th May 2022 to produce documents supporting ownership of the suit property by any other party other than the petitioner, but the first respondent had failed to comply with the directions.
7. The petition was heard through affidavit evidence. Additionally, upon an application by the petitioner, it was granted an opportunity to cross examine George O. Nyangweso on the contents of his above affidavit.
8. At the cross examination, George O. Nyangweso stated that the third respondent's title reads Kakamega/Municipality/Block 1/583 which is the same as the copy of register that he to his (Nyangweso's) affidavit and that the said register was reconstructed on 31st November 2012. He added that he could not tell who applied for the reconstruction of 31st November 2012 and that there was gazettelement following the petitioner's application for reconstruction of the register. That upon publication of Gazette Notice No 11836, an oral objection was made by the third respondent, but he (Nyangweso) did not notify the petitioner about the objection, and he did not revoke the gazette notice. He further testified that upon receiving the objection, a search was conducted in the first respondent's office and that documents relating to the third respondent's ownership of the suit property were found. That the first respondent's office verbally told the petitioner that the correct documents supporting the third respondent's ownership had been found.
9. Mr Nyangweso further testified that the third respondent was not the registered proprietor by the time the decree in Kakamega High Court Civil Suit No 41 of 2011 was issued and that the first respondent's office does not recognise the petitioner's certificate of lease. He further stated that regardless of whether the documents refer to Kakamega/Municipality/Block 1/583 or Kakamega/Municipality/Block I/583, they all refer to the same property and that the letters dated 16th November 2018 and 13th May 2022 referred to in the supplementary affidavit of Edward Kinyanjui did not emanate from the first respondent's office. Mr Nyangweso also stated that the gazette notice was issued as a procedural



step with a view to ascertaining if the petitioner was the registered owner and that it later turned out that the proper records had been kept in safe custody owing to disputes in court. That he (Nyangweso) personally found the proper records.

10. The petition was canvassed through written submissions. The petitioner filed submissions dated 27th May 2022 and supplementary submissions on 4th April 2023 while the first and second respondents filed submissions dated 5th December 2022 and supplementary submissions dated 2nd June 2023. Finally, the third respondent filed submissions dated 25th September 2023.
11. I have carefully considered the parties' pleadings, affidavits, oral evidence, submissions, and the authorities cited. The issues that emerge for determination are whether the petitioner's right to protection of property, right of access to information, and right to fair administrative action were violated, and whether the reliefs sought should issue.
12. Before I embark on resolving the issues for determination, I note the petitioner's argument that the replying affidavit of George O. Nyangweso is fatally defective and ought to be struck out for not being dated in breach of Section 5 of the *Oaths and Statutory Declarations Act* which provides that every commissioner for oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. As the record shows, beyond swearing and filing the said affidavit, George O. Nyangweso was cross examined on the contents of the affidavit upon an application by the petitioner. In so doing, the petitioner not only acknowledged the existence of the affidavit as well as the matters deposed therein, but it also interrogated them further on oath in open court. In the circumstances, failure to state the date the oath in the affidavit was taken is not fatal. Nothing significant turns on that issue.
13. Article 40 of the *Constitution* makes provisions on protection of right to property in the following terms:
 40. Protection of right to property
 - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless
 - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
14. The dispute herein revolves around a parcel of land described in the petition as Kakamega/Municipality/Block 1/583. The express wording of both the petition and the supporting affidavit notwithstanding, the petitioner annexed to the supporting affidavit a copy of a certificate of lease in respect of a parcel known as Kakamega/Municipality/Block I/583. The difference between the two



title numbers is that in the former, Block 1 is typed with the digit 1 (one) while in the latter, Block I is typed with Roman I. I have gleaned from the confusing evidence presented by the petitioner as well as its submissions that its position is that it is the registered proprietor of Kakamega/Municipality/Block I/583, which parcel it contends is not the same one as Kakamega/Municipality/Block 1/583.

15. The first respondent, who is the custodian of records concerning registered title to land, has adopted the position that Kakamega/Municipality/Block I/583 and Kakamega/Municipality/Block 1/583 refer to the same parcel and that the true registered proprietor of the parcel is the third respondent. The first respondent went as far as stating that the petitioner's title document is not genuine. The mix-up in the petitioner's pleadings and evidence aside, it seems to me that the dispute is really over one and the same parcel. That explains why both the petitioner and the third respondent refer to the same activities on the ground: that the third respondent established a carwash and placed two 40 feet containers on the property. It is plain that the semantics over title numbers aside, the petitioner and the third respondent have a dispute over ownership of the property at the centre of these proceedings. Each is waving its/her title document.
16. The petitioner contends at paragraph 36 of the petition that its right to property has been violated by the first and second respondents in view of their failure to issue a register in respect of parcel number Kakamega/Municipality/Block I/583 following advertisement of loss of the register in the Kenya Gazette of 5th November 2021 through Gazette Notice Number 11836. The respondents contend that a new register was not issued as was contemplated in Gazette Notice Number 11836 since the misplaced register was ultimately recovered in the land registry. The petitioner is not satisfied with that explanation. It wants a new register issued in its name as was contemplated in the Gazette Notice. Once again, it boils down to ownership of the property in dispute.
17. The protection of the right to property under Article 40 is only available in respect of property which truly belongs to the claimant. Where there exists an underlying dispute on ownership, that dispute must be resolved before the protection of the right to property can be claimed. The authors of *Halsbury's Laws of England*, 4th Edition (Re-issue) Vol. 8 (2) reiterated as much at paragraph 265 provides as follows:

the protection under the *Constitution* of the right to property does not obtain until it is possible to lay claim in the property concerned.....an applicant must establish the nature of his property right and his right to enjoy it
18. The parties will have to file an ordinary civil suit to have their dispute on ownership resolved. They cannot do so through this petition. In the circumstances, I find that the petitioner has not demonstrated that its right to protection of property was violated.
19. The next issue for determination is whether the petitioner's right of access to information was violated. The right of access to information is provided for under Article 35 as follows:
 35. Access to information
 - (1) Every citizen has the right of access to—
 - (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.



- (3) The State shall publish and publicise any important information affecting the nation.
20. To give effect to Article 35 of the Constitution, parliament enacted the Access to Information Act. Bearing in mind that the right of access to information- is not absolute, Section 8 provides that application to access information shall be in writing unless applicant is unable to make a written application and that the applicant shall provide sufficient particulars to enable the officer to whom the request is made to understand what information is being requested.
21. The petitioner averred at paragraphs 34 and 35 of its petition that its right of access to information was violated since the first and second respondents failed to furnish it with information received pursuant to letter dated 16th November 2018 from the Director of Land Administration and information received following publication of Gazette Notice Number 11836 in the Kenya Gazette of 5th November 2021. I note that letter dated 16th November 2018 is not written by the petitioner but by the Director of Land Administration. It does not constitute any application for information by the petitioner. Similarly, Gazette Notice Number 11836 was issued by the first respondent and is hence not an application for information by the petitioner. The petitioner has not availed any specific written application for information which it presented to the respondents. I find that the petitioner has not demonstrated that its right of access to information was violated.
22. The petitioner averred at paragraphs 38, 39 and 40 of the petition that its right to fair administrative action was violated. The right to Fair Administrative Action is provided for under Article 47 of the Constitution which states in part as follows:
47. Fair administrative action
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
23. The petitioner argued that failure to reconstruct the register following lapse of 60 days after issuance of Gazette Notice Number 11836 was an administrative action which had the effect of limiting its right to property. The petitioner further contended the respondents failed to give it reasons for the failure to reconstruct the register.
24. As confirmed by George O. Nyangweso during his cross examination, an oral objection was made by the third respondent upon publication of Gazette Notice No 11836, but the first respondent did not notify the petitioner about the objection. It equally emerged from his testimony that after receiving the objection, a register indicating that the third respondent was the proprietor was found in the land registry and that the petitioner was verbally notified. The gazette notice was not revoked following retrieval of the register. Having made an application that led to issuance of the gazette notice, the petitioner had a right to be formally notified of any objection and the decision not to proceed with reconstruction of the register. The failure to do so was a violation of its right to fair administrative action.
25. The last issue for determination is whether the reliefs sought should issue. At paragraph 50 of its supplementary submissions filed on 4th April 2023, the petitioner abandoned prayers (d), (e) and (f) of its petition. In view of the foregoing discourse, the petitioner is entitled to a declaration that its right to fair administrative action was violated. On the other hand, prayers (b) and (c) are not merited since



such orders can only be made upon resolution of the underlying dispute as to proprietorship of the property.

26. In the result, I make the following orders:

- a. A declaration is hereby made that the petitioner's right to Fair Administrative Action was violated by the first respondent.
- b. No order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Michuki for the Petitioner

Mr Juma for the First and Second Respondents

Ms Luseno for the Third Respondent

Court Assistant: E. Juma

