



**Chui & another v Hass Petroleum (K)Limited & 2 others (Environment & Land
Case 197 of 2018) [2023] KEELC 17213 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 197 OF 2018**

OA ANGOTE, J

APRIL 27, 2023

BETWEEN

ANDREW MWANGI CHUI 1ST PLAINTIFF

SHAURI MOYO DEVELOPERS 2ND PLAINTIFF

AND

HASS PETROLEUM (K)LIMITED 1ST DEFENDANT

THE LAND REGISTRAR, NAIROBI 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. Vide a Complaint dated the 25th April, 2018, and amended on the 8th February, 2021, the Plaintiffs are seeking for the following reliefs as against the Defendants;
 - i. A Declaration that the 1st Plaintiff is the rightful owner of L.R No 12062/915, situated at Kariobangi South, Nairobi.
 - ii. That the 2nd Defendant be directed through an order of this Honourable Court to nullify/cancel Title No I.R 122352 and/or any further and/or subsequent registration thereof registered in favour of the 1st Defendant and/or any person acting, with authority from him.
 - iii. A Permanent injunction do issue restraining the Defendants, their servants or agents from taking over possession or occupying, trespassing, interfering, selling or disposing off, or dealing in any way whatsoever with all that property identified as L.R No 12062/915 situated Kariobangi South, Nairobi.
 - iv. The Defendants be condemned to pay costs of the suit.



2. It is the Plaintiffs' case that at all material times, the 1st Plaintiff has been the legal and registered owner and leaseholder to parcel L.R No 12062/915 situated at Kariobangi South, Nairobi (hereinafter the suit property) having been allocated the same on the 10th October, 1981 upon successful application to the Nairobi City Council while he was operating under the trade name Mariani Auto Nursery.
3. It was averred in the Plaint that the 1st Plaintiff was further furnished with a beacon certificate illustrating the dimensions and boundaries of the suit property; that after the disbandment of the Nairobi City Council by the President, the 1st Plaintiff applied for a further allotment letter from the relevant authority being the Nairobi City Commission in the year 1992, which application was allowed and that he was issued with a further allotment letter on the 27th October, 1992.
4. It is the Plaintiffs' case that the 1st Plaintiff later applied to be issued with a lease by the head lessor, which application was successful; that he was issued with one on 6th February, 2013 and that the 1st Plaintiff has through the agents of the 2nd Plaintiff been paying rates in respect to the suit property; that the 1st Plaintiff is in possession of rates clearance certificates in his favour and remains the owner of the suit property which is under the management of the 2nd Plaintiff.
5. According to the Plaintiffs, despite the aforesaid, the Defendants have been forcefully and threateningly interfering with his quiet possession of the suit property through regularly sending their agents to the property in an attempt to seal it off and restrict their access and that upon the filing of the suit and through the 1st Defendant's Supporting Affidavit sworn on 8th May, 2018, the 1st Plaintiff learnt that the 1st Defendant has gone ahead to process title number L.R 122352.
6. It is the Plaintiffs' case that the title for LR No. 122352 was issued to the 1st Defendant through fraud and collusion with Dennis Mwangi and Leonard Njoroge Kariuki, whose title and claim has since been impugned vide Milimani ELC 1074 of 2015 and an eviction order issued against him and that the title was procured illegally while there was an order/injunction stopping any transactions on the property.
7. The 1st Plaintiff averred that despite numerous requests, the Defendants have refused to cease their illegal activities; that there is no suit pending, neither has there been any previous proceedings in any court between the Plaintiffs and the Defendants over the same subject matter and that this Court has jurisdiction to entertain the matter.
8. The 1st Defendant filed a Defence and Counterclaim on 9th May, 2018. In the Defence, the 1st Defendant denied the assertions in the Plaint stating that the root of acquisition of its title stems from orders issued on 20th December, 2013 at the High Court in Nairobi Civil Suit 610 of 2004 which ordered for the sale of all that parcel of land known as L.R 26719, I.R No 122352 situate in Nairobi by way of public auction and that at the time of the order, the duly registered owner of the suit property was one Leonard Njoroge Kariuki.
9. The 1st Defendant averred that on 7th March, 2014, a notification of sale containing the agent that would conduct the sale, place, time, terms and conditions were issued by the Deputy Registrar in accordance with the Civil Procedure Rules; that on 2nd April, 2014, Dikemwa Auctioneers put up an advert in the star newspaper of the intended sale by way of public auction and that at the public auction on 3rd April, 2014, Dennis Mwangi was declared the highest bidder and purchaser of the suit property at Kshs 23,000,000.
10. The 1st Defendant averred in the Defence that a Memorandum of Sale was executed upon which Dennis Mwangi was issued with a Certificate of Sale dated 3rd April, 2014; that on 29th October, 2015, the 1st Defendant entered into an agreement for the purchase of the property at a consideration of Kshs



- 50,000,000 and that upon execution of the agreement, it paid a deposit of 25% and thereafter paid the balance in installments.
11. It is the 1st Defendant's case that prior to the transfer of the suit property to it, Dennis K Mwangi applied to the High Court for vesting orders over the property which was granted on the 26th February, 2016 and that the purchaser applied to court to have the initial vesting orders amended and for further orders compelling the Registrar of Titles to cancel the previous entries and to issue a provisional certificate, which orders were granted on the 16th July, 2016.
 12. It was averred that the 1st Defendant was eventually registered as the proprietor of the suit property vide a transfer dated 28th July, 2016, which transfer was subsequently registered by the Registrar of Titles on 12th August, 2019; that in furtherance of the sale and purchase, the Defendants' due diligence entailed inquiring whether the previous owners had been paying rent and rates and that the rent and rates clearance certificates were issued to him.
 13. It was averred by the 1st Defendant that on the strength of its registration, it has proceeded to use the title documents to secure a financial facility to the tune of USD 1, 400,000; that by reason of the foregoing, the 1st Defendant is a stranger to the Plaintiffs' assertions and that had the Defendants been the beneficial owner of the suit property, they would have moved to protect their interest before the auction in 2014.
 14. According to the 1st Defendant, whereas the Plaintiffs purport to have entered into a lease with Nairobi County on 6th February, 2013, the same was not possible because during the aforesaid period, a moratorium had been issued by the Transitional Authority on transfer of assets and renewal of all leases; that similarly, the then Cabinet Minister for Local Authorities on or about the 20th January, 2012 resolved to freeze all renewals of expired leases and that further disposal of public assets was frozen during the transition period and any purported lease by the 1st Plaintiff was void for all intents.
 15. It is the 1st Defendant's case that the title which it holds supersedes the letter of allotment by the 1st Plaintiff and that the Defendant has never been a party to any suit involving the 1st Plaintiff and Leonard Njoroge and did not have an opportunity to defend its title.
 16. The 1st Defendant sought vide its counterclaim, a declaration that it is the duly registered proprietor of Land Reference Number 26719 and I.R 122352 measuring 0.2073Ha; an order directed at the Chief Lands Registrar to cancel Land Reference No 12062/915 situate at Kariobangi South, Nairobi; and a permanent injunction do issue restraining the Plaintiffs from taking over possession, occupation, trespassing, interfering and selling or dealing with the suit property.
 17. The 2nd and 3rd Defendants filed their Defence in which they denied the averments set out in the Plaint. The 2nd and 3rd Defendants averred that they were not the allocating authority of the suit property; that they were not parties to the proceedings in ELC 1075 of 2015 and that the suit as drawn does not disclose any reasonable cause of action against them.

Hearing & Evidence

18. The matter proceeded for hearing on the 4th July, 2022. PW1 adopted his witness statement as his evidence in chief and produced the list of documents of an even date as PEXB 1.
19. PW1 stated that in 1981, he was operating under the trade name Mariani Auto Nursery when he made an application to be allocated land parcel L.R No. 12062/915 situated at Kariobangi South, Nairobi (the suit property); that his application was successful and the land was allocated to him on



- 10th October, 1981 and that he was later furnished with a beacon certificate, clearly illustrating the dimensions and boundaries of the property.
20. It was the evidence of PW1 that after the Nairobi City Council was disbanded by the President, he sought for a further allotment from the relevant authority being the Nairobi City Commission which was also successful; that he was issued with a further allotment on 27th October, 1992; that he further applied for and was issued with a lease from the head lessor and that he has been paying rates personally and through the agents of the 2nd Plaintiff and has rates clearance certificates in this regard.
 21. According to PW1, the Defendants have been forcefully and threateningly interfering with his quiet possession of the suit property, a specific instance being the 11th April, 2018 where the 1st Defendant sent agents who appeared on the suit property with a crowd of young men and a few administration police carrying crude weapons and iron sheets with the intention of forcefully removing him from the property.
 22. It was the evidence of PW1 that it took the intervention of the District Commissioner, Embakasi West Region and City Council officials to quell the impending conflict; that the 1st Defendant is still sending agents to trespass on the suit property and harass the occupants claiming ownership of the property despite having no ownership documents and that he only learnt of the 1st Defendant's title upon filing this suit.
 23. It was the evidence of PW1 that Leonard Njoroge Kariuki, while unlawfully claiming ownership of the suit property conspired with Dennis Mwangi t/a Fuelex (K) Limited, who through a vesting order in Nairobi CMCC Misc Application No 987 of 2015, transferred a fictitious title to Dennis Mwangi t/a Fuelex on account of an alleged debt of Kshs.850,000.00 who then disposed the alleged title to the 1st Defendant.
 24. It was averred that the unlawful claim of ownership of the suit property by Leonard Njoroge has been the subject of litigation vide Nairobi High Court Civil Case 1074 of 2015 and out of which judgement has been entered declaring the 1st Plaintiff as the owner of the suit property and that despite numerous requests, the Defendants have refused to cease their unlawful activities.
 25. The Defendants did not participate in the hearing.

Submissions

26. The Plaintiffs' counsel submitted that the Plaintiffs have demonstrated that they are the lawful owner of the suit property; that the Plaintiffs have proved that the 1st Defendant's title was procured through fraud and /or corruption; that the 1st Defendant has never been in possession of the property and its title which only exists on paper should be nullified and that having clearly demonstrated their ownership of the suit property, the Plaintiff is entitled to the permanent injunctive reliefs sought.
27. It was submitted that further, the Plaintiffs have developed a factory, a commercialized weigh-bridge and a car wash employing numerous persons and that should the Court decline to grant the injunctive orders, they will be unable to meet their obligations to the state, employees, suppliers and creditors.
28. It was submitted that the alleged transfer to the 1st Defendant was effected on 28th July, 2016 as evinced by the transfer instrument while there was a court Order in ELC Case 1074 of 2015 (formerly High Court Commercial Court Civil Case No 139) in which the 1st Plaintiff had instituted a suit asserting his right over the whole property, including the illegally excised parcel the subject of this suit.
29. It was submitted that the afore stated suit was determined on 31st October, 2018 in which the Court conclusively determined the question of ownership finding in favour of the 1st Plaintiff;



that it is apparent that the alleged transfer of the property was contrary to the principles of *lis pendens* as expressed by the Court of Appeal in *Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another*[2015]eKLR and that the Defendants cannot claim that the 1st Plaintiff is a trespasser while affirming that the 1st Plaintiff has always been in possession of the suit property.

30. The 1st Defendant's counsel submitted that the 1st Defendant has a valid title L.R 26719 and I.R 122352 which has not been impugned and neither has it been the subject of challenge before any forum and that Section 24 of the [Land Registration Act](#), 2012 provides that the registration of a person as proprietor of land shall vest in that person absolute ownership of the land.
31. It was submitted that the 1st Defendant is an innocent purchaser for value as evinced by the fact the Certificate of Title bears the seal and signature of the Land Registrar; that the 1st Defendant duly carried out its due diligence before purchasing the property; that the 1st Defendant bought the property for valuable consideration of KShs 50,000,000 from the vendor and that the 1st Defendant has passed the bona fide purchaser test as set out in the Ugandan case of *Katende vs Haridar and Company Limited* cited with approval in *Lawrence Mukiiri vs Attorney General and 4 Others*[2013] eKLR.

Analysis & Determination

32. Having considered the pleadings, testimonies and submissions, the following arise as the issues for determination;
 - i. Whether the Plaintiffs have proved their case against the Defendants on a balance of probabilities and if so?
 - ii. What are the appropriate orders to issue?
33. The Plaintiffs instituted this suit against the Defendants seeking, inter alia, for a declaration that the 1st Plaintiff is the rightful owner of the property known as L.R No 12062/915 situated at Kariobangi South Nairobi and the cancellation of Title No I.R 122352 and/or any further subsequent registration thereof in favour of the 1st Defendant and permanent injunctive orders preventing the Defendants from any interference with the suit property.
34. Whereas all the Defendants entered appearance and filed their respective Defences, none was present at the hearing. Subsequently, they failed to substantiate the allegations made in their Defences and produce evidence to counter the Plaintiffs' testimony. It therefore follows that the Defences on record remain mere allegations and the Plaintiff's evidence is uncontroverted and unchallenged. In the same vein, the 1st Defendant's counter-claim fails for want of prosecution.
35. Notwithstanding the aforesaid, it is settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiffs to prove their case remains the same and the burden of proof is in no way lessened because the Defendants did not adduce any evidence. That is what was expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.



The Evidence Act is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

36. It is trite that he who alleges must prove. This principle is set out under Section 107 (1) (2) of the Evidence Act, which provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

37. And Sections 109 and 112 of the same Act which state;

“

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

38. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

39. PW1 testified that he is the lawful owner of all that property known as L.R 12062/915 situated at Kariobangi South, Nairobi, (the suit property) having been allocated the same on 10th October, 1981 upon application to the Nairobi City Council and that after the disbandment of the Nairobi City Council, he sought and was subsequently issued with a further allotment letter on 27th October, 1992 by the then Nairobi City Commission.

40. It is the 1st Plaintiff’s case that he has since been issued with a Lease by the head lessor, the Nairobi City Council and has been in possession of the suit property since then; that they have been duly paying the requisite rates and rents and that in May, 2018, they discovered that the 1st Defendant has proceeded to process a title number I.R 122352 which was issued fraudulently and in collusion with Dennis Mwangi and Leonard Njoroge whose title has since been impugned by the court in *Milimani ELC No. 1074 of 2015*.

41. To prove his claim, PW1 adduced into evidence a copy of the allotment letter dated 10th August, 1981, the letter of allotment dated 27th October, 1992, the Lease Agreement between himself and Leonard Njoroge Kariuki dated 26th April, 1999, several correspondences forwarding cheques for various sums being payments from Leonard Kariuki towards the purchase of the suit property.

42. PW1 also produced in evidence the beacon certificate dated 21st December, 2007; a letter from his counsel demanding payments for the suit property; copies of proceedings in HCCC No. 139 of 2009 including the *Plaint, injunction order of 1st November, 2012, decree dated 31st October, 2018 in ELC*



1074 of 2015, Order dated 1st December, 2015 in Misc 987 of 2015, and eviction order dated 11th December, 2018 in ELC 1074 of 2015. In addition, the PW1 produced photos of the suit property and the survey report dated 14th October, 2020.

43. In the Surveyor's report of 14th October, 2020, the surveyor indicated that parcel number L.R No 12062/915 Kariobangi South is occupied; that the whole area is fenced by a concrete wall and that there is a recently demolished petrol station on one side of the land. This position was not challenged at all by the Defendants.
44. The ownership of the suit property in this respect is undisputed and the court has no difficulty finding the 1st Plaintiff the proprietor of L.R No 12062/915. Indeed, no evidence was adduced to show that the documents relating to ownership of the suit property were acquired fraudulently or by misrepresentation.
45. The 1st Plaintiff seeks to impugn the 1st Defendant's title on the basis of the same having been acquired by fraud. The Court has considered the impugned Certificate of Title for I.R 122352. Entry number 6 thereof shows that the suit property was transferred to the 1st Defendant herein on 12th August, 2016. That being so, the applicable law is the [Land Registration Act, 2012](#).
46. The provisions of Section 24(a) and 25(1) of the Act outlines the interests and rights of a registered proprietor as follows;
- S.24(a) provides;
- “Subject to this Act—
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”
47. Whereas Section 25 (1) under the heading rights of a proprietor states;
- “The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject...”
48. With respect to instances under which the title held by a proprietor is liable to be challenged, Section 26(1) of the [Land Registration Act](#) is instructive and provides as follows:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
49. Whereas title is protected, the said protection can be impeached, if it is proved that the title was procured through fraud or misrepresentation to which the person is proved to be a party, or where it



is procured illegally, un-procedurally, or through a corrupt scheme. The Plaintiff contends that the 1st Defendant's title to I.R 122352 was acquired fraudulently.

50. The Black's Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

51. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in *Kuria Kiarie & 2 Others vs Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

52. It is on record that the Plaintiffs have pleaded and particularized the instances of fraud against the Defendants. The issue for the Court is to determine whether the same has been successfully proved.

53. The Court has considered the evidence. Indeed, there is no dispute that that the 1st Plaintiff was allocated the suit property herein being part of L.R 12062/R. It is also apparent that the 1st Plaintiff entered into an agreement for the sale of the property then known as an unsurveyed portion of L.R 209/9608 to one Leonard Njoroge.

54. A dispute arose between the 1st Plaintiff and Leonard Njoroge with respect to compliance with the terms of the sale leading to the institution of Civil Case No 139 of 2009, now ELC Case No 1074 of 2015 by the 1st Plaintiff. The Court determined the matter in favour of the 1st Plaintiff herein declaring him the owner of the property L.R 209/9608 and issued eviction orders against Leonard Njoroge.

55. According to the 1st Plaintiff, Leonard Njoroge with whom he had a dispute over the suit property went ahead and illegally acquired title to a portion of the property being L.R 267219, I.R 122352 which he transferred to Dennis Mwangi who thereafter disposed the same to the 1st Defendant.

56. In light of this assertion, the first point of call is a determination of whether, as alleged, the 1st Defendant's property is a part of the 1st Plaintiff's property. In this respect, the 1st Plaintiff heavily relies on the determination of the Court in ELC 1074 of 2015. While the Court did make a finding in the 1st Plaintiff's favour, the same does not relate to the suit property herein.



57. All orders emanating from ELC No. 1074 of 2015 refer to L.R 209/9608. In the same vein, the orders emanating from Miscellaneous Application number 987 of 2015 are with respect to L.R 26719. This is the property the 1st Defendant stated in the Defence that it purchased from a public auction. There is no evidence linking the suit property and the property that the 1st Defendant is claiming.
58. Having failed to establish to the required standard that the 1st Defendant's property is part of the suit property, it follows that there is no basis for the allegations of fraud as against the 1st Defendant's title.
59. For those reasons, it is the finding of the court that the Plaintiff has not proved his claim as against the 1st Defendant's title, being L. R. 26719, to the required standards.
60. Consequently, the Plaintiffs' case partially succeed as follows:
- i. The 1st Defendant's counter-claim is dismissed with costs.
 - ii. A declaration be and is hereby issued that the 1st Plaintiff is the rightful owner of L.R No 12062/915, situated in Kariobangi South, Nairobi.
 - iii. A Permanent injunction be and is hereby issued restraining the Defendants, their servants or agents from taking over possession or occupying, trespassing, interfering, selling or disposing off, or dealing in any way whatsoever with all that property identified as L.R No 12062/915 situated Kariobangi South, Nairobi.
 - iv. The 1st Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF APRIL, 2023

O. A. Angote

Judge

In the presence of;

Ms Njuguna for 5th Defendant

Mr. Muiruri for Plaintiff

Mr. Mohammed for 1st Defendant

Court Assistant - June

