



Chemusian Company Limited v Cosmic Enterprises Limited & another (Environment & Land Case 107 of 2019) [2022] KEELC 2671 (KLR) (20 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 107 OF 2019**

**A NYUKURI, J
JULY 20, 2022**

BETWEEN

CHEMUSIAN COMPANY LIMITED PLAINTIFF

AND

COSMIC ENTERPRISES LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

Introduction.

1. By a plaint dated 30th September 2019, Chemusian Company Limited, the Plaintiff herein averred that it was the bona fide registered proprietor of land Reference No. 337/1205 I.R. No. 59289 measuring 3.877 Hectares (herein after referred to as the suit property). Further that the Plaintiff is up to date in the payment of land rates and that upon obtaining all the relevant approvals, in the year 2015, the Plaintiff constructed a wall around the suit property where he now trains its security guards.
2. That in September 2018, the Plaintiff was informed that the 1st Defendant was claiming ownership of the suit property and was in possession of another title thereto, which prompted investigations by the Directorate of Criminal Investigation (DCI), leading to the conclusion that the 1st defendant's title was fraudulently obtained. The Plaintiff states that the Defendants used forged documents to register the 1st Defendant, that the defendants mutilated the Temporary Cover (TC) file and concealed deeds and introduced alien documents thereby falsifying the records.
3. It was the Plaintiff's assertion that as the original deed file was confirmed as lost, it sought for reconstruction of the deed file, which application is still pending. It further alleged that the 1st Defendant's agents went to the suit property on 27th September 2019 with intention of damaging the Plaintiff's wall but their attempts were thwarted by police.



4. Therefore, the Plaintiff sought for the following orders;
 - a. A declaration that the Plaintiff is the legal and registered proprietor of all property known as Land Reference No. 337/1205 I.R No. 59289.
 - b. An order directed at the 2nd Respondent to cancel or revoke any other registration of any interests on the suit property in favour of the 1st Defendant herein and ensure the title to the Plaintiff is free from any encumbrances or other adverse interests in favour of the 1st Defendant.
 - c. An order of permanent injunction be issued against the Defendants to restrain them jointly and severally whether by themselves, servants, agents, employees and/or officers from entering, trespassing, taking possession, wasting, damaging, transferring to any third party or in any other way interfering with the Plaintiff's quiet possession of all that land Reference No. 337/1205 including the entire improvements within the said property.
 - d. Costs of this suit.
 - e. Any other remedy the court deems fit to grant to meet the ends of justice.
5. By order of this court made on 14th October 2019, the court granted leave to the Plaintiff to serve the 1st Defendant with summons to enter appearance and pleadings by way of substituted service. That on 22nd October 2019, the Plaintiff served the 1st Defendant through advertisement in the Standard Newspaper of that date as demonstrated by the return of service filed on 13th November 2019. The 2nd Defendant was served with summons and pleadings on 9th October 2019. Despite service, none of the defendants entered appearance or filed defence. Therefore, this suit proceeded unopposed.

The Plaintiff's evidence

6. On 11th November 2021, PW1, Trophymus Kiplimo testified on behalf of the Plaintiff. He adopted his witness statement dated 9th March 2020 and filed on the same date as his evidence in chief. He testified that he was the Group legal officer of the Plaintiff. It was his testimony that the Plaintiff was the bona fide registered proprietor of the suit property and that the original title shows that the property was first allotted and registered in the name of Gastech Industries Limited on 1st January 1992 for a 99 year lease, before it was transferred to Trade World Kenya Limited for a consideration of Kshs. 5,000,000/= . He further stated that as Trade World Kenya was a sister company of the Plaintiff, a decision was made to consolidate all the land for the two companies hence on 29th September 1997, a transfer of the suit property was done by Trade world Kenya to the Plaintiff.
7. PW1 also stated that the Plaintiff has been in occupation of the suit property since 1997, paying rates thereof promptly and that in May 2014, the Plaintiff obtained approvals for construction of a wall around the suit properties, from the Decentralised Units, Urban areas and Municipalities, and thereafter they constructed the wall and have continued in the possession thereof. It was his testimony that the suit property is used as a training ground for its guards.
8. He further testified that around September 2018, the Plaintiff received reports that the 1st Defendant was claiming ownership of the suit property and was in possession of other title documents, which information prompted investigations by the DCI. The witness explained that after the investigations, it was found that the 1st Defendant obtained his title document by fraud as the records at the lands office showed that the 1st Defendant was the first entity to be assigned the correspondence file, while the truth was that the suit property was first allocated to Gastech Industries Limited, then transferred to Trade World Kenya, before being transferred to the Plaintiff in this matter. The witness stated that the documents found in correspondence files No. 303388 and Temporary Cover File No. 138786 were



all false documents as letters purportedly sent to Survey of Kenya were never delivered and hence the purported replies were forgeries.

9. That thereafter the Plaintiff visited the 2nd Defendant's office to lodge a complaint but the original deed file in respect of the suit property could not be traced, prompting him to seek for reconstruction of the same. He further stated that on 27th September 2019, the 1st Defendant's agents attempts to destroy the wall on the suit property were thwarted by the police.
10. The witness produced the Plaintiff's title deed as P-Exhibit 1, copy of duly registered transfer dated 21st December 1995 as P-Exhibit 2, copy of duly registered transfer dated 29th September 1997 as P-Exhibit 3, Copies of land rent receipts payment and clearance certificate as P-Exhibit 4, copies of fees payment and subsequent approval as P-Exhibit 5, copies of the 1st Defendant's purported title as P-Exhibit 6, copy of letter dated 20th May 2019 as P-Exhibit 7, copy of the reconstruction application as P-Exhibit 8, photographs of the site as at 27th September 2019 as P-Exhibit 9 and DCI Report as P-Exhibit 10.
11. PW2 was one Charles Kipkurui Ngetich, Deputy Chief Lands Registrar, working at the Ministry of Lands and Physical Planning. He testified that he was aware of the Plaintiff's complaint in regard to the suit property, which complaint had also been made to the DCI. He stated that the DCI made a report which was received by him on 4th June 2019. It was his testimony that the conclusions made by the DCI were that the suit property belonged to the Plaintiff and the 1st Defendant had manipulated the lands records especially the correspondence file.
12. It was PW2's testimony that the investigations revealed that the 1st Defendant took the original file, removed the original record and placed his own records showing that the land was allocated to them and not the first allottee who was Gastec Industries Limited. He stated that as the 1st Defendant fraudulently manipulated the records at the lands registry, their office had physically cancelled and deleted the file from the Electronic Data Management System as there cannot be two titles over the same land. According to PW2, now the search shows at entry 2 that the property was transferred to Trade World Limited on 16th January 1996 and entry No. 3 shows that the property was transferred to the Plaintiff on 29th September 1997. According to him the consideration for transfer to the Plaintiff was not mentioned as the transfer was to a sister company.
13. PW2 stated further that the 1st Defendant's forged title has been cancelled and that the Plaintiff's title is the one in the Electronic Data Management System and can be generated online. That marked the close of the Plaintiff's case.

Submissions

14. Counsel for the Plaintiff submitted that the Plaintiff had discharged the burden of proof confirming the validity of their ownership to the suit property and highlighted how the 1st Defendant used fraud to interfere with the Correspondence file and obtained a fraudulent title with the aim of defeating the Plaintiff's title. It was counsel's position that unless the 1st Defendant's title is declared null and void, the Plaintiff's proprietary rights will be violated by the 1st Defendant.
15. Counsel relied on the case of *Lazarus Estate Limited v Beasley* [1956] 1 QB 702, 712, where the court stated that courts will not allow any person to keep an advantage which he obtained by fraud. Further, counsel relied on the cases of *Arthi Highway Developers Ltd v West End Butchery Limited & 6 Others* [2015] eKLR, and *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR, for the proposition that a court should not hesitate to cancel a title where it is established that the same was obtained fraudulently.



Analysis and Determination

16. I have carefully considered the Plaintiff, the testimony of witnesses and the submissions by the Plaintiff. The issues that arise for determination are;

- a. Whether the Plaintiff is the bona fide proprietor of L.R No. 337/1205, I.R No. 59289.
- b. Whether the Defendant's title to the suit property was obtained fraudulently.
- c. Whether the Plaintiff is entitled to the orders sought.

17. The right to property is provided for under Article 40 of *the Constitution*. However, the protection does not extend to property unlawfully acquired. Essentially therefore, constitutional protection only protects the title where its root is clean. The Plaintiff in this matter stated that it was the bona fide proprietor of the suit property. Section 26 of the *Land Registration Act* No. 3 of 2012 provides for indefeasibility of title granted by registration, except on grounds of fraud or illegality, 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 ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

18. Both PW1 and PW2 in this matter gave the history of the suit land and stated how the Plaintiff acquired registration of the suit property from the previous registered proprietor. They testified that the suit property was initially assigned to Gastech Industries Limited, which was later transferred to Trade World Kenya Limited at a consideration of Kshs. 5000, 000/= . That Trade World Kenya Limited being a sister company of the Plaintiff, transferred the suit property to the Plaintiff. PW1 produced the title, transfer instruments, payment receipts for land rates and payment for approval for construction of a perimeter wall. No evidence was given by the Defendants to challenge the evidence given by the Plaintiff. I have considered the title produced by the Plaintiff, which clearly show that the Plaintiff is the registered proprietor of the suit property having been registered as such on 29th September 1997. The evidence of PW2, the Deputy Chief Lands Registrar corroborated the evidence of PW1 that indeed the suit property belongs to the Plaintiff. Besides, the Plaintiff presented evidence of receipts of land rates to Mavoko Municipal council to show that they had consistently paid rates in respect of the suit property. They have also shown that they are in possession of the suit property which they obtained approvals from the relevant authorities to put up a perimeter wall, which they did in 2014. It is therefore clear that the Plaintiff has demonstrated that the root of its title is clean and worthy of this court's protection. I therefore find and hold that the Plaintiff is the lawful and bona fide proprietor of the suit property.

19. Fraud is making a deliberate misrepresentation, for purposes of unlawfully obtaining an advantage over another. The Black's Law Dictionary 11th Edition, defines fraud as follows;

A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.



20. Fraud must not only be pleaded, but the particulars thereof must be specified in the pleadings and the same proved by evidence. In the case of *Vijay Morjaria v Nansing Madhusing Darbar & Another* [2000] eKLR, the court held 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

21. On whether the 1st Defendant's title to the suit property was obtained fraudulently, the Plaintiff pleaded particulars of fraud on the part of the 1st and 2nd Defendants in paragraph 10 of the Plaint. According to them, the proper record of the suit property showed that the first entity to be registered as proprietor of the suit property was Gastech Industries Limited on 1st January 1992, for a 99-year lease. And, that thereafter transfer was made to Trade World Kenya Limited on 16th January 2015 and later a transfer to the Plaintiff made on 29th September 1997. That therefore, the 1st Defendant's title which shows that they were the first to be assigned the suit property is based on fraud. In addition, the Plaintiff stated that the Defendants placed forged documents on the correspondence file No. 303388 and the Temporary Cover file No. 138786, and the letters purporting to have been delivered to the Survey of Kenya were never delivered, neither are the purported replies from the survey of Kenya, authentic replies as they did not originate from the latter. Further that the right process of land registration is that when a land officer requests for authentication from the Survey of Kenya, the response is on the authentication slip and not by letter which means that the letter purporting to originate from the Survey of Kenya was a forgery.
22. The evidence of PW1 and PW2 was that the 1st Defendant in cahoots with officers at the ministry of lands, falsified the documents on the correspondence file as well as the Temporary Cover file in respect of the suit property, by removing original and genuine documents and replacing them with forged documents, some of which were alleged to have originated from the Survey of Kenya when that institution did not author any such documents. I have perused the report of the Directorate of Criminal Investigations and I note that the investigations found that the documents used by the 1st Defendant to register the suit property in their name were forged and therefore the process of obtaining registration of the suit property was fraudulent. This is based on the fact that while the correct records show that Gastech Industries Limited was the first company to be assigned the suit property, yet the title held by the 1st Defendant, shows that the 1st Defendant was the first to be assigned the suit property, for a lease of 99 years with effect from 1st August 1994.
23. No evidence was given by the 1st Respondent to show that the title to the suit property was lawfully acquired by them. In view of the findings made from the investigations by the DCI, as well as the evidence on record that show that the Plaintiff was the bona fide proprietor of the suit property, and that the 1st Defendant's title was obtained pursuant to forged documents, it is clear that the title held by the 1st Defendant was indeed obtained fraudulently. Indeed, the 1st defendant did they give any evidence to dislodge the Plaintiff's evidence on how the latter acquire title nor to dispute the fact that their title was obtained by fraud. I therefore find and hold that the 1st Defendant's title to the suit property was fraudulently obtained. The Plaintiff has argued that should this state of affairs continue to persist, the defendant may use the fraudulent title to alienate the suit property to third parties, thereby violating the Plaintiff's proprietary rights. I agree with the Plaintiff that it is deserving of this court's protection in a manner that will uphold the sanctity of its title.



24. Having found that the Plaintiff is the bona fide proprietor of the suit property, and that the 1st Defendant's title thereto was obtained fraudulently, I am satisfied that the 1st Plaintiff has proved its case against the Defendants on a balance of probabilities and therefore, I enter judgment for the Plaintiff against the Defendants jointly and severally in the following terms;
- a. A declaration be and is hereby issued that the Plaintiff is the legal and registered proprietor of all property known as Land Reference No. 337/1205 I.R No. 59289.
 - b. An order be and is hereby issued directed at the 2nd Respondent to cancel or revoke any other registration of any interests on the suit property in favour of the 1st Defendant herein and ensure the title to the Plaintiff is free from any encumbrances or other adverse interests in favour of the 1st Defendant.
 - c. An order of permanent injunction be and is hereby issued against the Defendants to restrain them jointly and severally whether by themselves, servants, agents, employees and/or officers from entering, trespassing, taking possession, wasting, damaging, transferring to any third party or in any other way interfering with the Plaintiff's quiet possession of all that Land Reference No. 337/1205 including the entire improvements within the said property.
 - d. Costs of this suit shall be borne by the 1st Defendant.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ogembo for the Plaintiff

No appearance for the Defendants

Ms Josephine Misigo - Court Assistant

