



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI
ELC NO.701 OF 2014 (FORMERLY HCCC NO.610 OF 2005)
(NOW ELC NO.20 OF 2017 – THIKA ELC)

JORETH LIMITED.....PLAINTIFF

VERSUS

VICTORY FAITH INTERNATIONAL CHURCH.....1ST DEFENDANT

LIVING FAITH INTERNATIONAL AFRICA DIVISION.....2ND DEFENDANT

PRINCIPAL REGISTRAR OF TITLES.....3RD DEFENDANT

JUDGEMENT

By an *Amended Plaintiff* dated *10th June 2005*, the Plaintiff herein *Joreth Ltd*, has sought for the following orders:-

- a) An Order of permanent injunction restraining the 1st and 2nd Defendants by themselves, their agents, servants and or employees from parting with, alienating, disposing, wasting, selling or in any way dealing with the suit property, Land Reference No.13330/117.*
- b) An order for vacant possession of the suit premises Land Reference No.13330/117, against the 1st and 2nd Defendants.*
- c) A declaration that the deed plan No.202485, issued in respect of the suit property Land Reference No.13330/117, is fraudulent and a nullity abi-nitio.*
- d) An order that the 2nd Defendant do deliver up the fraudulently obtained deed plan No.202485 and title number LR.No.21637 for cancellation forthwith.*
- e) An order that the 3rd Defendant do cancel deed plan No.202485 and title LR.No.21637 and rectify the register forthwith.*
- f) Costs of this suit.*
- g) Any other relief that this Honourable Court may deem fit to grant.*

In its claim, the Plaintiff has alleged that it is the registered proprietor of *LR.No.13330/117* whose *Deed Plan* is *No.259943*, measuring *approximately 1.39 Hectares*. That sometimes in *1978*, it submitted to the

Commissioner of Lands a subdivision scheme in respect of the properties **LR.No.4920/3** and **4921/3**, which two titles were amalgamated and one **main title No.13330**, was issued to the Plaintiff. It further claimed that the Plaintiff applied for subdivision of the said amalgamated title which subdivision was approved upon fulfillment of certain conditions, one of them being that the Plaintiff was to set aside **LR.No.13330/117**, for the purpose of construction of a nursery school.

It was its further contention that in **April 2005**, it discovered that the 1st Defendant had trespassed on its land parcel **No.13330/117**, claiming that it was on the said parcel of land on the consent of the 2nd Defendant, as the owner of the said land. Further that the 1st Defendant is in possession of fraudulently obtained title deed for **LR.No.21637** and deed plan **No.207485**, which numbers refer to property **No.13330/117**. It was its further contention that the 2nd Defendant does not have a good title to its property which is **LR.No.13330/117**, and that the 2nd Defendant's obtained title is without the Plaintiff's consent and therefore the purported title is a fraud and *void ab-initio*.

It was also alleged that despite demand and Notice of Intention to sue, issued to the Defendants, they have failed and/or neglected to make good the Plaintiff's claim. The Plaintiff urged the Court to allow its claim.

The claim is contested. The 1st Defendant, **Victory Faith International Church**, filed its Defence on **31st May 2005**, and denied all the allegations made in the Plaintiff's claim. It also alleged that there was no basis for the grant of the orders sought. It urged the Court to dismiss the Plaintiff's claim with costs.

The 3rd Defendant filed its defence on **1st July 2005**, and alleged that it is a stranger to the contents of the **Amended Plaintiff** and did put the Plaintiff to strict proof thereof. Further the 3rd Defendant denied all the allegations of fraud and averred that if it registered any transfer of the suit property, then it did so in good faith and without notice of the fact that the documents presented have been forged as alleged. Therefore, the 3rd Defendant urged the Court to dismiss the Plaintiff's suit with costs.

The hearing of this matter commenced on **3rd May 2016**, wherein the Plaintiff called only one witness.

Plaintiff's Case

PW1 – Robert Nderitu Mwihi, told the court that he works for **Joreth Ltd**, the Plaintiff herein. It was his evidence that the land parcel **No.13330/117** is owned by the Plaintiff. It was his further evidence that he is the **Site Manager** and that the Plaintiff had bought **LR.No.4920/3/R** and **4921/3/R** in **1979**. However, the two parcels of land were later amalgamated to form one portion which was number **LR.No.13330**. The Plaintiff's surveyors then were **Kamwere Associates**, who wrote a letter dated **27th September 1978**, to that effect. Upon amalgamation, the resultant portion **13330**, was to be subdivided and the Government approved the said subdivision scheme on condition that **LR.No.13330/117**, was to be surrendered to the Government to be used as public utility plot, specifically for a nursery school. PW1 identified the Deed Plan for the said plot being **Deed Plan No.259943** dated **6th May 2005**. He also testified that the main title **LR.No.13330**, was issued on **1st January 1999** for **99 years**.

It was his further testimony that this parcel of land **LR.No.13330/117**, was unoccupied for a while but it has now been encroached by the 1st and 2nd Defendants. He stated that the Plaintiff has not sold the said parcel of land to anyone else. Further that they have now learnt that this parcel of land was allocated to **Jerry Savelle Ministries International, Registered Trustees** and who was allegedly issued with the title deed on **1st December 1999**. However, their title deed was issued on **1st January 1999**. After the suit land was allocated to the said **Jerry Savelle Ministries International**, it was given parcel **No.21637** and Deed

Plan **No.2002485** issued on **13th February 1998**. He also testified that the said land was earmarked for a nursery school and playing field and therefore it was irregularly allocated without the knowledge of the

Plaintiff. Indeed **Kamwere Associates**, had complained in the letter dated **12th May 2005**, to the Ministry of Lands. He further stated that though the land was earmarked for nursery school, it was never surrendered to the Government and the said land has always been in the name of the Plaintiff. He urged the Court to allow the Plaintiff's claim. He also produced the title deed for **LR. No.13330/117**, which was issued on **6th April 2011**, as **exhibit no.8**.

1st & 2nd Defendants' Case

DW1 – Davis Manambo Kimori, an **Assistant Minister** for **Living Faith International** which is under **Victory Faith International**, gave evidence on behalf of 1st – 2nd Defendants. He also adopted his witness statement dated **28th February 2012** as his evidence in court. He also produced all the documents listed in his bundle of documents. He further testified that the land is owned by the 1st and 2nd Defendants. He identified the **title deed** as **exhibit no.7** in court. The said title was allegedly issued on **21st January 2000**, but the **Deed Plan** was issued on **13th February 1998**. It was his testimony that the church acquired the land after applying for allocation of land. It was his testimony that the land was allocated to them through an **allotment letter** dated **24th December 1999**, as they had followed the laid down procedure by the Government. Further that the church paid all the relevant charges. He testified that the 1st and 2nd

Defendants lawfully owns the suit property and they were never informed of any inhibition. Further that the Government gave them a clean title which title was issued in the **year 2000**. It was his testimony that the Plaintiff's title was issued after their title deed had been issued. He also stated that their deed plan was issued on **13th February 1998**, whereas the Plaintiff's deed plan was issued on **6th May 2005** and therefore the Deed Plan for the church was issued early. He contended that the title deed for the church had not been cancelled and therefore the plot is for the church. He further testified that when the Plaintiff sued them in the **year 2005**, they did not have a title deed.

The 3rd Defendant did not call any evidence.

Parties thereafter filed their written submissions which this Court has carefully read and considered. The **Law Firm of Nyiha Mukoma & Co. Advocates** for the Plaintiff filed their written submissions on **6th November 2016**, and submitted that the suit property belongs to the Plaintiff since it never surrendered the said land to the Government as was intended on the subdivision scheme of **1979**. It was also submitted that since the land was never surrendered to the Government, the Commissioner of Lands did not have authority to alienate and allocated the suit land **LR.No.13330/117**, to the 1st and 2nd Defendants. Plaintiff relied on the case of **Scott..Vs...Brown (1982) 2 QB 724**, where the Court held that:-

“The courts ought not to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the Notice of the court”.

Plaintiff also relied on the case of **Lazarus Estates Ltd..Vs...Beasley (1956) 1ALL ER 341**, where the Court held that:-

“No court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything”.

The Plaintiff urged the Court to allow its claim.

The **Law Firm of A.I.Onyango & Co. Advocates** for 1st and 2nd Defendants filed their written submissions on **26th January 2017**, and urged the Court to dismiss the Plaintiff's claim. They relied on Section 23 of the Registration of Titles Act Cap 281 (now repealed) which provides:-

(1) the certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with the seal of office, shall be received in evidence in the same manner as the original.

Further the 1st and 2nd Defendants relied on Section 24 of the Land Registration Act which provides as follows:-

24. 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:

and;

b) the registration of a person as a proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

On the part of the 3rd Defendant, **Rose Nyawira, Litigation Counsel** on behalf of the **Attorney General** filed the written submissions on 2nd June 2017, and urged the Court to dismiss the Plaintiff's case. They relied on the case of **Darrelle Ltd..Vs...ASL Ltd & 2 Others (2015) eKLR**, which quoted the case of **Wreck Motors Enterprises...Vs...The Commissioner of Lands & Others, Civil Appeal No.71 of 1997**, where it was held that:-

“Where there are competing titles, the one registered earlier is the one that takes priority”.

The above position was similarly held in the case of **Gitwany Investment Ltd & 3 Others...Vs...Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if

both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.

They submitted that since the 2nd Defendant's title was issued first, it must prevail against the Plaintiff's title that was issued later. They also submitted that the Plaintiff did not specifically plead the issue of fraud on the part of the Defendants. For this, they relied on the case of **Vijay Morjaria...Vs... Nansingh Madhusingh Darbar & Another (2000) eKLR**, where the Court held that:-

“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 proved and it is not allowable to leave fraud to be inferred from the facts”.

The above being the available evidence and submissions, the Court is called upon to make a

determination of whether the Plaintiff is deserving of the orders sought.

Upon careful consideration of the available evidence and exhibits, the Court finds that the issue for determination is as framed by the Plaintiff.

i. Was the suit land herein surrendered to the Government?

ii. Was the allocation to the 1st Defendant fraudulent?

iii. Who has the indefeasible title herein and/or who is the rightful owner of the suit property?

iv. Are the 1st and 2nd Defendants trespassers?

v. Is the Plaintiff entitled to the prayers sought?

vi. Who is to bear costs of the suit?

There is no doubt that the suit property herein is a resultant of amalgamation of ***LR.No.4920/3 and LR.No.4921/3***, which titles gave rise to ***LR.No.13330***, and was issued to the Plaintiff herein in the ***year 1999***. There is also no doubt that the Plaintiff sought to subdivide the said ***LR.No.13330***, and the Government did approve the said subdivision scheme on condition that ***“open spaces, nursery playing field site and all road reserves to be surrendered to the Government free of costs”***.

The Plaintiff in its evidence stated that in fulfillment of the above condition as stipulated in the letter dated 27th September 1978, the Plaintiff earmarked the suit land ***LR.No.13330/117***, for the purpose of nursery school/playing field. It however stated that it did not surrender the said land to the Government and so the Commissioner of Lands had no business alienating and/or allocating the same to the 1st and 2nd Defendants. However, it is evident that ***Jerry Savelle Ministries International*** was allocated land ***Ref.No.21637*** vide a letter dated 24th September 1999 from ***1st September 1999***. It is also evident that ***Victory Faith Christian Centre*** paid the necessary charges being payment for land allocation fees vide a letter dated 5th January 2000. It is also evident that on ***24th July 2001***, ***Jerry Savelle Ministries International*** was varied by changing the

Certificate of Incorporation to ***Living Faith International Africa***. Further from the available exhibits, it is not in doubt that ***LR.No.21637***, was issued to ***Jerry Savelle Ministries International Registered Trustees*** on 21st January 2000. The said Certificate of Lease was later varied and registered to ***Living Faith International Africa Division Registered Trustees*** on ***25th March 2003***.

There is also no doubt that the Plaintiff herein was issued with title deed for ***LR.No.13330/117***, on ***6th April 2011***. By the time of filing this suit in the ***year 2005***, there was no Certificate of Lease available in the name of the Plaintiff in respect of the suit property though a Deed Plan was in existence.

The applicable law herein is Section 23 of the Registration of Titles Act Cap 281 (now repealed) which provides as follows:-

(1)The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the manner as the original.

Further Section 24 of the same Act is applicable and it provides as follows:-

24. Any person deprived of land or of any interest in land in consequence of fraud, or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action of law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription:

The above being the undisputed facts, the Court will now delve into the available evidence as it determines the issues earlier pointed out.

i) Was the suit land herein surrendered to the Government?

It is evident that vide a letter of subdivision approval dated **27th September 1978**, the Plaintiff was supposed to surrender a portion of land for public purpose; that is nursery school/playing field. The Plaintiff in its own evidence stated that it earmarked **LR.No.13330/117**, for that surrender but it did not complete the process of surrender. The 3rd Defendant submitted

that indeed the Plaintiff surrendered the said parcel of land to the Government. Even if the Plaintiff denied having surrendered the suit land to the Government, it is evident that Plaintiff did not obtain a title deed to this suit land until after the filing of this case. The Certificate of Lease was obtained herein on **6th April 2011**, whereas the suit herein was filed in the **year 2005**. If the Plaintiff had not surrendered the suit land to the Government, what caused it so long to obtain the Certificate of title? The Plaintiff only filed this suit after it noted that the suit land was now in the hands of the 2nd Defendant and not the Government as it had been made to believe that the same was surrendered to the Government for purpose of nursery school or playing field.

The Court believe that as a condition for approval of the subdivision, the Plaintiff did surrender the suit land to the Government for public purpose. Once the suit land was surrendered to the Government, it became a public land and the Government could alienate it under Section 3A of the Government Lands Act Cap 280(now repealed). The Plaintiff could not surrender the suit land to the Government and later claim it didn't just because it was not utilized by the Government for the purpose it was allegedly surrendered for. The Court therefore finds and holds that the Plaintiff herein duly surrendered the suit land to the Government as a condition for approval of its subdivision was indeed approved and various certificates of titles issued to various individuals as is evident from the certificates of titles produced by the Plaintiff in its bundle of documents.

ii) Was the allocation of the suit land to the 1st and 2nd Defendants fraudulent?

There is no doubt that the 1st and 2nd Defendants' title is for **LR.No.21637 IR No.82728**, which grant was issued on **21st January 2000**. However, the Plaintiff's title issued on **6th April 2011** for is **LR. No.13330/117**. However the parties are in agreement that the parcel of land is the same on the ground though with different Certificates of titles.

The Plaintiff has alleged that the 1st and 2nd Defendants were allocated this parcel of land fraudulently. It is trite that he who alleged must prove. See Section 107 of the Evident Act which states;-

(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.

The Plaintiff has alleged fraud on the part of the Defendants herein. However, it is trite that fraud is serious allegation which must be strictly proved and particulars stated in the pleadings. The Plaintiff has not done that. The Plaintiff has not specifically pleaded the said fraud and as was held in the case of Vijay Morjaria...Vs...Nansingh Madhusingh Darbar & Another (supra). It is not enough to infer fraud from the facts. The said

fraud must be specifically pleaded. The Court has considered the **Amended Plaintiff** as filed by the Plaintiff and has noted that the said fraudulent actions of the 1st and 2nd Defendants have not been specifically pleaded. Further the Court has seen the allotment letter issued to **Jerry Savelle Ministries International** and later the Grant issued on **21st January 2000**. There was no evidence that the same was not issued regularly by the Lands office. The 3rd Defendant submitted that the said Grant was regularly and legally issued to the 2nd Defendant herein. The Court finds that it is the Plaintiff who alleged and the burden of proof laid squarely on it as provided by Section 109 of the Evidence Act which provides:-

“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”.

The Plaintiff has not discharged that burden to the satisfactory standard. Therefore the Court finds that there was no evidence that the allocation of the suit land to the 1st and 2nd Defendants was fraudulent.

iii) Who has the indefeasible title herein and/or who is the rightful owner of the suit property?

It is evident that the registration of a proprietor as the owner of a suit property is a *prima facie* evidence that such proprietor is the **indefeasible** and **absolute** owner of the suit property. However, the said certificate can be challenged on grounds of **fraud, misrepresentation**, or if the said certificate was issued **illegally, irregularly** or **through corrupt scheme**. This was the position provided for by Section 23 of Cap 281 (now repealed) and later repeated in Section 26(1) of the Land Registration Act.

It is evident that the Plaintiff herein is the registered owner of **LR. No.13330/117**, which was issued on **6th April 2011**. The 2nd Defendant is the registered owner of **LR.21637**, which was issued on **21st January 2000**, and which is the same suit property on the ground. The Court has found that the Plaintiff did surrender the suit land to the Government. The Court has also found that there was no evidence that the 1st and 2nd Defendants were allocated this suit land fraudulently. Therefore if the 1st and 2nd Defendants were not allocated the suit property fraudulently, then their certificate of title was first in time and it should prevail. As was held in the **Wreck Motors Enterprises...Vs...The Commissioner of Lands (supra)**,

“where there are two competing titles, the one registered earlier is the one that takes priority”.

The 1st and 2nd Defendants' title was registered earlier and takes precedence or priority. Therefore the Court finds that the 1st and 2nd Defendants title prevails and consequent thereto their title is indefeasible. There is also no evidence of fraudulent allocation of this land to the 1st and 2nd Defendants. The Court finds that they are the rightful owners of the suit property. There is a letter of allotment which shows that this land was allocated to the predecessor of the 1st and 2nd Defendants by the Government. In answer to

issue **no.iii**, the Court finds that the 1st and 2nd Defendants title is indefeasible herein. The Plaintiff acquired its certificate of title during the pendency of this suit. By the time of filing this suit, the Plaintiff was not in possession of the certificate of title.

iv) Are the 1st and 2nd Defendants trespassers?

Having found that the 1st and 2nd Defendants are the rightful owners of the suit property and having traced the allocation of this suit land to the letter of allotment issued on **24th December 1999** and having

found no specific pleading of fraud on the part of the Defendants, the Court finds that the 1st and 2nd Defendants are not trespassers to the suit property herein.

v) **Is the Plaintiff entitled to the prayers sought?**

Having found that the Plaintiff did surrender the suit property to the Government and having found that the 1st and 2nd Defendants holds an indefeasible title and that their title was the first in time and so it prevails, and having found that they are not trespassers, then the Court finds that the Plaintiff herein is not entitled to the prayers sought in the Plaintiff.

vi) **Who is to bear costs of the suit?**

Ordinarily, costs do follow the event. The Defendants are the successful litigants herein. Therefore the Plaintiff will have to bear the costs of this suit.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has not proved its case against the Defendants on a balance of probabilities. For the above reasons, the Court dismisses the Plaintiff's suit herein against the Defendants entirely with costs to the Defendant to be borne by the Plaintiff herein.

It is so ordered.

Dated, Signed and Delivered at Thika this **24th** day of **November** 2017.

L. GACHERU

JUDGE

In the presence of

M/S Nakato holding brief for Mrs. Koech for Plaintiff

Mr. Macharia holding brief for Mr. Onyango for 1st and 2nd Defendant

No appearance for 3rd Defendant

Lucy - Court clerk.

L. GACHERU

JUDGE

24/11/2017

Court – Judgement reading open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

24/11/2017