Megvel Cartons Limited v Diesel Care Limited & 2 others (Civil Appeal 70 of 2018) [2023] KECA 184 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 184 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 70 OF 2018

HM OKWENGU, HA OMONDI & PM GACHOKA, JJA

FEBRUARY 17, 2023

BETWEEN

MEGVEL CARTONS LIMITED ..... APPELLANT

AND

DIESEL CARE LIMITED ..... 1ST RESPONDENT

REGISTRAR OF TITLES ..... 2ND RESPONDENT

COMMISSIONER OF LANDS ..... 3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the Environmental and Land Court in Machakos (A. Angote, J.) delivered on 26th January 2018 in ELC Case No. 166 of 2011)

JUDGMENT

1. The right to property is a right enshrined in the *Constitution* under Article 40. A parcel of land should only have one title but there are many cases that fill the shelves of the courts, where two or more titles are issued in respect of one property. Only one title can be genuine and courts are forced to delve into historical genesis of the titles to determine which is the genuine title. This is one of those disputes in which two parties are fighting over the same parcel of land and each claiming to be the genuine owner. The dispute between the parties relates to a parcel of land known as L.R. No. 1504/11 (I.R 85400) ('the suit property') situated in Nairobi.

2. By way of background, the 1st respondent brought the suit by way of a plaint filed in the Environment and Land Court (ELC) as against the appellant. The 1st respondent's claim in the trial court can be summarized as follows: that it was the registered proprietor of the suit property; that the appellant had on various occasions trespassed onto its property; that the 1st respondent was issued with a title to the land in the year 2001 and had been in occupation of the suit land since then; that the Director of Criminal Investigations confirmed that the appellants' documents were forgeries.

3. The 1st respondent claimed that it was the genuine owner of the disputed parcel of land and sought a permanent injunction restraining the appellant from entering or remaining upon the suit land and damages for trespass.

4. The 1st respondent's evidence in the trial suit, was that it was the registered proprietor of a parcel of land known as L.R. No. 1504/11 (I.R 85400) which it purchased from Mr. and Mrs. Mwikali Mulei, on 21st February, 2001 for Kshs. 6,000,000 and that the vendors had been allocated the land pursuant to an allotment letter dated 1st September, 1999, that the interest in the allotment of the property in favour of the Mwikali's was subsequently transferred to the 1st respondent and a grant was duly registered in favour of the 1st respondent on 30th May, 2001; that the 1st respondent held a title over the suit land and that in the year 2011, the 1st respondent noticed that the appellant had illegally and forcibly moved onto its property; he reported the issue of invasion to the Director of Criminal Investigations who confirmed that the appellant's documents were forgeries.

5. According to the 1st respondent, the suit land was allotted to Miriam T/A Maji Safi Agencies; that the land which was allotted to Maji Safi Agencies was for L.R. No. 1504/11 and that the land was then transferred to the 1st respondent by way of an informal transfer; that before he purchased the land, Miriam took him to the suit land and showed him the beacons, together with the survey plan and a deed plan; that the original deed plan that he was shown is dated 30th December, 1981 and that the Mwikalis' were allotted the land in 1991; that he was working in South Sudan and that upon his return in the year 2011, he found the appellant had developed the suit land and that is when the police started investigating the two titles; that he was not aware that the land had initially been owned by a Mr. Joseph Odero and that Mr. Odero had sought to have the user of the land changed from agricultural to industrial.

6. The 1st respondent, also denied being aware that the title to the land had been surrendered for issuance of a new grant and averred that it had bought the land for the purpose of putting up a workshop; that although the land had been surveyed, it did not have a title as at the time of buying it; that he ascertained that the letter of allotment was genuine by doing a search and that there was no one in occupation of the land in the year 2001. On their part, the 2nd and 3rd respondents filed a defence to the suit and the counterclaim, generally denying the averments by the 1st respondent.

7. On its part, the appellant filed a defense and a counter-claim, stating that the 2nd and 3rd respondents had acted fraudulently in purporting to grant the 1st respondent, a title for the suit property which had been surrendered to the government and that the said grant was null and void. In the counter – claim, the appellant prayed that the grant I.R. No. 85400, L.R. No. 1504/11 be declared null and void and the 1st respondent be restrained from entering upon L.R No. 25064.

8. It was the appellant's position that the 1st respondent had never been in occupation of the suit land; that the title which the 1st respondent purported to hold for the suit property was surrendered to the government in consideration of change of user, and a new title L.R. No. 25064 (I.R. No. 85088) issued by the Commissioner of Lands.

9. The appellant's director, testified that the appellant purchased land known as L.R. No. 25064 from Jewel Holdings Limited who had purchased it from one Joseph Odero, and that Joseph Odero had purchased the land from Margaret Wamaitha Humphrey in 1985; that the land that Mr. Odero purchased was L.R. No. 1504/11 and registered as I.R. No. 49771/1; that he was informed that in 1998, Mr. Odero applied for change of user of L.R. No. 1504/11 which was agricultural to industrial and that a new title being L.R. No. 25064 was issued to Mr. Odero on 5th December, 2000 after the original Grant for L.R. No. 1504/11 was surrendered.

10. Upon hearing the parties, the trial court (A. Angote J) held as follows:

> " 99. Although the 1st Defendant is in possession of a Grant for L.R No. 25064, Deed Plan number 231453, there is no evidence before me to show when the survey was conducted for the said land before Deed Plan number 231453 dated 3rd August, 2000 was issued. Indeed, Deed Plan number 231453 could not have been issued on 3rd August, 2000 if the surrender of L.R. No. 1504/11 (Deed Plan number 111527) was registered on 5th December, 2000 as alleged by DW1 and DW2.
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> 100. On the other hand, the Grant that was issued by the Ministry of Lands to the Plaintiff for L.R No. 1504/11 (I.R 85400) is supported by the survey plan F/R No. 156/174 and Deed Plan number 111527.
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> 101. It may be true that the Grant that DW2 surrendered to the Government for change of user, if at all, is the one that was allocated to people who sold it to the Plaintiff, which, in my view, is not true.
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> 102. If that is so, DW2 had a recourse as against the government for damages, the government having allocated the said land to a third party after the surrender. It was unlawful for DW2 to purport to sell the suit land before obtaining a valid title for the same. However, as I have pointed above, I am not satisfied that DW2 ever owned L.R. No. 1504/11 (I.R. No. 41771) notwithstanding that the said land was once owned by a Ms. Humphrey.
>
> 103. Indeed, the allegation by DW2 that he sold the suit land to DW1 for Kshs. 100,000,000 seems to be a red herring considering that no evidence was adduced to support that allegation."

11. In the end, the learned judge allowed the 1st respondent's plaint and dismissed the appellant's counter-claim in the following terms:

> " a. A permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents and/or servants or whomsoever is acting on their instructions from remaining upon, selling, allocating or denying the Plaintiff access to or in any way interfering with the Plaintiff's quiet and peaceful possession and ownership of land known as L.R No. 1504/11 (I.R. 85400) situated in Machakos County.
>
> b. The Grant for land known as L.R. No. 25064 (85088) held by the 1st Defendant be and is hereby declared null and void.
>
> c. The 1st Defendant to pay the costs of the suit and the Counter- claim."

12. Aggrieved by the judgment of the ELC, the appellant lodged this appeal seeking orders to set aside the judgment of the ELC. The memorandum of appeal lists 23 grounds of appeal which can be compressed into the following: that the learned Judge erred in law in abdicating the role of inquiring, adjudicating, the origin, validity and authenticity of the two titles to the suit property to the National Land Commission and the Director of Criminal Investigations; that the learned Judge failed to consider and/or trace the origins, chain of transmission and registration of title; the learned Judge ignored cogent documentary evidence and erred by holding that the 1st respondent had discharged the evidentiary and

legal burden of proof; that the learned judge did not appreciate the concept and practice of surrender of title; that the learned judge relied on factual assumptions and conjecture; that the learned judge granted orders not sought in the pleadings; the learned judge erred in dismissing the counter – claim in the circumstances of the case; that the learned judge's analysis of facts amounted to abuse of judicial discretion; that the learned judge gave a seal of approval to a fraudulent scheme between the officers of the criminal investigation department, together with the National Land Commission to disenfranchise the appellant.

13. The prayers sought in the memorandum of appeal, are that the instant appeal be allowed, that the judgment and decree of the superior court issued on 26th January, 2018 be set aside, that the court be pleased to dismiss the plaint dated 11th July, 2011 with costs to the appellant, that the court be pleased to enter judgment in favour of the appellant as prayed in the counter – claim dated 12th September, 2011 and that the appellant be awarded costs of this appeal and costs of the counterclaim.

14. The appellant has filed submissions dated 11th September, 2018. When the matter came up in court for hearing, learned counsel for the appellant, Mr. Obuya submitted as follows: that private property cannot be allotted and any alleged subsequent allotment was irregular; that the suit property was private property from 1931 with a chain of history that was corroborated and is clear; that the same was allotted in the year 1999 and a title issued in the year 2001; that a surrender of title could not produce a fresh title to someone else for the same deed plan; that the court issued orders that were not prayed, that is an order declaring the appellant's title null and void; that after the judgment, the appellant sought stay and was given a condition to deposit 100,000,000/= shillings.

15. He further submitted that the learned judge ignored the evidence of the Principal Land Administration Officer Mr. Gordon Ochieng, when he made a finding that the 1st respondent had proven that his title was the right title to the property and that the appellant's title could not be verified for the reasons that one of the Attorney General's witness, Mr. Antiphas Nyanjwa, in an investigation report by the Director of Criminal Investigations stated that it was a forgery; that the learned judge misinterpreted the evidence of Mr. Joseph Odero when he found that, at the time the property was transferred to the appellant, the file at the ministry of lands was not available, yet according to the appellant, Mr. Odero could not find the file because the deed plan was missing at the time of the surrender, but eventually the same was reconstructed and he was able to proceed with the transaction.

16. Counsel for the appellant pointed out, that the learned judge held that he was unable to see any evidence of payment by the appellant to Mr. Joseph Odero, the person he bought from and was therefore not convinced that they bought the plot. He submitted that Mr. Joseph Odero was present in court and their receipts were on record; that Mr. Joseph Odero confirmed that in fact, he sold the property to the appellant and that the evidence of payment could not be the proof of ownership; that given the chain of transmission from 1931 to date, the appellant having sold the plot at that time, the Judge could not dismiss their claim for ownership and nullify their title because he did not see proof of payment to Mr.Odero.

17. The 1st respondent filed submissions dated 7th January, 2019. Learned counsels for the 1st respondent, Mr. Muite, SC and Mr. Kibera Maina highlighted the same, and informed the court that the 1st respondent was the party who approached the court when the appellant invaded the suit property; that its witness produced in evidence the grant for L.R. No. 1504/11 (E-Land Registry No. 85400) which was registered in favour of the 1st respondent on 30th of May, 2001 and which title, was certified by the registrar of titles as a true copy of the original on 17th of June, 2011; that on the flipside, the appellant produced in court and sought to rely on, an uncertified copy of a grant that was purportedly registered in favour of L.R. No. 1504/11; that an uncertified copy is of zero evidential value.

18. According to the 1st respondent, no acceptable evidence was tendered by the appellant in the High Court to prove that the suit property was private land; that the suit property was public land and the government was perfectly entitled to allocate the land; that the surveyor from the Director of Survey PW4, informed the court that the grant that was issued to PW2 after the purported change of user, was issued un-procedurally; that the deed plan was actually altered in a red pen which is irregular because the documents from Directorate of Survey usually have special ink; that the appellant was asking the Court to reverse the fraud and the forgery, it had found.

19. The 2nd and 3rd respondents filed submissions dated 9th January, 2019. Mr. Allan Kamau appeared for the 2nd and 3rd respondents. According to him, the crux of the appeal, as was before the trial court was 'between the appellant and the 1st respondent whose title or which party held the valid title? He submitted that the learned Judge ably dealt with the question of the deed plan No. 231453 and the question of whether it should have been issued to the appellant or the 1st respondent in this appeal.

20. This being a first appeal, it is our duty in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This approach was adopted in *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others* [2015] eKLR where the court cited the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 and held as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

21. From a careful perusal of the record of appeal, parties' submissions and the authorities, the issues arising for determination can be discerned to be: Whether the title by the appellant is valid and legitimate and whether the learned Judge ignored cogent documentary evidence adduced by the appellant.

22. The evidence tabled by the appellant was that it purchased land known as L.R. No. 25064 from Jewel Holdings Limited who had purchased it from one Joseph Odero, who purchased the land from Margaret Wamaitha Humphrey in 1985.

23. Further evidence was that the land that Mr. Odero purchased was L.R. No. 1504/11 and registered as I.R. No. 49771/1; that in 1998, Mr. Odero applied for change of user of L.R. No. 1504/11 which was agricultural to industrial and that a new title being L.R. No. 25064 was issued to Mr. Odero on 5th December, 2000 after the original Grant for L.R. No. 1504/11 was surrendered; that when Mr. Odero applied to the Commissioner of Lands for consent to transfer the land in the year 2001, Mr. Odero was informed that the deed file was missing and was asked to sign a Deed of Indemnity to facilitate the opening of another file; that he prepared the said Deed of Indemnity dated 17th February, 2006 and that in the year 2008, the appellant entered into an agreement with Mr. Odero to purchase L.R. No. 25064 from the said Joseph Odero and he had the suit land transferred to Jewel Holdings Limited which transferred the land to the appellant and that the two companies belonged to his family.

24. The 1st respondent averred that it was the registered proprietor of the parcel of land known as L.R. No. 1504/11 (I.R 85400) which it purchased from Mr. and Mrs. Mwikali Mulei, on 21st February, 2001 for Kshs. 6,000,000 and that the vendors had been allocated the land pursuant to an allotment letter dated 1st September, 1999; that the interest in the allotment to the property in favour of the Mwikalis' was subsequently transferred to the 1st respondent and a grant duly registered in favour of the 1st respondent on 30th May, 2001.

25. It is trite law that the registration of a person and certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1) (a) and (b) of the *Land Registration Act*, which provides;(a) on the 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, un-procedurally or through a corrupt scheme.

26. We cite with approval the case of *Hubert L. Martin & 2 Others vs. Margaret J. Kamar & 5 Others* (2016) eKLR, in which Munyao J held as follows:

> " A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

27. The same position was held by the Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR that: "when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as ownership. It is this instrument that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

28. Needless to say that in such a case, where two titles are purported to be of the same property, investigation to the root of title would be apt.

29. The learned judge in his judgment, correctly identified the main issue for determination to be as who between the appellant and the 1st respondent held a valid title. In other words, who between the appellant and the 1st respondent was entitled to the suit property. We note that in both its written and oral submissions, the appellant made heavy weather of the allegation that the learned judge ignored cogent documentary evidence and raised the issue of fraud as captured in its' counter – claim by averring that the 2nd and 3rd respondents acted fraudulently in purporting to grant to the 1st respondent, a title for L.R. No. 1504/11 which had been surrendered to the government and that the said grant is null and void.

30. It is instructive to note that, the Judge aptly covered these pieces of evidence in his judgment where he held:

> " 104. Considering that DW2 has not shown that he followed the law in procuring a Grant for L.R. No. 231453 and Deed Plan number 231453 before he purported to sell it to DW1, who transferred the land to the 1st Defendant, and in the absence of any evidence to show that the Plaintiff fraudulently acquired the land whose registration number is L.R. No. 1504/11 (I.R 85400), I find that the Plaintiff has proved its case on a balance of probability."

31. A cursory look at Sections 109 and 112 of the *Evidence Act* provides that:

> 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."

32. The learned Judge found the evidence adduced by the appellant to be insufficient. This does not mean he did not consider the evidence as posited in the grounds of appeal.

33. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

34. It is therefore old hat that evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so will the evidential burden shift to the party who would fail, without further evidence. Such that, when prima facie evidence is adduced by the respondent, as was in the instant case, then evidential burden was created on the shoulders of the appellant who was called upon to prove the contrary, but chose not to.

35. From the record, the 1st respondent was able to discharge its' burden of proof during trial by producing documentary evidence to support its' acquisition of title and thus explaining away the origin of title, but the appellant did not. For instance, despite the appellant being in possession of a Grant for L.R No. 25064, deed plan number 231453, there was no evidence before the court to show when the survey was conducted for the said land before Deed Plan number 231453 dated 3rd August, 2000 was issued. On the other hand, the grant that was issued by the Ministry of Lands to the 1st respondent for L.R No. 1504/11 (I.R 85400) was supported by the survey plan F/R No. 156/174 and Deed Plan number 111527.

36. Despite the appellant being the defendant in the trial court, hence having a chance to rebut the 1st respondent's evidence, the learned judge correctly held that a historical investigation of the title clearly showed that the 1st respondent held the genuine title.

37. The appellant did not offer any plausible explanation regarding the facts and allegations made against it by the surveyor and it was not enough for it to deny, claim and shift blame to sustain its' defence. It had a positive duty to prove the allegations as contained in the counter - claim.

38. The surveyor testified that as for L.R. No. 25064, the deed plan No. 231453 was inserted in the said survey plan and indicated as a change of user by use of a red pen; that the proper procedures were not undertaken in respect of deed plan No. 231453 which gave rise to L.R No. 25064; that deed plan number No. 231453 for L.R. No. 25064 was not supported by any survey records held by the Director of Surveys; that both deed plans were released by the Director of Surveys to the Commissioner of Lands although one was "consistent" while the other one was "inconsistent"; that the inconsistency arose when the same survey plan was used to prepare two deed plans; that deed plan No. 2311452 dated 3rd August, 2000 was irregularly issued and that it was the Director of Surveys who should be blamed for issuing the said deed plan.

39. From the record, the testimony of Deputy Director of Investigations and Forensic Services at the National Land Commission, reveals that the National Land Commission carried out investigations and established that the records for L.R. No. 1504/11 I.R 85400 were missing; that the preliminary investigations by the Commission established that the title held by the appellant was not obtained procedurally and that the same was a forgery; that when he summoned Mr. Shah, (DW1), to explain how he obtained his title, he declined. According to him, the deed plan held by the appellant was a forgery; that the deed file and the correspondence file in respect of L.R. No. 1504/11 were missing at the Ministry of Lands and that he had to reconstruct the file using documents from the survey office and that the appellant declined to give him the documents that were in its possession.

40. The appellant through the grounds raised in the memorandum of appeal averred that the learned judge abdicated his role of inquiring, adjudicating, the origin, validity and authenticity of the two titles to the suit property to the National Land Commission and the Director of Criminal Investigations. This is far from the truth, as the only way the judge could execute this role and investigate, is by using the testimony given by the various witnesses and relying on reports and documents produced by officers from those offices. This is what informed the decision made by the learned judge.

41. The learned judge found that the appellant had failed to prove on a balance of probability that it held a valid title for L.R. No. 25064 (I.R 85088). That the burden of proof was on the appellant to prove its' defence and case in the counter-claim is not in doubt.

42. The learned Judge therefore did not misdirect himself by failing to find that the appellant had proved its' case on a balance of probabilities and in believing the evidence of the 1st respondent, since failure by the appellant to adduce evidence to rebut the 1st respondent's evidence meant that the evidence of the 1st respondent remained uncontroverted.

43. The law is clear as buttressed in the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated 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."

44. The onus was therefore upon the appellant to prove the elements of fraud it had raised, but the appellant did not and that argument cannot therefore hold at this stage. The allegations of fraud and irregularity as averred by the appellant herein thus fall by the way side.

45. In view of the foregoing and after a careful re - analysis and re - evaluation of the evidence, it is our finding that the appellant has failed to demonstrate that the learned judge erred in law and in fact, in coming up with the determination in the impugned judgment.

46. Accordingly, we hold that this appeal has no merit and it is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR