



**Chemusian Company Limited v Chemusian Company Limited & another (Environment & Land Case 107 of 2019) [2024] KEELC 5484 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5484 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 107 OF 2019  
A NYUKURI, J  
JULY 24, 2024**

**BETWEEN**

**CHEMUSIAN COMPANY LIMITED ..... PLAINTIFF**

**AND**

**COSMIC ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is the application dated 8<sup>th</sup> February 2023 filed by the 1<sup>st</sup> defendant in the suit. He sought the following orders;
  1. Spent
  2. Spent
  3. That the judgment and decree of 20<sup>th</sup> July 2022 and all consequential orders be varied and or set aside.
  4. That the 1<sup>st</sup> defendant be granted leave to defend this suit.
  5. That costs be borne by the plaintiff.
2. The application is based on grounds on the face of it and supported by the affidavit of one Willy Kipkorir Koske, a director of the 1<sup>st</sup> defendant. He averred that he was not served with summons in the suit and that it was not until 17<sup>th</sup> January 2023 that he was served with the judgment by a clerical officer of Machakos County offices Mavoko. He alleged that the 1<sup>st</sup> defendant was not served with the summons herein and was not aware of this matter. He deponed that he had been in contact with the



- directors of the 1<sup>st</sup> defendant including the late Manshuklal Vidhaldas Hindocha, who had been in custody of the company's documents but that there was no record regarding the instant case.
3. It was also the deponent's averment that the plaintiff had failed to disclose that she had instigated arrest and prosecution of one of the 1<sup>st</sup> Defendant's property director, one Jeremiah Malula, who was acquitted in Mavoko Criminal Case Number 680 of 2018. He further stated that the 1<sup>st</sup> defendant was the registered owner of the suit property. Further that the 1<sup>st</sup> defendant had erected a perimeter wall to secure the property and that the defendant was allocated the suit property as an unsurveyed industrial plot by the Commissioner of Lands on 9<sup>th</sup> August 1994, which it took possession and started paying land rents and rates thereof. He further deposed that the defendant had formalized the allocation by registering the lease and it was issued with a certificate of title. He concluded by stating that the defendant had a good defence to the case and that it has a Constitutional right to be heard, and that he would suffer substantial loss if the orders sought were not granted. He attached a copy of CR12; charge sheet and judgment in Mavoko Criminal Case No. 680 of 2018; allotment letter; land rates clearance certificates; certificate of title and current search.
  4. The application is opposed. The plaintiff filed an affidavit sworn on 7<sup>th</sup> July 2023 by one Trophimus Kiplimo, the legal officer of the plaintiff. He deposed that upon filing the suit herein, the defendant had proceeded to deface the plaintiff's gate to the suit property and inscribed therein the names Cosmic Enterprises Limited. He further averred that efforts to serve the defendant with the application for an injunction and orders thereon were fruitless as they had closed their premises in Athi River and relocated to an unknown location.
  5. He deposed that on 22<sup>nd</sup> October 2019, the defendant was served by means of substituted service as ordered by the court and that allegations of instigated arrest upon the directors of the 1<sup>st</sup> defendant are not true since the charge sheet is clear, that one suspect by the name Jeremiah Malula had been arrested for trying to vandalize the suit property in 2018.
  6. He stated that the plaintiff is the bona fide registered owner of the suit property herein known as Land Reference No. 337/1205 IR No. 59289 situate within the jurisdiction of this honourable court and measuring 3.877 hectares, which property was originally registered in the name of Gastech Industries Limited on 1<sup>st</sup> January 1992 as a 99-years lease. That the property was then transferred to Trade World Kenya Limited for consideration of Kshs. 5,000,000/= pursuant to a transfer instrument dated 29<sup>th</sup> September 1997. He also averred that the said Trade World Kenya Limited is a sister company to the plaintiff and a decision was made to consolidate all lands owned by the said Trade World Kenya Limited, thus the suit land was transferred to the plaintiff on 29<sup>th</sup> September 1997. Further that the plaintiff then took possession of the said suit land and has been in uninterrupted occupation thereof as well as paying land rates to Mavoko Sub County.
  7. The deponent also stated that the plaintiff had further applied for and received an approval to erect a fence around the property, which was completed in 2015 and the plaintiff continued with quiet possession of the suit land until 2018 when it received reports of unknown persons claiming ownership over the suit land. He averred that the plaintiff had written to the DCI to conduct investigations over the claims, resulting in report that concluded that indeed the 1<sup>st</sup> defendant had fraudulently obtained a title to the suit property. He also averred that the plaintiff further made a visit to the 2<sup>nd</sup> respondent and discovered that the original file could not be traced even after reasonable search, leading to a letter of inquiry dated 20<sup>th</sup> May 2019 upon which the 2<sup>nd</sup> respondent regularized their records and confirmed that the land belonged to the plaintiff.



8. It was the deponent's averment the 2<sup>nd</sup> respondent had testified in open court and confirmed that indeed the land belonged to the plaintiff and a decree dated 20<sup>th</sup> July 2022 was issued thereof, issuing a directive to cancel all the registrations of any other interest on the property. He further averred that upon issuance of the decree, the plaintiff eventually sold the land to a third party. He concluded by averring that the application is devoid of merit and ought to be dismissed with costs.

### **Analysis and Determination**

9. The court has considered the application and the response. The issue that arise for the court's determination is whether the 1<sup>st</sup> defendant deserves the orders sought.
10. The law governing setting aside *exparte* judgment is provided for in Order 10 Rule 11 of the [Civil procedure Rules](#) as follows;

Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

11. Therefore, the court has jurisdiction to set aside judgment entered for non-appearance and in default of defence. To set aside default judgment, the applicant ought to demonstrate that they were not served with the summons to enter appearance and where it is clear that service was effected, and therefore the judgment on record is regular; they must demonstrate that they have a defence that disclose triable issues. Where the court finds that there was no service, then the applicant would, as a matter of right be entitled to setting aside default judgment. However, where the court finds that service was effected, and therefore the judgment on record is regular, it ought to consider whether there is a triable defence.
12. In the case of [Philip Kiptoo Chemwolo & Mumias Sugar Company Ltd v Augustine Kubede](#) (1982-1988) KAR, the Court of Appeal held that:-

The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MC Connell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.

13. In this case, it is clear that upon the order of court issued on 14<sup>th</sup> October 2019, the plaintiff duly served the 1<sup>st</sup> defendant by way of substituted service by advertisement in the Standard newspaper of 22<sup>nd</sup> October 2019. Under Order 5 Rule 17 of the [Civil Procedure Rules](#), substituted service is sufficient service. The applicant has not denied this service or alleged that they did not see the advertisement. The allegation that he was served with the judgment by a clerk from the County Government of Machakos, is not supported by any evidence and there is no reason why a clerk from Machakos County Government would serve him with the judgment. In the premises, I find that the 1<sup>st</sup> defendant was duly and properly served and therefore the judgment on record is regular.
14. On whether the 1<sup>st</sup> defendant has raised a triable defence, I have considered the plaint, which stated that the 1<sup>st</sup> defendant had obtained a fraudulent title in regard to the suit property which is registered in the plaintiff's name and lawfully owned by the plaintiff. The plaintiff attached the defendant's alleged fraudulent title and stated the reasons for their claim that the same was fraudulent. Among these reasons are the findings of fraud against the 1<sup>st</sup> defendant in a report from the Directorate of Criminal Investigations (DCI) and the evidence of the 2<sup>nd</sup> defendant corroborating the contents of the report. In view of the above, it is expected that the 1<sup>st</sup> defendant would attempt to or show that its title was not tainted with fraud, at least at a *prima facie* level, in its application to set aside default judgment.



15. Although the 1<sup>st</sup> defendant did not attach a draft defence, it nevertheless stated its case in its supporting affidavit as a response to the plaintiff's claim. The 1<sup>st</sup> defendant stated in the supporting affidavit that it is the registered owner of LR No. 337/1205. The basis of their title is an allotment letter dated 9<sup>th</sup> August 1994. That letter has not specified the number of the plot allocated, and whether the same was unsurveyed. In addition, there is no evidence of acceptance of the allocation apart from a receipt dated 25<sup>th</sup> September 2017. The applicant did not state how an allotment made in 1994 was accepted in 2017, which is 23 years later. I have also considered the certificate of title by the 1<sup>st</sup> defendant, which had already been produced by the plaintiff herein. It is apparent that the attached deed plan has no particulars of the deed plan number, the land reference number or the original land reference number as should be. The 1<sup>st</sup> defendant, being aware of the contents of the DCI report which particularized the extent of its fraud, did not make any comment on the said report or make any claim or provide any evidence from the Ministry of Lands to contravene the contents of the DCI report and the evidence of the Chief Land Registrar which was emphatic and unambiguous that the creation of the 1<sup>st</sup> defendant's title was on the basis of the false documents on correspondence files 303388 and temporary cover file 138786; that when the land officer requests for authentication of land from the Survey of Kenya, the correspondence is on an authentication slip and not an ordinary letter and upon indent an issuing note is attached with the deed plan which is forwarded to the requesting land officer for necessary action; and that the letter purported to be from the Surveys of Kenya is a forgery. In short, the 1<sup>st</sup> defendant has not in the supporting affidavit, answered the plaintiff's pleading and evidence on fraud. On the whole it is clear that the 1<sup>st</sup> defendant's documents and title are a result of forgery as demonstrated by the plaintiff and the 1<sup>st</sup> defendant has not denied the particulars of fraud levelled against it and therefore, its defence does not raise a triable issue.
16. In the premises, as the 1<sup>st</sup> defendant was duly served and since it does not raise a triable defence against the plaintiff, I find and hold that the application dated 8<sup>th</sup> February 2023 has no merit and the same is hereby dismissed with costs to the plaintiff.
17. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Ogembo for plaintiff

No appearance for defendants

Court assistant – Josephine

