



**Dater Enterprises Limited v Kinako (Environment & Land Case
27 of 2021) [2023] KEELC 17261 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 27 OF 2021**

LG KIMANI, J

MAY 4, 2023

BETWEEN

DATER ENTERPRISES LIMITED PLAINTIFF

AND

AGNES MUMBANU KINAKO DEFENDANT

JUDGMENT

1. This suit was instituted by a plaint dated October 3, 2011 where the plaintiff claims to be the registered proprietor of Land Parcel Nzambani/Maluma/838 measuring 13.6 hectares within Nzambani Location, Kitui County (hereinafter called “the suit land”). The said land was previously owned by Mr. Mutemi Kamwaki (Deceased) who is said to have allowed the defendant to cultivate on a portion measuring 1.5 acres. After registration as owner, the plaintiff avers that it allowed the defendant to continue cultivating for a period of one year.
2. On 30th July 2011, the plaintiff issued the defendant with notice to vacate the land and harvest all her produce. That the defendant did not raise any objection and consequently the plaintiff took possession of the land on September 17, 2011. However, on the same day, the plaintiff’s directors were arrested by police from Kitui and charged in Kitui PM Criminal Case No 670 of 2011 with alleged malicious destruction of the defendant’s property.
3. According to the plaintiff, the defendant has since that date attempted to re-enter or trespass upon the plaintiff’s said parcel of land without consent and accuses her of burning and destroying trees thereon.
4. The plaintiff seeks the following orders:
 1. A permanent order of injunction restraining the defendant by herself, her agents, servants and/ or employees from entering, trespassing upon or in any manner interfering with the parcel of land known as Nzambani/Maluma/838.



2. General damages for trespass.
3. Costs of the suit and interests thereon and on (a) and (b) above at court rates from the date of judgment until payment in full and final satisfaction of the decree herein.
4. Any other relief this Honourable court may deem fit and just to grant.
5. The defendant filed a statement of Defence on October 24, 2011 denying that the plaintiff was the registered owner of the suit land and stating that the title held is null and void for having been obtained through fraud and deceit. She stated that the previous owner, the late Mutemi Kamwaki was her father and the plaintiff's directors are her brothers. She avers that the deceased allocated the suit property as a gift to her in the year 1989 in the presence of her late mother Kathila Muemi and her uncle Benjamin Kikundi Mukote. She states that in the same year, she embarked on development activities including renovation of a permanent house, construction of a pit latrine and sinking a borehole. She also planted trees and crops and overall she has invested over three million shillings on the property.
6. The defendant avers that on July 13, 2007, she organized a gratitude ceremony for the gift of the suit property at her father's home in Mtito wa Ndooa Market where the deceased confirmed the gift to her in the presence of family, friends and government officials.
7. She claims to have been in possession of the land since 1989 until 2011 January when she received a letter dated July 30, 2011 giving her 30 days' notice to vacate. On September 17, 2011 the plaintiff invaded the land and destroyed the suit property but did not take possession. As a result of the invasion the plaintiff's directors were charged in the Principal Magistrates Court at Kitui in Criminal Case No 620 of 2011.
8. Upon conducting investigation, the defendant found out that the plaintiff company was incorporated in 2007 and that one of the plaintiff's directors, Eric John Mutemi occasioned the drafting of the power of attorney purportedly signed by their late father Mutemi Kamwaki (Deceased), empowering the director to deal with the suit property in whatsoever manner he deemed fit and on August 28, 2009, the plaintiff company applied to the Land Control Board for consent to transfer the suit property to itself for a consideration of Kshs. 300,000 while the purported power of attorney was registered on September 25, 2009 and entered in the Kitui Land Registry as PA No.143 of 2009.
9. The defendant averred that the entire process of transfer of the suit land to the plaintiff was deceitful, unlawful, fraudulent and conspiratorial and deprived her of rights and interests over the suit property. She particularized the alleged fraud as incorporation of the plaintiff company with the sole intent of providing a platform to perpetuate fraud by buying the suit property, occasioning the drafting of the purported power of attorney to facilitate fraudulent registration of the transfer documents, forging the late Mutemi Kamwaki's signatures on the power of Attorney transfer forms and registration of transfer on June 29, 2010 against the suit property.
10. The defendant holds the position that she has at all times been in possession of the suit property she did not have to commit any acts of trespass on her own land.
11. Counsel for the parties confirmed the existence of another suit ELC case number 32 of 2021 Agnes Mumbanu Kinako versus Attorney General, District Land Registrar, Timothy Muimi Mutemi, Eric John Mutemi, Douglas Kyalo Mutemi and Dater Enterprises Limited which relates to the same subject Land Parcel Nzambani/Maluma/838. The litigants in both suits are essentially the same parties and it was agreed that judgment in the two suits be delivered at the same time. It was also agreed that the evidence of the Forensic Document Examiner John Muinde adduced in this suit be adopted in both cases.



Evidence at the Trial Court

12. Hearing of the suit begun on June 13, 2017 before Hon Angote J. when PW 1, Eric John Mutemi, a director of the plaintiff Company testified. The plaintiff called one witness Sophie Njeri Mutemi. PW1 was later recalled and testified on March 14, 2022. He relied on his witness statement filed on October 3, 2011 and a further statement dated April 4, 2022 and filed in court on 7th February 2022 in which he reiterated the contents of the plaint and testified further. He also relied on the bundle of documents filed in court on October 3, 2011, May 14, 2013 and a supplementary list of documents dated November 25, 2020 and the documents produced as exhibits.
13. The witness stated that the plaintiff Company has three directors and Mutemi Kamwaki (deceased), the father to the directors of the plaintiff and the defendant, was also a director prior to his death. He stated that the plaintiff acquired title to the suit land on 29.6.2010 from Mutemi Kamwaki (deceased).
14. He stated that his father obtained the title deed in 1989 and charged it to a bank but the charge was later discharged. That a valuation report done on the land showed there was no development on the land except the house that his father had put up and that the defendant never developed the land as claimed. He stated that throughout the 1980s upto 2004 their mother was the one that cultivated the suit land
15. Regarding the power of attorney, PW 1 stated that it was duly signed by their father and he used it to obtain the consent of the land control board where he appeared. He also stated that their father signed the transfer form in favour of the plaintiff but the word “company” was erroneously omitted by the plaintiff’s advocate. After their father died, PW 1 stated that the defendant fraudulently applied for letters of administration and they moved the High Court for revocation of grant which was annulled in 2016.
16. That the plaintiff gave the defendant a period of one year to cultivate after it obtained title to the land and at the end of the period gave her notice of one month to vacate. That when they went to take the land with a view to develop it the defendant had him, his co-directors and others arrested and charged with the offences of malicious damage to property, forgery and uttering forged documents.
17. Upon cross-examination, the witness stated that the application for Land Control Board consent was signed when the power of Attorney had not been registered. He denied forging the transfer form or that his father was ailing at the time of transferring the land. He also denied that there was any thanks giving ceremony performed where the defendant was given the suit land by the deceased.
18. PW 1 stated that the defendant has no proprietary rights over the suit land and that she has undertaken wanton destruction of trees and burning bushes and thus she should be removed from the land.
19. PW2, Sophie Njeri Mutemi stated that the plaintiff’s shareholders are her brothers and the defendant is her sister. She adopted the witness statement filed in court on October 3, 2011. She stated that she was aware that her father transferred land parcel Nzambani/Kaluma/838 to the plaintiff Company, Dater Enterprises Company Limited. She was not aware of the claimed gift of the land to the defendant. As a member of the family, she denied that during the lifetime of her father there was a family meeting to witness the transfer of the suit property to the defendant. That during the last two years of her father’s lifetime, she lived with him in Nairobi and that is when he transferred ownership of the suit property to the plaintiff.
20. The witness stated that the defendant was allowed by their father to cultivate a portion of the land, 1 ½ acres out of the total 32 acres. According to her the defendant used to farm seasonally and never lived on the land. Upon cross-examination, PW 2 stated that she was not involved in the transfers of the land and had never seen the transfer documents. The witness confirmed that she attended the meeting of



2007 attended by her father, two chiefs and her brother Timothy was the Master of Ceremony and also made a speech. She did not hear the defendant thanking their father for giving her land on that day. Their father instead told them that he was transferring the land to the plaintiff. She confirmed that their father had been sick from 2007 and he was diagnosed with cancer in 2009 when he was admitted in hospital for two days and then died and that he was able to walk to hospital by himself. PW 2 also noted that there is a semi-permanent house on the land put up by her father and that the defendant has never put up a house on the land. She denied agreeing to gang up against the defendant.

The Defence Case

21. The Defence called five witnesses and produced documents in evidence. DW 1, Agnes Mumbanu Kinako, the defendant herein testified that she comes from Endau in Kitui County and that the directors of the plaintiff are her brothers. She adopted her witness statement dated January 3, 2021 as evidence and produced as exhibits the documents contained in the list of documents dated February 3, 2020. In her witness statement, she reiterated the contents of her Defence and stated that in 1989, her late father Mutemi Kamwaki gave her the suit property and she commenced developments by putting up a granary, cowshed, toilets and ablutions and planting many fruit trees and exotic species of trees. She also renovated her parents' farm house and drilled a borehole. She stated that the land was not transferred in her name due to the loans taken to finance her father's businesses and was to be transferred to her once settled.
22. The defendant further stated that there was a thanksgiving ceremony on October 13, 2007 attended by relatives, friends and some government officials where she thanked her father for the land. After her father's death on October 23, 2010, she received word that her brothers intended to deprive her of the suit property and she was served with a demand letter to vacate on July 30, 2011 which she responded to through her advocates. She testified that she engaged the police to investigate the transactions leading to the registration of the plaintiff Company as the proprietor of suit property. On September 17, 2011, she received news that the land had been invaded by a group of heavily armed men who caused destruction and were arrested.
23. The defendant stated that the police engaged the services of a Forensic Documents Examiner and the report was that their late father's signature was forged to transfer the land to an entity which was not in existence. That the directors of the plaintiff were arrested together with others and charged in Kitui CM Criminal Case Number 620 of 2011 and were convicted of the offences of forgery, uttering forged documents and malicious damage to property.
24. The defendant confirmed to the court that the suit property Title No. Maluma/Nzambanu/838 is registered in the name of Dater Enterprises Ltd whereas the plaintiff's name is Dater Enterprises Company Ltd, which she states are not the same. Upon cross-examination stated that she is an administrator of her late father's estate but the suit property does not form part of the estate. She also stated that she is alleging fraud on the title of the suit land.
25. DW 2 Lilian Kola Kimanzi testified and adopted her witness statement dated 23rd November 2022 as evidence in chief. She stated that she is the Chief of Mutito Sub-county in Kitui County and the suit property is within her jurisdiction that she was invited to the thanksgiving ceremony at Mutemi Kamwaki's (deceased) house that was held on October 13, 2007. She stated that the immediate younger brother to the defendant, Timothy Muimi Mutemi was the Master of Ceremony and he called the defendant to tell the gathering the purpose of the special occasion which she stated was the granting of the suit property to her by her father, a statement which her father Mutemi Kamwaki confirmed.



26. As the administrator of the area, she stated that she did not get any complaints about the land bequest until the time the deceased died and she was called in late August 2011 by the defendant stating that her brothers had told her to vacate the suit property. She stated that she knew the late Mutemi Kamwaki as a man of honour and high integrity and who could not have snatched the gift to his favourite daughter and transfer it to the brothers without informing other family members. Upon the police investigations, the results were that the transfer had been effected through forgery.
27. DW 3 Samuel Ngui Kimanthi also gave evidence and stated that he was a retired civil servant. He adopted his witness statement made on January 23, 2022 as evidence in chief. He stated that he was the Chief of Endau Location in Kitui County which is the rural home of Kinako Musembi husband to the defendant. That he was invited to the thanksgiving ceremony at the home of Paul Mutemi Kamwaki on October 13, 2007 where he was joined by the area chief Lilian Kola Kimanzi. The ceremony was to give the defendant the suit land and the defendant gave gifts to her father who blessed her. He also confirmed that Timothy Muimi Mutemi, brother to the defendant was the Master of Ceremony He noted that the confirmation of the bequest for the land by Paul Mutemi Kamwaki was not only voluntary, but with a deep sense of pride by a father who loved his daughter. However, he also confirmed that there was no handing over of title to the defendant.
28. DW 4 Joseph Muvea Mitau adopted his witness statement dated January 23, 2022 as evidence in chief, where he had stated that the plaintiff's directors and the defendant are his nephews and niece respectively because their late father Mutemi Kamwaki is his first cousin. He stated that their extended family is known as Kyendwa family, and that the suit land initially belonged to his father Mitau Kyendwa who transferred it to Mutemi Kamwaki (Deceased), his nephew and that Mutemi Kamwaki gave the same land to the defendant in 1989.
29. DW 4 also referred to the thanksgiving ceremony in 2007 where the late Mutemi Kamwaki blessed his daughter Agnes Mumbanu Kinako the defendant and congratulated her for appreciating him. He later came to learn that the defendant's brothers had invaded the suit land and even tried to call them for reconciliation but they insisted that they had a title deed.
30. DW 5 John Muinde, a forensic document examiner and a senior superintendent of the Kenya Police produced his report. He stated that he was brought the sample documents on September 15, 2011 by one Corporal Musungu where there were disputed signatures compared with known signatures of the deceased. His statement was that he did not find any relationship between the known signatures in the documents and that they were not made by the same person. He presented the original report in Kitui Chief Magistrate's Criminal Case 620 of 2011 and he produced the same report as an exhibit on this suit.
31. Upon cross-examination, DW 5 stated that he could not remember whether the sample documents given to him were original or certified copies since a lot of time had passed since he examined them. He also noted that in the report, he referred to documents named A1, A2, B1 and B2 which have not been produced in court. He said that one signature can be forged by only one person and not three people. On re-examination he stated that the report he produced was made after examining all the aforementioned documents.

The Plaintiff's Submissions

32. The plaintiff noted in written submissions that it had demonstrated that it is a duly registered company and is the registered proprietor of Nzambani/Maluma/838. They submitted that the omission of the word 'company' or 'co' in the Land Control Board consent is and title deed is not a concern of the defendant.



33. Counsel submitted that the defendant has no capacity to defend the suit herein on behalf of the estate of the former proprietor and that she is not the registered owner of the suit land. Counsel contended that there is no person against whom the alleged fraud had been committed since the defendant was not a party to the transactions and that Mr. Mutemi Kamwaki never faulted the transaction during his lifetime
34. The plaintiff challenged the judgments relied on Kitui Chief Magistrate's Court No.620 of 2011 and HCCR Appeal 82 of 2018 that they were not final judgments relying on Section 47A of the Evidence Act.
35. The plaintiff also challenged the report by the forensic document examiner and stated that he had failed to prove forgery. They relied on Apex Security Limited vs Joel Atuti Nyaruri (2018) eKLR.
36. On the matter of fraud, counsel relied on the cases of Rattal Gondbabal Patel vs Laiji Mkaknji [1957] EA 314 where the court held that the standard of proof in fraud is higher than that required in ordinary civil cases and the cases of Elizabeth Kmene Ndolo v George Mataka Ndolo [1996] eKLR and Vijay Morjaria v Nansingh Madhu Singh Darbar and another [2000] eKLR.
37. Regarding the issue of a gift, they submitted that no evidence was presented by the defendant that any gift passed from the deceased to the defendant and relied on the cases of Registered Trustes Anglican Church of Kenya Mbeere Diocese vs David Waeru (2017) eKLR and Civil Appeal No 18 of 2017 Ernest Moturi Ongwara vs Conrad Mongera & Another where the courts noted that a gift must be completed during the lifetime and the court cannot enforce an incomplete gift.
38. The plaintiff submitted that they had proven their case on a balance of probability and that the defence case is misconceived, grossly incompetent and an abuse of court process. They also noted that the defendant has openly admitted to leasing part of the suit premises to third parties for gain for over 10 years and prayed for general damages of the sum of Kshs. 5,000,000.

Defendants Written Submissions

39. Counsel for the defendant filed written submissions and reiterated that the suit land was gifted to the defendant by her late father Mutemi Kamwaki (Deceased) and that the plaintiff Company is not the registered owner of the land. Counsel submitted that the transfer to the non-existent enterprise was null and void ab initio since a company is known by its name. They also hold that the plaintiff did not acquire a clean title due to the document examiner's report that showed there was forgery as they quoted Section 26(1) (a) and also relied on the cases of Alice Chemutai Too v Nickson Kipkirui Korir & 2 others [2015] eKLR & Arthi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR.

The defendant claim that the plaintiff directors were arrested, charged and convicted with the off The directors were arrested, charged and convicted with the offences of forgery, uttering forged documents and malicious damage to property.
40. The defendant submitted that she has established that she has been in exclusive occupation and use of the suit property by right and cannot be a trespasser and states that having been fraudulently transferred to the non-existing enterprise, the title should be reverted to the estate of the late Mutemi Kamwaki and administered together with the other assets of the estate. Counsel for the defendant further submitted that the plaintiff's suit should be struck out for want of locus standi and dismissed with costs to the defendant.



Analysis and Determination

41. The court has considered the pleadings filed, the evidence adduced, the submissions by Counsel and the legal authorities cited and the following issues in the courts view arise for determination;
1. Whether the plaintiff is the proprietor of the suit land Nzambani/Maluma/838 with absolute indefeasible rights.
 2. Whether the defendant is a trespasser on the suit land.
 3. Is plaintiff entitled to the orders sought?
42. On the 1st issue the matter in contention is the ownership of the suit property Nzambani/Maluma/838. The plaintiff produced in evidence the title deed in the name of Dater Enterprises Ltd and a certificate of official search both of which show that the title deed was issued on June 29, 2010. The defendant has challenged the said ownership in the 1st instance by stating that the certificate of incorporation of the plaintiff shows the name Dater Enterprises Company Ltd while the title deed is in the name of Dater Enterprises Ltd thus claiming that the two are not the same entity and that the plaintiff is not the registered proprietor of the suit land.
43. The plaintiff explained that the omission of the word “Company” from the title deed was a mistake which can be rectified. They further stated that the application for Land Control Board Consent, the Land Control Board Consent were all in the correct name as appears in the certificate of incorporation and it is only the Transfer of Land form that had an error.
44. The Court finds that the omission of the word “Company” from the title deed would be capable of rectification upon the relevant application being made to the Land Registrar under Section 79 of the [Land Registration Act](#) No 3 of 2012 if the transfer of land document was deemed a valid document. However, as will be seen later the validity of the transfer document that led to the name on the title deed reading as Dater Enterprises Limited instead of Dater Enterprises Company Limited has been successfully challenged and the transfer form has been declared as having been obtained through fraud and misrepresentation.
45. Registration of the plaintiff and issuance of a title deed to the suit land would ordinarily confer on it interests as provided for under Section 24 of the [Land Registration Act](#) which provides that;
- “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; ...”
46. The scope and the manner in which the rights conferred by law can be varied or defeated is spelt out under section 25 of the [Land Registration Act](#) which provides that the rights conferred are held together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. The section 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



- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

47. Section 26 (1) of the [Land Registration Act](#) No.3 of 2012 provides that: -

“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; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

48. Based on the provisions of Section 26 (1) above, the plaintiff has by providing the title deed to the suit land shown prima facie evidence that as the person named as proprietor of the land in the title the plaintiff can be presumed to be the absolute and indefeasible owner.

49. [Black's Law Dictionary](#) 11th edition defines Prima facie evidence as;

“Evidence that will establish a fact or sustain a judgement unless contradictory evidence is produced.

“The legislative branch may create an evidential presumption, or a rule of “prima facie” evidence, ie rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence” John H. Wigmore, *A student's Textbook of the Law of Evidence* 237 (1935)

Further Prima facie means “sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue”

“At first sight; on first appearance but subject to further evidence or information.”

50. However, Courts have held that even though the title deed is to be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, when a title to land is under challenge; the certificate of title is not enough proof of ownership. In the case of [Munyu Maina v Hiram Gathiba Maina](#) [2013] eKLR, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality



of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

51. From the foregoing a title deed can be challenged by adducing contradictory/contrary evidence to disprove, rebut or prove to be untrue that the title deed to the suit land conferred on the plaintiff absolute and indefeasible ownership. The defendant challenged the plaintiff's title and produced in evidence judgments in Kitui Chief Magistrates Criminal Case No. 620 of 2011 and the appeal in High Court at Kitui Criminal Appeal No.82 of 2018 where the directors to the plaintiff company were charged and convicted of the offences of forgery contrary to Section 349 of *Penal Code*. Particulars of the charge are that on June 29, 2009 they forged lands transfer form to land parcel Nzambani/Maluma/838. On count 2 they were charged with uttering a document with intent to defraud contrary to Section 357 (b) of *Penal Code* and on count 3 they were charged with the offence of malicious damage to property on 17.9.2011. On appeal to the High Court the conviction on Count 2 was quashed while the other two convictions were confirmed.
52. The directors of the plaintiff claim that they have challenged the High Court decision and filed an appeal to the Court of Appeal Criminal Appeal No. 155 of 2019. They adduced in evidence the Notice of Appeal and Memorandum of Appeal and claim that the said appeal is pending hearing and determination. The plaintiff thus relies on the provision of Section 47A of the *Evidence Act* on Proof of guilt in submitting that the judgment of the two courts is not a “final judgment” since the final judgment is expected to come out of the determination in the appeal in Court of Appeal Criminal Appeal No. 155 of 2019. Section 47A states that;

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

53. However, Section 193A of the *Criminal Procedure Code* CAP 75 Laws of Kenya provides for concurrent criminal and civil proceedings. In the case of *Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others* [2016] eKLR Justice Ngaah while dealing with the provisions of Section 47A of the *Evidence Act* and Section 193A of the *Criminal Procedure Code* stated as hereunder;

“But even so, the viability of a cause of action in a civil claim does not necessarily stem from the conviction of a defendant in a criminal trial. Further still, the success or failure of a civil suit based on facts similar to those that a criminal prosecution is mounted does not necessarily depend on the conviction or acquittal of the defendant in the criminal trial; the outcome of a civil suit is independent from that of a criminal trial largely because the standard of proof required of a prosecutor in criminal prosecution is higher than that required of a claimant in a civil suit. To sustain a conviction, the prosecution must discharge the burden of proof beyond all reasonable doubt that the accused committed the offence with which he is charged. On the other hand, the claimant in a civil suit will only need to demonstrate on a balance of probability that the defendant is the tortfeasor and as a result of his tortious act or omission, the claimant suffered some sort of loss or damage that would warrant a remedy.”



54. The Court stated further that;

“Section 193A of the *Criminal Procedure Code* contemplates civil and criminal processes running concurrently where facts which give rise to a cause of action are the same facts that constitute the particulars of an offence. It states:-

193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction..... The conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

55. Further, Courts have adopted and admitted prior convictions in criminal cases as evidence of establishing a prima facie case in subsequent civil proceedings especially taking into account the higher criminal standard of proof beyond reasonable doubt as opposed to proof in civil cases on a balance of probability. In the case of *Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 others* [2013] eKLR the Court stated;

“Judicial discretion as regards admissibility of evidence taken in criminal proceedings has been seen to be exercised in a number of jurisdictions. Most notable among them are the English Courts, who have in most instances adopted the *lexus classicus* case of *Hunter v Chief Constable of West Midlands & Another* [1981] 3 All ER 727. In its judgment, the English House of Lords also adopted *Reichel v Magrath 14 App Case 665*, *Mills v Cooper* [1967] 2 All ER 100 and *McIlkenny v Chief Constable of West Midlands Police Force* [1980] 2 All ER 229. In all the aforementioned cases, the English Courts adopted and admitted prior convictions in criminal cases, as evidence of establishing a prima facie case in subsequent civil proceedings. Lord Denning in *Hunter v Chief Constable of West Midlands (supra)* reiterated that:

“Thus a decision in a criminal case on a particular question in favour of a defendant, whether by way of acquittal or a ruling on *voire dire*, is not inconsistent with the fact that the decision would have been against him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the *Civil Evidence Act* 1968. In contrast to this a decision on a particular question against a defendant in a criminal case, such as Bridge J’s ruling on the *voire dire* in the murder trial, is reached on the higher criminal standard of proof beyond reasonable doubt and is wholly inconsistent with any possibility that the decision would not have been



made against him if the same question had fallen to be decided in civil proceedings instead of criminal. This is why convictions were made admissible in evidence in civil proceedings by the *Civil Evidence Act 1968*”.

Indeed, Lord Loreburn in the *McIlkenny* case (*supra*) put it even more succinctly by saying:

“the issue had already been finally determined against them by a court of competent jurisdiction in the criminal proceedings to which they were parties, and in those proceedings they had a full and fair opportunity of presenting their case, and in all the circumstances it would not be just to allow them to re-open the issue... In any event it would be an abuse of process to all the plaintiffs to litigate again the identical issue to that which had already been decided against them in the criminal proceedings, and they would not be permitted to call the further evidence on which they sought to rely...”

56. The court has read through the judgments in Criminal Case No. 620 of 2011 and the appeal in High Court Criminal Appeal No 155 of 2019 and is of the view that the conviction of the Directors of the plaintiff for the offences of forgery of the Power of Attorney and the Transfer of Land form is *prima facie* evidence that the transfer of the suit land was obtained illegally.
57. Apart from the judgements in the in Kitui Chief Magistrates Criminal Case No. 620 of 2011 and High Court at Kitui Criminal Appeal No.82 of 2018, the defendant adduced the evidence of John Muinde a forensic document examiner who produced in court the forensic document examiners report dated 20th September 2011. The said report was accompanied by exhibit memo forms which shows that the examiner received for examination exhibits A – 1 and A – 2 which were the questioned documents being the Transfer of Land form and Special Power of Attorney and exhibits B – 1 to B – 3 which were the known signatures of the deceased and the question he was to answer was whether the signatures on the exhibits marked A – 1 & A – 2 were made by the same author as the signatures on the exhibits marked B1 – B3. The document examiner was of the opinion that the signatures were not made by the same author.
58. The plaintiff challenged the report by the document examiner as they questioned the authenticity of the known signatures of the deceased which were taken to the document examiner for comparison with the transfer documents. The plaintiff states that proof of authenticity is at the center of the criminal appeal pending before the Court of Appeal. The forensic document examiner on cross-examination did state that the known signatures of the deceased had not been produced before this court but the disputed signatures were presented to court. The plaintiff also submitted that the documents relied on and named A1 – A2 and B1 – B2 were never produced in court and the examiner could not tell what kind of documents Exhibit A1 - A2 or B1 – B3 were.
59. However, the evidence of the said witness shows that he confirmed the disputed documents that were availed to him were the Transfer of Land form and the Special Power of Attorney. These were documents that were produced as exhibits before this court. It is however noted that the witness did not identify before this court the nature of the documents that constituted the known signatures. The witness stated that he analysed the documents presented to him and made the report that he produced in court.
60. The Court notes that the documents containing the deceased’s known signatures were produced during the criminal trial. The Court has looked at the judgment in Kitui Criminal Case No. 620 of 2011 *Republic vs Timothy Muimi Mutemi & others* and the appeal to the High Court and noted that the court confirmed that PW10 Corporal Musungu forwarded known signatures of Mutemi Kamwaki on an affidavit being exhibits 9 & 10 and the same were compared. It was found that there was no similarity with the disputed documents. The judgement of the High Court stated “In discharge



of its legal onus, the prosecution adduced evidence that established the fact of the signatures on the impugned documents having been dissimilar to some of the previous known signatures of the purported author.”

61. The court has also looked at the Forensic Document Examiners report and observed that the Forensic Document examiner was a qualified person having the relevant educational background and experience in forensic document examination and the report was detailed in content. He confirmed having examined the disputed signatures in document A1-A2 and the known signatures in documents B1-B3 and made his findings on the same. He further explained the methodology used and considerations given to possibilities of natural variations. The document examiner found that “the following individual characteristics did not provide me with forensic evidence of common authorship.”
62. Section 48 of the *Evidence Act* allows the Court to admit opinions of experts when there is need to make a decision or form an opinion as to whether the signature on a document was made by the person who is claimed to have made the signature. The Section states;
 - (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
 - (2) Such persons are called experts.
63. The Court further observed that though the plaintiff denied that the deceased’s signatures were forged, they did not produce in court the persons who were witnesses to the signatures of the deceased to confirm that indeed the said witnesses did see the deceased sign the documents. The evidence on record shows that the transfer of land form is said to have been drawn by Gakoi Maina & Co. Advocate and witnessed by Wamahiu Kimeria Advocate on May 31, 2010. The Power of Attorney is said to have been witnessed by Mildred K. Gakoi Advocates on August 28, 2009. The plaintiff did not call any of the said advocates to give evidence and in the courts view these witnesses would have been necessary for the plaintiff to establish the authenticity of the deceased’s signatures and that the title it held was obtained legitimately and not through fraud, or misrepresentation or acquired illegally, unprocedurally or through a corrupt scheme.
64. Further to this the plaintiff had the opportunity to call as witnesses any person acquainted with the handwriting of the deceased and their evidence would have been admissible under Section 50 of the *Evidence Act* which provides for opinion as to handwriting and states that;
 - (1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.
 - (2) For the purposes of subsection (1) of this section, and without prejudice to any other means of determining the question, a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him.
65. Further, nothing prevented the plaintiff from presenting any other known signatures of the deceased to a document examiner for comparison with the disputed signatures. The court finds that failure by the plaintiff to call any evidence to confirm the authenticity of the deceased signature and the challenge



the evidence of the document examiner leads to the presumption that the evidence of the said witnesses if produced would have been unfavourable to the plaintiff. This position is confirmed in the case of *Nguku v Republic* [1985] eKLR where the Court stated as follows;

“Where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony but can also apply to evidence of tape recording which is withheld.”

66. In submissions, counsel for the plaintiff pointed out that Mutemi Kamwaki never challenged the transfer in his lifetime and the defendant is only a trespasser and she cannot be allowed to challenge a transaction where she is not a party. It will however be noted that the deceased passed on a few months after the transfer was registered.
67. The plaintiff further challenged the evidence of the document examiner by stating that the said witness had confirmed that it was not possible for the three accused persons to forge one signature and that there was no evidence linking them with the forgery of the documents examined by the document examiner. However, from the evidence adduced the forged documents are the ones that were used to effect transfer of the suit land into the name of the plaintiff and the plaintiff was a beneficiary of the said forged documents. In the circumstances it was not necessary to establish that the directors of the plaintiff were the ones who forged the documents. In the case of *Alexander Muteti Mutinda & another v Republic* [2015] eKLR, the court stated as follows;

“As regard the evidence of the document examiner, this court holds that that evidence did indeed establish that the two documents that were presented to the complainant and her husband were not genuine. These documents were forgeries. The documents in question were the Title Deed and the letter of consent purportedly issued by the Athi River Land Control Board. PW3, the Land Registrar and PW6, the Chairman of the said Land Control Board confirmed that the two documents were indeed forgeries. It was not necessary for the prosecution to establish who actually made the documents if it managed to establish that the Appellants presented the said documents to the complainant with a view to inducing her to pay them the said sum of money as a consideration for the purported purchase of the suit property. The appellants were beneficiaries of the said forgeries.”

68. The plaintiffs’ Counsel in submissions stated that the court should not consider expert evidence in vacuum while relying on the case of *Apex Security Ltd versus Joel Atuti Nyaruri* (2018) eKLR. In my view the defendant presented more than the expert evidence in the Forensic Document Examiners report. The said report taken together with the evidence of the witnesses presented in court and the judgement in Kitui CMCC 620 of 2011 and High Court Criminal Appeal No.82 of 2018, was in the Courts view sufficient proof that the transfer of the suit land from the deceased Mutemi Kamwaki to the plaintiff was obtained through fraud in that the Transfer of Land form dated May 31, 2010 and the Special Power of Attorney dated August 28, 2009 were forged.
69. It is the conclusion of this court that the provisions of section 26 of the *Land Registration Act* have been met and it is found that registration of the suit land in the name of Dater Enterprises Limited and the issuance of the title deed dated 29.6.2010 was obtained through fraud and/or misrepresentation and the transfer of the land was done illegally and unprocedurally. The presumption of ownership under section 26 has in the courts view been rebutted and consequently it is found that the title deed in the name of the plaintiff does not confer on it the rights and privileges conferred under section 24 of the *Land Registration Act* or any other provisions of the law and the said title deed is illegal, null and void.



70. It is the courts view that the defendant met the threshold laid out in the case of *Vijay Morjaria v Nansigh Mdhu Singh Darbar & Another* [2000] eKLR where the Court of Appeal 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 alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* [1878] 7 Ch. D 473 at 489.”
71. Further it is the courts view that the defendant has discharged the standard of proof of fraud required of her which was higher than that required in ordinary civil cases, namely proof upon a balance of probabilities as was held in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR that;
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742 wherein the Court stated that:
- “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
72. The second issue for determination is whether the defendant is a trespasser on the suit land. Trespass has been defined by the 10th Edition of *Black’s Law Dictionary* as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”
73. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR also in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;
- ‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the defendant invaded his land without any justifiable reason.’
74. Section 3 (1) of the *Trespass Act*, defines trespass as follows;
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
75. In order for a party to succeed in a claim for trespass, the claimant must prove that the land belongs to them or they have an interest in the land in question and that another party has unlawfully trespassed upon the land by entering and/or remaining on the land. This Court has already found that the title deed of the plaintiff has been successfully challenged and it is thus found that the plaintiff does not have any rights to the land that would entitle it to orders of injunction sought. The plaintiff has also



not shown that it is or has been in possession of the suit land. It was held in the case of M'Mukanya v M'Mbijiwe [1984] KLR 761, that:

“the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, [1953] 2QB 153.”

76. The plaintiff has not proved that it has the right to immediate and exclusive possession of the suit land and thus the claim of trespass against the defendant cannot succeed. The court further finds that the defendant entered on to the suit land with permission of the deceased and the said permission was never revoked. The court finds that the defendant is not a trespasser on the suit land.

77. Another issue raised by the parties to this suit is whether the defendant was given the suit land as a gift *inter vivos* by the deceased. The defendant claims that she was given the suit land as a gift by the deceased Mutemi Kamwaki in 1989 and she has carried out developments on the land. The plaintiff on the other hand stated that the defendant was only given a portion of 1 ½ acres of the land in the year 2007 to cultivate and that the developments claimed either belonged to the deceased or did not exist. The Court of Appeal in Ogwara v Mangera & 4 others (Civil Appeal 18 of 2017) [2021] KECA 117 (KLR) (22October2021) (Judgment) Neutral citation number: [2021] KECA 117 (KLR) stated as follows concerning gifts;

“39. It is trite law that for gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing.

40. Gifts *inter vivos* must be complete for the same to be valid. In Halsbury's Laws of England 4th Edition Volume 20(1) the leaned author at paragraph 67 states as follows with respect to incomplete gifts:-?Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor?s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.? (Emphasis added)

78. It is the courts view that the plaintiff has not proved on a balance of probability intention on the part of the deceased to give the land to her as a gift. She did not meet the set out in law and in legal authorities as proof of a gift and in particular the Court of Appeal case of Ogwara v Mangera & 4 others (Civil Appeal 18 of 2017) [2021] KECA where the court stated that “Gifts of land must be by way of registered transfer, or if the land is not registered must be in writing or by a declaration of trust in writing.”



79. It is the courts view that the question of whether or not the defendant was given the suit land by the deceased Mutemi Kamwaki as a gift is an issue for determination by the Succession Court. Gifts inter vivos are contemplated by Section 42(a) of the [Law of Succession Act](#) which provides that:

“ 42. Where-(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”

80. Mutungi J in the case of [Charles Gitabi Kamau v District Land Registrar Nakuru; Priscilla Wanjiku Thumbi & 2 others \(Interested Parties\)](#) [2021] eKLR held that:

“ In the premises to the extent that as at the time of her death, the deceased had not transferred the portion of the land to the plaintiff the suit land Nakuru/Paive/571 became part of the deceased estate and fell to be administered and distributed in accordance with the law of succession. If it is the plaintiff’s position that he was gifted any portion of the land by the deceased before she died, he would have to prove that before the succession court. The determination whether or not there was an inter vivos gift made by the deceased to the plaintiff, that would be for the succession court to determine and this court lacks the jurisdiction to determine the issue..... The instant suit is defective not because land was not subdivided as claimed by the plaintiff but because the deceased died before effectuating the inter vivos gift in favour of the plaintiff, in case there was one. Since there was no transfer effected to the plaintiff during the lifetime of the deceased, the deceased property fell to be administered in accordance with the *Succession Act*, Cap 160 Laws of Kenya. This court has no jurisdiction to deal with succession.”

What orders should the court make?

81. It is the Courts view that the plaintiff has failed to meet the required standard of proof against the defendant and the suit herein is dismissed and each party to bear their own costs of the suit.

82. On the issue of costs, the court has considered that there is another suit ELC case number 32 of 2021 Agnes Mumbanu Kinako versus Attorney General, District Land Registrar, Timothy Muimi Mutemi, Eric John Mutemi, Douglas Kyalo Mutemi and Dater Enterprises Limited which relates to the same subject Land Parcel Nzambani/Maluma/838. The litigants in both suits are essentially the same parties but with the other suit having additional parties. It was agreed between the parties to the two suits that Judgment be delivered at the same time. The court has considered the fact that the main protagonists in the two suits are family members being brothers and sister and thus found that the most appropriate order with regard to costs is that each party will bear its own costs of the suit.

DELIVERED, DATED AND SIGNED AT KITUI THIS 4TH DAY OF MAY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT, JUDGE KITUI

Judgment read virtually and in open court in the presence of-

Musyoki C/A

M/S Ngala holding brief for Mwalimu for the defendant

Nzuva for the plaintiff

