



**Kinako v Attorney General & 5 others (Environment & Land Case
32 of 2021) [2023] KEELC 17269 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 32 OF 2021**

LG KIMANI, J

MAY 4, 2023

BETWEEN

AGNES MUMBANU KINAKO PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

DISTRICT LAND REGISTRAR-KITUI 2ND DEFENDANT

TIMOTHY MUIMI MUTEMI 3RD DEFENDANT

ERIC JOHN MUTEMI 4TH DEFENDANT

DOUGLAS KYALO MUTEMI 5TH DEFENDANT

DATER ENTERPRISES LIMITED 6TH DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit by way of a Plaint dated 23rd March 2015, where she averred that her father, the late Paul Mutemi Kamwaki (Deceased), also the father to the 3rd to 5th Defendants, was the registered owner and proprietor of land parcel Nzambani/Maluma/838 (hereinafter referred to as “the suit land”). That in the year 1989 the deceased bequeathed her the suit land as a gift and she undertook developments thereon to the tune of KES 10,000,000. To seal the aforesaid gift *inter vivos*, a gratitude ceremony was organized at his home at Mutito-Ndooa market where he acknowledged giving her the suit property. The ceremony was graced by members of the then provincial administration, her siblings and a host of friends.
2. The Plaintiff avers that she continued in quiet possession of the suit land until 2011, when by a letter from the 6th Defendant she was given 30 days’ notice to vacate the land. That she responded to the letter through her advocate’s letter dated 17th September 2011. She was thereafter informed that the suit land had been invaded and crops and trees destroyed. She reported the matter to the police and



3rd to 5th Defendants were arrested, charged, in Kitui Chief Magistrate's Criminal Case Number 620 of 2011 and later convicted of the offences of malicious damage to property, forgery and uttering a document with intent to fraud. The Plaintiff avers that the damage occasioned on the trees and crops were assessed by an agricultural officer at Kshs. 1,578,168.

3. After conducting due diligence, the plaintiff claims that she found out that the 6th Defendant, Dater Enterprises Limited was registered as the purported owner of the suit property from 29th June 2010. That Dater Enterprise Co. Ltd was incorporated on 14th November 2007 with the 3rd to 5th Defendants as directors but the company was not the owner of the suit land. She also found that the 4th Defendant occasioned the drafting of a power of attorney by Mutemi Kamwaki (Deceased) to deal with the suit lands on the strength of which he applied for Land Control Board Consent and that the application for consent of land control board was signed before the Power of Attorney was registered. That the 6th Defendant lodged the transfer documents dated 31st May 2010, purportedly signed by Mutemi Kamwaki (Deceased).
4. The Plaintiff claims there was fraud in the transactions by the defendants and she set out particulars of fraud in the plaint. In particular, she stated there was fraud in incorporating the company Dater Enterprises Company Ltd with the sole intent of providing a platform to defraud and deprive the Plaintiff of the suit property, occasioning the drafting of the power of attorney and the transfer of land document and forging the signature of Mutemi Kamwaki (Deceased). Uttering the said documents with intent to defraud and engaging in deceitful, wrongful and unlawful conduct
5. The Plaintiff also accused the Land Registrar-Kitui of allowing the Defendant's to register the suit property to a non-existent entity and allowing the 4th and 5th defendants to use their personal PIN numbers instead of the company's and being privy to the fraud of the 3rd-5th Defendants.
6. The Plaintiff avers that each of the defendants were acting in concert and/or as mutual agents of each other and she prays for the following orders:
 - a. A declaration that the plaintiff was, by virtue of the bequest made by Mutemi Kamwaki on 13.7.2007, the bonafide owner of Land Parcel Number Nzambani/Maluma/838.
 - b. An order directed to the Land Registrar Kitui to revoke the title deed issued to M/S Dater Enterprises Limited in respect to the suit property Nzambani/Maluma/838 and in its place insert the name of the Plaintiff.
 - c. Recovery of Ksh. 1,578,168 being the damages occasioned on the suit property by the 3rd to the 5th Defendants and their collaborators.
 - d. Costs of the suit and interest.

Alternatively and without prejudice to the foregoing, the Plaintiff prays for judgment against the defendants jointly and severally for the following:-

- a. An order directing the Land Registrar Kitui to revoke the title deed for Land Parcel Number Nzambani/Maluma/838 issued to M/S Dater Enterprises Limited and revert the title to Mutemi Kamwaki(Deceased) to be dealt with through succession proceedings.
- b. Recovery of Ksh. 1,578,168.00 being damages occasioned by the 3rd, 4th, and 5th defendants and their accomplices on the suit property.
- c. Costs of the suit and interest.



3rd, 4th, 5th and 6th Defendants' Statement of Defence

7. The Defendants filed a statement of Defence on 9th April 2015 denying the contents of the Plaint. They admitted that the deceased Mutemi Kimwaki was the father of the Plaintiff and the 3rd to 5th Defendants and the former proprietor of the suit land Nzambani/Maluma/838. That the deceased transferred to the 6th defendant the suit land and a title deed issued on 29th June 2010. That the deceased had allowed the Plaintiff to cultivate a portion of the suit land measuring about 1.5 acres and after acquiring the proprietorship of the land, the 6th Defendant allowed the Plaintiff to continue cultivating the said portion for a period of one year.
8. On 30th July 2011, the 6th defendant stated that it issued the Plaintiff with notice to cease cultivating, to harvest all her produce and also vacate the land so that the Plaintiff could proceed with a major development project. That the Plaintiff did not raise any objection, hence the Defendant took possession on 17th September 2011 and commenced the development project. However, on the same day, the 6th Defendant's directors were arrested by the police in Kitui and subsequently charged in Kitui P.M Criminal Case No.620 of 2011 with alleged malicious destruction of the Defendant's property, forgery and uttering false documents.
9. The 3rd-6th Defendants denied the allegations of fraud and also contended that the Plaintiff lacked capacity to bring the suit and that the allegations in the Plaint are time barred.
10. The 1st and 2nd Defendants did not enter appearance or file a defence
11. Counsel for the parties confirmed the existence of another suit ELC number 27 of 2021 Dater Enterprises Limited versus Agnes Mumbanu Kinako Mutemi 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 ELC number 27 of 2021 be adopted in both cases.

Evidence at the trial

12. PW 1 Agnes Mumbanu Kinako the Plaintiff herein adopted her witness statement filed in court on 24th March 2015 and a later one dated 3rd February 2020 as evidence in chief. She produced documents contained in the list of documents 23rd March 2015 and a supplementary list of documents dated 3rd February 2020.
13. The Plaintiff reiterated the averments contained in the plaint had stated that in 1989 her late father gave her the suit property in the presence of her mother and uncle and thereafter she commenced developments whereby she invested a sum in excess of Ksh. 3,000,000.00.
14. The Plaintiff further testified that to seal the gift, she organized a thanksgiving ceremony on 13th October 2007 which was graced by her siblings including the 3rd to 5th Defendants, relatives, friends and the local administration where the deceased acknowledged giving the land to her.
15. After her father's death all was well until on 23rd October 2010, she received word that her brothers intended to deprive her of the suit property. She was served with a demand letter to vacate on 30th July 2011. On 17th September 2011, she received news that the land had been invaded by a group of heavily armed men who caused destruction to property and the persons involved were arrested.
16. The Plaintiff stated that she engaged the police to investigate the transactions leading to the registration of the Plaintiff Company as the proprietor of the suit property. 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 the 6th defendant at a time he was terminally sick with cancer, to an entity which was not in existence. The 3rd – 5th Defendants were charged, found guilty and convicted in Kitui CM Criminal case No. 620 of 2011 with the offences of forgery, malicious damage to property and uttering false documents. That the said Defendants appealed in Kitui High Court Criminal Appeal No. 82 of 2018 but the court upheld the conviction on forgery and malicious damage to property. The Plaintiff claims that she lodged a caution to protect the title and filed this claim though there is another suit against her by the 6th Defendant Machakos ELC No 268 of 2011 now Kitui ELC No. 27 of 2021 pending before court and the claim herein could not be appropriately raised by way of counter-claim.
17. Upon cross-examination the Plaintiff noted that the title deed to the land was charged to Standard Chartered Bank on 14th March 1989 and to National Bank on 8th June 2000 and discharge of charge was registered on 8th February 2009. She confirmed that her name does not appear on the green card and that Mutemi Kamwaki (Deceased) did not give her any documents during the gift ceremony.
 18. PW2, Titus Mbeka Maluki testified that in 2010, he was employed in the Ministry of Agriculture as an Agricultural Officer in Nzambani. That he was instructed by Police to assess crop damage on the suit property. That accompanied by other Officers, he carried out the assessment and made a report which he produced in court. That he computed the damage and valued it at KES 1,578,168/=. He stated that he gave this evidence in the Criminal Case.
 19. Upon cross-examination he stated that the report was addressed to the Divisional CID Officer but he did not have the letter requesting for the report. The report was made on 12th December 2011 but the date that appears is 12th December 2010 while assessment was done on 19th September 2011. He also could not remember the parcel of land he assessed and confirmed that the land parcel is not indicated on the report.
 20. PW3 Joseph Muvea Mitau stated that he is a preacher and a business man and the plaintiff is his niece and the 3rd -5th defendants his nephews. He adopted his witness statement dated 3rd January 2020 as evidence save for the part where at paragraph 9 of the statement, he stated that he attended the thanksgiving ceremony which he confirmed he did not attend. The witness stated 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 Agnes Mumbanu Kioko in 1989 as his first born daughter.
 21. He later came to learn in September 2011 that the Plaintiff's brothers had invaded the suit land and he tried to call them for reconciliation but they insisted that they had a title deed. He also stated that he knew the late Mutemi Kamwaki as a man of honour and high integrity and who could not have snatched the gift given to his daughter and transfer it to the brothers without informing other family members and himself as the family members.
 22. PW4 Lilian Kola Kimanzi stated that she is the location chief of Mutito location. She adopted her witness statement dated 3rd January 2020 where she said that she was invited to the thanksgiving ceremony at Mutemi Kamwaki's house held on 13th October 2007 where there was a convoy of vehicles carrying many gifts for the Plaintiff's father. She stated that the immediate younger brother to the Defendant, Timothy Muimi Mutemi who was the Master of Ceremony called her 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.
 23. As the administrator of the area, the witness stated that there were no complaints about the land until late August 2011 when the Plaintiff complained 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. However, upon cross-examination, PW 4 confirmed that the deceased Mutemi did not take her to the suit property but was only told of existence of the land by the Plaintiff.

24. PW5 Samuel Ngui Kimanathi testified that he is a retired Civil Servant and was working as a chief in Endau Location, Kitui County. He knows the plaintiff and her husband since they were from his area. He adopted his witness statement dated 3rd January 2020 as his evidence. He stated that he was invited to the thanksgiving ceremony at the home of Paul Mutemi Kamwaki on 13th October 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 3rd Defendant was the Master of Ceremony. On cross examination, PW 5 confirmed that the suit property is not located in Endau. He confirmed knowing the deceased Mutemi but that he did not take her to the suit property but was only told of existence of the land. He also confirmed that Mutemi Kamawaki (Deceased), did not give a title deed to Agnes and that he never witnessed any malicious damage to property.
25. As stated earlier the parties to this suit agreed that the evidence of John Muinde, a forensic document examiner adduced in ELC 27 of 2021 be adopted in this suit. The said witness testified as DW 5 in the said suit and stated that he is a senior superintendent of the Kenya Police produced his report. He stated that he was brought the sample documents on 15th September 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.
26. Upon cross-examination, the witness stated that he could not remember whether the sample documents were original or certified copies since a lot of time had passed he examined them. He also noted that in the report, he referred to documents named AI, 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 Defence Case

27. DW1 Eric John Mutemi, the 4th defendant and director of 6th defendant testified and stated that he is an Advocate of the High Court. He adopted his witness statement dated 24th January 2018 and a further one dated 24th February 2020 as his evidence in chief. He also produced the documents in the lists of documents dated 8th April 2015, 19th January 2018 and 4th February 2022. The witness statement reiterated the contents of the defence filed and further stated that he is a director of the 6th defendant a registered company. He stated that Dater Enterprises Co. Ltd & Dater Enterprises Ltd is one and the same Company and that the Plaintiff acknowledged this in the plaint. He stated that the suit property LR No. Nzambani/Maluma/838 was previously registered in the name of their father Mutemi Kamwaki (Deceased) who obtained the title in 1989. He testified that the title was charged to a bank same year and discharged later. That the suit land was cultivated by their mother who died in 2004. The witness stated that in 2007 their father decided to change his business from sole proprietorship to a limited company and invited him, his elder brother Timothy and Douglas Kyalo to form a limited company. They agreed to raise capital to inject into their father's wholesale business in Mutito Market, Kitui County and to discharge the suit land and the land was discharged on 8th May 2009. They further agreed that the property would be transferred to the 6th Defendant



- Company, Dater Enterprises Company Ltd which acquired proprietorship of the land together with the buildings thereon. That Mutemi Kawaki (deceased) had in 2007 allowed the Defendant to cultivate a small portion of the land for the sole purpose of helping her family as she had children in school.
28. He further stated that on 6th July 2011 the 6th Defendant gave the Plaintiff 30 days' notice to remove her produce and vacate the land and since she did not object the 6th Defendant entered the land on 17th September 2011. On the said date the Plaintiff had the 3rd to 5th Defendants arrested. He stated that he knew no such thing as the suit property being given as a gift to the Plaintiff.
 29. The 4th Defendant denied forging the power of attorney dated 28th August 2009 and transfer of land form as alleged and confirmed that the other defendants were never charged with forging the power of attorney. He stated that the Plaintiff has no capacity to maintain a claim for the land to revert to the deceased's father as the grant issued to her was revoked. Upon cross-examination by the witness stated that his father sold the land to the company for consideration and that there was a sale agreement but the same was not on record.
 30. DW2 Timothy Muimi Mutemi, is a director of the 6th defendant. He adopted the two witness statements filed and dated 21st January 2018 and 4th February 2022 which he relied on as his evidence in chief. His witness statement was similar to that of the 4th defendant save that he was aware that the Plaintiff divorced her husband and approached their father and requesting him to cultivate a portion of the suit land during the rainy season. He stated that there was a ceremony in 2007 but instead of what the Plaintiff stated, she had come with her colleagues to condole the loss of their mother since she had not been to see their father after their mother died in 2004. He denied hearing about their father giving a gift to the plaintiff.
 31. During cross-examination, the witness stated that in the ceremony referred to by the Plaintiff, the plaintiff came with chief from Endau and her husband but the extended family was not present. He denied being the master of the ceremony. He stated that he knew his brother Eric the 4th Defendant was given a power of attorney. He also clarified that their company name is Dater Enterprises Co. Ltd as per certificate of incorporation and that the transfer form has a different name and does not have the name Company or 'Co' on it.
 32. DW3, Douglas Kyalo Mutemi, the 5th Defendant testified that he is a director of the 6th defendant. He adopted his two witness statements dated 24th January 2018 and 4th February 2022 in his witness statement. He reiterated the facts as stated by the 3rd and 4th Defendants. He denied attending any ceremony on 13th July 2007 and also stated that he was not aware that any gift given to the plaintiff by their father as alleged.
 33. Upon cross-examination, DW 3 stated that the plaintiff started cultivating the suit land in 2007. He confirmed that together with his brothers, they issued the plaintiff a notice to stop cultivating the land dated 30th July 2011. He denied that the Plaintiff Agnes Mumbanu responded to the letter.
 34. The 1st and 2nd defendants did not testify at the trial

The Plaintiff's submissions

35. Counsel for the Plaintiff filed written submissions and reiterated their case that the suit land was gifted to the Plaintiff by her late father Mutemi Kamwaki (Deceased) and the 6th defendant's directors were arrested, charged and convicted of the offences of forgery and malicious damage to property. They highlighted that the High Court in upholding the conviction stated that the appellants were the beneficiaries of the forged signatures.



36. The Plaintiff's submission is that the 6th Defendant 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 John Muinde, chief inspector, which showed there was forgery. They relied on Section 26 of the [Land Registration Act](#) and on the cases of Alice Chemutai Too v Nickson Kipkirui Korir & 2 others (2015) eKLR and Arthi Highway Developers Limited vs West End Butchery Limited and 6 others (2015) eKLR.
37. The Plaintiff 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 Plaintiff submitted that the Plaintiff has discharged the evidentiary burden of proof as required and prayed for compensation for the trees and crops valued at Ksh. 1,578,168/= as assessed by PW 2.

3rd -6th Defendants' written submissions

38. The Defendant stated their case in their written submissions, noting that the Plaintiff has not demonstrated that she acts in the suit herein on behalf of the estate of the former proprietor Mutemi Kamwaki (Deceased) regarding the suit property Nzambani/Maluma/838. Counsel also noted that the date of the alleged sealing of the bequest was changed by the Plaintiff's witnesses from 13th July 2007 to 13th October 2007. They further submitted that the two sets of judgments the Plaintiff relies upon were not pleaded in the Plaintiff.
39. Counsel for the Defendant submitted that the Plaintiff is not the registered owner of the suit land and that there was no attempt by the Plaintiff to demonstrate by way of evidence how the suit land was gifted to her in 1989. They relied on the cases of Registered Trustees 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 of the deceased and the court cannot enforce an incomplete gift.
40. They submitted that the Plaintiff cannot allege that the company was non-existent due to the omission of the word 'company' or 'co' while in the charge sheets, she herself and the police had charged them as directors of Dater Enterprises Ltd and she has sued them in that name.
41. Relying on Section 26 of the [Land Registration Act](#), the 3rd -6th Defendants submitted that the title to the suit property cannot be challenged unless it has been acquired illegally, unprocedurally or through a corrupt scheme and stated that the document examiner whose report that the Plaintiff relied upon did not produce the documents whose signatures he compared to the signatures of the deceased. They relied on the cases of Rattal Gondbabal Patel vs Laiji Mkaknji (1957) E.A 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 vs George Mataka Ndolo (1996) eKLR and Vijay Morjaria vs Nansingh Madhu Singh Darbar and another (2000) eKLR.
42. Counsel submitted that the Plaintiff lacks capacity to maintain the suit on behalf of the estate of Mutemi Kamwaki(Deceased) since the grant of representation in her bundle of documents was revoked by the court on 27th April 2016 and a fresh grant was issued on 6th March 2018 three years after the suit was filed. He relied on the case of Julian Adoyo Ongunga and another vs Francis Kiberenge Bendera (suing as the administrator of the estate of Fanuel Evans Amudavi-deceased) 2016 eKLR submitting that the Plaintiff should have filed a fresh suit as her previous powers of administration had been extinguished by the revocation.



43. Regarding the alleged malicious damage to property, counsel for the defendants submitted that the alleged damage was done on 17th September 2011 while the suit herein was filed in court on 24th March 2015, more than 3 years after the alleged incident contrary to the statutory time limitations for tort. Counsel relied on Section 4(2) of the *Limitation of Actions Act*. The defence further submit that no evidence was provided to show that the 3rd -5th Defendants actually damaged any property belonging to the Plaintiff since the report produced never bore the land parcel number in which the assessment was conducted.
44. Regarding the Land Control Board Consent, the defendants submitted that the power of attorney was signed by Mutemi Kamwaki (Deceased) and that the Land Control Board approved the consent and the Plaintiff therefore cannot fault the process as the decision of the board was final.

1st and 2nd Defendants' written submissions

45. State Counsel for the 1st and 2nd Defendant submitted that the Plaintiff has failed to show and prove transfer of the suit property to her and has therefore failed to prove ownership of the suit property. They relied on Nyamweya J's holding in the case of Re Estate of the Late Gedion Manthi Nzioka (Deceased) (2015) eKLR where she held that gifts inter vivos must be complete for the same to be valid. Counsel relied on the case of Anglican Church of Kenya Mbeere Diocese vs David Waweru .
 1. Counsel submitted that the Plaintiff lacks capacity to maintain the suit since her Grant of letters of administration intestate was revoked on 27th September 2016 in Kitui HC P&A Number 220 of 2015, while stating that the Plaintiff did not adhere to the provisions of Section 67(1) and Section 76 of the *Law of Succession Act*.
 2. Quoting from Section 45 of *Land Registration Act*, State Counsel submitted that the 2nd Defendant discharged his duties as mandated by the various statutes and the Plaintiff cannot purport to issue any directions on how the defendant performs the duties of his office.
 3. On the issue of costs, state counsel quoted from Section 27 of the *Civil Procedure Act* and relied on the holding in the case of Republic vs Rosemary Wairimu Munene, Ex parte Applicant; Ihururu Dairy Farmers Co-operative Society Ltd Jdicial Review Application No.6 of 2014 where it was held that costs follow the event.

Analysis and Determination

49. The court has considered the pleadings filed by the parties to this suit, the evidence adduced at the trial and the documents produced as exhibits, submissions by Counsel for all the parties and the authorities cited. It is noted that the 3rd-6th Defendants filed a Statement of Agreed Issues dated 19th January 2018 but summarized the said issues in their submissions. The Court proposes to take into account agreed issues filed and the submissions by the Counsel for all parties in framing the issues for determination as follows;
 - a. Whether the Plaintiff has Locus standi to institute this suit?
 - b. Whether the Plaintiff's claim is statutorily time barred?
 - c. Whether Mutemi Kamwaki (deceased) gifted or bequeathed the Plaintiff the suit land.
 - d. Whether the 6th Defendant holds the title deed of the suit land as absolute and indefeasible owner or the title deed issued was obtained unlawfully through fraud.
 - e. What orders should the court make?



a. Whether the Plaintiff has Locus standi to institute this suit?

50. The Defendants have challenged the Plaintiff's capacity to file this suit on behalf of the estate of Mutemi Kamwaki (Deceased) since her grant of letters of administration issued on 10th September 2014 in Kitui CM Succession Cause 147 of 2011 was revoked by the High Court at Kitui Succession Cause number 220 of 2015 where the grant was eventually issued jointly to the Plaintiff and the 3rd to 5th Defendants. The Defendants claim that the fresh grant was issued in 2018; three years after the filing of the suit and thus the Plaintiff ought to have filed a fresh suit.
51. This issue was dealt with by this court by Hon. Angote J when dealing with the application dated 13th December 2016 seeking to strike out the suit on this same ground. The Court in its ruling delivered on 22nd September 2017, noted that the Plaintiff was one of the administrators of the estate of the late Mutemi Kamwaki (Deceased) and had been in possession and having developed the suit land, she was therefore entitled to state her claim.
52. This court agrees that the Plaintiff has an interest in the suit property in her personal capacity and in her capacity as one of the Administrators of the estate of Mutemi Kamwaki (deceased). In *Law Society of Kenya Vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-
- “Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a Court of Law”.
53. Further in the case of *Alfred Njau and Others .Vs.. City Council of Nairobi (1982) KAR 229*, the Court also held that;-
- “ the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”
54. The Defendants have not cited any authority for the submission that the Plaintiff ought to have filed a fresh suit since the initial grant held was revoked. In the courts view the Plaintiff had capacity to file the instant suit at the time of filing since she had a valid grant issued by a competent court and she has capacity now at the time of delivery of judgement since she is one of the administrators of the estate of the deceased.

b. Whether the Plaintiff's claim is statutorily time barred?

55. The Defendants challenged the Plaintiff's suit on the ground that the claim for recovery of Kshs 1,578,168.00 being damages occasioned by the 3rd-5th Defendants by destruction of her property was statutorily time barred. The Plaintiff stated that the suit property was invaded on 17th September 2011, while this suit was instituted on 23rd March 2015, almost four years after the incident occurred. Section 4(2) of the *Limitation of Actions Act* provides that:
- “ An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”
56. The said claim for recovery of Kshs 1,578,168.00 is thus found to be time barred and is dismissed.



c. Whether the Plaintiff was given the suit land as a gift *intervivos* by Mutemi Kamwaki (deceased).

57. The Plaintiff claims that the suit property was a gift to her by her father, Mutemi Kamwaki (Deceased) in his lifetime. “Gift” according to the Black’s Law Dictionary 11th Edition means “1. The voluntary transfer of property to another without compensation. 2. A thing so transferred” It further states that;

“It is .. well to here state the things essential to make a valid gift. The donor must have the capacity to make a gift. He must have an intention to make it; His intention must be to make it now, and not in the future; he must deliver, either actually or constructively, the thing given to the donee, releasing all dominion over the thing given and investing the donee with whatever dominion he possessed; there must be an acceptance by the donee; it must be irrevocable unless the consent of both the donor and the donee is first obtained; it must be without valuable consideration, for if there be consideration, however small, for the transaction, it is a contract and not a gift; the thing given must not be indefinite, and the entire transaction must show a valid gift as a whole and not of a part” WW. Thorntorn, A treatise of the Law Relating to Gifts and Advancements 2-3 (1893)

58. The Court of Appeal in *Ogwara v Magera & 4 others* (Civil Appeal 18 of 2017) [2021] KECA 117 (KLR) (22 October 2021) (Judgment) Neutral citation number: [2021] KECA 117 (KLR) held;

“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 Halsburys Laws of England 4th Edition Volume 20(1) the learned 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 donors 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)

59. The Plaintiff claims that she was given the gift of the suit land in 1989 by the deceased in the presence of family members. That she was also given possession of the land to use pursuant to which she undertook developments to the tune of KShs. 10,000,000. To seal the aforesaid gift *intervivos*, on 13th October 2007, a gratitude ceremony was organized at the home of the Plaintiff’s late father at Mutito-Ndooa market, where the deceased acknowledged giving her the suit property in the presence of family members, friends and members of the provincial administration who had graced the ceremony. Other than that the Plaintiff did not show any documents to evidence the said gift or that the possession given by the deceased was intended as a gift of the land to herself.

60. It is noted that the deceased retained the title deed to the suit land and continued to deal with it and to exercise rights of ownership. The extract of title (green card) produced in court shows that on 14th



March 1989 he charged the land to Standard Chartered Bank PLC; on 8th June 2000 he transferred the charge to National Bank of Kenya Ltd and on 8th May 2009 he registered a Discharge of Charge against the said title. The Plaintiff does not challenge the said transactions and neither does she state that she was involved in any of these transactions.

61. 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 produce any documents to evidence the gift or that the possession given by the deceased was intended as a gift of the land to her.

As was stated in the above mentioned case of *Ogwara v Mangera & 4 others* (supra) 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. In the present case it would appear that the gift was in the form of an oral promise, or an 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.

62. Further, in the present case the donor is now deceased and the law governing such gifts would be in the courts view as 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.”

63. This would then fall within the jurisdiction of the High Court or Magistrates Courts with jurisdiction in the Succession Cause. Mutungi J in the case of *Charles Gitahi 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.”

c. Whether the 6th Defendant holds the title to the suit land as absolute and indefeasible owner or the title deed issued was obtained unlawfully through fraud.

64. The matter in contention in this entire sit is ownership of the suit land Nzambani/Maluma/838. The 3rd to 6th Defendants rely on the title deed issued in the name of Dater Enterprises Ltd and a certificate of official search both of which show that the title deed was issued to the 6th defendant on 29th June 2010. The Plaintiff 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 6th Defendant is not the registered proprietor of the suit land.

65. The 3rd to 6th Defendants explained that the omission of the word “Company” from the title deed is not fatal and that it was a mistake which can be rectified. They further stated that the application for Land Control Board consent and the Land Control Board Consent were all in the correct name as appears on the certificate of incorporation and it was only the Transfer of Land form that was drawn by the Advocate that had the incorrect name.
66. The Court is satisfied that the omission of the word “Company” from the title deed, would be capable of rectification upon the relevant application to the Land Registrar under Section 79 of the [Land Registration Act](#) No 3 of 2012 if the transfer 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.
67. Registration of the 6th Defendant and issuance of a title deed would ordinarily confer on it interests such as are provided for under Section 24 of the [Land Registration Act](#) which states 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; ...”
68. The scope and the manner in which the rights conferred by the 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;
- (1) 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.”
69. Section 26 (1) of the [Land Registration Act](#) 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

70. Based on the provisions of Section 26 (1) by providing the title deed to the suit land the 6th defendant has shown prima facie evidence that as the person named as proprietor in the title it is presumed to be the absolute and indefeasible owner. 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.”

71. 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 Gathiha 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.”

72. From the foregoing a title deed can be challenged by adducing contradictory or 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 Plaintiff challenged the 6th Defendants title relying on the provisions of Section 26 of the Land Registration Act claiming that the Defendants are guilty of fraudulent and unlawful conduct in acquisition of title to the suit land. It was held by the Court of Appeal in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR 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.”



73. Courts have also held that allegations of fraud are subject to a higher standard of proof. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR the court held that:

“Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations.”

74. The Plaintiff adduced 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 convicted of the offences of forgery contrary to Section 349 of Penal Code. Particulars of the charge are that on 29th June 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 on and count 3 they were charged with the offence of malicious damage to property on 17th September 2011. On appeal to the High Court the conviction on Count 2 was quashed while the other two convictions were confirmed.

75. The 3rd-5th Defendants 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 Memorandum of Appeal and claim that the said appeal is pending hearing and determination. The Defendants thus rely 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.”

76. 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.”



77. 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.”

78. 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 allow 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...”

79. The court has read the judgements in Criminal Case No. 62 of 2011 and the appeal to the High Court Criminal Appeal No. 155 of 2019 and is of the view the conviction of the 3rd to 5th Defendants and Directors of the 6th Defendants 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.
80. Apart from the judgements in the in case cited above, 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. The exhibit memo 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.
81. The 3rd -6th Defendants 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 Defendants state 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 Defendants 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.
82. 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 analyzed the documents presented to him and made the report that he produced in court.



83. The Court notes that the documents were produced during the criminal trial. The court has looked at the judgment in Kitui CMCC 620 OF 2011 Republic vs Timothy Muimi Mutemi & others and appeals to the High Court and note that the court confirmed that PW10 Corporal Musungu forwarded known signatures of Kamwaki Mutemi 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”.
84. The court has also looked at the Forensic Document Examiners report and observed that the report was detailed and the Forensic Document examiner was a qualified person having the relevant educational background and experience in forensic document examination. 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.”
85. 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.
86. The Court further observed that though the 3rd -6th Defendants denied that the deceased’s signatures were forged they did not produce in court the witnesses to the signatures of the deceased to confirm that indeed the said witnesses did see the deceased sign the impugned documents. The evidence on record shows that the transfer of land form is said to have been drawn by Gakoi Maina & Co. Advocates and witnessed by Wamahiu Kimeria Advocate on 31st May 2010. The Power of Attorney is said to have been witnessed by Mildred K. Gakoi Advocate on 28th August 2009. The Defendants did not call any of the said advocates to give evidence. In the courts view these were witnesses who would have been necessary for the Defendants to authenticate the signatures on the documents said to have been forged and establish that the title it held was obtained legitimately and not through fraud, or misrepresentation or acquired illegally, unprocedurally or through a corrupt scheme.
87. Further to this the Defendants had the legal right and opportunity to call as witnesses any person acquainted with the handwriting of the deceased 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.

88. It is also noted that nothing prevented the Defendants 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 Defendants to call any evidence to confirm the authenticity of the deceased's signature and to challenge the findings of the document examiner leads to the presumption that the evidence of the said witnesses, if produced would have been unfavourable to the Defendants. 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.”

89. The Defendants 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 6th Defendant and the same Defendant was the beneficiary of the said forged documents. In the circumstances it was not necessary to establish that the 3rd to 5th defendants were the ones who forged the signature on the documents. In the case of *Alexander Muteti Mutinda & another v Republic* [2015] eKLR the court held;

“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.”

90. The Defendants 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 Plaintiff 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 process of transfer of the suit land from the deceased *Mutemi Kamwaki* to the 6th Defendant was obtained through fraud in that the Transfer of Land form dated 31st May 2010 and the Special power of Attorney dated 28th August 2009 were forged.

91. 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 29th June 2010 was obtained through fraud and/or misrepresentation and the transfer of the land was done illegally and unprocedurally. The presumption of ownership of the suit land by the 6th Defendant under Section 26 has in the courts view been rebutted and consequently it is found that the title deed in the name of the 6th Defendant 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.

92. It is the courts view that the Plaintiff met the threshold laid out in the case of Vijay Morjaria versus Nansigh Mdhu Singh Darbar & Another (supra) and further that the Plaintiff has adduced evidence to the required standard of proof of fraud which is 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...”

What orders should the court make?

93. Having found that the transfer of the suit land from the deceased Mutemi Kamwaki to the 6th Defendant was illegally obtained through fraud, the Court finds that the remedy available is rectification of the land register of the suit land under Section 80 of the [Land Registration Act](#) which states that;

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake
2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

94. The Court of Appeal in the case of Evanson Wambugu Gachugi v Simon Wainaina Gatwiki & 2 others [2014] eKLR stated as follows in a case where the transfer was in question:

“On this issue of the validity of the transfer documents, we cannot fault the learned Judge for the conclusions that he made regarding the legality of the instruments of transfer that dispossessed the estate of the deceased of the suit land. On the other issue of whether the Judge could have ordered the transfer to the name of the 1st respondent. The Judge having found collusion on the part of the appellant and the Land Registrar in the manner in which the transfer was effected, under Section 143 (1) of the Repealed Registered [Land Act](#), the court is empowered to order the rectification of the Register by directing a registration to be cancelled if it was obtained by fraud or mistake. There is also no dispute that the 1st respondent is the administrator of the estate of the deceased and we find no fault in the order that directed title be registered in his name in that capacity as the administrator of the estate.”

95. On the issue of costs, the court has considered that there is another suit ELC number 27 of 2021 Dater Enterprises Limited versus Agnes Mumbanu Kinako Mutemi which relates to the same subject Land Parcel Nzambani/Maluma/838 where the litigants are essentially the same parties to this suit but with



this suit having additional parties. It was agreed between the parties to the two suits that Judgment be delivered at the same time. For the reason that the main protagonists in the two suits, the Plaintiff and the 3rd -5th Defendants who are directors of the Plaintiff herein are family members being brothers and sister, the Court finds that the most appropriate order with regard to costs is that each party will bear its own costs of the suit.

96. Arising from the above findings of the Court the following orders are hereby made;

- a. Prayer A, B, C, and D of the plaint dated 23rd March 2015 are hereby dismissed
- b. The alternative prayers B and C of the plaint dated 23rd March 2015 are hereby dismissed
- c. An order be and is hereby issued directing the Land Registrar Kitui to cancel and or revoke the title deed for Land Parcel Number Nzambani/Maluma/838 issued to M/S Dater Enterprises Limited and revert the title to Mutemi Kamwaki (Deceased) to be dealt with through succession proceedings.
- d. Each party to bear their 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

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

Musyoki C/A

M/S Ngala holding brief for Mwalimu for the Plaintiff

Nzuva for the 3rd to 6th Defendants

