



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 50 OF 2018

DAVID KIMENGERE WAITITU & DAVID GITONGA

(suing as the personal representatives

of the estate of the late

Benjamin Ithinyai M'narangui (deceased).....1st and 2nd PLAINTIFFS

JOHN NGOTHO NDURERE & JAMES MUTHAMI NDURERE

(Suing as the personal representatives

of the estate of the late

Ndurere Muhunyo Gathii (Deceased).....3rd and 4th PLAINTIFFS

VERSUS

ANGELA WAIRIMU GETHI.....1st DEFENDANT

MURUA LIMITED.....2nd DEFENDANT

AMENDED JUDGEMENT

1. Before me for determination is a matter that was filed on the 5th September 2018, vide a Plaint dated the 4th September 2018 wherein the Plaintiffs herein sought for the following orders:

- i. A declaration that LR No. 7381 (IR 6406) Laikipia is the property of the Estates of the deceased joint owners Benjamin Ithinyai M'narangui and Ndurere Muhunyo Gathii.
- ii. A declaration that the registration of LR No. 7381 (IR 6406) Laikipia in the names of Benjamin Menja Gathii and the subsequent registration of his successor in the title thereof are unlawful and illegal.
- iii. An order for cancellation of the registration of LR No. 7381 (IR 6406) Laikipia in the name of Benjamin Menja Gathii and the subsequent registration of his successor in the title thereof.
- iv. A permanent injunction restraining the Defendants their servants, workmen and agents from entering into the said Plot, or from in any way interfering with the Plaintiffs' use and enjoyment of LR No. 7381 (IR 6406) Laikipia.
- v. Costs of this suit and interest at court rates.
- vi. Any other relief the court deems fit to grant.

2. Alongside the said plaint the Plaintiffs herein had sought for interim orders vide their application by Notice of Motion of the same date. It was while the matter was pending hearing inter parte, of the said application dated the 4th September 2018 that the court noted that there had been another matter filed in ELC No 54 of 2018 wherein the 2nd Defendant herein had filed suit against the Plaintiffs and others over the same subject matter.

3. The court thus directed that parties exchange their pleadings and the matter be mentioned together with ELC No. 54 of 2018 for further directions.

4. On the 22nd January 2019, by consent, parties agreed that ELC No. 50 of 2018 and ELC No. 54 of 2018 be consolidated wherein ELC No. 50 of 2018 would become the lead file. The application dated the 4th September 2018 was also withdrawn to pave way for the hearing and disposal of the main suit.

5. On the 9th April 2019, the matter was certified ready for hearing after parties had complied with the provisions of Order 11 of the Civil Procedure Rules. By consent Counsel agreed to adopt the statements and documents as they were and for the witnesses who have not recorded their statements, that they adopt the statements on record.

Plaintiffs' case

6. The 2nd Plaintiff herein John Ngotho Ndurere, who testified as PW1 gave in evidence a history of their family in that he knew Benjamin Ithinyai and that Ndurere Muhunyo was his father, both men who were now deceased having died in the years around 2013 and 2014. He also testified that he was born in the year 1955, and that he and his siblings, consisting of two girls and two boys were born and brought up on land parcel No. 7381.

7. As he grew up on the land Ndurere Gathu and Benjamin were employed by Fabian Wallis who was a white settler. That his father used to live on that land as the farm manager of the settler while Benjamin was the cook. That both these men lived in village next to the settler's land.

8. That before Fabian Wallis left Kenya in the year 1964, due to ill health, he had called all his employees and had hosted a farewell party for them (at the time PW1 was 8 years old) where he had told them that he would give them a gift. That because of his love for his favorite employees being the Plaintiff's father and Benjamin, he had given them the suit land herein.

9. At the time, Kenya had gained independence wherein Fabian Wallis had taken the two employees to a court in Thomson falls where he had given them a lease called '999'. That after he had left the country, the Plaintiff's father and Benjamin had embarked on developing the land wherein they had planted trees, kept animals and had lived thereon peacefully for 12 years.

10. That he could remember sometime in August 1971 when they were milking cows, police officers had arrived in 4 motor vehicles at their home where they had inquired from him of the whereabouts of his father. They had then asked him to open the gate which he did. Among the police officers was the police Commissioner Ben Gethi. PW1 had then called his father who upon arrival, was interrogated and asked the whereabouts of Benjamin. The police Commissioner had then asked PW1's father for the title to the suit land which the white settler had left him or in the alternative, to take it to Mr. Kuria, who was the chief, by 10.00 am. Thereafter the police had gone towards Benjamin's house

11. Later on, the police had paid them a visit again, this time in 6 motor vehicles where his father had been advised to hide and not to give out the titles. The police had asked them of his father's whereabouts wherein they had told them that they did not know of his whereabouts. That was when Ben Gethi had grabbed PW1's mother and had assaulted her. The then left.

12. On the 3rd day when the police returned to their home again, Ben Gethi was not with them. The police had surrounded their house wherein they had camped there and had fed on their goats before evicting the Plaintiffs and their family members from the land in August 1979 where they had left our livestock and had taken refuge in their neighboring houses. That the eviction had rendered them destitute.

13. That his father had then gone to Gichau from where he had tired going back to the land but had died before they had gone back on their land where his mother had then started pursuing the same issue of the return of the land.

14. That they had been given a letter by the Commissioner of Land, where they had gone back on their land on the 2nd August 2018 but were not allowed to back to the white settler's land. His prayer therefore was for the court to give them back their land so that they could live in peace and have their children go back to school.

15. In cross examination, PW1 testified that he was one of the children of the people who had been left for the land. That David Kimengere was one of the sons of the two people who had been left for the land. That David had also recorded a statement like the one he had testified upon.

16. That Fabian Wallis had left the land to their parents wherein he had written a letter and had given it to the District Commissioner. The witness was referred to the 4th Document on the list of the Plaintiff's list of documents, a lease signed between Fabian and Ndurere, wherein he confirmed that the lease was for 999 years.

17. Since the witness informed Counsel that he did not know how to read in English language, Counsel read the contents of the lease to him wherein he testified that his father used a thumb print thereon. When clause 9 of the lease was read to the Plaintiff, he had stated that although he did not understand what 'the 5 years term' meant, yet he thought the 5 years were for the land rate.

18. Counsel read clause 4 of the lease to the witness who stated that he did not know whether that was what had been agreed upon by the parties to the lease but that the white settler could not have sold the land because he had already given it out.

19. The witness was referred to document 2 on the Plaintiff's list which was a search for land parcel No. LR No. 7381(IR 6406) Laikipia wherein he had testified that he did not know that the lease for 5 years had been registered at the land's office. He confirmed that they had

been evicted from the land on August 1971. That he had not seen the Defendant's documents and the official search because he had Counsel representing him.

20. That he would be shocked to learn that in February 1971 the land had been registered to its present owner. That he did not know that after 5 years, the lease had expired because it had been for 999.

21. That his father and Benjamin had been buried in the year 2012 on the land where they had sought refuge. That he did not know when his mother died but that she had been buried at the same place with his father. That from the year 1971 to 2018, they had not been on the suit land because they were chased away.

22. That the National Land Commissioner had visited that suit land wherein a report was given to them by the Board which had stated that the people who were on the land were illegally there because the lease had ended in 1969. That they had however been given a letter to go back to the land which letter he had not carried to court.

23. He also confirmed that there was a criminal case pending against them and wherein some of them had been released, others were still proceeding with the case in which his children and his brothers were the suspects.

24. That the case involved both members from his family and members of Benjamin's family wherein they had been charged with the offences of malicious damage which was committed in the year 2018.

25. He denied having cut down trees on the suit land and stated that they had been arrested before the start of the present case wherein the criminal case was still proceeding in court.

26. He also confirmed that Murua Limited were the people who had taken the land from them. That he also knew Angela Wairimu the 1st Defendant, who was the registered proprietor of the land as per the official search records.

27. In re-examination, the witness confirmed that he had conducted a search with the Lands Commissioner who had only recognized entry No. 9 in the said search as a legitimate entry. That he had been shown the lease between Fabian and Ndurere but had not been given a notice of termination of the lease. That they had planted the trees on the land which trees were the subject matter in the case they had been charged which was a case on the offence of Malicious Damage. The Plaintiff closed its case.

Defence case

28. The defence called Peter Nderitu Ngethi, one of the Managing Directors of Murua Ltd the 2nd defendant herein who adopted his statement dated 1st October 2018 as part of his evidence and who testified that his mother, the 1st Defendant and his brother, John were also Directors in the said Company.

29. That the company owned the land in question from the year 2010. That prior to which the land had belonged to his father before it was passed on to his mother as per evidenced in the official search dated 7th February 2019 which he produced as Df exh 1.

30. He testified that to the best of his knowledge, his father had taken possession of the suit land in the year 1971 by which time he was not the Commissioner. That he had become the police Commissioner in 1978.

31. That his father had been occupying the land from the year 1971 where they had kept livestock, fish ponds, indigenous forest, avocado trees (newly planted) and beehives. That the land now belonged to Murua Limited.

32. That his father was a friend to Fabian Wallis but that during the transfer of the land to his father, he had been not present. That in August 2018, there had been an evasion on the farm by the Plaintiffs who had claimed ownership and which claim was out of order.

33. That the Plaintiff and his people have continued to invade the land although they did not live thereon. The Defendant sought a permanent injunction to stop the Plaintiffs from further interference of the suit land, as well as costs and interests thereon.

34. When referred to a letter dated the 30th July 2018 from the Chief Land Registrar, he read the last paragraph, which stipulated that entry No. 9 was to be considered as the last and genuine entry, he testified that despite the said sentiments, Murua Ltd was a family company which related to the descendants of Ben Gethi who were given the suit land.

35. He also confirmed that his father and Fabian Wallis were friends who conducted businesses together in Nairobi and that the land had been transferred from Fabian to his father as gift but that he did not know what necessitated the transaction. There had been a transfer of the said land subsequently. He denied having assaulted the Plaintiff's people. The Defendant closed its case wherein parties filed their written submissions.

36. It is worth noting that since by consent parties had agreed to adopt their list of documents as exhibits, I shall deem the same produced as such and refer to them as exhibits.

Plaintiff's submissions.

37. After summarizing their case, the Plaintiff's Counsel submitted that in support of their case that they had relied on the title for No. LR

No. 7381(IR 6406) Laikipia, (Pf exh 1) which was a document that demonstrated the history of the suit land from the moment it had first been transferred from one Arthur Gilbert Lomax to the first owner to Fabian Harry Wallis who then transferred it to Benjamin Ithinyai and Ndurere Muhunyo as per the 9th entry.

38. That there was an entry No. 10 on the title which showed that the land had been transferred to Benjamin Menja Gathi for a consideration described as "affection" That a closer look at this entry, there had been an attempt to insert the word "gift" without even counter signing the amendment. That the question then arose as to who was making this "gift" for affection considering that the said Fabian Harry Wallis had left Kenya just before the country gained its full independence.

39. That at entry number 11 of the said title, the Registrar of Titles had placed a caveat over the suit land after complaints of questionable dealings but as entry number 12 would demonstrate, the said caution had been mysteriously removed to perpetuate subsequent fraudulent transfers.

40. That Pf exh 2 was an official Search Certificate for parcel No. LR No. 7381(IR 6406) Laikipia which search clearly described the owners of the suit property as Benjamin Ithinyai and Ndurere Muhunyo .

41. The lease dated the 23rd October 1960 filed herein and produced as Pf exh 3 was executed by Fabian Harry Wallis, Ithinyai Marangui and Ndurere Muhunyo and clearly demonstrated that the suit land was legally and lawfully transferred to the latter who assumed ownership. This document was appropriately entered into the title as entry No. 10

42. That the letter of consent dated 28th October 1964, Pf exh 4 confirmed that indeed the transfer of lease from Fabian Harry Wallis to Ithinyai Marangui and Ndurere Muhunyo was above board and conducted in line within the relevant statutory stipulations and therefore legal for all intents and purposes under the laws of the land .

43. The Pf exh. 5, being a conveyance dated 14th April 1966 was a document executed by Fabian Harry Wallis on one part and Ithinyai Marangui and Ndurere Muhunyo Gathii on the other part, which document was attested before the court at Thompson's Falls (now Nyahururu law courts) and clearly authenticated the Plaintiffs' testimony that the suit land was truly bestowed as a gift to Ithinyai Marangui and Ndurere Muhunyo Gathii.

44. That vide a copy of a letter to the Land Registrar dated the 2nd February 2017 produced as Pf exh 6, the same was authored by the Plaintiffs' Counsel and address to the central Land Registry complaining about the non-availability of the records pertaining to the suit land.

45. That Pf exh 7, which was a letter dated the 30th July 2018 from the Chief Land Registrar, a response to their letter dated 2nd February 2017, was to the effect that the Ministry had considered entry No. 9 dated 7th November 1964 in the presentation book number 211 to be the last and genuine entry which had been the transfer of lease from Fabian Harry Wallis to and Ithinyai Marangui and Ndurere Muhunyo.

46. That the affidavit dated 23rd June 2017 herein produced as Pf exh 8, was clear demonstration, by a deceased person, of the machinations and collusion by the Defendant and Senior Officials in the Department of Lands to deny the Plaintiffs a replacement of title to the suit land, which title disappeared when the Plaintiffs had been evicted from the suit land and their properties razed down.

47. The Company records dated the 10th August 2018 were produced as Pf exh 9 Which records were clear that the purported current proprietor of the suit land was Murua Limited a body owned entirely by the family of the late Benjamin Menja Gethi for the sole purpose of hiding their misdeeds behind the veil of incorporation.

48. The letter from the National Land Commission dated the 14th January 2015 herein produced as Pf exh 10 was to the effect that indeed a dispute over the suit land had been referred to the Nyandarua County Land Management Board which had then acknowledged their failure to resolve the dispute (in undated report) and had recommended that the matter proceeds to be determined by a court of competent jurisdiction.

49. The Plaintiff then took issue with the Defendants' case and submitted that the evidence adduced by DW1 did not explain why there was not in existence any deed or instrument whatsoever executed between Fabian Harry Wallis and Benjamin Menja Gethi transferring or conferring any interest in the suit land to the latter or how the suit land was transferred as a gift to Benjamin Menja Gethi by Fabian Harry Wallis when the letter had already left the country seven years earlier.

50. The Plaintiffs' the summary of the Defendants' case was that the court was not furnished with any deed executed between the Department of Lands and Benjamin Menja Gethi, and further there was no grant of lease to Benjamin Menja Gethi from the Department of Lands. The Plaintiff also pointed out that the court had not been furnished with any letter of consent contrary to the provisions of the Land Control Regulations and therefore the transfer of the suit land from Fabian Harry Wallis to Benjamin Menja Gethi was not legally sanctioned.

51. That from the evidence tendered herein, it had been clear that the Defendants had capriciously, forcefully, fraudulently, unconscionably, dishonestly, illegally and unlawfully grabbed the suit land from its rightful owners and had caused themselves to be registered as proprietors without any color of right which action had deprived the Plaintiffs of their rights to own property in contravention of the provisions of Article 40 of the Constitution. The Plaintiffs relied on the case of **Susan Cheburet Chelugui & Another vs Daniel Toroitich Arap Moi & 5 others [2019]eKLR** to buttress their case.

52. The Plaintiffs' submission was that their evidence had been uncontroverted in comparison to the Defendant's evidence which was inconsistent and did not stand the test of cross examination. They sought that having proved their case to the required standard of in civil matters on a balance of probability that the court finds in favour of their case.

Defendants' Submission.

53. The Defendants gave a summary of the matters arising before this matter was filed in this court before they submitted that the main issue for determination was purely the ownership of LR No. 7381(6406).

54. That it was the Plaintiffs evidence that the land in question was transferred to their fathers in the year 1964 by the then registered owner hence they had inherited their fathers' property. Suffice to note that there was no succession cause filed by the Plaintiffs as alleged beneficiaries of their father's estate.

55. That the Plaintiffs have acknowledged that sometimes in 1971 they had been dispossessed of the land by one Benjamin Menja Gethi who took possession from that year to the year 2018 hence making it a total of 47 years wherein they have never been out of the same .

56. It was the Defendants' evidence that Benjamin Menja Gethi had been given the suit property by the registered owner wherein in 1971 a transfer had been registered in his favour where he had taken possession of the land and had been living thereon with his family from 1971 to date. That they had never parted ways or surrendered the same to anyone. After the death of Benjamin Menja Gethi, the land was transferred to his widow the 1st Defendant vide a Succession Cause and later to the current owner Murua Limited.

57. That sometimes in August 2018 the Plaintiffs together with some members of the family had invaded the said parcel of land and had started to put up temporal structures and cut down trees. The police had been informed wherein they had been arrested and charged in court where the proceedings were still on going. Simultaneously, with the criminal case filed in the lower Court, the Company had filed suit against the Plaintiffs so as to restrain them from trespassing into the property.

58. The Defendants' submission was that the 1st Defendant was wrongly enjoined in the suit as no evidence had been tendered against her and neither had the pleadings touched on her in any manner.

59. That while Plaintiffs relied on the lease dated the 23rd October 1964, to contend that they had inherited the land from their fathers after it had been transferred to them by the previous owner, the truth of the matter was that indeed entry No. 9 was registered against the title where the lease had been given to their fathers for five years running from 1964 to 1969. The same lapsed at the expiry of the 5 years and there had been no evidence that it had been extended.

60. That there was no evidence led on the purported document of transfer herein produced as Pf exh 6 explaining how the document came to be since when it was allegedly signed in 1966, the lease between the two parties was still subsisting. The purported conveyance was never registered in the lands office against the property and no entry was ever made in the register. Further, there was no evidence adduced showing that the stamp duty was ever paid for the conveyance hence it was of no evidentiary value in this case.

That by the time the property was transferred in 1971 by Fabian Harry Wallis to Benjamin Menja Gethi, there was no overriding interest against the title by any person. The transferor was still the registered owner and the land was free from any encumbrances. There was unanimity on both sides that the new registered owner took possession of the property until his demise where the same was passed on to his family.

61. The Defendant's submission was that the current law concerning ownership of land is contained in Section 24, 25 and 26 of the Land Registration Act which deals with the effect of registration of land. That at the moment, the 2nd Defendant was the prima facie owner of the suit property. The Plaintiffs had not pleaded any impropriety against the transfer of the land to the current registered owner. No fraud has been pleaded or any evidence tendered to that effect.

62. That for over 47 years the Plaintiffs have been dispossessed of the land and legitimately so and in any event they had not given any explanation as to why they were so indolent to prosecute the matter. Even if they had any form of claim, which is disputed, the same was time barred and that case by all means was unsustainable due to the Limitation of Actions Act.

63. The Defendants relied on the case of **Civil Appeal No 246 of 2013** between **Arthi Highway Developers Ltd vs. West End Butchery Ltd & Others** which judgment was adopted in the case of **Kitts Investments limited vs. David Kimiti & 8 Others [2019] eKLR**, to submit that where there was absence of evidence to suggest fraud or misrepresentation by the title holder, then the title was prima facie evidence of ownership.

64. That in the case of **Hassan Mohamed Haji vs. Mohammed Keynan & Another [2019] eKLR** the Court had stated that where the issue arose as to the validity of a title as provided for under Sections 25 and 26 of the Land Registration Act, the burden was always on the person making the allegations to tender the evidence to prove the existence of the exception provided under section 26 (1) (a) and (b).

65. That in the instant case, although the Plaintiffs' evidence was based on allegations that the Defendants had occupied the land and illegally. They had not strictly speaking challenged the authenticity of the title held by the 2nd Defendant.

66. That the author of the letter dated the 30th July 2018 which was purportedly written by the Chief Land Registrar, was not called to testify furthermore, the Land Registration Act had no provision where the Registrar communicated by way of letters. This letter therefore had no evidentiary value.

67. The Defendants sought that the Plaintiffs' case be dismissed and that the prayers in their counterclaim be granted. That further the Plaintiffs be condemned to pay costs for general damages to the tune of Ksh 2,000,000/=.

Analyses and determination.

68. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that the undisputed facts of this case being that Fabian Harry Wallis transferred parcel of land No. LR No. 7381(IR 6406) Laikipia, the suit land herein to the Plaintiffs' fathers Benjamin Ithinyai and Ndurere Muhunyo wherein the transfer was registered in the Lands Titles Registry as entry No. 9 on the 7th November 1964.

69. It is also not in dispute that the Plaintiffs' fathers Benjamin Ithinyai and Ndurere Muhunyo had taken possession of the suit land and lived there with their families up to the year 1971 when they had been evicted from the suit land and have never gone back to date.

70. It is also not in dispute that the Defendants herein took possession of the suit land from 1971 where they have remained in possession to date.

71. What is in dispute is whether the Defendant's occupation of the suit land was acquired unlawfully, illegally and fraudulently.

72. It is important to note that the Plaintiffs in this matter filed suit and an Application seeking interim orders against the Defendants vide ELC No. 50 of 2018 on the 5th September 2018. That it was while the matter was pending the hearing of the application inter parte that it was brought to the attention of the court that the Defendants had also filed suit vide ELC 54 of 2018 on the 2nd October 2018 where they had obtained interim orders, from the honorable judge sitting in Nakuru, against the Plaintiffs herein.

73. By consent, both matters consolidated wherein ELC No. 50 of 2018 become the lead file and ELC No. 54 of 2018 became the counterclaim where the Plaintiffs in the counterclaim had sought for the following orders;

- i. A permanent injunction restraining the Defendants either by themselves their servants, agents, employees and family members from entering into, trespassing, onto and/or interfering with and that property known as No. LR No. 7381(IR 6406/1).
- ii. Cost of this suit
- iii. Further or other reliefs as this honorable court may deem just and expedient in the circumstance of this case.

74. Briefly the matter in question was that the Plaintiffs fathers herein having been employees of a white settler by name Fabian Wallis, they had been gifted with the suit land in the year 1964 just before the white settler left Kenya. That the transfer of the suit land was registered accordingly and the Plaintiffs fathers' and their families took possession of the same where they lived in harmony until the year 1971 wherein PW1's father, using the police force, had caused their eviction from the suit land wherein he had taken possession of the same with his family who have lived there to date.

75. The Plaintiff relied on the documents herein produced as Plaintiff exhibits and took issue with the registration of the Defendants as proprietors to the suit land to the effect that they had obtained title illegally and fraudulently, their fathers' lease having been for 999 years.

76. The Defendants on the other side have denied the Plaintiffs assertion stating that the suit land was transferred to Benjamin Menja Gethi by its proprietor as a gift for affection on the 8th February 1971.

77. Having laid down the background of the matter in question and having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows.

- i. Whether there was fraud involved in the transfer of ownership of the suit property to Benjamin Menja Gethi
- ii. Whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act.
- iii. Do the Plaintiffs have any cause of action against the Defendants herein?
- iv. Who should pay the cost of the suit?

78. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

79. I have no doubt in my mind that the Plaintiffs herein have distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, illegality and misrepresentation as submitted by the Plaintiff.

80. It was the Plaintiff's testimony that the suit land herein had been gifted to their father for 999 years. However the documentary evidence adduced by the Plaintiff as Pf exh 1 being the title for No. LR No. 7381(IR 6406) Laikipia, at entry No. 9 , was clear that the suit land herein had been leased to Benjamin Ithinyai and Ndurere Muhunyo for 5 years from 1st November 1964 for a yearly sum of Ksh 20/=. It therefore

means that the lease ended in the year 1969. There was no evidence adduced to the effect that the same had been extended or renewed.

81. The Plaintiffs, in considering the remarks made in Pf exh 7, which was a letter from the Chief Land Registrar dated the 30th July 2018, to the effect that the Ministry had considered entry No. 9 dated 7th November 1964 in the title to be the last genuine entry which had transferred the lease from Fabian Harry Wallis to and Ithinyai Marangui and Ndurere Muhunyo, they had therefore concluded that the subsequent entries made therein were fraudulent. I find that since this document was the backbone of the dispute herein, it was incumbent of the Plaintiff to adduce more tangible evidence of for example evidence of an expert witness in the nature of a forensic document examiner, or even an independent witness from the Land Registry to shade more light on the subsequent entries after entry No. 9 as proof these allegation that the subsequent entries after entry No. 9 could have been forgeries.

82. Such evidence was not called. As the provisions of *Section 107 to 109 of the Evidence Act* place the onus of proof on the Plaintiffs, it was their duty to displace such onus. The Plaintiffs did not even produce any document to demonstrate that they had reported the alleged crime of fraud to the police or that the matter was pending investigation. This allegation therefore remains un-proved.

83. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

84. On the second issue as to whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act.

85. Section 7 of the Limitation of Actions Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”

86. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiffs’ having been evicted for the suit land in the year 1971 and their parents having claimed ownership in the same, they could seek to recover it from the Defendants, but only if they did so within twelve years from the date on which the right of action accrued to them .

87. There is no doubt that the period of about forty seven (47) years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiffs needed to commence their claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time they filed this suit, the claim was statute barred.

88. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

89. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

90. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

91. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. Plaintiff’s suit is herein dismissed with costs.

92. On the Defendants’ counter claim, the court finds that there was evidence adduced which evidence was not rebutted by the Plaintiff that in August the year 2018, there had been an evasion on the farm by the Plaintiff and his family members who claimed that they had ownership and who have continuously continued to invade the suit land.

93. In the case of **Park Tower Vs Moses Chege & others HC Civil suit No. 1825 of 1999 (2014) eKLR** Justice Mutungi held as follows:-

“I agree with the learned judges that where trespass is proved a party needs not prove that he has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages.and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages”.

94. The court allows the Defendant’s counterclaim and grants prayers to the counterclaim to which:

- i. A permanent injunction is herein issued restraining the Defendants in the counter Claim, the Plaintiffs in the main suit either by themselves their servants, agents, employees and family members from entering into, trespassing, onto and/or interfering with and that property known as No. LR No. 7381(IR 6406/1).
- ii. The court awards the Plaintiffs in the counter claim, Defendants in the Main suit herein Ksh 100,000/= as damages for trespass.

95. It is so ordered.

Amended at Nyahururu this 5th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 50 OF 2018

DAVID KIMENGERE WAITITU & DAVID GITONGA (suing as the personal

representatives of the estate of the late BENJAMIN ITHINYAI

M’NARANGUI (DECEASED).....1ST AND 2ND PLAINTIFFS

JOHN NGOTHO NDURERE & JAMES MUTHAMI

NDURERE (Suing as the personal representatives of the estate of the late NDURERE

MUHUNYO GATHII (Deceased).....3rd and 4th PLAINTIFFS

VERSUS

ANGELA WAIRIMU GETHI.....1ST DEFENDANT

MURUA LIMITED.....2nd DEFENDANT

JUDGEMENT

1. Before me for determination is a matter that was filed on the 5th September 2018, vide a Plaint dated the 4th September 2018 wherein the Plaintiffs herein sought for the following orders:

- i. A declaration that LR No. 7381 (IR 6406) Laikipia is the property of the Estates of the deceased joint owners Benjamin Ithinyai M’narangui and Ndurere Muhunyo Gathii.
- ii. A declaration that the registration of LR No. 7381 (IR 6406) Laikipia in the names of Benjamin Menja Gathii and the subsequent registration of his successor in the title thereof are unlawful and illegal.
- iii. An order for cancellation of the registration of LR No. 7381 (IR 6406) Laikipia in the name of Benjamin Menja Gathii and the subsequent registration of his successor in the title thereof.

iv. A permanent injunction restraining the Defendants their servants, workmen and agents from entering into the said Plot, or from in any way interfering with the Plaintiffs' use and enjoyment of LR No. 7381 (IR 6406) Laikipia.

v. Costs of this suit and interest at court rates.

vi. Any other relief the court deems fit to grant.

2. Alongside the said plaint the Plaintiffs herein had sought for interim orders vide their application by Notice of Motion of the same date. It was while the matter was pending hearing inter parte, of the said application dated the 4th September 2018 that the court noted that there had been another matter filed in ELC No 54 of 2018 wherein the 2nd Defendant herein had filed suit against the Plaintiffs and others over the same subject matter.

3. The court thus directed that parties exchange their pleadings and the matter be mentioned together with ELC No. 54 of 2018 for further directions.

4. On the 22nd January 2019, by consent, parties agreed that ELC No. 50 of 2018 and ELC No. 54 of 2018 be consolidated wherein ELC No. 50 of 2018 would become the lead file. The application dated the 4th September 2018 was also withdrawn to pave way for the hearing and disposal of the main suit.

5. On the 9th April 2019, the matter was certified ready for hearing after parties had complied with the provisions of Order 11 of the Civil Procedure Rules. By consent Counsel agreed to adopt the statements and documents as they were and for the witnesses who have not recorded their statements, that they adopt the statements on record.

Plaintiffs' case

6. The 2nd Plaintiff herein John Ngotho Ndurere, who testified as PW1 gave in evidence a history of their family in that he knew Benjamin Ithinyai and that Ndurere Muhunyo was his father, both men who were now deceased having died in the years around 2013 and 2014. He also testified that he was born in the year 1955, and that he and his siblings, consisting of two girls and two boys were born and brought up on land parcel No. 7381.

7. As he grew up on the land Ndurere Gathu and Benjamin were employed by Fabian Wallis who was a white settler. That his father used to live on that land as the farm manager of the settler while Benjamin was the cook. That both these men lived in village next to the settler's land.

8. That before Fabian Wallis left Kenya in the year 1964, due to ill health, he had called all his employees and had hosted a farewell party for them (at the time PW1 was 8 years old) where he had told them that he would give them a gift. That because of his love for his favorite employees being the Plaintiff's father and Benjamin, he had given them the suit land herein.

9. At the time, Kenya had gained independence wherein Fabian Wallis had taken the two employees to a court in Thomson falls where he had given them a lease called '999'. That after he had left the country, the Plaintiff's father and Benjamin had embarked on developing the land wherein they had planted trees, kept animals and had lived thereon peacefully for 12 years.

10. That he could remember sometime in August 1971 when they were milking cows, police officers had arrived in 4 motor vehicles at their home where they had inquired from him of the whereabouts of his father. They had then asked him to open the gate which he did. Among the police officers was the police Commissioner Ben Gethi. PW1 had then called his father who upon arrival, was interrogated and asked the whereabouts of Benjamin. The police Commissioner had then asked PW1's father for the title to the suit land which the white settler had left him or in the alternative, to take it to Mr. Kuria, who was the chief, by 10.00 am. Thereafter the police had gone towards Benjamin's house

11. Later on, the police had paid them a visit again, this time in 6 motor vehicles where his father had been advised to hide and not to give out the titles. The police had asked them of his father's whereabouts wherein they had told them that they did not know of his whereabouts. That was when Ben Gethi had grabbed PW1's mother and had assaulted her. The then left.

12. On the 3rd day when the police returned to their home again, Ben Gethi was not with them. The police had surrounded their house wherein they had camped there and had fed on their goats before evicting the Plaintiffs and their family members from the land in August 1979 where they had left our livestock and had taken refuge in their neighboring houses. That the eviction had rendered them destitute.

13. That his father had then gone to Gichau from where he had tired going back to the land but had died before they had gone back on their land where his mother had then started pursuing the same issue of the return of the land.

14. That they had been given a letter by the Commissioner of Land, where they had gone back on their land on the 2nd August 2018 but were not allowed to back to the white settler's land. His prayer therefore was for the court to give them back their land so that they could live in peace and have their children go back to school.

15. In cross examination, PW1 testified that he was one of the children of the people who had been left for the land. That David Kimengere was one of the sons of the two people who had been left for the land. That David had also recorded a statement like the one he had testified upon.

16. That Fabian Wallis had left the land to their parents wherein he had written a letter and had given it to the District Commissioner. The witness was referred to the 4th Document on the list of the Plaintiff's list of documents, a lease signed between Fabian and Ndurere, wherein he confirmed that the lease was for 999 years.

17. Since the witness informed Counsel that he did not know how to read in English language, Counsel read the contents of the lease to him wherein he testified that his father used a thumb print thereon. When clause 9 of the lease was read to the Plaintiff, he had stated that although he did not understand what 'the 5 years term' meant, yet he thought the 5 years were for the land rate.

18. Counsel read clause 4 of the lease to the witness who stated that he did not know whether that was what had been agreed upon by the parties to the lease but that the white settler could not have sold the land because he had already given it out.

19. The witness was referred to document 2 on the Plaintiff's list which was a search for land parcel No. LR No. 7381(IR 6406) Laikipia wherein he had testified that he did not know that the lease for 5 years had been registered at the land's office. He confirmed that they had been evicted from the land on August 1971. That he had not seen the Defendant's documents and the official search because he had Counsel representing him.

20. That he would be shocked to learn that in February 1971 the land had been registered to its present owner. That he did not know that after 5 years, the lease had expired because it had been for 999.

21. That his father and Benjamin had been buried in the year 2012 on the land where they had sought refuge. That he did not know when his mother died but that she had been buried at the same place with his father. That from the year 1971 to 2018, they had not been on the suit land because they were chased away.

22. That the National Land Commissioner had visited that suit land wherein a report was given to them by the Board which had stated that the people who were on the land were illegally there because the lease had ended in 1969. That they had however been given a letter to go back to the land which letter he had not carried to court.

23. He also confirmed that there was a criminal case pending against them and wherein some of them had been released, others were still proceeding with the case in which his children and his brothers were the suspects.

24. That the case involved both members from his family and members of Benjamin's family wherein they had been charged with the offences of malicious damage which was committed in the year 2018.

25. He denied having cut down trees on the suit land and stated that they had been arrested before the start of the present case wherein the criminal case was still proceeding in court.

26. He also confirmed that Murua Limited were the people who had taken the land from them. That he also knew Angela Wairimu the 1st Defendant, who was the registered proprietor of the land as per the official search records.

27. In re-examination, the witness confirmed that he had conducted a search with the Lands Commissioner who had only recognized entry No. 9 in the said search as a legitimate entry. That he had been shown the lease between Fabian and Ndurere but had not been given a notice of termination of the lease. That they had planted the trees on the land which trees were the subject matter in the case they had been charged which was a case on the offence of Malicious Damage. The Plaintiff closed its case.

Defence case

28. The defence called Peter Nderitu Ngethi, one of the Managing Directors of Murua Ltd the 2nd defendant herein who adopted his statement dated 1st October 2018 as part of his evidence and who testified that his mother, the 1st Defendant and his brother, John were also Directors in the said Company.

29. That the company owned the land in question from the year 2010. That prior to which the land had belonged to his father before it was passed on to his mother as per evidenced in the official search dated 7th February 2019 which he produced as Df exh 1.

30. He testified that to the best of his knowledge, his father had taken possession of the suit land in the year 1971 by which time he was not the Commissioner. That he had become the police Commissioner in 1978.

31. That his father had been occupying the land from the year 1971 where they had kept livestock, fish ponds, indigenous forest, avocado trees (newly planted) and beehives. That the land now belonged to Murua Limited.

32. That his father was a friend to Fabian Wallis but that during the transfer of the land to his father, he had been not present. That in August 2018, there had been an evasion on the farm by the Plaintiffs who had claimed ownership and which claim was out of order.

33. That the Plaintiff and his people have continued to invade the land although they did not live thereon. The Defendant sought a permanent injunction to stop the Plaintiffs from further interference of the suit land, as well as costs and interests thereon.

34. When referred to a letter dated the 30th July 2018 from the Chief Land Registrar, he read the last paragraph, which stipulated that entry No. 9 was to be considered as the last and genuine entry, he testified that despite the said sentiments, Murua Ltd was a family company

which related to the descendants of Ben Gethi who were given the suit land.

35. He also confirmed that his father and Fabian Wallis were friends who conducted businesses together in Nairobi and that the land had been transferred from Fabian to his father as gift but that he did not know what necessitated the transaction. There had been a transfer of the said land subsequently. He denied having assaulted the Plaintiff's people. The Defendant closed its case wherein parties filed their written submissions.

36. It is worth noting that since by consent parties had agreed to adopt their list of documents as exhibits, I shall deem the same produced as such and refer to them as exhibits.

Plaintiff's submissions.

37. After summarizing their case, the Plaintiff's Counsel submitted that in support of their case that they had relied on the title for No. LR No. 7381(IR 6406) Laikipia, (Pf exh 1) which was a document that demonstrated the history of the suit land from the moment it had first been transferred from one Arthur Gilbert Lomax to the first owner to Fabian Harry Wallis who then transferred it to Benjamin Ithinyai and Ndurere Muhunyo as per the 9th entry.

38. That there was an entry No. 10 on the title which showed that the land had been transferred to Benjamin Menja Gathi for a consideration described as "affection" That a closer look at this entry, there had been an attempt to insert the word "gift" without even counter signing the amendment. That the question then arose as to who was making this "gift" for affection considering that the said Fabian Harry Wallis had left Kenya just before the country gained its full independence.

39. That at entry number 11 of the said title, the Registrar of Titles had placed a caveat over the suit land after complaints of questionable dealings but as entry number 12 would demonstrate, the said caution had been mysteriously removed to perpetuate subsequent fraudulent transfers.

40. That Pf exh 2 was an official Search Certificate for parcel No. LR No. 7381(IR 6406) Laikipia which search clearly described the owners of the suit property as Benjamin Ithinyai and Ndurere Muhunyo .

41. The lease dated the 23rd October 1960 filed herein and produced as Pf exh 3 was executed by Fabian Harry Wallis, Ithinyai Marangui and Ndurere Muhunyo and clearly demonstrated that the suit land was legally and lawfully transferred to the latter who assumed ownership. This document was appropriately entered into the title as entry No. 10

42. That the letter of consent dated 28th October 1964, Pf exh 4 confirmed that indeed the transfer of lease from Fabian Harry Wallis to Ithinyai Marangui and Ndurere Muhunyo was above board and conducted in line within the relevant statutory stipulations and therefore legal for all intents and purposes under the laws of the land .

43. The Pf exh. 5, being a conveyance dated 14th April 1966 was a document executed by Fabian Harry Wallis on one part and Ithinyai Marangui and Ndurere Muhunyo Gathii on the other part, which document was attested before the court at Thompson's Falls (now Nyahururu law courts) and clearly authenticated the Plaintiffs' testimony that the suit land was truly bestowed as a gift to Ithinyai Marangui and Ndurere Muhunyo Gathii.

44. That vide a copy of a letter to the Land Registrar dated the 2nd February 2017 produced as Pf exh 6, the same was authored by the Plaintiffs' Counsel and address to the central Land Registry complaining about the non-availability of the records pertaining to the suit land.

45. That Pf exh 7, which was a letter dated the 30th July 2018 from the Chief Land Registrar, a response to their letter dated 2nd February 2017, was to the effect that the Ministry had considered entry No. 9 dated 7th November 1964 in the presentation book number 211 to be the last and genuine entry which had been the transfer of lease from Fabian Harry Wallis to and Ithinyai Marangui and Ndurere Muhunyo.

46. That the affidavit dated 23rd June 2017 herein produced as Pf exh 8, was clear demonstration, by a deceased person, of the machinations and collusion by the Defendant and Senior Officials in the Department of Lands to deny the Plaintiffs a replacement of title to the suit land, which title disappeared when the Plaintiffs had been evicted from the suit land and their properties razed down.

47. The Company records dated the 10th August 2018 were produced as Pf exh 9 Which records were clear that the purported current proprietor of the suit land was Murua Limited a body owned entirely by the family of the late Benjamin Menja Gethi for the sole purpose of hiding their misdeeds behind the veil of incorporation.

48. The letter from the National Land Commission dated the 14th January 2015 herein produced as Pf exh 10 was to the effect that indeed a dispute over the suit land had been referred to the Nyandarua County Land Management Board which had then acknowledged their failure to resolve the dispute (in undated report) and had recommended that the matter proceeds to be determined by a court of competent jurisdiction.

49. The Plaintiff then took issue with the Defendants' case and submitted that the evidence adduced by DW1 did not explain why there was not in existence any deed or instrument whatsoever executed between Fabian Harry Wallis and Benjamin Menja Gethi transferring or conferring any interest in the suit land to the latter or how the suit land was transferred as a gift to Benjamin Menja Gethi by Fabian Harry Wallis when the letter had already left the country seven years earlier.

50. The Plaintiffs' the summary of the Defendants' case was that the court was not furnished with any deed executed between the

Department of Lands and Benjamin Menja Gethi, and further there was no grant of lease to Benjamin Menja Gethi from the Department of Lands. The Plaintiff also pointed out that the court had not been furnished with any letter of consent contrary to the provisions of the Land Control Regulations and therefore the transfer of the suit land from Fabian Harry Wallis to Benjamin Menja Gethi was not legally sanctioned.

51. That from the evidence tendered herein, it had been clear that the Defendants had capriciously, forcefully, fraudulently, unconscionably, dishonestly, illegally and unlawfully grabbed the suit land from its rightful owners and had caused themselves to be registered as proprietors without any color of right which action had deprived the Plaintiffs of their rights to own property in contravention of the provisions of Article 40 of the Constitution. The Plaintiffs relied on the case of **Susan Cheburet Chelugui & Another vs Daniel Toroitich Arap Moi & 5 others [2019]eKLR** to buttress their case.

52. The Plaintiffs' submission was that their evidence had been uncontroverted in comparison to the Defendant's evidence which was inconsistent and did not stand the test of cross examination. They sought that having proved their case to the required standard of in civil matters on a balance of probability that the court finds in favour of their case.

Defendants' Submission.

53. The Defendants gave a summary of the matters arising before this matter was filed in this court before they submitted that the main issue for determination was purely the ownership of LR No. 7381(6406).

54. That it was the Plaintiffs evidence that the land in question was transferred to their fathers in the year 1964 by the then registered owner hence they had inherited their fathers' property. Suffice to note that there was no succession cause filed by the Plaintiffs as alleged beneficiaries of their father's estate.

55. That the Plaintiffs have acknowledged that sometimes in 1971 they had been dispossessed of the land by one Benjamin Menja Gethi who took possession from that year to the year 2018 hence making it a total of 47 years wherein they have never been out of the same .

56. It was the Defendants' evidence that Benjamin Menja Gethi had been given the suit property by the registered owner wherein in 1971 a transfer had been registered in his favour where he had taken possession of the land and had been living thereon with his family from 1971 to date. That they had never parted ways or surrendered the same to anyone. After the death of Benjamin Menja Gethi, the land was transferred to his widow the 1st Defendant vide a Succession Cause and later to the current owner Murua Limited.

57. That sometimes in August 2018 the Plaintiffs together with some members of the family had invaded the said parcel of land and had started to put up temporal structures and cut down trees. The police had been informed wherein they had been arrested and charged in court where the proceedings were still on going. Simultaneously, with the criminal case filed in the lower Court, the Company had filed suit against the Plaintiffs so as to restrain them from trespassing into the property.

58. The Defendants' submission was that the 1st Defendant was wrongly enjoined in the suit as no evidence had been tendered against her and neither had the pleadings touched on her in any manner.

59. That while Plaintiffs relied on the lease dated the 23rd October 1964, to contend that they had inherited the land from their fathers after it had been transferred to them by the previous owner, the truth of the matter was that indeed entry No. 9 was registered against the title where the lease had been given to their fathers for five years running from 1964 to 1969. The same lapsed at the expiry of the 5 years and there had been no evidence that it had been extended.

60. That there was no evidence led on the purported document of transfer herein produced as Pf exh 6 explaining how the document came to be since when it was allegedly signed in 1966, the lease between the two parties was still subsisting. The purported conveyance was never registered in the lands office against the property and no entry was ever made in the register. Further, there was no evidence adduced showing that the stamp duty was ever paid for the conveyance hence it was of no evidentiary value in this case.

That by the time the property was transferred in 1971 by Fabian Harry Wallis to Benjamin Menja Gethi, there was no overriding interest against the title by any person. The transferor was still the registered owner and the land was free from any encumbrances. There was unanimity on both sides that the new registered owner took possession of the property until his demise where the same was passed on to his family.

61. The Defendant's submission was that the current law concerning ownership of land is contained in Section 24, 25 and 26 of the Land Registration Act which deals with the effect of registration of land. That at the moment, the 2nd Defendant was the prima facie owner of the suit property. The Plaintiffs had not pleaded any impropriety against the transfer of the land to the current registered owner. No fraud has been pleaded or any evidence tendered to that effect.

62. That for over 47 years the Plaintiffs have been dispossessed of the land and legitimately so and in any event they had not given any explanation as to why they were so indolent to prosecute the matter. Even if they had any form of claim, which is disputed, the same was time barred and that case by all means was unsustainable due to the Limitation of Actions Act.

63. The Defendants relied on the case of **Civil Appeal No 246 of 2013** between **Arthi Highway Developers Ltd vs. West End Butchery Ltd & Others** which judgment was adopted in the case of **Kitts Investments limited vs. David Kimiti & 8 Others [2019] eKLR**, to submit that where there was absence of evidence to suggest fraud or misrepresentation by the title holder, then the title was prima facie evidence of ownership.

64. That in the case of **Hassan Mohamed Haji vs. Mohammed Keynan & Another [2019] eKLR** the Court had stated that where the issue

arose as to the validity of a title as provided for under Sections 25 and 26 of the Land Registration Act, the burden was always on the person making the allegations to tender the evidence to prove the existence of the exception provided under section 26 (1) (a) and (b).

65. That in the instant case, although the Plaintiffs' evidence was based on allegations that the Defendants had occupied the land and illegally. They had not strictly speaking challenged the authenticity of the title held by the 2nd Defendant.

66. That the author of the letter dated the 30th July 2018 which was purportedly written by the Chief Land Registrar, was not called to testify furthermore, the Land Registration Act had no provision where the Registrar communicated by way of letters. This letter therefore had no evidentiary value.

67. The Defendants sought that the Plaintiffs' case be dismissed and that the prayers in their counterclaim be granted. That further the Plaintiffs be condemned to pay costs for general damages to the tune of Ksh 2,000,000/=.

Analyses and determination.

68. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that the undisputed facts of this case being that Fabian Harry Wallis transferred parcel of land No. LR No. 7381(IR 6406) Laikipia, the suit land herein to the Plaintiffs' fathers Benjamin Ithinyai and Ndurere Muhunyo wherein the transfer was registered in the Lands Titles Registry as entry No. 9 on the 7th November 1964.

69. It is also not in dispute that the Plaintiffs' fathers Benjamin Ithinyai and Ndurere Muhunyo had taken possession of the suit land and lived there with their families up to the year 1971 when they had been evicted from the suit land and have never gone back to date.

70. It is also not in dispute that the Defendants herein took possession of the suit land from 1971 where they have remained in possession to date.

71. What is in dispute is whether the Defendant's occupation of the suit land was acquired unlawfully, illegally and fraudulently.

72. It is important to note that the Plaintiffs in this matter filed suit and an Application seeking interim orders against the Defendants vide ELC No. 50 of 2018 on the 5th September 2018. That it was while the matter was pending the hearing of the application inter parte that it was brought to the attention of the court that the Defendants had also filed suit vide ELC 54 of 2018 on the 2nd October 2018 where they had obtained interim orders, from the honorable judge sitting in Nakuru, against the Plaintiffs herein.

73. By consent, both matters consolidated wherein ELC No. 50 of 2018 become the lead file and ELC No. 54 of 2018 became the counterclaim where the Plaintiffs in the counterclaim had sought for the following orders;

i. A permanent injunction restraining the Defendants either by themselves their servants, agents, employees and family members from entering into, trespassing, onto and/or interfering with and that property known as No. LR No. 7381(IR 6406/1).

ii. Cost of this suit

iii. Further or other reliefs as this honorable court may deem just and expedient in the circumstance of this case.

74. Briefly the matter in question was that the Plaintiffs fathers herein having been employees of a white settler by name Fabian Wallis, they had been gifted with the suit land in the year 1964 just before the white settler left Kenya. That the transfer of the suit land was registered accordingly and the Plaintiffs fathers' and their families took possession of the same where they lived in harmony until the year 1971 wherein PW1's father, using the police force, had caused their eviction from the suit land wherein he had taken possession of the same with his family who have lived there to date.

75. The Plaintiff relied on the documents herein produced as Plaintiff exhibits and took issue with the registration of the Defendants as proprietors to the suit land to the effect that they had obtained title illegally and fraudulently, their fathers' lease having been for 999 years.

76. The Defendants on the other side have denied the Plaintiffs assertion stating that the suit land was transferred to Benjamin Menja Gethi by its proprietor as a gift for affection on the 8th February 1971.

77. Having laid down the background of the matter in question and having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows.

i. Whether there was fraud involved in the transfer of ownership of the suit property to Benjamin Menja Gethi

ii. Whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act.

iii. Do the Plaintiffs have any cause of action against the Defendants herein?

iv. Who should pay the cost of the suit?

78. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

79. I have no doubt in my mind that the Plaintiffs herein have distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, illegality and misrepresentation as submitted by the Plaintiff.

80. It was the Plaintiff’s testimony the suit land herein had been gifted to their father for 999 years. However the documentary evidence adduced by the Plaintiff as Pf exh 1 being the title for No. LR No. 7381(IR 6406) Laikipia, at entry No. 9 , was clear that the suit land herein had been leased to Benjamin Ithinyai and Ndurere Muhunyo for 5 years from 1st November 1964 for a yearly sum of Ksh 20/=. It therefore means that the lease ended in the year 1969. There was no evidence adduced to the effect that the same had been extended or renewed.

81. The Plaintiffs, in considering the remarks made in Pf exh 7, which was a letter from the Chief Land Registrar dated the 30th July 2018, to the effect that the Ministry had considered entry No. 9 dated 7th November 1964 in the title to be the last genuine entry which had transferred the lease from Fabian Harry Wallis to and Ithinyai Marangui and Ndurere Muhunyo, they had therefore concluded that the subsequent entries made therein were fraudulent. I find that since this document was the backbone of the dispute herein, it was incumbent of the Plaintiff to adduce more tangible evidence of for example evidence of an expert witness in the nature of a forensic document examiner, or even an independent witness from the Land Registry to shade more light on the subsequent entries after entry No. 9 as proof these allegation that the subsequent entries after entry No. 9 could have been forgeries.

82. Such evidence was not called. As the provisions of *Section 107 to 109 of the Evidence Act* place the onus of proof on the Plaintiffs, it was their duty to displace such onus. The plaintiffs did not even produce any document to demonstrate that they had reported the alleged crime of fraud to the police or that the matter was pending investigation. This allegation therefore remains un-proved.

83. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

84. On the second issue as to whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act.

85. Section 7 of the Limitation of Actions Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”

86. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiffs’ having been evicted for the suit land in the year 1971 and their parents having claimed ownership in the same, they could seek to recover it from the Defendants, but only if they did so within twelve years from the date on which the right of action accrued to them .

87. There is no doubt that the period of about forty seven (47) years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiffs needed to commence their claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time they filed this suit, the claim was statute barred.

88. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

89. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

90. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of

the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

91. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. Plaintiff's suit is herein dismissed with costs.

92. On the Defendants' counter claim, the court finds that there was evidence adduced which evidence was not rebutted by the Plaintiff that in August the year 2018, there had been an evasion on the farm by the Plaintiff and his family members who claimed that they had ownership and who have continuously continued to invade the suit land.

93. In the case of **Park Tower Vs Moses Chege & others HC Civil suit No. 1825 of 1999 (2014) eKLR** Justice Mutungi held as follows:-

"I agree with the learned judges that where trespass is proved a party needs not prove that he has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages.and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages".

94. The court allows the Defendant's counterclaim and grants prayers to the counterclaim to which:

i. A permanent injunction is herein issued restraining the Defendants either by themselves their servants, agents, employees and family members from entering into, trespassing, onto and/or interfering with and that property known as No. LR No. 7381(IR 6406/1).

ii. The court awards the Defendants herein Ksh 100,000/= as damages for trespass.

95. It is so ordered.

Dated and delivered at Nyahururu this 12th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE