



**Shah v Republic (Criminal Appeal E070 of 2021)
[2024] KEHC 837 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E070 OF 2021
MW MUIGAI, J
JANUARY 25, 2024**

BETWEEN

PRASUL JAYANTILAL SHAH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment delivered on 29th October, 2021 by Hon. M. H. Onkwani Mavoko Criminal Case No. 238 of 2019: Republic vs Prasul Jayantilal Shah)

JUDGMENT

Background

1. The Appellant Prasul Jayantilal Shah was charged with three counts of forcible detainer, forgery and conspiracy to defraud respectively.
2. The information that led to the arraignment of the Appellant before the trial court was as follows:

1st Count

Forcible Detainer Contrary to Section 91 of the [Penal Code](#)

Particulars of the offence were as follows:

Prasul Jayantilal Shah: on diverse dates between 23rd day of December, 2009 and 10th day of January, 2019 at Mlolongo area in Athi River Sub-County, within Machakos County, being in possession of a parcel of land I.R No. 85088/1 L. R. No 25064 measuring 9.186 hectares belonging to Diesel Care Limited without colour of right, held possession of the said land in a manner likely to cause a breach of peace, against Diesel Care Limited who was entitled by law to the possession of the said land.

2nd Count



Forgery contrary to Section 350 (1) of the [Penal Code](#).

Particulars of the offence were as follows:

Prasul Jayantil Shah: on or before 5th December,2006 at unknown place within the Republic of Kenya, jointly with others not before the court, with intent to defraud forged a document namely grant No. I.R No. 85088/1 L. R. No 25064 measuring 9.186 hectares purporting it to be a genuine and valid grant signed by Commissioner of Lands Sammy Mwita.

3rd count

Conspiracy to defraud contrary to Section 317 of the [Penal Code](#).

Particulars of the offence were as follows:

Prasul Jayantil Shah: on or before 5th December,2006 at unknown place within the Republic of Kenya, jointly with others not before the court, conspired with intent to defraud by forging a document namely grant No. I.R No. 85088/1 L. R. No 25064 measuring 9.186 hectares pretending that you were the genuine owner of the said parcel of land a fact you knew to be false or untrue.

3. The Appellant pleaded not guilty to the charges and the matter proceeded to full trial.

Prosecution Case at the Trial Court

4. Prosecution case was anchored on the evidence of seven [7] witnesses.
5. PW1 was Joseph Kaguro Claudia. He testified that on 25/2/2001 he met Miriam Gikandi who was introduced by a friend. They had land to sell. She had the allotment letter and due diligence was done and she showed him the plot. They went to the Lands office and the allotment letter PMFI-1 was okay. He further told court that he did a search and the allotment letter was valid. The land was 9 acres. They entered into an agreement of sale of land. According to PW1, the allotment was in the name of Maji Safi Agencies. PW1 did a search on Maji Safi Agencies there was Miriam and Robert as directors. PW1 entered into a sale agreement PMHIF-2 dated 25/2/2001 between Miriam and Robert Mulei Mutua and Diesel Company limited. PW1's company Diesel was incorporated on 15/3/1990- PMFI 3A. Documents for company PMFI-4. They completed the sale agreement and the was Kshs. 6,000,000/= . PW1 had a project in Sudan and he came back. He met Miriam who told him that someone was developing the land. In 2011 PW1 went to the site and met Shah who was not cooperative.
6. They met the 2nd time at the lawyer's office. the 1st time Shah was putting up a perimeter wall and warehouse. Shah insisted the land belonged to him. According to PW1 Shah told him they meet at the lawyer's office. PW1 went and he did not appear. Testifying that he got a call from CID headquarters that he had invaded Mr. Shah's land and purported that the land was his.
7. Mr. Shah continued to develop the land and PW1 went to the Civil Court and sued Shah in year 2011 in the land court PMFI- 4 of case. It was his testimony that the ELC case was conducted and the parcel of land was awarded to PW1 and upon conclusion of the case Mr. Shah was not ready to move out. Mr. Shah filed matter in the High Court and he declined to follow the High Court orders and they went to Court of Appeal. The matter has not been concluded. The land is with Mr. Shah there is a go down and activities are ongoing.
8. In cross-examination, he told Trial Court that there was no title at the time of entering into the agreement. PW1 was involved in the informal transfer and the owner presented the documents for Registrar to facilitate registration. According to PW1, he believes the premium was paid in cash.



- Testifying that he did the facilitation and gave Mulei cash money and that it was documented. PW1 did not have the petty cash voucher and that he did not know if the Government can allocate private land or not
9. In re-examination, he told Trial Court that DMFII belongs to land, L.R. No. 5458 which led to 1504/2. His property was 1504/11. According to his testimony, he did a search and it was that allotment letter was 1504/11 and that the allotment did not show any subdivisions. Testifying that due diligence showed 1504/11 was for allotment and that the go down was erected after he purchased land.
 10. PW2 was Robert Mulei Mutua. He testified that as regards this case there was land for his company and his wife Miriam Mwikali Mulei which land they sold to Diesel Care Company. Testifying that the owner of Diesel Care was Kirodio. He told trial court that the land was 25 Acres; they had allotment letter. The land was in the name of Maji Safi Agencies, their company. PW1 testified that the company sold to Diesel Care Company the land. According to PW1 his wife is the one that entered into the sale agreement. They met Kirodio in his office and they entered into an agreement. PW1 did not know the agreement as his wife told him they had agreed to sell the land to Kirodio; he did not attend the meeting.
 11. PW2 testified that agreement dated 21/2/2001 between Miriam and Robert against Diesel Care Limited he confirmed his signature and that of Miriam. Testifying that after the sale of land and the Accused went and said he had been sold the land. According to PW2 Kirodio called him and explained that an Indian had claimed the land. He told court that his wife had no agreement with the Indian. PW2's wife passed on in the year 2016, November *vide* death certificate PMF17. He further claimed that the Councilor who later became mayor gave them the land.
 12. In cross-examination, he told court that the allotment was given to his wife as his wife had a relative with the County Council. PW2 could not explain the allotment since it was his wife who followed up. PW2 was not present when the allotment letter was issued; he only signed when called upon by his wife. PW2 knew the allotment was for the land and the land was theirs. He told court that DMFI 1504/11 the allotment number was the land they sold. As per PW2 1/9/1999 is when the land was allotted to them. DMFI showing the owner as Wamaitha and that he does not know the transaction between Wamaitha and Odera in 1986. According to PW2, they did not steal other people's land. They were paid Kshs one million which was paid in cash.
 13. PW3 was Pricilla Njeri Wango. She testified that she works with the Director of Survey, Ministry of Lands Physical Planning since 2006. PW3 does court investigation and attend court. As regards this case she went court in Machakos over the same matter. The case was before the DCI and she recorded a statement on 28/3/19. Concerning land- 1504/11, 9.816 hectares, she discovered that the land was surveyed in the year 1981 July for plan No. 156/174. A deed plan No. 11527 was issued. PW3 had the office copy for L.R No. 1504/11. PW3 discovered that the survey plan L.R No 25064 and on the notes it showed change the user meaning the owner applied for change of user and a new L.R No. 2501453 was issued. According to PW3, a deed plan No. 231453 was issued on 3/8/2000. PW3 found an inconsistency in number issued for Change of User (25044) and this continued in another map L.R. No 213/82. This was also a change of user for L.R No. 11895/4. In conclusion, PW3 found out that L.R. 1504/11 that if owner carried change of user the deed plan was to be surrendered as per *the Act* Cap 299. Secondly, L.R 25064 was not available for change of user in year 2000 as it had been used in the year 1990 as per the map. For L.R 25064 measures 9.186 hectare the Director of Survey does not confirm ownership. She marked the documents as PMFI 8 A- L.R. 1504/11 8b- L.R. 25064- 8C Folio No. 23 8D- Folio 156.
 14. In cross-examination, PW3 testified that the 1st survey was done, the land in question is L.R. 1504/11. The deed plan issued is 111527. It is a genuine document in their records dated 31/12/1981. DMFI-



- a title dated 15/10/1986 for Joseph Odero, Box 50222 Nairobi has L.R Number and she cannot explain because she does deal with titles. PW3 further told court DMFI 4 has L.R. No 1504/11 dated 15/10/1986, the deed plan confirms the documents she had over land has been surveyed and title issued, is a private property. According to PW3, in 1999 private property would not be allocated PEXH2 sale agreement dated 25/2/2001. There was no surrender as per their records. DMFI 8 shows surrender for change of user. She told court further that the practice is in case of surrender, the deed plan is returned and a new title issued; there was an error in issuing. She does not have any surrender. She only had maps.
15. Testifying that deed plan 231/453 exists in their records dated the 3/8/2020- L.R. No. 25064 which is the same for 1504/11. The Surveyor of Kenya is not the allocating authority. Location of property is the same. A letter at page 48 dated 8/6/1999 is for L.R. 1504/11. The deed plan PW3 had 111527 is genuine but No. 231453 is not genuine which was not drawn to standard. They found wrong documents at the survey and they placed them aside. The document is at the Surveyors of Kenya and is questionable. L.R. 1504/11, is the genuine deed plan (111527). The title attached to the deed plan is the same.
 16. PW3 proceeded and testified that the documents do not have the name of the surveyor and that is not proper. According to PW3 the license of the surveyor is supposed to appear in the deed plan. She had a deed plan from survey of Kenya but does not match with the document held. The title held indicates that there was surrender but the deed plan makes her doubt it because that is not proper.
 17. According to PW3 the document that the Accused person forged is Deed Plan No. 23453 awarded to DMFI 7. In the year 2003 the Director of Survey was not using such paper to prepare a deed plan and the fact that the deed is attached to the title document is a forgery. PW3 testified that there is information that is missing in the defense deed plan. The title DMFI 7 was issued on 5/12/2000, PW3 could not tell the registered owner of the property. Further she could not tell who created a forged document, but it's a forgery. PW3 never had this title as she has seen it for the first time in court and as such they would not be able to complain.
 18. In re-examination, she testified that the material used in deed plan attached to DMFI 7 is not proper some information on the surveyor is lacking. The change of user is done and L.R. Number changes and deed plan number.
 19. PW4 was Sammy Silus Komen Mwaita. He testified that he was the Commissioner of Lands from year 1999 to February 2002. His mandate was to head the department in land, administration matters. On 11/7/2019 PW4 testified further that he was shown two grants by Mr. Karanja, a Police Officer. He asked him to tell him about the two grants that belong to the same parcel of land. PMFI 4 thus- L.R. 85400 from L.R. 1504/11 belongs to Diesel Care Limited (PW1).
 20. As per PW3 the police officer wanted to know about the signature on page 3. PW4 perused the document and the signature resembled his. PW4 was shown another document grant DMFI 5- 12 No. 85088 which also belongs to same land reference number 1504/11 and new L.R. No 250264 all contained in same page granted to one Joseph Odero. PW4 noted that the two grants purport to belong to the same parcel of land. The second PW4 looked at the signature and was thin spaced and similar to his signature and could not ascertain it was his for certainty one had to get the Land records and the correspondences to show how the two grants were processed.
 21. It was his testimony that the two grants when he looked at them the dates signed he was working- PMFI 4, was signed 16/4/2001 and PMFI5- purported to be signed on 5/12/2000. According to PW4 he was gazetted one year earlier in 2009. The two grants were signed during his tenure in office. PMFI 4- the signature is his PMFI 5. PW4 can't ascertain if it is his signature. One needs to look at the files and the



- process since the signature is at tail end. PMFI 9 documents for security services (PMFI 4) PW4 gave these documents for the signature to be verified. It is not possible for the two grants to be genuine. One is genuine and the other is forgery. It is not possible for one land to have two title documents. PMFI 9- contains his day to day signature he gave out for verification.
22. In cross-examination. It was PW4's testimony he was Commissioner of Lands in the year 1999 that is when he was gazetted on 4/12/1999 and handed over in February,2003 and became a member of parliament in 2008. He testified that the events occurred 19 years ago and could not recall every document that he signed as a commissioner. According to PW4 there is a mother file, plot file and the title file. These three files are critical for one to differentiate the owner. He only gave the signature for verification that was in the two documents. The L.R. No 1504/11 (25064- 1504/11) shown on the deed plan. It is the same parcel of land from the physical look- date of registration- 30/5/2001- and 5/12/2000. The one for Joseph Odero came first- it was registered first as per the document (5/12/2000). Testifying that the title for Odero is cited as a surrender. PMFI-4 the citation is for a new grant the land was allocated.
 23. If the land had a title, then it could not be allocated. He could not tell which of the two is genuine. According to PW4 the three files as stated earlier have to be received for one to know the original. DMFI 5 talks of Joseph Odero- pursuant to surrender 85088/1- 1st entry 2nd entry- transfer Diesel Holdings Ltd- 27/10/2008. 3rd transfer to Megnel Carlons Ltd. 23/12/2009. Accused, the director of Megnel Carlons Ltd. He cannot make the documents unless employed in the Ministry of Lands. PMFI- letter of allotment.
 24. Letter of allotment cannot be issued to private land. The reference on letter is- 33745/XXII which is the mother file which is a file necessary to ascertain the history of land. The history of the land DMFI 9 page 142-145 this is a certificate of title for L.R. No 1504/2 lease for 999 years 1931. The lease is still in existence. Until surrender Constitution of 2010 all 999 years were translated to 99 years. Entry No. 6 of that title is a mere discharge of a charge. The origin of title can be traced by history entry No. 7 transfers to Wamaitha- 1/10/1972.
 25. This is a certificate of title and not mother file and it can be in the deed file. He told court that entry No. 16- transfer to Odero 1504/11 (99 years) which is the same L.R Number in PMFI 4. Same acreage (9.186 acres) 15/10/1986 is when it was transferred to Joseph Odero as per entry in the documents- L.R. No. 41771, the significance of that number is given to certificates of title being transferred meaning the title existed. He testified that the documents presented to him the title can be issued. 15/10/1986 is when the Odero's title was registered as per these documents. DMFI 3- is a transfer of a title between Wamaitha and Odero (the land be sub- divided and land number- 1504/11 original No. 1504/7/1). He testified that for one to see the land was transferred from Wamaitha to Odero, they have to check the documents at the registry on any approvals. There is a deed plan number. The surrender can only be confirmed from the mother file DMFI 8- entry No. 4 changed to Cannon Assurance for Kshs 600,000/ =. As per PW4, the letter from Commissioner of Lands to Odero on proposed change of user from agricultural to industrial- to show that the change was approved
 26. PW5 was Ali Ibrahim. He testified that he was not originally listed as a witness. His colleague Antipas Nyachwa passed on. He was the one who was a witness in this case. PW5 had worked with the late Document Examiner for 7 years since 2014 till April 2021 when he died. He testified that the statement for Antipas dated 27/3/2019. The copy witness statement of Antipas was shown to him and he told court that it was his signature.
 27. In cross-examination. PW5 told trial court that DMFI 18 which he had not come across stated that the procedure is that if any determination is made by the Commission then it is placed in the Kenya



Gazette. Further, DMFI 19 at page 119 has a familiar signature of Abigael- Vice Chair of the Land Commission. Page 8 he was familiar with issue of Wamaitha and Ndambuki because prior to joining Land Commission he was with DCI for 20 years and he remembers working on this matter while at Land Fraud Unit of DCI Headquarters in the year 2012 and the year 2013. It was his testimony that he got all land related documents for L.R. No. 1540/7 and to the best of his knowledge, the land belongs to Margaret Wamaitha Humphrey.

28. PW6 was 232056 Superintendent of Police Geoffrey Chania. He testified that DCI headquarters approved examination laboratory at DCI headquarters. PW6 testified that he was trained at Rabat University Forensic Science Institute Laboratory Khartum Sudan, he was trained at Gujarat Forensic Laboratory India and security Laboratory in Australia.
29. PW6 examined disputed documents, hand writing, signatures, stamps and seal impressions, seal and counterfeit. PW6 had worked for 13 years. According to PW6 he had the exhibit memo PMFI 1/11/2019- that forwarded the following documents:A1 – A3 copy of title deed I.R. No. 85400 PMFI 4B1- B4- a copy of title deed I.R. No 85088 PMFI 5C1- C3- specimen signature of Sammy Silas Komen Mwaita.D1 – D2- specimen signature of Robert Mulei Mtua.E1 – E 7 a copy of sale agreement between Martin Mwikali Mulei and Robert Mulei and Diesel Care Ltd. For L.R. No. 1504/11 Mavoko Municipality dated 21/2/2001 PMFI 2.F1 – F4- known signature of Sammy Silas KomenG1 – G3- Statement of Mulei Mutua with known signature.H1 – H2- Certified copies for title deed- I.R. 85088 indicated as obtained from H.C. Machakos.

Testifying that an exhibit memo form accompanied the documents. The request was from No 62624 Corporal Moses Mwenda of DCI Athi River Office, who wanted to ascertain if the signature pointed by red pen on the document A1 – A3 PMF4 was made by the same author when comparing with specimen signature on document C1 – C3 and known signature pointed by black pen in FA-F4 (signatures of Sammy Silas Komen).

On examination PW6 formed the opinion that the signatures were made by the same author. Sammy signed A1 – A3. Second request was to ascertain if signature pointed by red pen on questioned document E1- E7 sale agreement dated 21/2/2001 PMFI 2 was made by the same author when compared with specimen signature on document DI-D2 and known signature in black pen in document G1-G3 (Specimen signature of Robert Mulei Mutua). Upon examination PW6 formed the opinion that the Signatures were made by same author.

On Request 3 PW6 was to ascertain if signature in blue pen questioned document marked B1-B4 title deed for I.R No. 85088 was made by the same author when compared with document C1-C3 and known signature pointed by black pen on document F1-F4 (specimen signature of silas Komen). Upon examination PW6 formed an opinion that signatures were made by different authors. Sammy did not append the signature on the document marked BI-B4 that is the title deed for I.R No. 85088.

Request No. 4 was to ascertain whether the document BI-B4 that is for I.R No. 85088 and document HI-H2 copies obtained from the High Court Machakos were from the same document. Upon examination he noted that the pages marked BI & HI were from the same document also pages B3 & H2 were from the same document. Further PW6 noted that there is evidence of alteration of stamp impression.

After consideration he concluded that document marked BI-B4 title deed I.R No. 85088 and HI-H2 copies of the same title from Machakos High Court, all these documents were forged documents. PW6 told trial; court that considering the examinations, the initial and technical workers after construction and arrangement after spacing and alignment, natural pen lifts, ink distribution in the signatures waiting quantity and general resilience among others. Further during the process of examination he



- did caption six images from the video specimen machine comparator machine. He complied the report and signed which he produced before the trial court.
30. In cross-examination, it was his testimony that he has worked in the force for 21 years and in document examination for 13 years and that he did not know the accused. Testifying that his work was to analyze the specimen signatures and the questioned documents. He claimed that there was no dispute in seal that he is an expert in handwriting, seals and signatures. PMFI 12 C (H1-H2)- He received the document; he did not apply for them; he received them from No 62624 Corporal Moses Mwenda of DCI Athi River. PW6 indicated that his report is dated 18/10/2019 and that he did not receive any specimen signature from accused.
 31. PW7 was No. 99501 P.C. George Karuga. He testified that he was investigating officer in this case previously attached at Athi River. On 8/1/2019 PW7 was in the office and was called by DCIO Vincent Kipkorir. He was briefed of the O.B of 8th January,2019. He met Joseph Claudio who narrated that there was his parcel of land located at Weighbridge area- I.R 850400 and L.R No 1504/1. PW7 visited the land in question and met Mr. Shah and informed the latter of the complaint and he sought for sale agreement and title documents for his ownership and took them in circles. He referred them to the advocate and no documents were availed.
 32. According to PW7, in their investigation, the Land Commission investigated the matter and Shah had no documents. They met Antipas Nyanchwa who was aware of the case who took them through and recorded his statement. They went to Director of Survey and met Pricilla Njeri of Survey of Kenya who was aware of the investigations she recorded a statement. It was his testimony that on 1/4/2019, Mr. Prasul was arrested and charged with forcible detainer and that the evidence obtained was that he had a forged title and had a go down on the property. The second was a forgery of title. According to PW7 the title was not genuine on count three PW7 charged the accused with conspiracy to defraud. Later he traced Sammy Silas Komen former Land Commissioner and he recorded his statement. He obtained his signature for forensic analysis. He recorded his statement and specimen signatures and handwriting for forensic analysis which Mr. Shah had refused to give out the title.
 33. PW7 liaised with Mr. Kibera Advocate, the Counsel in ELC matter and he did a letter to Deputy Registrar Machakos and certified copy of title of accused was issued. The said title was incomplete and that is what had been filed in Machakos. As per PW7 during the investigation he was supplied with a statement of Ms. Njeri in ELC 166 of 2011 PMFI 15- PEXH.15 PEAXH- a copy of death certificate of Miriam Mwikali Mulei one of the sellers PMFI 7- PEXH7. The title 85400 for Diesel Care the deed plan No. 1115227- PMFI 4 registration of title for 85400 of 1504/11 under diesel care- PEXH 4. A copy of title I.R. 85088 Land Ref. 25064 15- PEXH15. PW7 got the document from high court and some pages missing and letter PMFI 16- PEXH 16.
 34. In cross-examination, he told trial court that as regards forgery, the accused had forged title. The document examiner proved that 25064- conspiracy to defraud. He tried to get Mr. Odera and he would not be found. Testifying that he charged accused before document examination report was out and on 11/7/2019, Mr. Mwaita recorded his statement after charges had been preferred. 10/1/2019 is when the complainant recorded a statement. 20/2/2018 is when the decision of Court of Appeal was decided. He inquired from the Complainant on progress of the case and he was informed that in ELC the matter had been dismissed.
 35. In re-examination, he testified that he did not receive any stay for criminal proceedings order.
 36. In light of the nature of the case the accused was placed on his defence.



Defence Case

37. The defence case was anchored on six (6) witnesses.
38. DW1 was Prasul Shah. He testified in a sworn statement, that this is the title to the land and that he bought the land from Mr. Joseph Odero for Kshs. 110,000,000/ =. Testifying that the entry No.2 was made in year 2008. They bought the land as Jewel Company for 110 million shillings. Sale agreement DMI 21. According to DW1 when the agreement was signed, in 2008, the said agreement was made in his name and later they decided to register the land in company's name. They paid 10% deposit and the balance was paid later. The purchase price was 100 million shillings. According to him entry No. 2 dated 27/10/2008 thereafter as a family, they decided to transfer it to the company Jewel the Magvel Co. Ltd. Copies of documents DMI 22 & 23 dated 18/7/2008 for Kshs. 11 million and the second one dated October 2008 for Kshs 99,000,000 to Prime Bank Limited. It was the banker's cheque to Kamere & Co. Advocates the lawyers for Mr. Odero.
39. He claimed to have the original title to the property; he did not forge any document. It was his testimony that there was a case filed in Machakos and he participated in that case ELC 166/11 and the Ruling was against them. They went to appeal and stay orders was issued against the order and decree. He told Trial Court that the Ruling was in the year 2018 and he was charged in the year 2019 and the order for stay is still in force. The matter has not been heard in the Court of Appeal. It was his position that he has a stay order from the court, that is why he is still in possession of the land.
40. According to DW1 he had not conspired with anyone to defraud. He produced DMFI17 AS DEXF 17, DMIFI7-DEXH7, DMFI4-DEXH4, DMFI21-DEXH21, DMFI 22 AND 23- DEXH 22 AND DEXH 23. He produced these documents as exhibits.
41. In cross-examination, it was his testimony that they had a running overdraft facility with Prime Bank. The bank gave 99 million shillings a running overdraft. The banker's cheque was issued to Kamere & Co. Advocate acting for Mr. Odero. Testifying that he had receipt from Kamere for the 99 million and that he had no banker's cheque for 99 million from Prime Bank. DWI gave instructions to the bank to issue the banker's cheque.
42. In re-examination. He told trial court that Mr. Odero has never complained of not receiving the purchase price.
43. DW2 was Abigael Mbagaya Mukolwe. She testified that she is the former chair of NLC from February,2013 to February,2019. The case before court relates to a transfer of land. She dealt with the issue for land for Wamaitha. They had a review and Wamaitha family went to them to determine the legality and propriety of the land. DW1 listed all the documents and they made a lot of findings that all parties who appeared before them had no documents. It was Wamaitha who had L.R. 1504/7. testifying that they looked at DMFI 19, that Wamaitha subdivided the land in 4 portions and sold 1982, 1986. 1982 to Christopher and another 15/10/1986 to Joseph Odero 15/6/1988 to prof David Musau. 17/10/1990 to Endowers Ltd that is what they found out. Page 7 of the report. They referred to DMFI 18-19, a task force on allocation of public land- Saitoti Report on Mavoko.
44. The Task Force received report in 2012 and Ndambuki presented his case to the Task Force and they found out that the land belonged to Margaret Wamaitha. Pg. 82 of the Report par 14. Miriam Mwikali was found to sell non- existent land. DMFI 18 is a letter under DW2'S hand and DMFI 19 is under DW2'S hand. DMFI 20 the Saitoti report which she produced as DEXH 18,19 and 20 respectively.
45. In cross-examination, it was her lamentation that the report in Court DEXH 19, the findings she cannot tell the date of gazette. That in the year 2019 they would gazette their findings. DW2



- did not testify in ELC 2011 case and she testified that as NLC Commissioner she should be absolved from any claims as matters that did not fall within their consideration included succession matters and issuance of grants. Therefore, they would not correct the same.
46. The Wamaitha family went with a lease. It was a title and they verified the title deed and found that Wamaitha was the registered owner as per the Report of the Commission. She told Trial Court that the decision of the Commission is not a must to be gazetted
 47. DW3 was Joseph Odero. He testified that he was the owner of the L.R. 25064. He told court that he is the owner of the land- DEXH7 which he bought in 1985 having been approached by original owner through/by Dr. Ndetei. He told him about the land that had been sub-divided and one was vacant ready for sale by the owner. The owner went to the office – Mr. Humphrey and narrated why he wanted to sell the land. He wanted money for medical treatment. The wife lived in the property and he had to consult. DMFI 2 sale agreement. This was Margaret Wamaitha. According to DW3 the agreement was done by Mfamosi & Co. Advocates and the sellers Advocate was Kaplan and Stratton DMFI 3. DW3 signed the sale agreement and they went to Land Board at Machakos to finalize the transfer. DW3 bought the land for Kshs 675,000/=. After the Transfer DMFI 6- the title that he was issued with Certificate of Title dated 15/10/1986 for 999 years. The deed plan number is 11507 dated 30/12/1981. Testifying that the L.R. No. assigned to that deed plan was 1501/11. He opined that the title was not challenged by anyone. DW3 had the intention of building the estate with Dr. Ndetei and tried to reach out to the middle neighbor who opposed the construction.
 48. He then changed the user to industrial. DMFI 9- letter of 13/8/1988 to Commissioner of Lands requesting change of user from agricultural to industrial use. DMFI 10,11,12,13A, 13B, 13, C, 13D. he told court that these letters show the correspondences and authority was given for change of User. He was allowed to change the map for survey. He hired an agent, Odera Kadassian to deal with the Lands Office. DMFI 6- the title he was told to surrender for destruction after the deed plan was prepared for sub-division DMFI 8. According to DW3 the date of surrender is the date the new title was issued to him on 5/12/2000. DEXH 5- the title by Diesel Care, he claimed he had never seen the document.
 49. He stated that he was issued title by the Commissioner of Lands and that it is not forged. He produced in court DMFI-2- DEXH 2, DMFI 6- DEXH6, DMFI 8- DEXH8, DMFI 9- DEXH9, DMFI 11- DEXH 11, DMFI 12- DEXH 12, DMFI 13- DEXH 13- DEXHI 3A, B, C & D, DMFI 3- DEXH 3. He claimed he had never been charged for possessing a forged document.
 50. In cross-examination, it was his testimony that he was a witness in ELC 166/11.
 51. DW4 was Prof. Gordon Wayomba. He told trial court that he is a lecturer in Surveys at Technical University of Kenya and practices as a licensed surveyor under Geometer Survey Ltd. He has been a surveyor since 1976 and worked till November 1991 then moved to UON as a lecturer till 2016. According to DW4 he had worked for 44 years as a surveyor- DMFI 24. In respect to L.R. No 25064 and deed plan No. 231453, he checked the documents at the Survey of Kenya and found it to be genuine and signed on 3/8/2000 by Pauline Gatimu. He claims that she knew her signature and was given the authenticated copy from Director of Survey- DMFI 25, receipt- DMFI 26, Authenticated deed plan- DMFI 27. 156/174 (survey plan and the L.R. No.is indicated and the deed plan is as well). 16/10/98 is when it was done. It was done by Mr. Kasii for Mr. Odero for change of user. The Director compiled a copy and issued a new title. The document is genuine. He produced the documents DEXH 25- DEXH27.
 52. In cross-examination, he told court that 1995-1999 he conducted a Survey for Kenya for Airport Authority. He claimed that he is not aware of fake deed plans during that period. He learnt later that



- people acquired land for the land for the Airport and Survey beacons disputed. According to DW4 change of user. There was only a compilation.
53. In re-examination, he testified that after change of user, if the owner is still the same the land is same and area is same there is no need for a new survey
 54. DW5 was Charles Kipkurui. In his testimony, he told trial court that he works with the Ministry of Lands and Physical Planning as Chief Land Registrar. Testifying that I.R No. 85088 L.R. No. 25064- registered on 5/12/2000 in 1946 for a lease of 999 years from 1st January,1931 to 1st January, 2930. That is the mother title from 1931. He told Trial Court that this was a private land and entry No. 7 is for Margaret Wamaitha Humphrey for Kshs. 30,000 on 1/10/1970 as entry No 52. Entry No. 16 and 17 shows that the entry No. was to Joseph Odero for a term of 999 years. L.R 1504/11. Measuring 9.186 hectares. Title I.R No. 41771 on 15/10/1986. He told Trial Court that there were other transfers to other people (entry No.17 and 18). The title that arose out of that entry is DEXH 6 changed earlier for Kshs. 600,000/= in 1993.
 55. He claimed that there was a subsequent discharge of that change in entry No. 3 dated 20/12/1995. Entry No. 4 the title was surrendered to Government of Kenya for issue of new grant I.R 85088. The surrender was for change of user from freehold to leasehold. He testified further that the surrender document was registered 4/77/4. On 5/12/2000. That gave rise to the user that is before court; the Land Officer surrenders the Land Owner documents. He told court that since this was a title land cannot be allocated, unless there was double allocation.
 56. According to DW5 a letter of allotment cannot direct one of their land and that in 1999 a letter of allotment would not have been issued. He claimed that he wrote a letter to A.G on 4/1/2012- DMFI 29 and I response to the letter by A.G for November, 2011, I.R. 41771 was properly registered with them. He lamented further that the deed file in their archives contains the original title I.R 41771 as well as their copy which shows the owner one Joseph Odero brought the title for surrender. He claimed that both the deed plan and title are surrendered as you cannot separate the title from deed plan. He told court that he informed A.G. that the title for Diesel Care registered in 2001 was a forgery. That fraudsters used I.R No. 1504/11 and deed plan that had been surrendered and used it to prepare a forged title. Further he testified that title 25064 registered on 5/12/2000 is the generic one and that is the title for Magvel Ltd and on 27/10/2008 it was transferred to Jewel Ltd.
 57. Court noted that the witness cannot explain the process of surrender and change of user.
 58. DW5 confirmed that title by Diesel Care was not genuine.
 59. In cross-examination, he told court that Mr. Odero bought land from a lady by the name Wamaitha Margaret Humphrey. He did not present deed plan from their file it is the Surveyors who prepare deed plans. He claimed that he can only comment on matters of registration. He told Trial Court that he testified before the High Court and cannot remember telling the court that Odero's document had irregularities. That he did not change any documents for Odero and he relied on what he found on record.
 60. In re-examination, it was his testimony that the affidavit he relied on in the ELC is the same affidavit he adduced and that the Chief Land Registrar is the Custodian of Titles. He testified that Survey of Kenya does not register titles.
 61. DW6 was Robert Simiyu. He testified that he is Assistant Director Land Administration Based at Ministry of Lands. He told Trial Court that the File for parcel No. 1504/11 is the original file where the title originated from the land in question was registered in the name of Joseph Odero on 15/10/1986. The entry according to DW6 No. 16 DEXH3 is the transfer from Margaret Wamaitha to Odero. The



title number that was issued to Odera was I.R. 41771. Further, he lamented that DEXH 2 is the Title Issued L.R. 1504/11- the deed plan No. is 111527. He stated that the interest Mr. Odera held as per the title was 999 years from 1/1,1931 at annual rent of Kshs. 156/=. That on 1/9/1999 this land was not available for allocation and there was no way Commissioner of Lands would allocate private land. He told Trial Court that the Complainant's Title PEXH 4 has the same L.R. number but different I.R number and the user of the property is also different. He claimed that the land has never been used as residential as it was initially agricultural DEXH7- DEXH8- 6 and DEXH 12. This titles exist in their records. He testified that upon change of user by Odera from agricultural to industrial L.R No. changed from 1504/11 to new L.R. No. 25064 with I.R No. 85088 with a term of 99 years from 1/6/1999 at annual rent of 36,950/=.

62. According to DW6 the change from 999 years to 99 years is because of the change of user that 999 years was for colonial times and once one changed user the government policy was to give 99 years. It was submitted, that as at 1/9/1999 the owner had 999 years and had applied for change of user. DEXH 8- is a surrender title to government. The purpose of surrender was for change of user. The mother title was surrendered for change of use. He testified further that when title is surrendered it is retained in their custody and a new one issued.
63. As per DW6 surrender was done on 5/12/2000 and registered the same time that a new deed plan and a new grant was issued. The new deed plan was issued DEXH 14, DEXH 16- was issued by Director of Survey on 3/12/1999 through Commissioner of Lands. He told Trial Court that the deed plan issued was number 231456 as per the document; that a new L.R No. issued is no. 25064 DEXH 16- is the document used by Director of Survey to forward deed plan to Commissioner of Lands. He testified that once deed title had been surrendered it is cancelled and one cannot transact with it.
64. In cross-examination, it was his testimony that the title issued to Odera was proper and that he cannot tell the forgery of the signature of Mwaita.
65. In re-examination, he told Trial Court that the title was surrendered and registered.

Trial Court Judgment

66. *vide* the judgment dated and delivered on 29/10/2021, the Trial Court found that the prosecution proved its case beyond reasonable doubt in count 2 and 3 of the offences and found the Appellant herein guilty as charged dismissing count 2 and acquitted the Appellant of the same as there was no evidence to show that the Appellant forged the signatures.
67. The Appellant was convicted in Count 1 and III under Section 215 of the [Criminal Procedure Code](#) Cap 75 Laws of Kenya and ordered that under Section 350 (1) of the [Penal Code](#) title documents held by the Appellant being L.R 25064 I.R No. 85088 be forfeited to the State as they were forgeries. The Appellant was acquitted of Count 2 of forgery.

The Appeal

68. The appellant was aggrieved with the judgment and conviction filed this appeal *vide* Petition of Appeal dated 4th November,2021 and filed I court on 5th November,2021 wherein he raised the following grounds that: -
 1. The Honorable Magistrate erred in law and fact in entertaining, proceeding to conduct trial of the Appellant with the offence of Forcible Detainer in utter contempt of the Orders of the Court of Appeal Issued on 20th April 2018 in Civil Application No. 64 of 2018 (UR 56 of 2018) Megvel Cartons Limited Versus Diesel Care Limited, the Registrar of Titles and



the Commissioner of Lands and Civil Application No. 65 of 2018 (UR 57 of 2018) Megvel Cartons Limited Versus Diesel Care Limited, the Registrar of Titles and the Commissioner of lands.

2. The Honorable Magistrate erred in law and fact in convicting the Appellant with the offence of Forcible Detainer in utter contempt of the Orders of the Court of Appeal issued on 20th April, 2018 Civil Application No. 64 of 2018 (UR 56 of 2018) Megvel Cartons Limited Versus Diesel Care Limited, the Registrar of Titles and the Commissioner of Lands. And Civil Application No. 65 of 2018 (UR 57 of 2018) Megvel Cartons Limited Versus Diesel Care Limited, the Registrar of Titles and the Commissioner of lands.
3. The Honorable Magistrate erred in law and fact in violating the principle of judicial precedent and the hierarchy of courts in finding the Appellant herein guilty of Forcible Detainer despite there being a court of Appeal order staying execution of the Judgment and Decree of the ELC court in ELC case No. 166 of 2011: Diesel Care Limited Vs Megvel Cartons Limited & 2 Others.
4. The Honorable Magistrate ignored the Ruling and Orders of the Court of Appeal dated 20.04.2021 in Civil Application No. 64 of 2018 (UR 56 of 2018) Megvel Cartons Limited Versus Diesel Care Limited, the Registrar of Titles and the Commissioner of lands and Civil Application No. 65 of 2018 (UR 57 of 2018) Megvel Cartons Limited Versus Diesel Care Limited, the Registrar of Titles and the Commissioner of Lands; which found that the Appellant had an arguable appeal and stayed execution of the Judgment and Decree in ELC case no 166 of 2011: Diesel Care Limited Vs Megvel Cartons Limited Versus Diesel Care Limited & 2 Others.
5. The Honorable Magistrate exceeded her statutory jurisdiction and proceeded to assume the jurisdiction of the ELC court to determine title to land ownership and subtly declared the complainant in Criminal Case No. 238 of 2019: Republic Vs Prasul Jayantilal Shah to be the true owner of the suit property despite the pendency of Civil Appeal No. 70 of 2018: Megvel Cartons Limited & 2 others and Civil Appeal No. 71 of 2018: Megvel Cartons Limited Vs Diesel Care Limited & 2 Others.
6. The Honorable Magistrate without jurisdiction purported to order forfeiture and destruction of the Title to the property LR 25064 (I.R 85088).
7. The order of forfeiture and destruction of the Title to the property LR 25064 (I.R 85088) is intended to subvert the Appellant's pending appeals in Civil Appeal No. 70 of 2018: Megvel Cartons Limited & 2 others and Civil Appeal No. 71 of 2018: Megvel Cartons Limited Vs Diesel Care Limited & 2 Others.
8. The Honorable Magistrate erred in Law and fact in ignoring the evidence of a clear line of history as to the origin and line of Transmission of L.R No. 25064 (I.R 85088) and that the same has been private property since 1/1/1931.
9. The Honorable Magistrate erred in Law and fact in failing to appreciate that the complainant in the criminal case has never been in occupation of the suit property.
10. The Honorable Magistrate erred in Law and fact in failing to appreciate that the suit property had been private property since the year 1931 when the property was allocated as private land to Cecil Higin.



11. The Honorable Magistrate erred in law and fact in ignoring the evidence of DW2 DW5 and DW6 who testified on personal and official Government records and confirmed that indeed it is the complainant who manipulated records to come up with a title which had no root.
12. The Honorable Magistrate erred in law and fact in wrongly convicting the Appellant with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code for the following reasons: -
 - a. All the alleged occurrences for which the Appellant is alleged to have conspired with others occurred 8 years before Megvel Cartons Limited acquired the suit property.
 - b. DW3, Eng. Joseph Odera who sold the property to Megvel Cartons Limited confirmed to the court that he (Eng. Joseph Odera) acquired the property in the year 1985 and sold the Property to Megvel Cartons Limited in the year 2009.
13. The Honorable Magistrate erred in law and fact in failing to appreciate that if at all there was any forgery and conspiracy to defraud, the Appellant could not have been a party. The Honorable Magistrate ignored the obvious evidence but instead convicted the Appellant in the larger scheme of exerting pressure to settle the civil case.
14. The Honorable Magistrate erred in law and proceeded in excess of jurisdiction in declaring the Complainant to be the true owner of the suit property.
15. The Honorable Magistrate erred in law in failing to consider that to prove the offence of conspiracy to defraud it must be evinced that the accused agreed with other persons to commit the alleged offence.
16. The Honorable Magistrate erred in fact and in law in failing to appreciate that the Prosecution had not proved its case beyond reasonable doubt.
17. The Honorable Magistrate erred in fact and in law in placing heavy reliance on circumstantial evidence over primary documentary evidence tendered before the court by the Appellant.
18. The Honorable Magistrate erred in fact and in law in ignoring documentary evidence produced by the Appellant and instead took for gospel truth the evidence tendered by the prosecution without question.
19. The Honorable Magistrate erred in law in failing to accurately record the court proceedings and deliberately left out crucial evidence from the Defence witnesses.
20. The Honorable Magistrate erred in law in failing to appreciate that the evidential burden of proof placed on the prosecution is that of proving its case beyond reasonable doubt. Instead, the Honorable Court made an order for conviction where the evidence was scanty, dubious and inconsequential.
21. The Honorable Magistrate erred in fact and in law in abdicating and acting in dereliction of the Court's duty in failing to enforce justice and the rule of law.
22. In the circumstances of this case, justice was gravely subverted.
69. The Appellant urged the court to allow the appeal and that the judgment and conviction be quashed and the Appellant be acquitted.
70. The matter was canvassed vide written submissions.



SUBMISSIONS

THE APPELLANT'S SUBMISSIONS** ___

71. The Appellant in his submissions dated and filed in court on 20th January, 2023, wherein counsel for the Appellant submitted on the following issues.
 - i. Whether the learned magistrate erred in law and fact in convicting the Appellant with the offence of forcible detainer contrary to Section 91 of the Penal Code;
 - ii. Whether the learned magistrate erred in law and fact in convicting the Appellant with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code;
 - iii. Whether the learned magistrate correctly applied the law and evidence on the question of ownership of the disputed property.
 - iv. Whether the learned magistrate exceeded her jurisdiction in declaring the complainant as the true owner of the suit property;
 - v. Whether the Appeal should be allowed as sought.
72. As to Whether the learned magistrate erred in law and fact in convicting the Appellant with the offence of forcible detainer contrary to Section 91 of the Penal Code, counsel submitted that the Court of Appeal allowed and granted the stay of execution dated 20th April 2018 effectively staying the findings and determination of Environment and Land Court and maintaining the status quo in allowing the Appellant's Company to continue to occupy the suit property.
73. It was submitted that the honorable Magistrate erred in law and fact in convicting the Appellant with the offence of forcible detainer in utter contempt of the Orders of the Court of appeal issued on 20th April, 2018.
74. It was further submitted that the determination of the Appeal in Civil Appeals No 70 and 71 of 2018: Megvel Cartons Limited Vs Diesel Care Limited and 2 Others remains pending, therefore the question of the ownership of the suit property lies before the Court of Appeal. Contending that ignoring the Ruling and orders of the Court of Appeal dated 20th April, 2014 which found that the Appellant had an arguable appeal and stayed the execution of the judgment and decree of the ELC Court in ELC 166 of 2011 Diesel Care Limited Vs Megvel Cartons Limited & 2 Others.
75. Credence was placed on the case of Mark Kariuki Nthia Vs Republic [2020] eKLR, bolster his position in the hierarchy of courts. He opined that convicting the Appellant the trial court acted in contempt of the Court of Appeal order of 20th April, 2018.
76. On Whether the learned magistrate erred in law and fact in convicting the Appellant with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code, counsel opined that none of the witnesses who testified in the Respondent's case referred to the Appellant's alleged Co-conspirators. Further, none of the exhibits adduced by the respondent demonstrated any conspiracy by the Appellant with any persons whatsoever and no such evidence was presented before the trial court to corroborate the charge as drawn. Reliance was placed on the case of Christopher Wafula Makokha Vs Republic [2014] eKLR, to bolster his position on the offence of conspiracy. It was contended that the honorable Magistrate acted in error in convicting the Appellant for the offence of conspiracy to defraud but failing to consider that the alleged conspiracy occurred 8 years before the Appellant acquired the property.



77. As to whether the learned Magistrate correctly applied the law and evidence on the question of ownership of the disputed property, counsel relied on Section 99 (5) of the Survey Act Cap 299 and submitted that the learned Magistrate failed to consider the history of ownership of the title held by the Appellant as detailed by several officials from the Ministry of Lands and Physical Planning. It was the Appellant's case that trial court erred in failing to find that the Title bearing L.R No. 25064, I.R. No. 85088 and D.P. No. 231453 is the valid title and that the Appellant's Company Megvel Cartons Limited has a legal right of ownership over the property.
78. Reliance was on the case of *Munyu Maina Vs Hiram Gathiha Maina* (2009) eKLR, to substantiate his position when a registered proprietor's root of title is under challenge., further reliance was placed on *Nakuru Industries Limited Vs Vinod Shah & (2016) eKLR*, *Nelson Kazungu Chai & 9 Others Versus Pwani University College* [2017] eKLR, *Alice Chemutai Too Vs Nickson Kipkirui Korir & 2 Others* (2015) eKLR and *Richard Kiptalam Biengo Vs Republic* (2015) eKLR, and submitted that the Respondent failed to prove that the Appellant's Title is irregular and neglected to discharge its duty of proving that the Complainant's title is lawful.
79. On the issue of whether the learned magistrate exceeded her jurisdiction in declaring the complainant as the true owner of the suit property, it was submitted that the Honorable Magistrate erred in law and acted in excess in declaring the complainant to be the true owner of the suit property despite the fact that the court was well aware of the court of appeal decision. Counsel placed credence on the case of *Samuel Kamau Macharia and Another Vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, to bolster his position.
80. On whether the Appeal should be allowed as sought, it was argued that the trial court relied on circumstantial evidence instead of documentary evidence adduced by Appellant. Counsel relied on the case of *Sawe Vs Republic* [2003] KLR 364 to cement his discontent on the circumstantial evidence. Contending that it is discernible that the charges against the Appellant were fabricated from the onset and were institute for a collateral purpose of exerting pressure on the Appellant. The counsel urged the court to quash the decision of the Learned Magistrate and the Appellant herein be acquitted of the charges levelled against him.

RESPONDENTS SUBMISSIONS

81. The Respondent in his submissions dated and filed in court on 1st March, 2023, wherein State Counsel while opposing the Appeal Averred that the Court of Appeal stay orders was/were in respect to the execution of the judgment and decree by Diesel Care Limited.
82. It was Counsel's contention that the Court of Appeal did not issue any orders with regard to the Criminal proceedings of Criminal Case no. 238 of 2019 at Mavoko Law Courts. Reliance was placed on Article 157 (6) (a) CoK 2010 to support his position on the mandate of ODPP.
83. further, Counsel cited the case of *Musyoki Kimanthi Vs Inspector General of Police & 2 others* (2014) eKLR,
84. On the second ground on the face of the Petition of Appeal it was submitted that the Trial Court was right in convicting the Appellant as the prosecution availed direct and documentary evidence to show that indeed the Appellant was guilty as charged. He averred that the Court of Appeal issued a stay order in respect to the execution of the judgment and decree of ELC court in ELC Case No. 166 of 2011 which does not bar the ODPP from instituting criminal charges against the Appellant. Credence was placed on the case of *Richard Kiptalam Biengo Vs Republic Criminal Appeal No.430of 2013*, to cement his argument on the offence of forcible retainer. It was the position of Respondent that the



prosecution clearly demonstrated that the Appellant was in actual possession of L.R No. 1504/11 I.R 85400 measuring 9.816 hectares hence he had no right over the said piece of land since he had no valid title document.

85. As to the third ground on the face of the petition of Appeal, State Counsel opined that the trial court did not violate the principle of judicial precedent and hierarchy of courts in finding the Appellant guilty of forcible detainer. Counsel made reference to *Prasul Jayantil Shah & Another Vs Inspector General of National Police Service & 3 others* [2020] eKLR, where the petition was dismissed and the criminal trial allowed to proceed effectively in the Magistrate's court.
86. As to the fourth ground on the face of the petition of Appeal, counsel averred that the Court of Appeal stay orders were granted in respect to ELC court in ELC case No. 166 of 2011 *Diesel Care Limited Vs Megvel Cartons Limited and 2 Others*.
87. Regarding the fifth ground on the face of Petition of the Appeal, it was submitted that the Trial court scrutinized the direct documentary evidence availed by prosecution and defence. According to State Counsel, the Trial Court noted that the Appellant's title deed with regards to L. R. No 2504 I.R No. 85088 did not have Original records from the Ministry of Lands and that the deed plan 231453 was not genuine as per the procedure at survey of Kenya.
88. It was the case of the Respondent that the Trial Court was right to adopt the findings in the ELC hence the trial court did not usurp the jurisdiction of the ELC court but adopted its finding based on the cogent evidence provided by the prosecution.
89. With regard to sixth round on the face of Petition of the Appeal, state counsel relied on Section 350 (1) of the Penal Code to bolster his stance on the forged document, and contended that Trial Court was right in ordering for the forfeiture and destruction of the title to property L.R No. 25064 I.R 85088. Reliance was placed on the testimony of the former Commissioner of land, PW4 who testified that L.R 1504/11 was the genuine one bearing his signature.
90. Regarding the seventh ground on the face of the Petition of Appeal, state counsel averred that the trial court was right to issue a forfeiture order of the title documents L.R No. 25064 I.R. No. 85088. The core reason being that Section 350 (1) of the Penal code empowers the trial court to forfeit forged documents.
91. As to the eighth ground of the face of the Petition of Appeal, it was submitted that the trial court was right to disregard the defence of the Appellant as there were no official records in the Ministry of Land in respect to LR No. 25064 I.R. No. 85088 secondly that the deed Plan No. 231453 was not procedurally obtained from the survey of Kenya.
92. On the ninth ground on the face of the Petition of Appeal, it was the contention of the Respondent that no law makes it mandatory for a legal owner of a property to reside therein. That the Appellant without title document took possession of the land to detriment of the complainant.
93. As to tenth ground of the Record of Appeal, counsel opined that the trial court was right in disputing whether the property was private land since no official records exists in the Ministry of Lands to ascertain the same.
94. State Counsel looked at every ground of the petition of the Appeal and submitted that the trial court scrutinized the criminal culpability of the Appellant with regards to forcible detainer, forgery and conspiracy to defraud.
95. On the elements of the offence proved beyond reasonable doubt: first regarding forcible detainer, Counsel relied on the Section 91 of the Penal Code and cited the Case of *Richard Kiptalam Biengo Vs*



Republic Criminal Appeal No. 430 of 2013 and Albert Ouma Matiya Vs Republic Criminal Appeal 8 of 2012, to support the limb of forcible detainer

96. As to conspiracy, reliance was placed on Section 317 of the Penal Code and submitted that the Appellant conspired with other individuals in order to obtain title documents LR No. 25064 I.R. No. 85088. Contending that the Appellant is the only individual who will benefit from the forged title documents hence the trial court was right to convict the Appellant with the offence of conspiracy to defraud.
97. Respondent invited this court to uphold the conviction of the trial court and that the Appellant needs to be sentenced appropriately by the Trial Court.

HIGHLIGHTED SUBMISSIONS

98. Mr. Obuya highlighted his submissions as follows:
1. After hearing was concluded of forcible detainer and conspiracy to defraud, prior to sentencing an application was filed before G.V Odunga J wherein the judge suspended further proceedings hence no sentence was imposed. It was submitted by Mr. Obuya that the dispute relates to ownership of land of land LR. 25064 Mavoko. Contending that there has been consolidated proceedings.
99. Counsel highlighted the following:
1. First matter was ELC 166/2011 Machakos ELC court cancelled the Accused/Appellant's title due to lapses in survey and injuncted him to use the property.
 2. The accused/Appellant moved to Court of Appeal 64 and 65 of 2018 and on 20th April, 2018 at Page 56-65 of Record of Appeal the Court of Appeal stayed the execution of the Judgment and decree which effectively meant that the Accused/Appellant remained in possession pending determination of the appeal.
 3. During the subsistence of this order the criminal proceeding was ongoing and the stay order by C.O.A were in place. It is their submissions the conviction was contrary to the orders of the COA. Highlighting that the accused/Appellant was to give up possession and Court of Appeal stayed the said order of ELC.
 4. The accused was acquitted of the offence of conspiracy to defraud but acquitted of the charge of forgery. Pg. 8 of the Record of Appeal Charge: on or before 5/12/2006 at an unknown place within the Republic of Kenya. This has been private land since 1930 and ownership changed from one to another after Joseph Odero who sold to the accused person 2008. Reference was made to Page 278 record of appeal the Trial court stated on the judgment that the accused person owned the property in 2008. 2006 was Mr. Odero who is alive and was a witness Dw.3.
 5. According to counsel Page.244 of the record of appeal Mr. Joseph Odero Dw3 testified in court and agreed he sold the property to the accused person yet the charge is of 2006 while the accused person was not an owner of the property.
 6. Further reference was made on Page 281 of the Record of Appeal indicating that the accused person dealt with the issue of the deed plan. Evidence on record during trial and page 108 of Record of Appeal and the court will see the Grant issued to Mr. Joseph Odero deed plan issued to Joseph Odero.
 7. The Title registration of the Act page. 105 registered in the name of Joseph Odero up to 2008.



8. According the counsel Mr. Odero acquired the property in 1970 as agricultural land where he wanted to change the user from agricultural to industrial. He applied for change of user and surrendered the title and was issued with this Title in 2000.
 9. No formal survey was conducted and as such there was irregularity with the surrender process. Deed plan page 23/453 dated 31/9/2000 and years before the accused person acquired the property. The person who obtained the deed plan was not the accused person who surrendered the title
 10. Page 99 record of appeal deed of surrender was by DW3 in 20/9/2000 by DW3 and he came to court and not the accused person who came 8 years later and bought the property.
 11. Counsel averred that these charges/collateral attack to put presumed on the Indians to settle – civil case that was pending.
 12. Civil appeal no. 20 of 2018 in court of appeal between Maglev limited and the other company. The case was concluded and an attempt to proceed to Supreme court was declined for lack of jurisdiction.
 13. There is Petition No. 5 of 2013 ELC Machakos Joseph Odero vs Diesel Care Status quo order as pertains to the suit property.
100. Mr. Mwangera State Counsel highlighted his submissions as follows:
1. There is Respondents summary of cases of 1/3/2023. There are 5 cases. The matter was dismissed in court of Appeal as shown at page 19 of the summary of cases.
 2. Civil application 65 of 2018 was about the execution of the judgment and decree of 166 of 2011 which is also attached.
 3. The stay of execution was in the ELC case 166 of 2011 and not criminal matter – which had no stay of proceedings order.
 4. Prasul Jayantalal & anor –vs- Inspector general of police service – Kemei J ordered the matter to proceed up to its logical conclusions.
 5. There is an appeal on conviction of accused on 2 counts out of three. 7 witnesses testified in court.
 6. Pw.3 asserted the appellant deed plan had issues and inconsistencies around the original deed plan 111527 of LR 1504/2011 was the original surveyed deed plan used by the Complainant PW.1.
 7. Pw4 former land Commissioner to verify the signature/title L.R. 25064 of the Appellant. The signature was not his and this is supported by Document Examiner PW. VI. The signature appearing on the Title Deed was.is indeed false.
 8. According to state counsel, PW.1 – PW. VII is overwhelming that indeed the charge of forcible detainer and conspiracy to defraud are proved.
 9. With regard to the forgery counsel opined that the accused person is a beneficiary of the company. The evidence on record shows the ownership of land from 1930 to date and the accused person’s version of property from Joseph Odero to the Appellant is not backed by evidence/documents – No evidence of payment of 100,000,000/- by Prime Bank Confirming the payment. The parties have moved to the Supreme Court Application No. 008 of 2013 where Notice of motion was dismissed.



The matter has moved from ELC to court of appeal to supreme court. It is true the High court by Hon G. V. Odunga J gave a stay on the sentence to go back to the court in Mavoko law courts to face sentence on the counts. The appellant took possession of the land and built a factory there and count No.3 and he is the biggest beneficiary.

101. Mr. Ochieng counsel for the Appellant highlighted his submissions as follows:

1. He had listened to the ODPP - prosecution of the public interest and not a prosecution of fraud and are bound to explain to the court the issues. 2. Supreme court ruling of the court were of the view that the Trial Court ELC ignored evidence on the root of the title and ignored the evidence. DMFI- 1 Page 1 & 2 – page 48 – DMFI-1 Title up to page 43 – 48 of record of appeal Page. 48 – Transfer to Joseph Odero 9.186 Ha for 999 years. This was private land Since 1931 not available for allocation.
2. Agreement of sale of 8/11/1985 between Margaret Wamaitha Humphrey and Joseph Odero - DMFI-page 49 Record of Appeal. DMFI-8 – page.14, 15,16 – page 53, 54, 55 Record of Appeal. There is a transfer of Joseph Odero.
3. Counsel further highlighted that Page 66 – certificate of title D Exhibit 6 a resultant title. Court of Appeal did not consider the sale and which before this court is an appeal of a criminal matter and ought to be proved beyond reasonable doubt.
4. Counsel further highlighted that the question the ODPP and the AG ought to explain is whether private land for 99 years is available by the Government.
5. The certificate of title page 66 Record of Appeal and Deed Plan – land survey Plan No. 111527 which was surrendered by Mr. Odero for change of user to the lands office. Annexed Deed plan page 67 Record of Appeal the surrender is at page 73 and resultant Title page 65 – 70.
6. If Mr. Odero is the one who applied for change of user and obtained a new title how come a party who bought the land 10 years later be charged with forgery.
7. Page 78 DMFI-12 Record of Appeal – DMFI-12 – the same title was used by Mr. Odero for the loan of Kshs. 600,000/- in 1993 and there is a discharge of charge and this particular title was genuine. Page 79 Record of Appeal surrender to the government of Republic of Kenya in consideration of New Grant IR 185088 of 5/12/2000.
8. Page 75 letter of 1/2/2012 by Ministry of Lands DMFI-10 shows the letter of 1/2/2012 used the surrendered title to make allocation. The AG did not take up the matter and never filed the submissions. The accused person was charged in Mavoko law court where there is stay order in Court of Appeal. The charges in Mavoko law court were not proved beyond reasonable doubt.
9. At the time of commencement of the criminal proceedings there was a stay order by Court of Appeal a director of the company that is of accused.
10. They filed constitutional petition counsel challenged the proceedings.
11. Petition before Hon. D. K. Kemei Ruling of 2019 they were told to go and present their defence to the Trial Court and the decisions did not determine the matter.
12. How can one be charged in criminal proceedings where the party has stay from Court of Appeal?



13. According to the counsel Page 63 Record of Appeal at page 8 of the Ruling/judgment the matter whether private land can be allocated and the question has not been determined and was to be determined by the ELC suit on appeal. There was evidence of root of title from 1930 –to date and provided the evidence in court. contending that If there is any clearer use on root of title in this case. How did the accused person confirm whether it is clear history? Highlighting that they challenged evidence from Ministry of lands. Opining that the entire file of Mrs. Wamaitha was ignored.
14. Mr. Odero testified that he was paid 110,000,000/-. We provided all the transfer documents. A receipt which is not confirmed. Page 149 Record of Appeal – DMFI-23 - prime bank kshs.99, 000,000/- and Prime bank kshs.4, 400,000/-.

According to the counsel, Kamere Advocates represented Mr. Odero. Further counsel averred that there was gross abuse of the criminal justice system. Hon. G. V. Odunga – J ordered that there was/is a very unique case. Despite Mr. Odero owner of the property and applied for change of user and did not direct himself of the title the court directed the title be surrendered for destruction. The Trial court at page.284 Record of Appeal delivered that the genuine title to be destroyed. It was highlighted that the supreme court has not determined as the same awaits the matter to be heard and determined by the Trial court and the supreme court can proceed. Further, he stated that for the accused to suffer conviction and go to jail on a transaction that occurred 10 years before they bought the property is a gross injustice.
15. It was the Appellant’s case that if irregularity was in the title of Odero then title revert back to Odero as the one who bought property from Wamaitha and will not derail Odero of the original title. Counsel questioned How the allotment was issued on private land since 1930. It was highlighted that documents issued for surrender were used to process over the title. Counsel urged the court and specifically the high court to exercise its criminal jurisdiction.
16. Counsel questioned on What was the complainants root title? Where and when was the Complainant title confirmed? The Trial Court erred and ignored the issuance of private land and no fair hearing under Article 50 & Article 25 Constitution of Kenya 2010. All these transactions took place during Odero’s time- forgery the accused was not here. The genuine titles were not presented, returned or copies. Clear case of injustice in this matter – burden not beyond reasonable doubt. Machakos pet 5 of 2023 – status quo order issued on 29/06/2023. As per the counsel, Megvel built a factory with 700 people and there was threat of eviction – awaiting ELC to determine whether private land can be subject to allocation.

DETERMINATION/ ANALYSIS

102. The Court considered the Trial Court record Court proceedings and judgment various cases filed in relation to the same subject-matter and detailed written and oral submissions by able legal teams representing parties to the contested dispute(s) and various issues emerge for determination in reaching the decision whether the appeal is allowed or dismissed.
103. In a nutshell the appeal is on the condensed on the following issues; that the Trial Court proceeded with the criminal trial in spite of the Court of Appeal Ruling staying the judgment and decree of ELC 166/2011 pending hearing & determination of the appeal; Trial Court lacked jurisdiction to determine valid title/ownership of land and was not legally capable to issue orders of confiscation and destruction of title; the Trial Court failed to observe judicial precedent and hierarchy of Courts; the Trial Court failed to consider the documents and evidence by the Defence and erroneously found the case was proved beyond reasonable doubt and the conviction was not sound in law.



104. As a first appellate court, the court is obligated to re-evaluate the evidence afresh, and make its own conclusions bearing in mind that it did not have the advantage of hearing and observing the demeanor of the witnesses as elaborated in the case of *Okeno vs. Republic* [1972] E.A 32.
105. The ever-constant duty of the prosecution in a criminal case; proving the case against the accused beyond reasonable doubt. The discharge or otherwise of this onus constitutes the overall issue for determination in this appeal.
106. It is trite that all criminal offences require proof beyond reasonable doubt. In *Peter Wafula Juma & 2 Others v Republic* [2014] eKLR⁹; the d Court referred to Viscount Sankey L.C in the case of *H.L. (E)* WOOLMINGTON V DPP* [1935] A.C 462 pp 481 on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

107. I have considered the proceedings before the Trial Court and judgment, the appeal written and oral submissions made herein on behalf of the Appellants and the Respondents. This appeal lies on whether the prosecution proved its case against the Appellant to the required legal standard, and in particular, whether it proved all the essential ingredients of the charge of forcible detainer and conspiracy to defraud as prescribed by law.
108. The court shall delve into each ingredient of the offence of forcible detainer as is established in Section 91 of the Penal Code (Chapter 63 of the Laws of Kenya) as follows;

“91. Forcible detainer

Any person who, being in actual possession of land without color of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanor termed forcible detainer.”



109. In *Julius Edapal Ekai v Republic* [2018] eKLR, HIGH COURT CRIMINAL APPEAL NO. 31 OF 2017, Hon. Riechi J., stated as follows;

“ A literal reading of Section 91 of the Penal Code shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that:-

- a. A person has actual possession of land
- b. The person has no right over the land
- c. The act of possession is against the interests of the legal owner or the person legally entitled to the land; and
- d. The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.”

(a) A person has actual possession of land

110. It was the appellant’s testimony that he bought the land from Joseph Odero for Kshs 110,000,000 and failed to produce the sale agreement but produced Certificate of Title which he stated that it was made in his name and transferred to the Appellant but later they registered the land in the company’s name. The Appellant had the original title to the property and did not forge any document. He stated that there was a case filed in Machakos ELC 166/11 whose decision upheld the Complainants title. The Appellant appealed the ELC Court decision and was granted stay of execution order in *Megvel Cartons Ltd vs Diesel Care Ltd & 2 Others* [2018] eKLR and thus remained in possession of the property.

111. PW1 the Complainant testified he operating as Diesel Care Ltd purchased the suit property LR Number 1504/11 Mavoko Municipality from Miriam Mwikali Mulei & Robert Mulei Mutua t/a Maji Safi Agencies on 21/2/2001. They entered into an agreement of sale of land of 21/2/2001 and he was issued with title documents. He testified he was in Sudan, that a dispute arose where he was informed that someone was developing the land and when he went to the site he met with accused who was putting up a perimeter wall and a warehouse. He later was called from the CID Headquarters that there was a complaint that he had invaded Mr Shah’s land and he purported that the land was his and continued to develop the land.

112. testified that he went to the civil court and sued Mr Shah in the ELC 166 of 2011 and that it was difficult for the case to proceed so he decided to file a complaint at the National Land Commission. The case at the ELC Case was concluded and he was awarded the parcel of land but Mr Shah was still not ready to vacate the land. He testified that Mr Shah is still on the property, there is a godown and industrial activities ongoing.

It is therefore noted that the appellant is in actual possession of the land during the ownership wrangle that remained unresolved, this ingredient has been met.

(b) The person has no right over the land

113. On this ingredient, PW1 during cross examination stated that there was no title at the time of entering into the sale agreement and that the owner presented documents to the Registrar and there was an informal transfer. He stated that the title had history of the land and transfer and that the land he bought was an allotment and that as at 5.12.2006 he was the owner of the land as it was transferred to him in the year 2001. He stated that the accused forged the land title while he had the original documents. He however stated that he could not tell whether Megvel Cartons Ltd bought the property or not.



114. testified that together with his wife they sold land to Diesel Care Company and that the land had been given to them by the mayor and they had a letter of allotment and that after the sale of the land, an Indian came and claimed that the land had been sold to him.
115. testified that the land was surveyed in 1981 and a deed plan was issued and there was a change of user on the survey plan but found inconsistencies in number issued for change of user and concluded that L.R 1504/11 that if owner carried change of user the deed plan was to be surrendered and that L.R 25064 was not available for change of user in the year 2000 as it had been used in the year 1990 and that the director of survey does not confirm ownership.
116. DW1 on the other hand testified that he bought the land from Joseph Odera and was given the original title. He stated that the sale agreement was made in his name and they later decided to register the land in the Company's name.
117. DW3 testified that he was the owner of the land L.R 25064 that he bought the property in the year 1985 from Margaret Wamaitha Humphreys and transfer was registered on 15/10/1986 signed a sale agreement and was issued with a certificate of title for 999 years. LR 1504/11 (IR No 6458/16) on 15/10/1986. He changed the user to industrial and surrendered the title and executed Deed of Surrender, because he had intentions of building an industry and after a successful change a new title was issued to him LR No 25064 (IR 85088) with new user being commercial.
118. During trial the evidence on record as summarized above pitted the Complainant PW1 against the Accused person/Appellant DW1. While PW1 buyer relied on the evidence of PW2 seller, PW3 Employee at Director of Survey & PW4 Commissioner of Lands supported by the evidence of PW5 & PW6 & PW7 that the documents by the Appellant were forged; on the other hand the Appellant presented evidence how he bought the suit property from DW3, DW2 from National Land Commission confirmed Margaret Wamaitha 's Land was subdivided and a portion sold to DW3 who in turn sold to the Appellant. DW4 from Survey of Kenya DW5 Chief Land Registrar & DW6 Assistant Director in Lan Administration all confirmed the Appellant's documents were legitimate. In light of Ministry of Lands Personnel claiming divergent positions on the same property, there remained a dispute as to ownership and/or legal right to land.
119. Therefore, during and from the criminal proceedings it was not not clear whether the accused had any legal right over the land as there is no clear proof that the accused had a land transaction with the DW3 whom he alleged sold him the land.
120. DW3 in his testimony only testifies as to how he bought the land and how he effected change of user. He even stated that he was a witness in the ELC case and he does not allude to any subsequent sale. The issue of ownership remained in dispute as evidenced by the various cases until the final determination of the Appeal by the Court of Appeal.

(c) The act of possession is against the interests of the legal owner or the person legally entitled to the land;

121. It is clear the complainant filed the case because he was aggrieved by the conduct of the accused being in possession of the land and that he was developing godowns while he was rightful owner and that even the ELC 166/2011 case which ownership issues had been canvassed determined that he was the one with the valid title thus the rightful owner. However, an appeal was preferred and awaited the outcome to confirm that Appellant's possession was against the Legal Owner's rights.



(d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.”

122. It is no doubt that the possession of the land by the accused is the genesis of all the court battles including this appeal. As per both parties, each of them contends that the land rightfully belonged to them and even produced documents to corroborate the ownership.
123. The prosecution had the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged. See John Mutua Munyoki vs. Republic [2017] eKLR).
124. The matter has been subject to myriad of Court cases; the chronology of the cases is as follows;
1. ELC CASE 166 OF 2011 [2018] e KLR MACHAKOS -DIESEL CARE LTD VS MEGVEL CARTONS LTD; REGISTRAR OF TITLES & COMMISSIONER OF LANDS. The Court on 26/1/2018 found that the 1st Defendant failed to prove on a balance of probability that it holds a valid title for LR No 25064 (I.R.85088) and allowed the Plaintiff's claim and dismissed the 1st Defendant's Counterclaim
 2. MEGVEL CARTONS LTD VS DIESEL CARE LTD & 2 OTHERS [2018] e KLR; The Court of Appeal granted both applications and stayed Judgment & decree of 26/1/2028 and the Ruling & order of 23/2/2018 on pending hearing & determination of Civil Appeals 70 & 71 of 2018.
 3. CRIMINAL CASE NO 238 OF 2019 -MAVOKO MAGISTRATE'S COURT REPUBLIC VS PRASUL JAYANTILAL SHAH; The Accused person/Appellant herein was charged with offences of Forcible Detainer c/s Section 91 of Penal Code; Forgery c/s 350 (1) Penal Code & Conspiracy to Defraud C/s 317 of the Penal Code.
 4. PRASUL JAYANTLAL SHAH VS INSPECTOR GENERAL OF POLICE SERVICE & 3 OTHERS [2020] e KLR, The application to stop and hold that criminal proceedings are illegal and unconstitutional due to stay of execution orders granted in the Court of Appeal was dismissed under Article 157CoK & Section 193A CPC on 29/5/2020.
 5. PRASUL JAYANTILAL SHAH VS REPUBLIC JOSEPH KARUORO CLAUDIO (INTERESTED PARTY) [2022] eKLR; The Court halted the criminal proceedings to avoid a situation where the Applicant might lose his liberty when the subject-matter's status is/was yet to be determined and this Court is yet to determine the proprietary of the criminal proceedings.
 6. Megvel Cartons Ltd vs Diesel Care Ltd Registrar of Titles & Commissioner of Lands Court of APPEAL Civil Appeal 70 of 2018 on 17/2/2023 upheld the ELC 166 of 2011 Judgment & Decree. The Court found that the National Land Commission carried out investigations and found records for L.R. 1504/11 I R 85400 were missing at the Ministry of Lands and a file was reconstructed from documents availed from the Survey Office. The Appellant failed to prove fraud and therefore the failure by the Appellant to adduce evidence to rebut the 1st Respondent's evidence, that evidence remained uncontroverted. The judgment of ELC 166/2011 was upheld.
 7. Megvel Cartons Ltd vs Diesel Care Ltd Registrar of Titles & Commissioner of Lands App No 008 of 2023; The Supreme Court dismissed the application for lack of requisite jurisdiction.



125. Taking into account the various cases filed throughout the justice system confirms that there has been until 17/2/2023 a long standing dispute with rival, parallel and competing positions of ownership of land; where there have been 2 title documents over the same suit property LR 1504/11 (IR 85400) The ELC Court holds the legal mandate/requisite jurisdiction by virtue of Article 162 (2) of Constitution and Section 13 of the Land & Environment Act to hear & determine matters regarding the environment and the use and occupation of, and title to, land.
126. The ELC Court determined the issue of ownership vide Judgment of 26/1/2018 in ELC 166 OF 2011. Thereafter, the Appellant filed an appeal and stay of the orders in ELC 166 OF 2011 were granted pending hearing and determination of the appeal vide Civil Application 65 of 2018.
127. Therefore, at this juncture the Trial Court was within its rights to rely on the finding of ELC 166 of 2011 as the Court mandated to determine Land and Environment matters. Secondly, in the hierarchy of Courts, the Trial Court was bound by the decision of the ELC Court.
128. saI find the Trial Court acted legally and appropriately as at Pg 16 the Trial Court adopted the finding of ELC 166 of 2011 in determining the commission of the criminal offences. There is also no part of the proceedings and judgment of the Trial Court that confirms the Trial Court was informed and/or presented with Ruling of Court of Appeal staying judgment of ELC 166 of 2011. The Trial Court judgment was on 29/10/2021 and Ruling on stay of execution of ELC Court was on 20/4/2018. Even then the Trial Court relied on ELC 166 of 2011 and awaited the outcome of the appeal by Court of Appeal as the said Ruling was to stay the judgment pending hearing and determination of the Appeal.
129. The Court finds that the Trial Court did not err in conducting trial following binding judicial precedent and hierarchy of Courts as the Court of Appeal Ruling did not refer or stay the Criminal proceedings and the High Court Ruling 29/5/2020 allowed criminal proceedings to go on as prosecution mandate was/is held by the ODP under Article 157 of *the Constitution*. This case and all the pending cases over the issue of ownership of the land remained relevant and ongoing until the appeal was determined, in the meantime, the disputes continued to ensue.
130. In the criminal proceedings, the prosecution has to prove its case beyond reasonable doubt in Count 1 in the charge of forcible detainer one of the ingredients of the offence ie legal right and ownership of the land was hotly contested; it was one team's word against the other team notably personnel from Ministry of Lands. The matter rested on the forged document. Therefore, to the offence of Forcible detainer c/s 91 of the Penal Code; the Court thus agrees with the findings of the Trial Court in reliance of ELC 166/2011 judgment that the suit property belonged to the Complainant.
131. In the case of Richard Kiptalam Walubengo vs Republic 2015 eKLR where the Court held;
- Where the ownership of the land in an offence of forceful detainer is in controversy or to put it more appropriately, if the legal ownership or entitlement of the land cannot be established beyond reasonable doubt at the Accused's trial, then a conviction cannot be sustained.
132. Of concern and interest to this Court is that the seller of the suit property to the Accused person/ Appellant one Joseph Odera presented evidence in 2 instances; in ELC 166/2011 and in Criminal Proceedings, yet he failed to present Sale Agreement of the suit property between himself and the Appellant but alluded to payment of consideration for purchase of the suit property by the Appellant as shown by cheques 18/7/2008 for Ksh 11,000,000/- in the name of Kamere Advocates & 2 cheques of 14/10/2008 to Prime Bank from Jewel Holdings Ltd of Ksh 99,000,000/- & 4,400,000/-
133. Yet a seller cannot pass a better title than he/she holds; if the title by DW3 was defective then that is the same title he passed on to the Appellant in the alleged sale. The Certificate of Title IR6458 which



DW3 was sold 1504/11 by Margaret Wamaitha shows that he transferred to David Musyimi Ndeti. The Certificate of Title under the Registration of Titles Act Grant IR 85088 granted to Joseph Odero signed on 10/11/2000, is transferred to the Accused person/Appellant through Jewel Holdings Ltd on 27/10/2008 and to Megvel Cartons Ltd on 23/12/2009.

134. In light of the above, if indeed there was a sale of land from DW3 to the Appellant why was DW3 a witness and not an Accomplice /Co Accused person in the criminal proceedings? If as alleged by Investigation Officer that DW3 could not be found at the time, Criminal matters have no limitation period, after he surfaced and testified twice why was he not charged alongside the Appellant?
135. I find this anomaly reinforces the conviction in Count 1 as there is total silence and no explanation or evidence of sale/purchase on this issue save payments by cheques alleged to be between the Appellant & DW3. Unless and until this aspect of the claim is proved, there is doubt at the Appellant's legal right and ownership as he bought the property from the seller DW3, the Appellant did not tender any evidence to confirm the sale save the title document with the name of the Appellant's Companies.
136. This conviction in Count 1 is now further augmented by the Court of Appeal Judgment of 17/2/2023 which upheld Judgment of ELC 166 of 2011. Thus the dispute on ownership title use of land was/is settled by the relevant Court ELC 166/2011 whose judgment was upheld on Appeal by Court of Appeal. The appeal is dismissed in Count 1.
137. On the offence of Conspiracy to defraud Contrary to Section 317 of the Penal code jointly with others not before the court, conspired with intent to defraud by forging a document namely grant No. I.R no. 85088/1 L. R. No 25064 measuring 9.186 hectares pretending that he was the genuine owner of the said parcel of land a fact he knew to be false or untrue.
138. The focus point is on the testimony of DW3, Joseph Odero who allegedly sold the property to the accused. It was his testimony that he bought the property in 1985 and that the initial grant L.R No. 154/2 was issued to Cecil Higgs who transferred the property to Margaret Wamaitha who then sold a subdivision L.R No 1504/11 to him and transfer was registered on 15.10.1986. He then did a change of user of the property from Agricultural to Commercial, and surrendered title L.R No. 1504/11 and executed a deed of surrender and was issued with a fresh title L.R No. 25064 with the new user being commercial.
139. The case-law relating to proof of the offence of conspiracy c/s 317 Penal Code is as follows;
Ronald Kiptoo Yator vs Republic 2019 eKLR, the Court observed;

This court agrees with the Appellant's counsel that for the offence of conspiracy to defraud to be complete evidence must be adduced to show that there existed an agreement, consent or combination of the two or more persons.

For that proposal, the Appellant's counsel relied on the case of Christopher Wafula Makhoha –vs- Republic [2014] eKLR. This court agrees with the holding in that case where the court (Mabeya J) held that the charge of conspiracy to defraud must involve two or more persons and not a single accused person.

Evanson Mwangi Kihumba v Republic [2022] eKLR, the Court considered conspiracy as ;

In Black Law Dictionary 9th Edition at page 351 Conspiracy is defined as follows;

“An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most cases), action or conduct that furthers the agreement; a combination for unlawful purpose.



The agreement may be proved in the usual way or by proving circumstances which the jury may presume it. Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in principle of an apparent criminal purpose in common between them.”

140. The Trial Court in its judgment Pg 21 -22 referred to ‘Mr Odero who was signing the deed of indemnity and selling LR 256064 to the Accused person/Appellant in 2008 which the Complainant had already purchased LR 1504/11 through title issued by Ministry of Lands in 2001. The land had already been surveyed and deed plan was issued. As such the land would not have another title, the circumstantial evidence herein links the Accused ,Mr Odero and officials of Ministry of Lands.’
141. With respect, there is no evidence on record to show agreement or consent between 2 persons, if Mr Odero was involved why did he remain a witness and not an Accomplice/Co Accused person in the criminal proceedings? If the Accused person/Appellant bought the property from DW3 why would he conspire to achieve what he already had/bought from DW3?
142. Thirdly, the fact that the Trial Court acquitted the Appellant of Count 2 Forgery c/s 350 of Penal Code; it could not be by the same breath the Accused person/Appellant conspired with others not before Court with intent to defraud by forging a document When he was acquitted of forgery.
143. Fourthly, no evidence of any overt act or omission by the Accused person/Appellant that depicts common intention to defraud was adduced in Court.
144. Fifthly, if the Appellant was involved in conspiracy to defraud through a forged document in 2006, I find no evidence to imply that the Accused person knew and/or was involved in obtaining a forged Certificate of Title save for the fact that he obtained title in 2008.
145. Sixthly, the investigations carried out by the National Land Commission with regard to LR 1504/11 IR 85400 disclosed that records and correspondence were deleted from the system and survey plans were destroyed. None of these activities indicate the Accused person/Appellant had access or worked in cahoots with insiders at Ministry of Lands.
146. The Court finds that there is no evidence to prove that if there was any conspiracy to defraud, the accused person was part of it. The accused came into the picture at the point when all the alleged conducts of fraud had already happened as can be seen in the testimony of the Surveyor DW3 that the forgery and fraud happened at the time of surveying and not at the time of entering into sale and drawing the sale agreement.
147. From the above considerations the evidence on record did not impute any act or omission or circumstantial evidence of the appellant being part of a conspiracy to defraud. Members of the public on their own cannot access records of Ministry of Lands. The picture painted is of different personnel in the Ministry of Lands engaged in processing and registration of 2 titles over the same suit property.

Disposition

1. In the upshot, this appeal partially succeeds and partially fails, in that the Appellant is acquitted on count iii of charge of Conspiracy to defraud due to lack of evidence.
2. In Count 1 the evidence on record is of the contested legal right /ownership of suit property L R No 1504/11 (IR 85400) and the Trial Court relied on ELC 166/2011 judgment and decree which was upheld on appeal Court of Appeal 70 of 2018 delivered on 17/2/2023. Therefore, Count 1 is upheld.



3. This Court considers enforcement of ELC 166/2011 & Court of Appeal 70 of 2018 judgments and decrees sufficient in lieu of sentencing in Count 1 as it would amount to double jeopardy; more so where the issue of ownership of the suit property remained hotly contested until it was finally settled in the above- mentioned matters.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25/1/2024. (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence of;

Mr James Ochieng Oduol For Appellant

Mr Mwongera For Odpp For Respondent

Mr Patrick Kaume – Court Assistant

Mr Oduol; We seek leave of the Court to appeal to the Court of Appeal and seek stay of all forms of execution for 60 days to enable us get the judgment read and appreciate the judgment before filing the Appeal.

Mr Mwongera; My Senior should file a formal stay of execution and that will enable us to respond to the issue and file our response.

Mr Oduol; There is a risk of execution and there is need to file an appeal if it is an application for stay we shall file the formal application.

Court: The formal application for stay of execution shall be filed and served after this judgment is availed to the Parties/Counsel as the Court is proceeding online of station.

Further mention on 8/2/2024 and status quo is maintained upto 8/2/2024.

M.W.MUIGAI

JUDGE

25/1/2024.

