



Kimundia & 2 others (Suing as Administrators of the Estate of Edward Kamau Wairi - Deceased) v Chief Lands Registrar & 3 others (Environment & Land Case 42 of 2015) [2023] KEELC 682 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEELC 682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 42 OF 2015
JA MOGENI, J
FEBRUARY 14, 2023**

BETWEEN

**EMILY WANJIKU KIMUNDIA 1ST PLAINTIFF
HESBON WAIRI KAMAU 2ND PLAINTIFF
IRENE NJERI KAMAU 3RD PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF EDWARD KAMAU
WAIRI - DECEASED**

AND

**CHIEF LANDS REGISTRAR 1ST DEFENDANT
HON. ATTORNEY GENERAL 2ND DEFENDANT
BHARATKUMAR NARICHANDRA PATEL 3RD DEFENDANT
HARSHA BHARAT PATEL 4TH DEFENDANT**

JUDGMENT

1. By an Amended Plaint dated 22/11/2018, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a) A permanent injunction be issued restraining the 3rd and 4th Defendants, their employees, servants and or agents and any other person acting or purporting to act on behalf of the 3rd and 4th Defendants from trespassing, occupying, alienating, dealing in any manner or otherwise interfering with the deceased’s property being L.R no. 7785/288.



- b) A mandatory injunction do issue to the 1st Defendant to rectify the Land Register for the property known as L.R no. 7785/288 by removing the Transfer Entry known as “Entry No. 4” forthwith unconditionally.
- c) A revocation of any documents of ownership held by the 3rd and 4th Defendants in regard to LR no. 7785/288.
- d) Vacant possession of the suit property.
- e) General Damages for Trespass by the 3rd and 4th Defendants on the Plaintiff’s property.
- f) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
- g) Any other relief this Honourable Court deems fit.

Plaintiffs’ Case

2. It was the Plaintiffs’ contention that Edward Kamau Wairi (deceased), 25/02/1991, acquired a property known as LR No: 7785/288 (I.R No.52118) measuring 0.3966 Hectares that is situated in the Runda area within Nairobi County. The deceased had inter alia paid a consideration price of Kshs. 875,000/= to Mae properties Limited who were his predecessor in title.
3. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff aver that a Deed of transfer was prepared and registered at the Lands Registry in Nairobi in on 27/02/1991 whereupon an Original Title deed was issued to the deceased’s transactional advocate Grace Githu t/a Grace Githu & Co Advocates for safekeeping.
4. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff aver that on 13/01/2006 Edward Kamau Wairi emigrated to the United States of America to pursue further studies and set up a permanent residence there.
5. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff affirm that during the deceased’s stay in the United States of America, he did not authorize the release of the Title Deed to anyone at any given time.
6. That the deceased returned to Kenya on 25/02/2011 and sought to collect the Original Title Deed from his transactional advocate only to discover that she was now deceased and that the law firm had been wound up.
7. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff avers that upon making inquiries through his advocates on record m/s Akide and Company advocates, the duly appointed executors of the law firm of Grace Githu and Co Advocates could not trace the Original Title Deed.
8. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff further states that on 2/9/2014, the deceased attempted to carry out an official search to confirm the status of his property only to receive a rejection on his application with comments that his copy of the Title was incomplete without all the entries.
9. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff aver that upon making further inquiries with the Lands registry, the deceased obtained a copy of the Title Deed indicating that an additional entry known as “No. 4” was done to the Title. The said entry indicated that a Transfer was registered in favour of the 3rd and 4th Defendants as joint tenants on 30/06/2008.
10. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff listed the particulars of fraud as follows: The Deceased’s Original Title Deed to IR NO. 7785/288 has been irregularly manipulated at the Lands registry, an entry “No. 4” has been registered against the Original Title Deed to LR No. 7785/288 by the 1st



Defendant at the Lands Registry and as a result of the Transfer, the 3rd and 4th Defendants have occupied the Deceased's land and constructed permanent fittings on it.

11. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff affirms that the deceased had not conveyed or sold his property to any person since he was in U.S.A from 13/01/2006 to 25/02/2011. Therefore, any alleged transfer must have been procured without his authority.
12. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff state that despite the deceased seeking clarity on the matter from the 1st defendant, the same has not been forthcoming.
13. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff state that as a consequence of the forceful occupation and interference the suit premises by the 3rd and 4th Defendants, the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff have been grossly inconvenienced and has have suffered loss and damage.
14. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff listed the particulars of loss and damage as follows: The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff has have been deprived of the use and quiet enjoyment of the suit Property, The 3rd and 4th Defendants' construction of a house on the suit Property has occasioned detriment to the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff, further, the 3rd and 4th Defendants have prevented the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff from accessing the suit Property by erecting a perimeter boundary wall thereon, the 3rd and 4th Defendants have deployed security personnel on the suit property thereby preventing the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff from accessing his the property.
15. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff state that the claim to ownership of the suit property by the 3rd and 4th Defendants is irregular and that the same is an unlawful attempt by the 3rd and 4th Defendant to deprive the Plaintiff deceased off his lawful title to the suit property.
16. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff state that the deceased is the lawful owner of the suit property, and his quiet enjoyment ought to be restored, recognized, and respected by the 3rd and 4th Defendants and any other person claiming the same.
17. The 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff state that the property should revert back to the Estate of Edward Kamau Wairi (deceased).

Evidence By The Plaintiffs

18. PW1 – Irene Njeri Kamau informed the Court that she is the first daughter to the deceased Edward Kamau Wairi. She then adopted her witness statement dated 23/02/2022 and her bundle of documents as her evidence. She testified that she was in Court because of the land purchased LR No. 7785/288 (IR No. 52118). She added that the land is about one acre and was purchased in 1981. The deceased paid Kshs. 875,000.00 the title is at page 15 of the bundle. The transfer is at page 21. It was her testimony that they would like the land to be reverted back to the family of the family to be compensated.
19. In cross examination, she reiterated that her father bought the land in 1981 and he was in the USA. That the title came out in the name of the deceased and the wife, Annie Wangechi Wairi. She added that she was above the age of 18 in 1981. She confirmed that she was not involved in the purchase. On page 21 of the bundle, the transfer was to both Edward and Annie after paying Kshs. 875,000.00. The certificate of title shows that they are the owners. This is seen at page 16 as well. At page 86, she stated that she has seen a copy of the document, and both were selling the property to the 2nd defendant. According to the transfer, she was signing on behalf of Edward due to P/A 252621. She further testified that there is also the forensic examination report which was requested by her father. It is at page 43. The findings showed that the signature on the Power of Attorney is different from that of Edward



- (deceased). She further stated that she was not sure if there was anyone charged with forgery. It was her testimony that Annie has not been sued though they have a claim against her. at page 46, it shows the Power of Attorney is registered and drawn by an advocate and it is dated 6/02/1981.
20. Further, it was her evidence that the property was bought in 1991 and GW Githu & Co. Advocates did the transaction. Annie was married to her father, and she had children. The Power of Attorney derogated power to Annie. The firm that prepared the Power of Attorney is the one of GW Githu. The property was in both their names as joint owners. The deceased did not have the title with him. Her dad reported to the police.
 21. In re-examination, she testified that there is an OB No. 48/06/02/2015 which shows that the deceased reported at CID Mlolongo. This is shown at page 43. At page 96, Annie's name is appearing as witness for the 3rd and 4th Defendants.
 22. PW2- Daniel Gutu, SN. 231663, informed the Court that he is a Chief Inspector. He testified that he is a forensic document examiner working with DCI National forensic lab at the DCI headquarters. He added that he has been a document examiner for more than 14 years and has been trained by the Regional Forensic Laboratory and National Ribat University in Khartoum, Sudan. In regard to the matter before the Court, it was his evidence that on 6/02/2015 they received documents under Escort Late. Inspector Richard Mugo from DCI Mlolongo. The documents were forwarded using exhibit forms dated 6/02/2015 and the documents were marked as follows: A: is a question document PA dated 6/02/1991, B1: specimen signatures of the late Edward Kamau Wairi and B2+B3: known signatures enclosed in pencil of Edward Kamau Wairi.
 23. He testified that there was a request for examination so as to ascertain the authority of the signatures on the Power of Attorney. they were requested to ascertain if the signatures were signed by the same author on documents. He did the examination and, in his opinion, the signature in question on document A, the Power of Attorney was made by a different author. Meaning that the late Kamau did not apprehend his signature. During the examination, PW2 testified that he subjected the specimen in question and known signatures to image magnification procedures using video spectral comparator for better visibility and inspection of individual writing. In his opinion, the question specimen is based on the following: signatures initialization and terminal strokes, pen movement, natural pen lifts and signature specimen and baseline alignment. He finished by stating that he prepared the report on 6/02/2015 and signed the report.
 24. In cross-examination, he reiterated that they received the document, as per the document. The complainant is Edward Kamau Wairi. The Power of Attorney was alleged to have been signed by Edward Kamau Wairi. The title deed was not brought to them. He added that he has never summoned Ann Kamau Wairi. He was only examining the signature and he was not doing the examination. He contended that as per his examination report, there is no margin for error. The difference between the specimen signature and known signature are guided by the five standards. In relation to this report, PW2 stated that he has not provided it anywhere else. Since he wrote this report in 2015, this is the first time he is producing it.
 25. In re-examination, he testified that at page 46, he did not see Ann's signature.
 26. PW3 – Eric Nduhiu testified that he is a licensed land surveyor. He then adopted his witness statement dated 22/11/2018 as his evidence before this court. He stated that under the instruction of Mr. Edward Kamau Wairi, he was requested to locate parcel 7785/288 somewhere in Runda. He was given a copy of the certificate of title. He went to survey of Kenya and purchased the map which has two numbers. Folio number and register number. Folio number is 141 and register number is 14. So, they call it FR No. 141/14. From the map, they got the coordinates of the parcel which are on the map, top left corner.



They located the parcel on the ground. When they got to the site, they found the property had been fenced and gated with a house. They did not get inside. That is the report he gave to his director.

27. In cross-examination, he informed the court that his license number is 893 and that he also had a certificate, but he has not produced them in court. He testified that he received instructions in 2018. He was given instructions on 4/12/2014. A copy of the title is the same on page 16. According to the title, the owners are Edward Kamau Wairi and Ann Wangechi Wairi. He did not contact Ann since his instructions were for locating the parcel. Mr. Wairi came to him alone. He never knew Ann. There was a guard, who denied them access. He reported back to Mr. Wairi orally and through his lawyers. PW3 added that he gave him a google map and he plotted the boundary using the coordinates. He never submitted any report.

28. With that evidence, the Plaintiffs closed their case.

Defendants' Case

29. The 1st and 2nd Defendant entered appearance on 5/02/2015 and filed a defence dated 25/07/2020. The 3rd and 4th Defendants entered appearance on 4/02/2015 and filed a defence dated 27/11/2018.

1st and 2nd Defendants

30. The 1st and 2nd Defendants deny each and every allegation made in the amended plaint and pray that the Plaintiffs' suit against them be dismissed with costs.

31. The 1st and 2nd defendants aver that land reference number LR No. 7785/288 (I.R 52118) was registered in the names of Edward Kamau Wairi and Annie Wangechi Wairi as joint owners on 27/02/1991 and a title issued to that effect.

32. They aver that the suit parcel was transferred to Bharatkumar Navichandra Patel and Harsha Bharat Patel (the 3rd and 4th Defendants) by Annie Wangechi Wairi on her own behalf as a joint owner and on behalf of her co-owner and husband Edward Kamau Wairi through Power of Attorney No. IP/A 25262/1 vide transfer dated 19/06/2008 and registered on 30/06/2008 at a consideration of Kshs. 12,000,000.00

33. Lastly, they contend that the suit offends the mandatory provisions of the government's proceedings act as no notice of intention to the government was ever issued.

3rd and 4th Defendants

34. The 3rd and 4th Defendants deny each and every allegation that has been labeled against them by the Plaintiffs jointly in the amended plaint.

35. It their contention that the suit property LR. No. 7785/288 (I.R No. 52118) was acquired by both the deceased Edward Kamau Wairi and Annie Wangechi Wairi as joint tenants and the property was registered, and a title issued in both their names.

36. They further state that they later came to learn that the deceased plaintiff had emigrated to the United States of America.

37. They deny that the deceased did not authorize the release of the title deed to anyone or sign any documents. They contend that the deceased gave Annie Wangechi Wairi general power of attorney which was registered by the deceased advocate Grace Githu. The power of attorney gave the said Annie Wangechi Wairi the powers to among others buy and sell movable or immovable goods in the name of the donor.



38. They deny contents of paragraphs 12,14 and 14 for the reasons that the deceased through the general power of attorney authorized the sale and transfer of the suit property and this had even been facilitated by the deceased transactional advocate Grace Githu & Co. Advocates. The deceased's allegations that the title could not be found is a blatant lie as he had already authorized the transaction of which the title was key.
39. They contend that the sale and transfer transaction was done in accordance with the law. It is legitimately expected that the 4th entry is made in order to secure the property belonging to the defendants.
40. The 3rd and 4th defendants aver that the particulars of fraud have not been established because curiously the deceased never made Annie Wangechi Wairi a party to the suit and/or take the appropriate action in relation to fraud. The allegations of fraud are casual and hazy.
41. They state that the deceased having donated general power of attorney the donee Annie meant that the deceased had given all the powers to Annie to act on his behalf in respect of any transaction including the sale and transfer of the suit property.
42. They contend that they acquired possession legally. The sale and transfer of the suit property was that of a willing seller and willing buyer. The deceased himself through executing a general power of attorney portrayed his willingness to have Annie Wangechi Wairi deal with the property, thus, the transaction is a legitimate transaction. Further, the Plaintiffs allegation that they are aggrieved is not true. They have even not pointed out how they have been aggrieved.
43. That following the legally sound transaction, the defendants are the rightful and legitimate owners of the suit property, and the suit was brought up by the Plaintiffs is an attempt to deny them their right to the property and that the courts should protect their right to the property.
44. They aver that the prayers sought by the plaintiffs are bad in law. The prayers are equitable in nature and for them to be in line with the principles of equity, the plaintiffs must come with clean hands.

Evidence By The Defendants

1st and 2nd Defendants

45. DW1 – Gildine Gatwiri Karani informed the court that she was a land registrar and a principal land registration officer. She adopted her witness statement dated 20/09/2022 as her evidence and produced the documents at page 82-91 marked in the order they appear.
46. In cross-examination, she reiterated that she has not carried the original document. That what she has in court is what she found in the system. According to this firm on page 90, the stamp duty which was assessed then was Kshs. 480,000.00. When there are cancellations, the registrar counter-signs. The cancellation at the bottom is however not counter-signed. The document at page 89 also bears cancellation though it is not counter-signed. This document is the beginning of the registration process. There are hand written comments which reflect internal notes on the P/A documents show that they would be required for registration. What she found in the system is the transfer between Edward Kamau Wairi and Anne Wangechi and the 3rd and 4th Defendant with the title deed, IR No. 52118. There is also a charge document between Edward Wairi and Anne Wangechi Wairi and Mae Properties Ltd. There is also a discharge between Mae properties and Edward Kamau and Anne Wangechi. The Power of Attorney brought before the court does not appear in the system and was not in the list of documents presented by DW1, but the Power of Attorney was properly registered. What is there is an IPA number and that is where they register Powers of Attorney. She has no Power of



Attorney document but if she is given time, she can produce it. The document on page 46 is a Power of Attorney, it has a receiving stamp and stamp duty stamps are genuine. For this registration of Power of Attorney to be valid, it required a booking form. If the document was to be found to be invalid, then the registration would be invalid. For one to register the title, one needs relevant consents and the rates clearance certificates (which are not before the court), commissioner's consent (not before the court), that would validate the registration. DW1's response however is that this title was registered in the correct way and the title is genuine. It is on the RTA title. She testified that they have provided a search at page 83. The search was issued in 2019. The registration was done in 2008 but they have no search done by themselves since it is the client to do the search.

47. Further, the document at page 90, the registrar fills the form which is the middle part. Her duties involve assessment of stamp duty and registration of documents. They also register Powers of Attorney. There is a book where they register Powers of Attorney. The one they have, Annie Wangechi had been given a Power of Attorney by Edward Kamau Wairi. The number on the Power of Attorney corresponded with what is in the book. At page 84, there is a transfer. The process here is that they endorsed the transfer because all documents were there. They do not conduct searches themselves. She added that she was not aware of the forensic report. The accused person as per the report at page 45 shows the 3rd and 4th defendants and the chief land registrar but they were never conducted by the police.
48. In re-examination, she testified that the search was done because the attorney general requested it. Searches are not done suo moto since they have their records. She added that there is nothing suspicious about the Power of Attorney and she can rely on it to effect transfers. It is genuine. It has a receiving stamp, stamp duty stamps, it is properly executed, drawn and filed on face of document and signature of registrar is genuine. The number on the Power of Attorney and transfer form is the same 25262/1. The registrar has to confirm registration before effecting the transfer. The stamp duty assessment form at the bottom is filled by the bank. A transfer cannot be effected without all the transfer documents. The transferee in the transfer forms are Annie Wangechi Wairi and Annie holds the Power of Attorney. The suit has not listed Annie as a defendant.
49. The 1st and 2nd Defendants closed their case.

3rd and 4th Defendants

50. DW3- Bharatkumar Narichandra Patel informed the court that he stays at 288 Runda. He is a businessman. He testified that he acquired his property after due diligence. He adopted his witness statement dated 27/11/2018. He confirmed that he wants to produce it as part of his evidence together with the documents.
51. In cross-examination, he reiterated that he did due diligence through his lawyer. That they have not sworn a statement before this court. Other than his statement, there is nothing else in the file to show that due diligence was done. He stated that the seller in the sale agreement is Ann Wangechi Wairi. The owner of the title document on page 16 of the bundle shows that the owner is Edward Kamau Wairi and Annie Wangechi Wairi. The sale agreement is signed by Annie Wangechi as the sole seller. She presented a Power of Attorney, DW3 testified that he never inquired as to whether Mr. Kamau was available or not. They just trusted the Power of Attorney. he never received proof that they were not married. The only proof that she was the owner was the Power of Attorney. the transfer document at page 85 – 86 shows that Annie and also that she is acting for Edward Kamau Wairi. He documents for PA, at page 46 is the one provided to him. He did not know if it had the signature of Edward Kamau. The signature of Edward is neither in the sale agreement or the transfer document at page 85-86.



52. It was his evidence that the cost of the plot was Kshs. 12,000,000.00. there is a receipt/letter on page 105 which talks about a banker's cheque. He did not recall when he received the title, but he paid Kshs. 12,480,000.00 inclusive of stamp duty. He added that the last entry to the title has his name. It was his testimony that he conducted a search, but it was not filed in court. He has filed a Power of Attorney at page 46 of the bundle which shows Annie had powers to sell the property. He confirmed that the stamp duty was paid in relation to the number of stamps on the stamp duty transfer documents.
53. In re-examination, he testified that he relied on the general Power of Attorney, and it was registered – IP/A25262/1. He stated that he never heard any doubt on the Power of Attorney at the time of the transaction. The transfer document has the Power of Attorney. Annie's lawyer, K Kahuthu witnessed her signature, he is the same one who drew the sale agreement. The letter on page 105-106, shows DW3 giving details of the banker's cheque. At page 90, the is an assessment for payment of stamp duty and DW3 stated that he paid on 23/06/2008. The final entry on page 108 is a transfer to himself and his wife as joint tenants. The registrar made the entry.
54. The 3rd and 4th Defendants closed their case.

Written Submissions

55. After hearing closed on 26/09/2022, all parties were given the opportunity to file their written submission. By the time of writing this judgment, only the Plaintiffs and the 3rd and 4th defendants had filed their submissions which I have considered. The Plaintiffs filed their submissions dated 10/11/2022 on 21/11/2022 and the 3rd and 4th Defendants filed their submissions dated 30/11/2022 on the even date.

Issues for Determination

56. Having considered all the pleadings filed in this matter, the following arise as the issues for determination before this court.
- a. Whether the deceased donated the general power of attorney.
 - b. Whether the suit property was lawfully transferred to the 3rd and 4th Defendants.
 - c. Whether the Plaintiff is entitled to prayers sought in the Amended Plaintiff.
 - d. Who shall bear the costs of the suit.

Analysis and Determination

Whether the deceased donated the general power of attorney.

57. In the present case, it is not in dispute that the late Edward Kamau Wairi and Annie Wangechi Wairi were previously registered proprietors of the suit property having acquired the same and issued with a certificate of title on 25/02/1991 in both their names as joint tenants. It is also not in dispute that the suit property was transferred to the 3rd and 4th Defendants, and they were registered as joint tenants on 30/06/2008.
58. It is the Plaintiffs' case that the deceased had not sold the suit property to any person since he purchased the same and that the transfer was procured without his authority. They thereby allege that the power of attorney dated 5/02/1991 is forged. The Plaintiffs affirmed that the deceased had not conveyed or sold his property to any person since he was in USA from 13/01/2006 to 25/02/2011. They essentially denied that that the deceased gave a power of attorney to Annie Wangechi Warai.



59. The crux of the transfer of the suit property to the 3rd and 4th Defendants is pegged on the said general power of attorney which allegedly donated power to Annie Wangechi Wairi from the late Edward Kamau Wairi to sell and transfer the suit property to the 3rd and 4th Defendants. So therefore, what is in dispute is the validity of the general power of attorney dated 5/02/1991.
60. I have considered this issue and the evidence on record. The Plaintiffs denied that the deceased denoted power to Annie Wangechi Warai, who used it to sell and transfer the suit property to the 3rd and 4th Defendants. In other words, the deceased did not execute the power of attorney.
61. The law places the burden of proof on the Plaintiffs to prove their case on a balance of probability. Counsel for the 3rd and 4th Defendants submitted that it behooves the Plaintiffs to lead evidence capable of proving that the registration effected in favor of the 3rd and 4th Defendants is vitiated by the pleaded fraud.
62. The Court agrees with the 3rd and 4th Defendants' submissions in so far as they stated that he who alleges must prove. Section 107 of the *Evidence Act* provides that whoever desires the court to give judgment on the basis of existence of certain facts, must prove that such facts exist. Further, section 108 provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party. In this regard, the plaintiffs bore the burden to prove their case against the 3rd and 4th defendant on this issue.
63. That position of the law notwithstanding, the Plaintiffs denied that the deceased donated the power of attorney to Annie. That power of attorney triggered the events that followed and are the subject of this dispute. The Plaintiffs also argued that the deceased had not conveyed or sold his property to any person since he was in USA from 13/01/2006 to 25/02/2011. With this denial, the burden of proof shifted to the 3rd and 4th Defendants to prove that the deceased actually donated the power to Annie, executed that power of attorney and appeared before the advocate who attested his signature.
64. Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In that case, the 3rd and 4th Defendants wanted the court to believe that the deceased donated the power to Annie which the plaintiffs denied. The burden of proof, therefore, shifted to the 3rd and 4th Defendants on this issue.
65. The fact that evidential burden of proof can shift depending on the circumstance of the case, was stated by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, thus:
- “(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”
66. The burden having shifted to the 3rd and 4th Defendants, it was its duty to call evidence to prove that indeed the deceased donated the power to Annie, thus disprove the plaintiffs’ claim that the deceased did not donate that power. The 3rd and 4th Defendants did not call evidence to support its claim that the deceased executed the disputed power of attorney as it pleaded. It was also their submission that the 3rd and 4th Defendant had no reason to doubt the authenticity of the power of attorney.



67. Section 112 of the *Evidence Act* provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon them. In that case therefore, where the party fails or refuses to adduce evidence to prove or disprove the fact in question, the court is entitled to make an adverse inference that if such evidence was called it would have been adverse to that party.
68. The fact of who executed the power of attorney shifted to the 3rd and 4th Defendants. The 3rd and 4th Defendants did not call evidence to disprove the plaintiffs' contention and evidence that the deceased did not donate the power to Annie; that he did not convey or sell his property to anyone in the period when he was in the USA. The evidence of who executed the power of attorney was on the 3rd and 4th defendants who did not sufficiently testify on that fact.
69. In *CMC Aviation Ltd v Crusair Ltd* (No1) [1987] KLR 103, Madan JA, (as he then was) stated:
“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence, and no decision could be founded on them. Proof is the foundation of evidence.
“As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”
70. The 3rd and 4th Defendants, apart from filing a statement of defence, they contended that the general power of attorney was prepared and executed by the deceased's own advocate, Grace Githu, who also was their transactional advocate and submitted that they had no reason to doubt the authenticity of the power of attorney. The Plaintiffs maintained that the general power of attorney was forged. This was also demonstrated in the forensic examination report dated 6/02/2015 prepared by CI Daniel Gutu. This fact was not sufficiently controverted by the 3rd and 4th Defendants.
71. From the above analysis, and in the absence of evidence to the contrary, I find and hold that the deceased did not donate the power of attorney dated 5/02/1991 to Annie Wangechi Warai. Borrowing from the forensic report as well, I am convinced that the alleged power of attorney fraudulent and a forgery and, therefore, null and void.

Whether the suit property was lawfully transferred to the 3rd and 4th Defendants.

72. The next issue is whether the transfer to the 3rd and 4th Defendants was lawful. The transfer dated 19/06/2008 was executed by Annie Wangechi pursuant to the impugned general power of attorney dated 5/02/1991 and registered on 6/02/1991. That fact was admitted by the Defendants. The transfer shows that Annie Wangechi executed the transfer on behalf of the late Edward Kamau Warai and on her own behalf as a joint tenant.
73. Having determined that there was no valid power of attorney donated to Annie capable of giving her power or authority to sell and transfer the suit property on behalf of the deceased, the transfer that is purportedly executed on the basis of that non-existent power of attorney, did not amount to a valid transfer in accordance with the law.



74. There being no evidence that the deceased executed the power of attorney, the execution of the transfer document had no foundation in law. There was no valid power of attorney that could confer authority on Annie to sell and transfer the suit property on behalf of the deceased. That power of attorney could not be the basis of the valid transfer of the suit property.
75. I once again find and hold that the transfer was an outright illegality. The sale and transfer of the suit property could not be found on a lawful and binding contract between the deceased and Annie Wangechi Warai, capable of being performed Annie.

Whether the Plaintiff is entitled to prayers sought in the Amended Plaintiff

76. By now it is clear that the issue of whether Annie Wangechi Warai could sell the deceased's suit property must be in the negative. The deceased did not transfer the suit property in favor of Annie Wangechi Warai. The transfer was not lawfully executed on behalf of the deceased to sell the suit property. The deceased was not even aware that the suit property had been transferred to the 3rd and 4th Defendants. To that extent, therefore, the deceased was an innocent party whose property was fraudulently transferred to the 3rd and 4th Defendants without his knowledge. Annie Wangechi Warai's actions could not bind the deceased, an innocent party, who had nothing to do with those actions. A contract founded on illegalities and or misrepresentations, could not bind the deceased. The 1st Defendant could not, therefore, register the transfer of the suit property in favor of the 3rd and 4th Defendants.
77. Regarding this issue at hand, the Plaintiffs are seeking a conspectus of orders under the Amended Plaintiff. To begin with, the principles that guide the court in granting an order of injunction are set out in the celebrated case of *Giella V Cassman Brown & Company Limited* 1973. E.A 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

78. From the Plaintiffs' evidence stated above, without repeating the same, it is my finding that they have met the threshold for the grant of an injunction. I therefore grant prayers (a) and (b).
79. Regarding prayer for revocation of title, to enable me to cancel any documents of ownership held by the 3rd and 4th Defendants in regard to the suit property as sought by the plaintiffs, I have to be convinced that the provisions of Section 26 of the [Land Registration Act](#), Act No.3 of 2012 have been met. Section 26 is drawn in the following terms.

“Section 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

80. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
81. For the first limb, it appears to me that the suit property was transferred to the 3rd and 4th Defendants through fraud or misrepresentation. However, there is no evidence that the 3rd and 4th Defendants were a party to the fraud or misrepresentation. I am not of the view that they were a party to the fraud or misrepresentation that conveyed the land to him. I cannot therefore impeach their title by virtue of the provisions of Section 26 (1) (a).
82. Is the title impeachable by virtue of Section 26(1) (b) ? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.
83. The evidence in this case puts no one in doubt that the title to the 3rd and 4th defendants was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to them were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 3rd and 4th defendants is liable to be cancelled. I therefore proceed to cancel the title of the 3rd and 4th defendants and their registration as proprietor of the suit property. The estate of the late Edward Kamau Wairi should be registered as owner of the suit property.
84. Regarding the prayer for vacant possession of the suit property, the issue of what vacant possession means was addressed by Lord Greene in the case of *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 270 as follows:
- “The right to actual unimpeded physical enjoyment is comprised in right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right...since the presence of the rubbish which the purchaser never bought and to whose presence, he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought...”
85. It is true that the Plaintiffs’ have the right in law over the suit property. However, the evidence by the 3rd Plaintiff, PW3 and DW3 shows that the Plaintiffs have been prevented to use the suit property. The evidence before this court is that there is a perimeter walls surrounding the suit property and the same is gated.



86. Indeed, the test of whether a person has taken vacant possession of land or not is this: if the physical condition is such that there is substantial impediment to his use of the property or a substantial part of it or even a portion thereof during the purchase or immediately after the purchase, then vacant possession will not have taken place.
87. Having found that there was no valid power of attorney, I am of the view that the most justifiable thing to do is to order for the suit property to revert back to the estate of the late Edward Kamau Warai and give the Plaintiffs vacant possession of the suit property.
88. Regarding loss and damage, counsel for the Plaintiffs submitted that the court grants general damages in favor of the Plaintiffs by considering the price of the property before and after the date which the 3rd and 4th Defendants irregularly acquired the suit property. The Court notes that the Plaintiffs failed to adduce evidence of the price of the suit property as of 2008 that they are claiming. The only evidence of damage that they rely on is the testimony of PW3 who informed the court that he had not filed any report regarding his visit to the suit property. He only mentioned that the property was fenced and gated.
89. The Plaintiffs had listed particulars of loss and damage as follows: that they have been deprived of the use and quiet enjoyment of the suit Property, the 3rd and 4th Defendants' construction of a house on the suit Property has occasioned detriment to the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff, further, the 3rd and 4th Defendants have prevented the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff from accessing the suit Property by erecting a perimeter boundary wall thereon, the 3rd and 4th Defendants have deployed security personnel on the suit property thereby preventing the 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff from accessing his the property.
90. In *Park Towers Ltd v John Mithamo Njika* et al [2014] eKLR, the Court held that: -
- “I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”
91. Trespass has been defined as “any unjustifiable intrusion by one person upon the land in possession.”
92. In the case of *Philip Aluchio v Crispinus Ngayo* [2014] eKLR, the Court held as follows:-
- “..... The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is lessThe Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess General Damages for trespass...”
93. In the case of *Willesden Investment Limited v Kenya Hotel Properties Limited* HCC No. 367 OF 2000, the court held that:-
- “There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstance in each case”.
94. There is no doubt that the 3rd and 4th Defendants did enter upon the suit property and its actions caused interference with the Plaintiffs' use and occupation of the suit property. However, the Plaintiffs did



not provide the value with which the Court is to work, nor did they provide any Valuation Report of the land where the Defendant trespassed. There is no Valuation Report to show the extent of damage.

95. Nevertheless, it is trite law that trespass is actionable per se (without proof of any damage). See Park Towers Ltd (*supra*) and *Duncan Nderitu Ndegwa v KP&S LC Limited & Another* [2013] eKLR. Additionally, the Plaintiffs must have suffered considerably for being kept out of the use of their land and also, they will be forced to restore the land to its original condition before the intrusion. The Court therefore proceeds to award a figure of Kshs. 12,000,000.00 considering the length of time that the trespass has occurred.
96. In the end, the Court is convinced that the Defendants herein are liable for how they handled the transfer of the suit property to the 3rd and 4th Defendants considering that the general power of attorney was invalid on grounds of forgery. I am satisfied that the Plaintiffs have proved their claim against the Defendants therefore are entitled to the orders sought.

Who shall bear the costs of the suit.

97. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite law that costs usually follow the events. In this instant case, the Plaintiffs are the successful party and are therefore entitled to the costs of the suit.

Disposal Orders

98. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court, the written submissions and the relevant provisions of the law, the Court finds that the Plaintiffs' case succeeds, and I make the following orders: -
- a. A permanent injunction be and is hereby issued restraining the 3rd and 4th Defendants, their employees, servants and or agents and any other person acting or purporting to act on behalf of the 3rd and 4th Defendants from trespassing, occupying, alienating, dealing in any manner or otherwise interfering with the deceased's property being L.R no. 7785/288.
 - b. A mandatory injunction be and is hereby issued to the 1st Defendant to rectify the Land Register for the property known as L.R no. 7785/288 by removing the Transfer Entry known as "Entry No. 4" forthwith unconditionally.
 - c. A revocation of any documents of ownership held by the 3rd and 4th Defendants be and is hereby issued in regard to LR no. 7785/288.
 - d. The 3rd and 4th Defendants are given six (6) months' notice to vacate the suit property known as L.R No. 7785/288 (IR No. 52118) measuring 0.3966 Hectares situated in the Runda area, failure to which an eviction order to issue.
 - e. The 3rd and 4th Defendants to pay Kshs. 12,000,000.00 (Kenya Shillings Twelve Million only) being general Damages for Trespass.
 - f. The Defendants to bear the costs of this suit jointly and severally together with interest thereon at Court rate from the date of this Judgment until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 14th DAY OF FEBRUARY 2023

.....



MOGENI J.

JUDGE

In the virtual presence of: -

Mr Munene for the Plaintiffs

Mr Ochola for 3rd, 4th Defendants

No appearance 1st and 2nd Defendants

Caroline Sagina: Court Assistant

