



**Wanjiku v Wainaina (Sued on his own behalf and on behalf of the Estate of
Teresia Wanjiku Wainaina) & 2 others (Environment and Land Case Civil Suit
498 of 2015) [2022] KEELC 14566 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 498 OF 2015
SO OKONG'O, J
NOVEMBER 3, 2022**

BETWEEN

ZACHARY THIRU WANJIKU PLAINTIFF

AND

**ALBERT NDICHU WAINAINA (SUED ON HIS OWN BEHALF
AND ON BEHALF OF THE ESTATE OF TERESIA WANJIKU
WAINAINA) 1ST DEFENDANT**

GITHUNGURI RANCHING CO. LTD 2ND DEFENDANT

THIKA DISTRICT LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The plaintiff brought this suit through a plaint dated June 8, 2015. The plaint was amended on August 4, 2015 and further amended on October 25, 2018. In his further amended plaint filed on December 21, 2018, the plaintiff averred that he purchased all that parcel of land known as Ruiru Kiu Block 2/ 3442(hereinafter referred to as “the suit property”) from one, Stephen Mwangi Maina, deceased (hereinafter referred to only as “the deceased”) in 2009. The plaintiff averred that the deceased died in the same year after receiving the full purchase price but before transferring the suit property to him. The plaintiff averred that the suit property was transferred to him by one, Teresia Njeri Mwangi who was the wife and administrator of the estate of the deceased and the same was registered in his name on February 27, 2015.
2. The plaintiff averred that after obtaining a title for the suit property, he visited the same and was shocked to find that one, Teresia Wanjiku, deceased (hereinafter referred to only as “Wanjiku”) and the 1st defendant had entered the property, fenced the same and put up a building thereon. The plaintiff averred that although the searches that he had carried out on the suit property prior to the registration



of the property in his name showed that the property was registered in the name of Stephen Mwangi Maina (the deceased), he came to learn that there was a parallel title in existence in respect of the suit property in the name of Wanjiku. The plaintiff averred that when he was registered as the owner of the suit property, the parallel title in the name of Wanjiku did not exist. The plaintiff averred that the title that was held by Wanjiku was issued fraudulently in which fraud all the defendants were involved.

3. The plaintiff averred that the entry and occupation of the suit property by Wanjiku and the 1st defendant was illegal and amounted to trespass. The plaintiff sought judgment against the defendants for;
 - a. A declaration that the suit property belongs to the plaintiff.
 - b. A declaration that the 1st defendant has no valid claim over the suit property and that he should move out of the suit property and demolish at his own cost the structures that he has put up thereon in default of which the OCS Ruiru Police Station do supervise his eviction.
 - c. A mandatory injunction directed to the 1st defendant to exhume the remains of Teresia Wanjiku Wainaina and Wainaina Kanuri from the suit property and to bury the said remains at another site or at a cemetery.
 - d. The OCS Ruiru Police Station be ordered to provide security and the Ruiru/Thika or Kiambu Public Health Officer to be in attendance during the exhumation to ensure that the same was conducted in the right manner.
 - e. A permanent injunction restraining the defendants by themselves and/or their agents or servants from trespassing, entering or in any way dealing or interfering with the suit property.
 - f. An order directed at the 3rd defendant to cancel the title held by Teresia Wanjiku Wainaina in respect of the suit property.
 - g. General damages for trespass.
 - h. Costs of the suit.
4. The 1st defendant and Wanjiku who had also been sued before her death filed a defence on July 13, 2015 to the original plaint. The defence was not amended even after the plaint was amended and further amended. The 1st defendant and Wanjiku averred that they had been in occupation of the suit property for over 30 years and denied that they entered the suit property after the plaintiff acquired the same. The 1st defendant and Wanjiku denied that their entry and occupation of the suit property was unlawful and contended that they were the registered proprietors of the suit property. The 1st defendant and Wanjiku averred that the title held by the plaintiff in respect of the suit property was acquired fraudulently and as such the same was illegal. The 1st defendant and Wanjiku averred that the plaintiff colluded with the estate of Stephen Mwangi Maina (the deceased) to acquire a second title for the suit property without following due process.
5. At the trial, the plaintiff gave evidence as PW1. The plaintiff adopted his witness statement filed on June 8, 2015 as part of his evidence in chief and produced his bundle of documents and further bundle of documents dated June 8, 2015 and March 1, 2017 as PEXH 1 and PEXH 2 respectively. In his witness statement, the plaintiff reiterated the contents of his amended plaint. The plaintiff called two witnesses. The first one was Francis Maina Njonjo (PW2). PW2 was an advocate of the High Court of Kenya. He adopted his witness statement filed in court on January 7, 2020 as his evidence in chief. PW2 told the court that he was involved in his professional capacity in the transfer of the suit property from the deceased to his wife, Teresia Njeri Mwangi by transmission and the subsequent transfer of the property



by the said Teresia Njeri Mwangi to the plaintiff. He stated that as at the time the suit property was transferred to Teresia Njeri Mwangi by transmission, there was not parallel title or double registration of the property at the Land Registry. He stated that after the suit property had been transferred to the plaintiff, the plaintiff came back to him complaining that the suit property was occupied by some people. He stated that he was thereafter instructed by Teresia Njeri Mwangi to investigate the plaintiff's complaint which he did. He stated that it was in the course of those investigations that he learnt that Wanjiku owned a parcel of land known as title No Ruiru Kiu Block 2/3204 that was previously owned by his deceased husband, Wainaina Kanuri and that Wanjiku had transferred the property to one, Rebecca Waringa on 7th February 2003 the same date that a second title was issued to Wanjiku in respect of the suit property. He stated that Wanjiku inherited her husband's Share Certificate No 4969 in the 2nd defendant. He stated that he learnt from the 2nd defendant that according to the 2nd defendant's Ballot Register, Wanjiku's husband balloted for a plot on 12th March 1985 and was issued with Ballot No 1353. He stated that Ballot No 1353 entitled Wanjiku's husband to the parcel of land, Ruiru Kiu Block 2/3204 which was registered in the name of Wanjiku and which she transferred to Rebecca Waringa on February 7, 2003 as aforesaid. PW2 stated that his further investigations revealed that the suit property, Ruiru Kiu Block 2/3442 was allocated to Paul Kamau Mbugu under Ballot No 1480. He stated that it was Paul Kamau Mbugu who sold the property to the deceased from whom the plaintiff purchased the property.

6. The plaintiff's last witness was John Rimui Waweru(PW3). PW3 was a director of the 2nd defendant from 2003 to 2009. He stated that he worked with the deceased who was also a director of the 2nd defendant. He stated that the suit property was allotted under Ballot No 1480. He stated that the ballot was held originally by Paul Kamau Mbugu. He stated that Wanjiku owned Ruiru Kiu Block 2/3204 that was allotted under Ballot No 1353, share certificate No 4969. He stated that the suit property was owned by Stephen Mwangi Maina and that the same was originally owned by Paul Kamau Mbugu.
4. The 2nd and 3rd defendants neither entered appearance nor filed a defence. The 1st defendant's case was closed on February 1, 2022 when the 1st defendant and his advocate failed to turn up for hearing on that day. After the close of the plaintiff's case the court directed that the parties make closing submissions in writing. The plaintiff filed submissions on February 16, 2022 through the firm of Njonjo, Okello & Associates Advocates. This firm is not on record for the plaintiff. On May 20, 2021, the plaintiff appointed the firm of Matiri Mburu & Chepkemboi Advocates to act for him in place of Njonjo, Okello & Associates Advocates. The said firm filed a Notice of Change of Advocates on the same date. There is no evidence on record that the plaintiff changed advocates again and re-appointed the firm of Njonjo, Okello & Associates Advocates to act for him. The submissions filed herein by the said the firm of Njonjo, Okello & Associates Advocates are in the circumstances irregular and the court will not consider the same. The defendants did not file submissions as had been directed by the court.
8. The plaintiff's claim against the defendants is based on the tort of trespass. Section 3 of the [Trespass Act](#), chapter 294 Laws of Kenya provides as follows:
 - “(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
 - (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”



9. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.
10. What I need to determine is whether the plaintiff has proved that he is the owner of the suit property and that the defendants have entered and occupied the same without any justifiable cause. From the evidence before the court, the plaintiff has demonstrated that he is the legally registered owner of the suit property. The plaintiff has produced in evidence a copy of the title deed for the suit property in his name and a copy of the extract of the register for the suit property showing that he was registered as the owner of the property on February 24, 2015. The plaintiff has also produced satisfactory evidence on the root of his title. The plaintiff has further demonstrated that the title held by Wanjiku for the suit property was illegally and fraudulently acquired since Wanjiku was only entitled to the parcel of land known as title No Ruiru Kiu Block 2/3204.
11. The suit property was registered under the *Registered Land Act*, chapter 300 Laws of Kenya (RLA) (now repealed). Sections 27 and 28 of the *Registered Land Act* provides as follows:

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“27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Section 143(1) and (2) of the *Registered Land Act* provides as follows:

- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or



amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Section 24, 25 and 26 of the [Land Registration Act](#), 2012 provides as follows:

“ 24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25 The rights of a proprietor, whether acquired on first registration

(1) or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26 The certificate of title issued by the Registrar upon registration,

(1) 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.”

12. Both under the *Registered Land Act* and the *Land Registration Act, 2012*, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest in the land. Under the *Registered Land Act* which is the statute under which the suit property was registered, a register of land may be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.
13. This suit was defended by the 1st defendant but the 1st defendant failed to appear in court and tender evidence in his defence and in defence of the estate of Teresia Wanjiku Wainaina(Wanjiku). Although the 1st defendant and Wanjiku had contended in their statement of defence that they held a valid title in respect of the suit property that gave them a right to occupy the same, the 1st defendant did not place any evidence before the court in support of that contention. The other defendants did not defend the suit. The testimony of the plaintiff and his witnesses was therefore not controverted by the defendants. The plaintiff's title to the suit property was not contested. The evidence that was adduced by the plaintiff to the effect that the parallel title held by Wanjiku in respect of the suit property was fraudulently acquired was not controverted. The plaintiff's testimony that the 1st defendant and Wanjiku entered into and occupied the suit property without his consent or authority is also not challenged. The plaintiff having proved his ownership of the suit property and the 1st defendant and Wanjiku's entry and occupation thereof, the onus was upon the 1st defendant to justify their occupation of the property.
14. In the absence of any evidence from the 1st defendant, this court can only conclude that the 1st defendant and Wanjiku had no justifiable cause for entering and occupying the suit property and as such they are trespassers thereon. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the 1st defendant and the estate of Wanjiku. The plaintiff has also proved his case against the 3rd defendant. The plaintiff has proved that the title held by Wanjiku is fraudulent. The fraudulent title could not have been issued in the absence of collusion between Wanjiku and the 3rd defendant. The case against the 2nd defendant was however not proved. I am of the view that the 2nd defendant was joined in the suit merely as a necessary party. The plaintiff did not establish any wrong doing on its part.
15. I have set out at the beginning of this judgment the reliefs sought by the plaintiff. I am satisfied that the plaintiff is entitled to the reliefs sought in prayers (i), (ii), (ii)(b) and (iii) of the amended pleadings. The plaintiff is also entitled to an order for the cancellation of the title held by Wanjiku and general damages for trespass. The plaintiff is however not entitled to an order for the exhumation of the remains of Teresia Wanjiku Wainaina and Wainaina Kanuri allegedly buried on the suit property. The plaintiff did not prove that the two were buried on the suit property. I am also of the view that having regard to the time that has passed since the alleged burial, it would serve no purpose to disturb the remains of the two deceased persons.

Conclusion:

16. In conclusion, I hereby make the following orders;



- a. I declare that the plaintiff is the lawful proprietor of all that parcel of land known as title No Ruiru Kiu Block 2/3442(the suit property).
- b. I declare that the 1st defendant and the estate of Wanjiku have no valid claim over the suit property and that they should move out of the suit property and demolish at their own cost the structures that they have put up thereon within one hundred and twenty (120) days from the date hereof in default of which the plaintiff shall be at liberty to apply for warrants for their forceful eviction under the supervision of the OCS Ruiru Police Station in which case the plaintiff shall comply with section 152G of the *Land Act*, 2012.
- c. A permanent injunction is issued restraining the 1st defendant by himself and/or his agents or servants from trespassing, entering or in any way dealing or interfering with the suit property after vacating the same or being evicted as aforesaid.
- d. The 3rd defendant shall cancel forthwith the register for title No Ruiru Kiu Block 2/3442 that was opened on February 7, 2003 and all the entries in the said register including but not limited to the registration of Teresia Wanjiku Wainaina as the proprietor of the property and the title issued to her.
- e. Kshs 100,000/- as against the 1st defendant being general damages for trespass.
- f. Costs of the suit against the 1st and 3rd defendants payable by the 1st defendant.
- g. The suit against the 2nd defendant is dismissed with each party bearing its own costs.

DELIVERED AND DATED AT KISUMU THIS 3RD DAY OF NOVEMBER, 2022.

S.OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform:

Mr. Njonjo for the Plaintiff

N/A for the 1st Defendant

N/A for for the 2nd and 3rd Defendants

Ms. J. Omondi-Court Assistant

