



**Wainoga & another (Suing as the administrators of the Estate of Francis Wainoga Kimata) v Kinyanjui & another (Environment and Land Case Civil Suit 1068 of 2014) [2023] KEELC 171 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 171 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1068 OF 2014  
OA ANGOTE, J  
JANUARY 19, 2023**

**BETWEEN**

**JOHN TEVIN KAMAU WAINOGA ..... 1<sup>ST</sup> PLAINTIFF  
PHILOMENA SHEILA NJERI WAINOGA ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF FRANCIS  
WAINOGA KIMATA**

**AND**

**JAMES KINYANJUI ..... 1<sup>ST</sup> DEFENDANT  
CITY HOPPER LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide a Complaint dated 5<sup>th</sup> August, 2014, the Plaintiffs seek the following reliefs against the Defendants jointly and severally;
  - i. A declaration do issue that the 1<sup>st</sup> Defendants' purported acquisition of parcel Dagoretti/Riruta/1228 was unlawful.
  - ii. That a mandatory injunction do issue, compelling the Chief Land Registrar to forthwith cancel the purported proprietorship of parcel Dagoretti/Riruta/1228 and any such derivative titles thereto by James Kinyanjui.
  - iii. That the 2<sup>nd</sup> Defendant, by itself, its servants, agents, licensees and/or tenants be forthwith be evicted from the deceased Francis Wainoga Kimata (accruing to his Estate as administered by the Plaintiffs as administrators thereof) parcel Dagoretti/Riruta /1228.



- iv. That a permanent injunction be issued, restraining the Defendants either by themselves, their servants and/or agents or otherwise howsoever from trespassing, remaining upon, occupying, cultivating, leasing, licensing, letting for a peppercorn fee, constructing upon, carrying any form of business or otherwise howsoever dealing in the Plaintiffs deceased fathers Francis Wainoga Kimata's parcel Dagoretti/Riruta/1228.
  - v. That the 1<sup>st</sup> Defendant do pay mesne profits to the Plaintiffs equivalent in rent chargeable and for continued unlawful occupation of the Plaintiffs deceased fathers Francis Wainoga Kimata parcel Dagoretti/Riruta/1228 up to the delivery of the same in vacant possession unto the Plaintiffs.
  - vi. General Damages.
  - vii. Costs and Interests of this suit
  - viii. Any other relief that this Honourable Court may deem fit to grant.
2. It is the Plaintiffs' case that at all material times, the deceased Francis Wainoga Kimata, was and still is the registered owner of all that parcel of land known as Dagoretti/Riruta/1228 situate in Nairobi County (hereinafter the suit property) having purchased the same from Ephraim Muniu Gachoka on 7<sup>th</sup> July, 1979.
  3. It was averred in the Plaint that vide an instrument of Transfer dated 7<sup>th</sup> July, 1979 and registered with the lands department on 18<sup>th</sup> July, 1979, the said Ephraim Muniu Gachoka transferred the suit property to the deceased and that neither the deceased nor the Plaintiffs herein have ever sold, transferred or in any way parted with possession of the suit property, nor have they pledged it or been guarantors in relation to the suit property.
  4. The Plaintiff averred in the Plaint that the above notwithstanding, the 1<sup>st</sup> Defendant has without any colour of right purported to lease the suit property to the 2<sup>nd</sup> Defendant from whom he illegally collects rent; that they have never dealt with the 2<sup>nd</sup> Defendant who is in any event a trespasser and that the deceased had not only fenced off the suit property but made further developments intended for commercial and rental use.
  5. According to the Plaintiffs, the Court should intervene to protect the Plaintiffs' rights in light of the incontestable evidence of ownership; that any claim that the 1<sup>st</sup> Defendant alleges to have over the property is a result of fraud, the particulars of which include presenting forged documents to the Registrar of Lands for registration when no transfer has been lawfully effected in his favour, misrepresenting to the 2<sup>nd</sup> Defendant that he was entitled to alienate the suit property and failing to act in good faith.
  6. The 1<sup>st</sup> Defendant filed a Defence on 26<sup>th</sup> January, 2015 wherein he denied the averments as set out in the Plaint. According to the 1<sup>st</sup> Defendant, he is a bona fide purchaser for value and is currently the registered owner of the suit property; that he has leased the suit property to the 2<sup>nd</sup> Defendant for a term of 6 years which commenced on 1<sup>st</sup> April, 2012 for a monthly sum of Kshs 90,000 and that he neither dealt with the deceased nor the Plaintiffs in the purchase of the suit property.
  7. The 1<sup>st</sup> Defendant averred that having bought the suit property from a third party, he is not a trespasser but its owner; that at the time of the purchase of the suit property, the same was vacant land and that he has made substantial developments thereon.



8. The 2<sup>nd</sup> Defendant, through its Defence filed on 31<sup>st</sup> March, 2015, denied the Plaintiffs averments stating that it entered into a lease agreement with the 1<sup>st</sup> Defendant believing that the 1<sup>st</sup> Defendant is the owner or having the authority of the owner to let it out; that the 2<sup>nd</sup> Defendant has been paying rent to the 1<sup>st</sup> Defendant since the inception of the lease and that the 2<sup>nd</sup> Defendant was not part of any fraud with respect to the suit premises and that the 2<sup>nd</sup> Defendant is ready and willing to enter into a formal lease with whoever the Court deems as the rightful proprietor of the suit property.

### **Hearing & evidence**

9. The matter proceeded for hearing on 20<sup>th</sup> February, 2019. PW1 was Philomena Sheila Njeri, one of the Administrators of the Estate of the late Francis Wainoga Kimata. It was her testimony that the case relates to the parcel of land known as Dagoretti/Riruta/1228 belonging to the deceased, which the 1<sup>st</sup> Defendant has not only trespassed onto but leased to the 2<sup>nd</sup> Defendant.
10. According to PW1, neither the Plaintiffs nor their late father gave the 1<sup>st</sup> Defendant permission to take possession of the suit property; that they conducted a search at the Lands Registry which shows that the property is still in the name of her late father [PEXHB 2]: that her father purchased the suit property from Ephraim Gachoka on 7<sup>th</sup> July, 1979 and that she has the original title document [PEXHB 3].
11. It was the evidence of PW1 that there is no way the 1<sup>st</sup> Defendant could have obtained title to the suit property in 2002 because the search that was conducted in 2008 showed that the land was still registered in her father's name and that the 1<sup>st</sup> Defendant has been receiving rent from the 2<sup>nd</sup> Defendant which rightfully belong to the Plaintiffs.
12. On cross-examination, PW1 testified that her father was initially called Stephen Kinyanjui Kimatta; that he was initially working with Kenya Breweries but later went into Real Estate; that the grant in respect to her father's Estate was confirmed although the confirmed one has not been attached produced in evidence and that there is no entry on the proprietorship section of the adduced Land Certificate.
13. According to PW1, there are two ID numbers on the part of the transferor and the second one is altered but not counter signed and that they engaged geographic services to confirm the position of the suit property on the ground.
14. PW1 informed the court that she contacted the search in 2008 and the subsequent searches did not provide any results; that she discovered the 1<sup>st</sup> Defendants presence on the suit property in 2010; that her father put up a perimeter fence around the suit property but she is not aware of when this was done; that they filed a suit seeking to manage their mother's property as she was gravely ill and that she is not aware of whether the person who sold her father the land is still alive.
15. It was the evidence of PW1 that she obtained the documents in her possession from her mother; that it is not true that her father sold the property to David Waweru who in turn sold it to the 1<sup>st</sup> Defendant and that her father's name changed from Stephen Kinyanjui Kimatta to Francis Wainoga Kimatta.
16. DW1 was James Kinyanjui Kiritu, the 1<sup>st</sup> Defendant herein. It was the testimony of DW1 that the case relates to L.R Dagorreti/ Riruta/1228 which land belongs to him by virtue of a purchase from David Waweru Nganga in 2001 which sale was completed in 2002; that there is an official search showing him as the owner of the suit property and that he was issued with the title to the suit property in 2002.
17. According to DW1, in the year, 2010, the title got lost and he reported the matter at Parklands Police Station where he was issued with a Police Abstract; that the loss of the title was advertised in the Kenya Gazette and he was issued with a provisional title and that when he purchased the suit property, it



was vacant and bushy with no water or electricity. It is the 1<sup>st</sup> Defendant's case that he later leased the suit property to the 2<sup>nd</sup> Defendant in 2010 for Kshs 60,000 which figure was adjusted to Kshs 90,000 when he put up the perimeter fence.

18. During cross-examination, DW1 stated that he did not purchase the property from the Plaintiffs but from David Waweru Ngugi; that the transfer and the land control board consent got lost and that the Agreement was only between the two of them as close friends. According to DW1, he did not value the land and does not know the process of paying stamp duty which they paid through the bank; that he does not recall the particular bank where stamp duty was paid and that the vendor became sick and later died.
19. DW2 informed the Court that prior to his posting to Kajiado, he worked at Ardhi House between 2019 and 2022 as a land registrar; that he was in possession of the Land Certificate for the suit property in the name of David Waweru issued on 23<sup>rd</sup> April, 1997, a transfer document between David Waweru & James Kinyanjui dated 5<sup>th</sup> June, 2002 and registered on 20<sup>th</sup> August, 2002, a letter of consent between David Waweru and James Kinyanjui and a deed of indemnity issued when documents are lost to indemnify the government.
20. It was the evidence of DW1 that the initial register was missing in the binder; that a reconstructed green card showing the initial proprietor as Ephraim Gachoka was registered on 4<sup>th</sup> October, 1974 who transferred the property to Francis Wainoga Kimata on 16<sup>th</sup> July, 1979, who then transferred the suit property to David Waweru Ngugi on the 23<sup>rd</sup> April, 1988.
21. It was the evidence of the land registrar that the suit property was transferred to the 1<sup>st</sup> Defendant, James Kinyanjui, on 20<sup>th</sup> August, 2010; that the entry no 9 shows that the title was re-issued vide gazette notice number 4906 of 18<sup>th</sup> July, 2014 and that when a transfer is registered, the documents that are needed include a title deed, letter of consent and evidence of payment of stamp duty.
22. It was the evidence of DW2 that Francis Wainoga on the green card shows that he was registered as the proprietor of the suit property in 1979; that he cannot explain why the Plaintiffs have the original title; that the search dated 14<sup>th</sup> June, 2008 shows the owner of the property as Francis Wainoga; that he does not have the documents of transfer from Francis to David; that he cannot tell when the green card was lost and that he is the one who reconstructed the register on 7<sup>th</sup> June, 2014.
23. It was the evidence of DW2 that the original title should have been surrendered by Francis; that the deed of indemnity was only with respect to the reconstruction of the green card; that the current registered owner of the suit property is James Kinyanjui and that he did not have all the documents in support of the pre-2002 transactions.

## **Submissions**

24. The Plaintiffs' counsel submitted that the 1<sup>st</sup> Defendant's assertion that he did not deal with the Plaintiffs' late father and his refusal to call the person who sold to him the suit property was a deliberate and calculated attempt to plead that he is an innocent purchaser for value and that having established the validity of the title held by the Plaintiffs, there is no basis upon which the Court could hold that the latter was an innocent purchaser for value.
25. It was submitted that DW2, the Land Registrar, produced transfer documents from David Waweru Ngugi to the 1<sup>st</sup> Defendant but did not produce transfer documents from the deceased David Waweru Ngugi; that whereas the green card was reconstructed, it was not disclosed which documents were relied on in the reconstruction and that the Land Registrar acknowledged that the Plaintiffs' original title to have come from the lands registry which title they still possess.



26. The 1<sup>st</sup> Defendant's counsel submitted that whereas the Plaintiffs have throughout the proceedings referred to the 1<sup>st</sup> Defendant as a fraudster, there is no evidence to prove the same; that according to PW1, her late father was previously known as Stephen Kinyanjui Kimata and changed his name to Francis Wainoga Kimata and that he only changed his name two months before the transfer of the suit property.
27. It was submitted by the defense counsel that there appears to be no relationship between the Plaintiffs and the deceased whom they allege to be their father; that the 1<sup>st</sup> Defendant purchased the suit property from one David Waweru Ngugi who may well have been a fraudster and that in this respect, the 1<sup>st</sup> Defendant is an innocent purchaser for value.
28. It was submitted that despite alleging to have discovered the 1<sup>st</sup> Defendant's occupation of the suit property in 2010, no efforts appear to have been made by the Plaintiffs to raise their concerns with the Chief Lands Registrar or to join the Chief Lands Registrar as a party to this suit to grant him an opportunity to testify and that the provisions of Section 26 of the Land Act protects the 1<sup>st</sup> Defendant as a bona fide purchaser for value.
29. According to the 1<sup>st</sup> Defendant, the title issued to the deceased ought to have been surrendered and therefore stands surrendered and or cancelled and that the only legitimate title is the one held by the 1<sup>st</sup> Defendant. It was submitted that the Court should order for the deposit of the rent collected by the Court vide its order of 8<sup>th</sup> September, 2014 to be released to the 1<sup>st</sup> Defendant's advocates and the Plaintiffs case to be dismissed in its entirety.

### **Analysis & determination**

30. Having carefully considered the pleadings, the testimonies and submissions herein, the issues that arise for determination are;
  - i. Whether the Plaintiffs have established their case on a balance of probabilities?
  - ii. Whether the Plaintiffs are entitled to the orders sought?
31. The Plaintiffs instituted this suit seeking inter-alia for a declaration that the 1<sup>st</sup> Defendant's purported acquisition of the suit property was unlawful; a mandatory injunction compelling the registrar to cancel the 1<sup>st</sup> Defendant's title and any derivatives therefrom; permanent injunctive orders restraining the Defendants from any dealings with the suit property; eviction of the 2<sup>nd</sup> Defendant from the suit property; mesne profits and general damages.
32. It is the Plaintiffs' case that their deceased father, Francis Wainoga Kimatta, has at all times been the registered proprietor of the suit property having purchased the same from one Ephraim Gachoka on 7<sup>th</sup> July, 1979; that the 1<sup>st</sup> Defendant has unlawfully purported to take proprietorship of the suit property and is leasing the same to the 2<sup>nd</sup> Defendant and that neither the deceased, nor the Plaintiffs have parted with possession of the suit property in any manner whatsoever warranting the 1<sup>st</sup> Defendants purported ownership thereof.
33. According to the Plaintiff, the 1<sup>st</sup> Defendant's claim to the suit property is actuated by fraud whose particulars are set out in the Plaint and include: presenting forged documents to the Registrar for registration as proprietor of the suit property; purporting to be the owner of the suit property and leasing the same out to the 2<sup>nd</sup> Defendant.
34. In support of its case, the Plaintiff adduced into evidence the Land Certificate in respect of the suit property indicating that the deceased-Francis Wainoga Kimatta was registered as the owner of the land



on 16<sup>th</sup> July, 1979; a copy of the transfer of land from Ephraim Gachoka to Francis Wainoga dated the 7<sup>th</sup> July, 1979 and a Certificate of Official search dated 14<sup>th</sup> July, 2008 showing Francis Wainoga as the registered proprietor.

35. On the other hand, the 1<sup>st</sup> Defendant maintains that he is a bonafide purchaser for value having purchased the property in the year 2002 from one David Waweru; that he has extensively developed the suit property including erecting a perimeter wall and a metallic main gate and that sometime in 2010, whilst travelling, he lost the original title document which loss he reported to the Parklands Police Station and was issued with an Abstract.
36. It was the testimony of DW1 that he subsequently sought and applied for a new Certificate of Title and Gazette Notice no 4906 dated 18<sup>th</sup> July, 2014 was published whereafter he was duly issued with a new title deed and that a search conducted on 7<sup>th</sup> July, 2014 confirmed that he is the registered owner of the suit property.
37. The 1<sup>st</sup> Defendant adduced into evidence a copy of the Title Deed to the suit property dated 27<sup>th</sup> October, 2014; a Certificate of Official Search dated 7<sup>th</sup> July, 2014, a Gazette Notice no 4906 dated 18<sup>th</sup> July, 2014; an application and approval for connection of sewer line and electricity; and receipts showing expenses incurred in constructing of the perimeter wall, installation of electricity and connection to the sewer line.
38. DW2 adduced into evidence the Land Certificate in the names of David Waweru Ngugi dated 23<sup>rd</sup> April, 1997, transfer of land from David Waweru to James Kinyanjui dated 5<sup>th</sup> July, 2002, a letter of consent from the Land Control Board allowing the transfer of the suit property from David Waweru to James Kinyanjui, a Deed of Indemnity with respect to the lost green card of the suit property; a copy of a Gazette Notice no 4906 dated 18<sup>th</sup> July, 2014 and the reconstructed Green Card extract.
39. It is trite that he who alleges must prove. This position is succinctly captured in Section 107, 109 and 112 of the Evidence. The said Sections of the Act provide as follows:
  - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
40. And Sections 109 and 112 of the same Act states;
  - “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
  - “112. 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 him.”
41. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:
  - “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence



advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

42. The present case revolves around two competing titles held by the Plaintiff and the 1<sup>st</sup> Defendant with respect to the suit property. Whereas ordinarily, a certificate of title would prima facie evince proprietorship thereof, it is in itself insufficient in such circumstances. The court is mandated to conduct an investigation into the root of the two titles to establish the genuine one. This position was enunciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others[2016] eKLR*, where Munyao J succinctly held as follows;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root.”

43. The Plaintiffs produced in evidence the Land Certificate showing the deceased was registered as the proprietor of the suit property on 16<sup>th</sup> July, 1979. According to PW1, the deceased bought the property from one Ephraim Gachoka. PW1 adduced in evidence a Transfer of Land dated 7<sup>th</sup> July, 1979.

44. DW2, a Registrar at the Lands Department confirmed that the re-constructed green card showed the registration of Ephraim Gachoka as the initial owner of the land as at 4<sup>th</sup> October, 1974. He also confirmed that Ephraim transferred the suit property to Francis Wainoga Kimatta (the Plaintiffs' late father) in 1979. DW2 further affirmed that there was a search dated the 14<sup>th</sup> July, 2008 showing Francis Wainoga Kimatta as the registered owner of the land.

45. On his part, the 1<sup>st</sup> Defendant's case is that he purchased the suit property from one David Waweru in the year 2002. The 1<sup>st</sup> Defendant adduced the Title Deed dated 27<sup>th</sup> October, 2014 which he avers is a replacement of his title which he lost in 2010. DW2 in his testimony produced into evidence a copy of the Land Certificate in the names of David Waweru Ngugi dated 23<sup>rd</sup> April, 1997, the transfer of the property to the 1<sup>st</sup> Defendant and the land control board consent transferring the suit land from David Waweru Ngugi to the 1<sup>st</sup> Defendant.

46. It is apparent that a parcel of land cannot have two titles. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of *Gitwany*



Investment Ltd & 3 Others vs Commissioner of Lands, HCCC No.1114 of 2002, where the Court held that;

“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly, the first in time prevails.”

47. This position was further confirmed by the Court of Appeal in the case of Lawrence P. Mukiri Mungai vs Attorney General and others (2017) eKLR in which they held as follows:

“As at the date of the trial. The appellant was still holding a valid title deed to the suit property, which title was issue to him in 1992. The 2<sup>nd</sup> Respondent was allegedly issued a title deed for the same property in 1996. A property cannot have two title deed. Even assuming the second title deed had been issued by mistake, the first in time prevails.”

48. The Plaintiffs’ title was issued in 1979 whereas the 1<sup>st</sup> Defendant’s title was issued in 2014 or in 2002. The 1<sup>st</sup> Defendant and DW2 did not adduce evidence to show that indeed David Waweru purchased the suit property from the late Francis Kimata, or at all. Indeed, neither a copy of the sale agreement between the said Francis and David nor evidence of payment of the purchase price by David to Francis was adduced.

49. The land registrar, DW2, confirmed that the official search in possession of the Plaintiffs dated 14<sup>th</sup> July, 2008 is a genuine document. Considering that the search shows that as at 2008, the land was still registered in the name of Francis Kimata, it follows that the purported transfer of the suit property to David Waweru in 1997 or at all was a forgery that was perpetrated by the 1<sup>st</sup> Defendant and the said David Waweru.

50. Indeed, this position is fortified by the fact that the original extract of title (the green card) does not exist, the same having disappeared almost at the same time that the 1<sup>st</sup> Defendant’s title deed and all the supporting document purportedly got lost. Notwithstanding the weird coincidence of the disappearance of the green card and the 1<sup>st</sup> Defendant’s title deed and supporting documents, there was no explanation on how the green card was reconstructed in the absence of the said documents.

51. In the absence of any evidence impugning the legality of the Plaintiffs’ title, either by DW1 or DW2, the Court finds that the Plaintiffs’ title was the first in time. It is trite that where a suit property registered under the Registered *Land Act* (repealed), as in this case, and is sold by the registered owner, the original title deed must be surrendered for cancellation before a fresh title deed is issued to the transferee.

52. To the extent that the Plaintiffs are in possession of the title deed that was issued to their father in 1979, it follows that the said land was never sold or transferred to David Waweru, who purportedly sold it to the 1<sup>st</sup> Defendant. The title deed in the possession of the 1<sup>st</sup> Defendant is a forgery and should be cancelled forthwith.

53. The next question is whether the 1<sup>st</sup> Defendant is, as he maintains, a bonafide purchaser for value. The threshold for one to be considered a bonafide purchaser were set down in *Katende vs Haridar & Company Limited* (2008) 2 E.A.173 where the Ugandan Court of Appeal stated thus;

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it



wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

54. It is key to note however, that the import and tenor of the doctrine of bonafide purchaser for value and in particular the decision in *Katende vs Haridar & Company Ltd* (2008) 2 E.A 173, has since been reviewed by the Court of Appeal in *Mwangi James Njehia vs Janet Wanjiku Mwangi & another* [2021] eKLR, where the court stated;

“...In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.”

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*.”

55. The new position as set out in *Mwangi James Njenga* (supra) is that before one can benefit from the doctrine of bona fide purchaser for value, it must be established that the vendor had a valid title, as opposed to apparent valid title. This is the same position that the Court of Appeal had taken earlier in the case of *Arthi Highway Developers Ltd vs West End Butchery & 6 Others* [2015] eKLR where the court expressed itself as follows:

“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

56. In the circumstances of this case, it is noted that in light of the Plaintiffs claim that neither themselves nor their father parted with possession of the suit property, and considering that neither DW1 nor DW2 have been able to prove that there was any transfer of the suit property from the Plaintiffs’ late father to David Waweru from whom the 1<sup>st</sup> Defendant claims the property, the 1<sup>st</sup> Defendant’s claim that he is entitled to the land as an innocent purchaser fails.



57. I say so because DW2 confirmed that if there was indeed any transfer, the original title ought to have been surrendered. DW2 was at pains to explain why the Plaintiffs had in their possession the original title, and admitted that “there must have been a problem with the transaction”.
58. What arises from the foregoing is that whatever title David Waweru held was illegitimate and was incapable of being passed on to another party. Consequently, the 1<sup>st</sup> Defendant’s reliance on the doctrine of bona fide purchaser for value without notice fails.
59. The Plaintiffs have sought for several reliefs including a declaration that the 1<sup>st</sup> Defendant’s acquisition of the suit property is illegal, cancellation of the title in the 1<sup>st</sup> Defendants’ name, permanent injunctive orders against the Defendants and eviction of the 2<sup>nd</sup> Defendant from the suit property as well as mesne profits.
60. Having found in favour of the Plaintiffs title vis a vis the 1<sup>st</sup> Defendant’s, the 1<sup>st</sup> Defendant’s title is amenable to revocation and/or cancellation pursuant to the provisions of Section 143 (1) of the Registered *Land Act* Cap 300 (repealed). The Plaintiffs are also entitled to an order of permanent injunction.
61. The Plaintiffs have also sought for mesne profits equivalent in rent chargeable and for continued unlawful occupation of the suit property up to the delivery of the same.
62. It is trite that a claim for mesne profits being one in the nature of special damages must be specifically pleaded and proved. This position was affirmed by the Court of Appeal in the case of Peter Mwangi Mbuthia & another vs Samow Edin Osman [2014] eKLR where the court posited;
- “We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”
63. In the instant case, the 1<sup>st</sup> Defendant admits to have leased out the suit property to the 2<sup>nd</sup> Defendant from the year 2010 at the rate of Kshs 90,000/= per month. It is this rental sum that the Plaintiffs are claiming. It is also noted that vide its order of 8<sup>th</sup> September, 2014, the Court ordered that the rental payments by the 2<sup>nd</sup> Defendant be deposited with the Court. The aforesaid sums which constitute mesne profits should be released to the Plaintiffs.
64. It is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. The Court of Appeal in the case of Kenya Hotel Properties Limited vs Willesden Investments Limited [2009] eKLR held that
- “...once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”
65. The claim for general damages therefore fails.
66. In the end, the Court finds that the Plaintiffs have established their case on a balance of probabilities and proceeds to make the following final orders;
- i. A declaration does hereby issue that the 1<sup>st</sup> Defendant’s purported acquisition of parcel Dagoretti/Riruta/1228 was unlawful.



- ii. A mandatory injunction does hereby issue, compelling the Chief Land Registrar to forthwith cancel the purported proprietorship of parcel Dagoretti/Riruta/1228 and any such derivative titles thereto by James Kinyanjui, the 1<sup>st</sup> Defendant.
- iii. A permanent injunction does issue restraining the Defendants either by themselves, their servants and/or agents or otherwise howsoever from trespassing, remaining upon, occupying, cultivating, leasing, licensing, letting for a peppercorn fee, constructing upon, carrying any form of business or otherwise howsoever dealing in parcel number Dagoretti/Riruta/1228.
- iv. The 2<sup>nd</sup> Defendant is hereby directed to give vacant possession to the Plaintiff of the suit property within 60 days of the date hereof failure to which eviction shall issue.
- v. The rental sums deposited into court pursuant to the orders of 8<sup>th</sup> September, 2014 shall be forthwith released to the Plaintiffs and the sum of Kshs 90,000/= shall accrue monthly until the same is paid in full to the Plaintiffs and the 2<sup>nd</sup> Defendant vacate the suit property.
- vi. The Plaintiffs shall have the costs of the suit to be paid by the 1<sup>st</sup> Defendant.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Achoki for Osenyo the Plaintiff

Ms. Kimathi holding brief for Itonge for 2<sup>nd</sup> Defendants

Mr. Mutanga for 1<sup>st</sup> Defendant

Court Assistant - June

