



REPUBLIC OF KENYA



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Njiru v Kenya Urban Roads Authority (KURA) & 5 others (Environment & Land Case 2 of 2020) [2023] KEELC 16602 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16602 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE 2 OF 2020**

CK YANO, J

MARCH 29, 2023

BETWEEN

FRANKLINE JAPHET NJIRU PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY (KURA) 1ST DEFENDANT

THE ADMINISTRATOR CHUKA TOWNSHIP 2ND DEFENDANT

THE COUNTY GOVERNMENT OF THARAKA NITHI 3RD DEFENDANT

**HYPER CONSTRUCTIONS & EQUIPMENT COMPANY LIMITED 4TH
DEFENDANT**

RACHAEL NJERI NDOHO 5TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by a plaint dated May 20, 2020 which was amended on June 29, 2020 seeking for the following reliefs:
 - 1.(a) A declaration that plot NoM26B Chuka Township which measures 20 by 120 feet is the property of the plaintiff.
 - 2.(a) A declaration that the plaintiff is at liberty to reconstruct part of plots No M26B measuring 20 feet by 20 feet that were demolished, damaged and destroyed by the 4th and 5th defendants at the instance of the 1st defendant without any interference by the defendants, their agents, servants or any person acting at their behest.
 - 3.(a) The defendants to pay the plaintiff Kshsn2,893,170 being the assessed value of the demolished part of the plaintiff's plot No M26B Chuka Township.



4. The defendants to pay the plaintiff Kshs 23, 276/- being the charges for the assessment report.
- 5.(a) The defendants jointly and severally be restrained by way of a permanent injunction from constructing “Moi Girls’ Road” or any other road in Chuka township that will affect plot No M26B or any part thereof which measure 20 feet by 120 feet.
6. The defendants to pay mesne profits and non-user of the premises.
7. Cost and interest from the date of filing suit.

Plaintiff’s Case

2. The plaintiff contends that he is and has been the owner of plot No M26B Chuka Township having inherited the same from his mother, one Rebekah Njiru, who in turn had inherited the same from Japhet Njiru, the plaintiff’s father.
3. The plaintiff avers that according to the PDP held by the director of survey the plot measures approximately 20 feet by 120 feet. That by April 4, 2020, the said plot was fully developed as per PDP approved by municipal council of Chuka, the predecessor of the 2nd defendant herein. The plaintiff further contends that all the while, the 2nd defendant has been collecting land rates in respect of the suit plot for and on behalf of the 3rd defendant and the 2nd defendant has been issuing receipts to that effect.
4. The plaintiff states that the 1st defendant contracted the 4th defendant to build a road within Chuka township commonly known as “Moi Girls Road” and works commenced by the 4th defendant. That by a general notice dated February 18, 2020 and which was expiring on March 3, 2020 issued by Engineer D Nderitu, an agent of the 1st defendant, the plaintiff was directed to demolish a portion measuring 20 feet by 20 feet out of plot No M26B Chuka Township.
5. The plaintiff states that being dissatisfied with the notice demanded that a surveyor do visit the locus in quo and map and beacon the parameters of plot No M26b Chuka Township, but that neither the 1st nor 4th defendants would hear the plaintiff’s plea. That in a bid to save the situation, the plaintiff and six others whose plots were also affected by the demolition notices by the 1st defendant, went to court vide the Chief Magistrate ELC case No 13 of 2020 and sued the 1st, 2nd and 3rd defendants seeking for orders restraining the 1st defendant from demolishing the said plots pending the hearing of the application dated March 3, 2020 and the main suit thereof. That the issue of pecuniary jurisdiction on the part of the magistrate’s court was raised and the trial magistrate declined to grant the interim orders of injunction or an order for maintenance of status quo, and the plaintiff and the other 6 parties filed High Court miscellaneous ELC Case No 5 of 2020 seeking for the court’s opinion on the issue and or transfer of ELC Case No 13 of 2020 to the ELC court, but the application was not concluded and overtaken by events and withdrawn.
6. The plaintiff avers that on April 4, 2020, the 5th defendant at the instance of the 1st and 4th defendants demolished part of plot No M26b Chuka Township measuring 20 feet by 20 feet, occasioning the plaintiff loss and damage assessed at Kshs 2,893,170/=. It is the plaintiff’s contention that the demolition was in contravention of article 40 (3) (b) (ii) of the Constitution and was an affront to the principle of natural justice. The plaintiff further contends that the notice dated April 3, 2020 did not constitute a hearing and was unilateral.
7. The plaintiff further avers that after a government surveyor mapped and beacons the parameter of plot No M26B and 6 others on April 28, 2020, namely M.26A2, M25, M.19, M.20B, M.23 and M.27b, the government surveyor returned the finding that the said plots were not on the road or road reserve.



The Plaintiff's Evidence

8. At the hearing, the plaintiff testified as PW1 and called four witnesses. In his evidence, the plaintiff reiterated the facts contained in the amended plaint and adopted his witness statement dated May 31, 2021 as his evidence-in-chief and prayed for the reliefs in the amended plaint. The plaintiff stated that he was getting an income of about Kshs30,000/= per month from the premises on the plot that he had rented out. The plaintiff produced a letter of allotment dated February 7, 1994, a PDP from director of survey (F/R No 230/171 folio no 253) for Chuka Town, letters of administration issued to Rebecca Njiru in succession cause No 45 of 1986 in respect of the estate of Japhet Njiru, transfer of plot No M26B, letters of administration issued to the plaintiff in succession cause No 66 of 2002, certificate of death of Rebecca M Njiru, certificate of confirmation of grant in succession cause No 66 of 2002, reviewed certificate of confirmation in the same cause, confirmation letter from the administrator Chuka township that the plaintiff is the owner of the suit plot, bundle of land rates payment receipts, approved plan by the municipal council, notice of demolition, photographs, receipts for charges for valuation, demand letter and statutory notice to the Attorney General as p exhibits 1 to 16 (e) respectively.
9. The plaintiff testified that there is a difference between parcel No 26 and plot No M26B, adding that he came to know the registered owner of parcel No 26 as one Njeru Kanyi.
10. When cross-examined by Mr Mugambi, learned state counsel for the Attorney General for the 1st and 6th defendants, the plaintiff reiterated that his building that was demolished was on a plot that he claims. He stated that he has produced the letter of allotment as proof of ownership and is used to process title. He confirmed that a letter of allotment is an offer. He further confirmed that he withdrew the case against the 2nd and 3rd defendants.
11. When re-examined by Mr Mugo, learned counsel for the plaintiff, the plaintiff stated that he has sued the 5th defendant because she was the one demolishing the building while the 4th defendant were given the contract to construct the road by the 1st defendant.
12. PW2 was Cecilia Mukiri, the administrator of Chuka sub-county, and Chuka town is within her area of jurisdiction. She testified that she coordinates the devolved functions of the county government of Tharaka Nithi and her work entails keeping some records, while others are kept by the other departments.
13. According to PW2, plot No M26B measuring 20 feet by 120 feet is within the planned commercial zone 513 in Chuka township and is registered in the name of the plaintiff. PW2 referred to the letter of confirmation dated May 19, 2022 which she stated she obtained from the senior physical planner, Tharaka Nithi county, who also provided a PDP extract for plot No M26 and an extract of the register which shows that plot No m26 was subdivided into plot M26A (1) in the name of Richard Gakuri and M26A2 belonging to Elias Mucheni and M26B in the name of the plaintiff. PW2 produced the said documents as pexhibits 21 (a) and (c) respectively.
14. When cross-examined by Ms Kendi learned counsel for the 1st and 6th defendants and re-examined by Mr Mugo, PW2 confirmed that her work did not include land survey and was not the custodian of land records. While referred to the letter of allotment, PW2 could not confirm whether stand premium was paid or whether there was acceptance or if the offer lapsed. PW2 could not also explain why the physical planner used the words “currently not developed”.



15. PW3 was Cyprian Kirera Irugu a registered valuer and licensed to practice valuation. He prepared the report dated April 24, 2020 which he produced as pexhibit 14 and confirmed that he charged for the services rendered and issued a receipt which was produced as pexhibit 15.
16. PW3 testified that he looked at the survey plan, rates demand notices, approved drawings and also inspected the property which was also identified by the plaintiff. He stated that the entire property was not demolished. He assessed the damage at Kshs 2,893,170/= and the land at Kshs 406,640/=.
17. PW4 was Zachary Thuku Kananu, a licensed surveyor under the *Survey Act* under the name of Kananu Geospecial Surveyors Consultants. He testified that pursuant to instructions, he investigated and filed a report over plot No M26B, a subdivision of plot No M26 parcel No 227. PW4 stated that a plot number is not registered with the director of surveys while a parcel number refers to an area that is surveyed, beaconed, issued with a parcel number by the director of survey and a plan thereof issued. He stated that parcel No Chuka 227 is surveyed and approved by the director of survey and that pexhibit 2 is a copy of the survey plan from survey of Kenya.
18. PW4 testified that in carrying out the exercise, he referred to survey plan F/R 253/67 done by S.N Wambaru (deceased) which was authenticated on October 4, 1985 and which comprised parcel Nos 202 to 259 in which parcel No 227 was part of. He stated that surveyors who are recognized to carry out survey works are licensed surveyors and government surveyors, and that the director of survey can authorize a surveyor who is not in his department to do survey work and the authorization must be in written. That a surveyor working with a parastatal must have a letter from the director.
19. PW4 testified that he did not do the beacons for plot No M26B, but confirmed that the said plot is part of parcel No 227. That he visited the area in question and found out that plot No 227 was demarcated into three portions: M26A(1) belonging to Richard Kagure, M26A(2) belonging to Elias Micheni and M26B belonging to Frankline Japeth Njiru. That he found that the upper parts of portions M26A and M26B were demolished. That the area for plot No 26A and M26B were demolished. That the area for plot No 26A(2) that was demolished was 0.0043 hectares and for plot No. M26B, the area demolished was 0.050 hectares.
20. It was the evidence of PW4 that properties which have been approved by the director of surveys cannot include roads, adding that the roads must be outside the parcels. That plot Nos M26B and M26A(2) could not be on the road. PW4 produced the report he prepared as pexhibit 17 and the receipt as pexhibit 18.
21. When cross-examined by Ms Kendi learned counsel for the 1st and 6th defendants, PW4 stated that plot No M26B and M26A2 are within parcel No 227 which had been subdivided. He testified that parcel No 227 was surveyed in the year 1995, though the letter of allotment (pexhibit 1) states that the plot was unsurveyed. He confirmed that page 2, paragraph 2 of the letter of allotment states that one had to be clear when constructing on an unsurveyed plot for if one overstepped, the reconstruction would be borne by the owner.
22. When re-examined by Mr Mugo learned counsel for the plaintiff, PW1 stated that he was taken around the suit property by the owner and he confirmed that no construction was undertaken outside the surveyed plot No 227.
23. PW5 was Mwenda Kithinji Duncan, a senior physical planner working with the Tharaka Nithi county government. He testified that his work entails preparation of physical and land use development plans. He stated that he was conversant with all the plots and properties in Tharaka Nithi county, which includes plots in Chuka township.



24. PW5 testified that he authored the letter of confirmation of ownership dated May 19, 2022 produced as exhibits 21 (a), (b) and (c). He stated that he obtained the details from the plot register and confirmed that plot No M26b measures 20 feet by 120 feet. He however stated that there was an error on his letter when he stated that it was not developed, yet there is a building on the plot. He confirmed that the plot was within the plan of Chuka township and that the plot was not on a road reserve. He testified that as per the register, plot No M26B is registered in the name of Frankline Japheth Njiru, the plaintiff herein and measures 20 feet by 120 feet.
25. When cross-examined by Ms Kendi, PW5 confirmed that they did not keep all the ownership documents, but only kept a copy of the register. He reiterated that he authored the letter dated May 19, 2022 which stated that the plot was currently not developed, though he pointed out that that was an error and which he wrote to the owner to clarify. He admitted that exhibit 1 indicated that the plot No M26 Chuka is unsurveyed and set out the conditions the allottee needed to meet including stating that if a building is constructed on a road reserve, the owner of the building will bear the costs of the demolition of such buildings. He further confirmed that once one is given a letter of offer, he/she is supposed to make payment in acceptance within 30 days. PW5 stated that he was not aware whether these conditions were met within 30 days.

Defendants' Case

26. The case against the 2nd and 3rd defendants was withdrawn by the plaintiff while the 4th and 5th defendants never entered appearance and/or file defence.
27. The 1st and 6th defendants filed a joint defence dated June 15, 2020 wherein they denied the averments in the plaint. The 1st and 6th defendants denied that the plaintiff has been the legally registered owner of parcel No 26B Chuka township and averred that the suit land is the property of the republic of Kenya and that the plaintiff interest in the suit land was fraudulently and illegally procured contrary to the provisions of the [Government Lands Act](#) and the repealed constitution and all enabling laws.
28. The 1st and 6th defendants listed particulars of fraud and illegality as follows:
 - i) Making application for property that was being reserved for government purposes which application was never approved hence has no locus over the suit property.
 - ii) Unduly influencing municipal council to allot land that was not within their jurisdiction and without issuance of any lease certificate.
 - iii) In consort with the municipal council failure to comply with the provisions of the [Government Land Act](#) (GLA).
 - iv) In consort with the commissioner of lands, failing to comply with section 9, 12 and 13 of the [Government Land Act](#) (GLA).
29. The 1st and 6th defendants further denied the use and further developments in the suit land. They reiterated that the suit land was reserved for government purpose, was not available for disposal to private entities and by dint of the doctrine of radical title ought to revert back to the government as the owner.
30. It is the 1st and 6th defendants' case that they are strangers to all the allegations set out in the plaint and aver that they are strangers to all the said allegations and put the plaintiff to strict proof thereof. Further, the 1st and 6th defendants aver that the suit does not disclose any reasonable cause of action, is misconceived and not properly grounded in law and prayed for the dismissal of the suit with costs.



The 1st and 6th Defendants Evidence

31. The 1st and 6th defendants called one witness, Dorcas Kanana Mungai, a senior lands surveyor at the Kenya Urban Roads Authority (KURA), the 1st defendant herein, who testified as DW1. It was the evidence of DW1 that the development plan for Chuka Township which was approved by the commissioner of Lands in 1988 provided a road for 15 metres. That plot No M26 was not provided in that plan and so the planner developed a part development plan in 1993 that allocated plot No M26 and reduced the road from 15 metres to 9 metres. It is the testimony of DW1 that the suit property has encroached into the road or road reserve. DW1 testified that the 1988 plan supercedes the 1993 plan. The witness confirmed that the letter of allotment produced by the plaintiff as p.exhibit 1 was an allotment over an unsurveyed plot. That according to the letter of allotment, the allottee was supposed to have surveyed his plot before developing it. That in this case, the buildings that were demolished were on a road reserve, and were removed at the cost of the owner as stipulated in the letter of allotment. That if one does not comply with the conditions in the letter of allotment, the plot reverts back to the government.
32. DW1 testified that the owners of the structures that were to be demolished were issued with notices to carry out the demolitions and denied that the 1st defendant carried out the demolition.
33. When cross-examined by Mr Mugo, DW1 stated that the only licensed surveyor in Kenya Urban Roads Authority [KURA] is the deputy director. DW1 stated that she is not a registered licensed surveyor, but a government surveyor. DW1 further stated that she is the one who went to the site and took out measurements that showed that there was encroachment (on the road reserve). DW1 stated that at the time they went to the site, the plot was not surveyed, adding that a physical planner is not a surveyor and that Kenya Urban Roads Authority [KURA] is the one to be believed in regard to the suit plot. She stated that the National Land Commission had no role to plan in the matter as there were no evictions to be carried out.
34. DW1 was categorical that the 1st defendant did not demolish any structure, adding that it is the owners of the structures who carried out the demolitions after they were issued with notices. DW1 stated that they had contracted Hyper Constructions and Equipment Company Limited to tarmac the “Moi Girls Road” and they had gone there to show the contractor the extend of the road. However, the contract was later cancelled.
35. DW1 stated that before the construction of the road, there was public participation meeting for people who would be affected. DW1 stated that she did not know if the plaintiff attended the meeting.
36. DW1 further stated that they obtain documents from the ministry of lands since the 1st defendant is not a custodian of the documents. She stated that the suit plot was not surveyed, adding that the survey plan of 1994 did not reflect the true position on the ground. That the reduction of the road from 15 metres to 9 metres is enough evidence to show that the Part Development Plan and the survey plan are not correct. That the plan for Chuka Township was done by the physical planner in 1988 when the 1st defendant was not yet in existence. That the 1st defendant relied on that plan because it had been approved, adding that the 1994 plan was dismissed because it had a lot of inconsistencies and errors. The witness made that conclusion because plots 254 and 255 were also demolished.
37. DW1 stated that she was aware of compulsory acquisition, but that the plaintiff was not entitle to be compensated. The witness stated that she was not aware of case No 1 of 2020 in the magistrate’s court. she stated that the 1st defendant did not carry out any demolitions and the instructions to the contractor did not include demolition of structures. She confirmed that the 1988 plan provided for a road of 15 metres while the 1994 one provided for a 9 metre road. That the fault was on the director of survey.



38. Regarding the letter of allotment issued on February 7, 1994, DW1 stated that the same talks of an unsurveyed plot and that plot No 26 is different from plot No M26. That survey works are carried out by the allottees of the plots in order to get a lease, which does not exist in this case. She stated that the plot belongs to the owner while the road belongs to Kenya Urban Roads Authority [KURA].
39. When re-examined by Ms Kendi, DW1 stated that Kenya Urban Roads Authority [KURA] is a government agency under the Ministry of Roads and Infrastructure and does not require permission of the director of survey or National Land Commission when undertaking its mandate. That the plaintiff's plot was not compulsorily acquired.

The Plaintiff's Submissions

40. The plaintiff filed written submissions dated December 2, 2022 through the firm of I. C Mugo & Co Advocates. Counsel for the plaintiff summarized the facts of the case and the evidence and submitted that there was a principal/agent relationship between the 4th and 5th defendants on the one hand and the 1st and 4th defendant on the other hand in that the 4th defendant contracted the 5th defendant to demolish the plaintiff's property using a government registered machine. Further, that there was a principal/agent relationship between the 1st defendant and the 4th defendant in that the 1st defendant had contracted the 4th defendant to construct the Moi Girls' Road. Counsel for the plaintiff pointed out that the 4th and 5th defendants never entered appearance and submitted that the plaintiff's claim against the 4th and 5th defendants should succeed and in turn the 1st defendant be found liable under the doctrine of vicarious liability and further that the 6th defendant be vicariously liable for the acts, omissions and commissions of the 1st defendant. The plaintiff's counsel relied on the case of High Court of Kenya at Kiambu civil appeal No 121 of 2018 [Lenson Products Limited v Mary Waitihira Ndirangu & John Wainaina](#) [2020] eKLR.
41. The plaintiff's counsel further submitted that from the evidence and documents adduced, the plaintiff is the owner of the property upon the principle of long possession and that lack of a lease cannot be a basis to deprive the plaintiff ownership of the plot. The plaintiff's counsel relied on Meru civil appeal No 90 of 2009 [Betha Kanini Baini v Agnes Ithiru Njoka](#) [2011] eKLR.
42. It is the plaintiff's submission that the property was planned and surveyed and as such it could not have encroached on the public road.
43. The plaintiff further submitted that the 4th and 5th defendants demolished the suit property at the instance of the 1st defendant and that the demolition amounted to eviction of the plaintiff. It is submitted that the procedure for demolition was not followed as provided under section 152 and 155 of the [Land Act](#) No 6 of 2012 and the plaintiff relied in the Court of Appeal No 56 of 2018 [Benson Wekesa Milimo v National Land Commission & 2 others](#) [2021] eKLR. The plaintiff's counsel cited the provisions of article 40 of the [Constitution](#) and argued that the demolition was arbitrary and against principle of natural justice and against an injunction order granted in ELC Case No 1 of 2020. Counsel for the plaintiff relied on the High Court of Nairobi petition No 157 of 2016 [Hellen Wachuka Njoroge v The Hon Attorney General & another](#) [2016] eKLR and ELC at Nairobi petition No 27 of 2020 [Mercy Munjiru Waiguru v Hon Julius Musili Mawathe & 3 others](#) [2022] eKLR.
44. It is submitted that the plaintiff is entitled to special damages totaling Kshs 2,966,446/= which was specifically pleaded and strictly proved. The plaintiff therefore urged the court to grant the prayers sought in the plaint plus costs of the suit.



1st and 6th Defendant's Submissions

45. The 1st and 6th defendants filed their submissions dated February 2, 2023 through the Honourable Attorney General in which they also outlined the brief facts of the case. It is their submission that the plaintiff did not provide any evidence that the original allottees had made payment of stand premium, rates, rent and survey fees and accepted the offer within 30 days. The 1st and 6th defendants counsel relied on the case of *Joseph Arap Ng'ok v Justice Moiyo Ole Keiwua* [1997] eKLR, *Abmed Obo v Kenya Airports Authority* ELC Case No 141 of 2013 *John Mukora Wachichi & others v Minister of Lands & others* High Court petition No 82 of 2010 and *Ali Mohamed Dagane (granted power of attorney by Abdullahi Mubumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* [2021] eKLR which gave the process of the disposition of government land. They also relied on *Nelson Kazungu Chai & 9 others v Pwani University College* [2014] eKLR, *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri), *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR *African Live Transport Co Ltd v The Hon AG* Mombasa HCCC No 276 of 2013. It was submitted that having failed to comply with conditions of the letter of allotment, the allottees had no interest in land to transfer to the plaintiff.
46. It is the 1st and 6th defendants submission that the plaintiff has not discharged his burden as he has not established any employer – employee or agency/principal relationship between the 5th defendant and the 1st defendant cannot be held liable for the acts and/or omissions of the 5th defendant with whom they had no legal relationship. Counsel for the 1st and 6th defendants cited the provisions of section 107 and 108 of the *Evidence Act* and relied on the case of *John Nderi Wamugi v Ruhesh Okumu Otiangala*, civil appeal No 24 of 2015.
47. It is the 1st and 6th defendants' submission that the plaintiff having failed to establish legal ownership of the suit land, he has no legal right that can be infringed and as such has failed to establish a *prima facie* case hence is not entitled to the prayers sought. They relied on the case of *David Bagine v Martin Bundi* and *Giella v Cassman Brown* [1973] EA 358 and prayed that the suit be dismissed with costs.

Analysis And Determination

48. The court has carefully considered the pleadings and the evidence adduced. The court has also taken into account the submissions filed, the cited authorities and the relevant provisions of law. The court identifies the following issues for determination:
- i. Whether the plaintiff has satisfied the court as to ownership of the suit property
 - ii. Whether the property had encroached into a road or road reserve.
 - iii. Whether the defendants are liable for the demolition.
 - iv. Whether the plaintiff is entitled to the orders sought.

Whether the plaintiff has satisfied the court as to ownership of the suit property

49. The plaintiff's case is that he is the owner of the suit property known as plot No M26B Chuka Township measuring 20 feet by 120 feet. The plaintiff avers that he inherited the said plot which was subdivision of plot No M26 parcel No 227 from his mother, Rebecca Njiru who had in turn inherited the plot from Japheth Njiru, the plaintiff's father. That at one time, the property was referred to as plot No 26 which was allocated to Japheth Njiru and Richard Gakuuri. Among the documents produced by the plaintiff as exhibits in support of his case are a letter of allotment dated February 7, 1994 in the names of Richard Gakuri and Rebecca Njiru in respect of an unsurveyed plot No M26 Chuka,



- a PDD, grant of letters of administration in respect of the estate of Japheth Njeru and the estate of Rebecca M Njiru, certificate of confirmation of a grant in respect to the said estates, death certificate, a letter dated September 16, 2020 from the sub-county administrator, Chuka, confirming that plot No M26B is in the name of the plaintiff, land bills and receipts for payment of rates, an approved plan, notice to remove structures on road reserve and photographs. Other documents are valuation reports and correspondences among others.
50. Looking at the said documents, the main ownership document relied on by the plaintiff is the letter of allotment and the PDP produced as exhibit 1 and 2 respectively.
51. In a persuasive case of *John Mukora Wachichi & others v Ministry of Lands & others* High Court petition No 82 of 2010; it was stated that:
- “...the court observed that the distinction is based on the fact that the right to property under the law and constitution is afforded to the registered owners of land, that a letter of allotment is not proof of title as it is only a step in the process of allocation of land.”
52. In the case of *Joseph Arap Ng'ok v Justice Moiyo Ole Keiyua* (supra), the Court of Appeal stated thus:
- “It is trite law that such title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provisions of the Act under which the property is held.”
53. In this case, the original allottees were being offered government land and the letter of allotment was subject to, and the grant was to be made under the provisions of the *Government Lands Act* [cap 280), and title issued either under the *Registration of Titles Act* [cap 281) or the *Registered Land Act* [cap 300] (all repealed). It is also clear from the letter of allotment the plot was given subject to the allottees meeting certain conditions.
54. In another persuasive case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR the court elaborated the process of the disposition of government land and stated as follows:
- “The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the commissioner of lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harrison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR.”
55. And as rightly submitted by the 1st and 6th defendants, the second step would be for the part development plan to be drawn up and approved by the commissioner of lands, the third step involves the determination of certain matters by the commissioner of lands which are listed under section 11 of the *Government Lands Act* (repealed), then gazettment and sale as provided under section 13 and 15 of the said Act.
56. The next step would be for the issuance of an allotment letter to the allottee as in the present case. It has however been held that a letter of allotment per se is nothing but an invitation to treat. It is not capable of conferring an interest in land, being nothing more than an offer, since the allottee is expected to meet the stipulated conditions.



57. In this case, the original allottees were required to comply with the conditions stipulated in the letter of allotment dated February 7, 1994 within thirty (30) days. In this case, the plaintiff has not produced any evidence to show that the original allottees met the conditions stipulated in the said letter of allotment. This court cannot rely on the correspondence that simply give a confirmation that the plot is in the name of the plaintiff. The question that arises is if the allottees had complied with the conditions set out in the letter of allotment, then the cadastral survey, its authentication and approval by the director of surveys and issuance of a beacon certificate. The survey process precipitates the issuance of a land reference number and finally the issuance of a certificate of lease. None of these processes have been shown to the court by plaintiff herein.
58. And even assuming that the suit plot was surveyed as alleged by the plaintiff, the court has noted that the size of the plot allotted to the original allottees was approximately 0.036 hectares. However, the survey report marked pexhibit 17 that was produced by Zachary Thuku Kananu who testified as PW4 has given the area of the suit plot as 0.0469 hectares. If the original allottees were allocated a plot measuring 0.036 hectares and that is what the plaintiff inherited, then the question that arises is where did the extra 0.0109 hectares come from? There was no evidence adduced that there was any amendment made on the original letter of allotment dated February 7, 1994 which was for an area measuring 0.036 hectares, or that another letter of allotment was issued for the additional area measuring 0.0109 hectares. The only presumption is that the extra area is a road reserve. Therefore, it is my finding that the extra area of 0.0109 hectares is on a road reserve and the plaintiff is the one who had encroached on the road reserve.

Whether the defendants are liable for the demolition and whether the plaintiff is entitled to the orders sought

59. Having perused the evidence adduced, and specifically the letter of allotment marked pexhibit 1, the court finds that the plaintiff was only entitled to a portion measuring 0.036 hectares. From the documents relied on by the plaintiff, and in particular the report marked pexhibit 17, it is apparent that the plaintiff's building may have been put up on an area outside the one that was allocated, and may as well be on a road reserve.
60. This court has also noted that the plot that was allocated was in respect of an unsurveyed plot, but there was also a warning given to the allottees that at the time they commence building, they should "exercise the greatest care to ensure that any building or other works are contained within the boundaries of the plot." Further, the allottees were warned that in the event they inadvertently overstep the boundaries, the cost of removal and reconstruction must be borne by them.
61. Having evaluated the matter and the evidence adduced, and considering that the plaintiff did not confine his building within the area that was given to him, and in the absence of any evidence to prove where the extra area came from, it is my finding that the plaintiff has failed to prove his case on a balance of probabilities.
62. Consequently, this suit fails and the same is hereby dismissed with costs to the 1st and 6th defendants.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF MARCH, 2023

In the presence of:

CA: Martha

Mugo for Plaintiff

Ms. Kendi for 1st & 6th Defendants

No appearance for 2nd & 3rd Defendants



No appearance for 4th & 5th Defendants

C. K. YANO,

JUDGE.

