



REPUBLIC OF KENYA



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**Rono v Jepcom Ventures Co Limited & another (Environment & Land
Case 15 of 2020) [2023] KEELC 16811 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16811 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 15 OF 2020**

**MC OUNDO, J
APRIL 13, 2023**

BETWEEN

MATTHEW KIPKIRUI RONO PLAINTIFF

AND

JEPCOM VENTURES CO LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF KERICHO 2ND DEFENDANT

JUDGMENT

1. Vide a Plaint dated the 8th June 2020, the Plaintiff herein sought for the following orders;
 - i. An order restraining the Defendants jointly and severally from continuing the trespass on the Plaintiff's property Plot No. 2A Kapkugerwet Market.
 - ii. A permanent injunction restraining the Defendants, their agents and/or servants from annexing, trespassing or in any way dealing with the Plaintiff's property Plot No. 2A Kapkugerwet Market.
 - iii. General and exemplary damages for loss and degradation to the Plaintiff's property.
 - iv. Costs for the suit.
2. In response to the Plaintiffs claim, the 1st Defendant filed its Memorandum of Appearance on the 15th June 2020 and their statement of defence dated the 21st May 2021 on the 25th May 2021 wherein they had denied the contents contained in the Plaint arguing that the title referred thereto was none existent, unregistered and unrecognized and that unlike what had been stated therein, it had been the Plaintiff who had encroached on a public property being a road reserve and the demolition had therefore been within the law thus the suit ought to be dismissed with costs.



3. The 2nd Defendant's Memorandum of Appearance on the other hand had earlier been filed on the 22nd June 2020 wherein their defence and counterclaim dated the 29th June 2020, had been filed on the 30th June 2020.
4. In the said defence and counterclaim, the 2nd Defendant had disapproved the Plaintiff's claim stating that he had not provided any proof of ownership to the suit land as there was no known land registered as Plot No. 2A Kapkugerwet Market. That the Plaintiff had illegally built a perimeter wall on a road reserve by approximately 1.6 meters wherein the process of demolition of all illegal structures within the area had commenced after sufficient notice had been issued.
5. In its counter claim thereof, the 2nd Defendant sought the following orders;
 - i. A declaration that the Plaintiff has encroached on the road reserve adjacent to his parcel namely Plot No. 2 Kapkugerwet Market by 1.6 meters.
 - ii. An order compelling the Plaintiff to surrender 1.6 meters of the road reserve encroached on the side adjacent to parcel known as Plot No. 2 Kapkugerwet Market.
 - iii. A permanent injunction restraining the Plaintiff and his agents and or servants from encroaching on the road reserve adjacent to parcel known as Plot No. 2 Kapkugerwet Market.
 - iv. Costs to be provided for.
6. On the 28th September 2021 after Counsel had confirmed that they had complied with the pre-trial issues, the matter had been certified ready for the hearing of the main suit wherein on the 27th January 2022 the Plaintiff's case proceeded for hearing, and the Plaintiff, Matthew Kipkirui Rono testified as PW1 to the effect that he lived in Brooke at Kapkugerwet within Kericho County and was a retired employee of Unilever Tea Company Ltd. He adopted his statement dated 8th June 2020 as his evidence in chief before he proceeded to testify that the case was in relation to his plot No. 2A Kapkurgwet Market which had been allotted to him and others by the County Government. That he had bought the suit plot from its previous owner Mr. Wesley Rasugu where they had entered into an agreement and the land had subsequently been transferred to him upon which he had been paying rates to the County Government.
7. That the plot had already been developed when he bought it wherein it contained a two storied building with the front part having a shop, and 8 rental rooms/units. He proceeded to produce his identity card as Pf exh 1, an affidavit dated the 27th September 2013 as Pf exh 2, receipts of payment of rates dated 4th February 2019 and 24th March 2020 as Pf exh 3 (a)(b), a receipt of payment of transfer fee issued by Kericho County Council dated 14th June 2012 as Pf exh 4 and photographs of the suit plot as Pf exh 5 (a-f).
8. He continued to testify that sometime around the year 2019, some people from the County Government had informed them that they had wanted to build a road on the space behind the plot, which space was occupied by Kenya Power and lighting company (KPLC) posts and for which he knew was a leeway of Kenya Power.
9. That subsequently, the people had gone on the suit land on a Wednesday in the company of the County Surveyor, and a supervisor of the contractor to the 1st Defendant measured his plot, took measurements and thereafter marked the wall on his plot stating that it exceeded the length of 50 x 100 ft.
10. That the following day they had returned and proceeded to demolish the wall even when no notice had been given or public participation conducted. That there was also an intention to demolish the building as well wherein he had called the police who had then asked the contractor for documents



authorizing them to demolish the wall. The contractor had no documents and the notice and that was when he left and he (Plaintiff) had sought for legal advice.

11. He testified that although he had some information that there were plans to put up a road, or a sewerage treatment plant the same had not been clear as to which particular point the amenities were to be put.
12. He also confirmed that there were Kenya Power Lines running through the area and which had now posed a danger to the public. That the road had already been constructed in that area, and part of the wall to the building had been removed wherein the tenants in occupation of his rental houses had to leave as there was no water and the bathroom and toilets had been destroyed.
13. The Plaintiff reiterated that there had not been notices issued, but rather, the people had gone on the land on a Wednesday wherein on Thursday they had started demolishing the wall. He thus sought for compensation for loses he had incurred stating that at the time, (he was testifying) the project had stopped. His evidence was that his next door neighbor had also been affected with the same fate as he had.
14. When cross examined by Counsel for the 1st Defendant, the Plaintiff confirmed that he had bought the developed suit property being plot No 2A from one Rasugu and that the impugned space and wall were intact at the time. He confirmed that he had been paying rates although he did not have a certificate of lease. That he had done his due diligence and assessed the plot with a surveyor before he purchased it. He also confirmed that the vendor had not given him any documents of approvals of the developments of those structures. That the plots used to belong to individuals but the county had acquired the same and allocated them to people.
15. That at the time, he did not confirm the measurement or extend of the plot, but had consulted a surveyor after the case had been filed just to confirm the measurement. He confirmed that the plot had encroached on the “leeway” by 4 feet but that the space “leeway” which was behind his plot belonged to the County Government. That the roads that were in between the plots at the Kapkugerwet market belonged to the County Government. That when the surveyor went to the site, he had checked the measurement of the space although he himself did not take the measurements. That although some of his neighbors had been affected, yet he was not aware of any suit(s) they have filed.
16. The Plaintiff was referred to paragraph 3 of this statement wherein he responded that after the people had taken the measurements, the marking of ‘X’ had been made on the following day. He confirmed to having seen such marking before and that sometimes it were done by the National Construction Authority (NCA) or The Kenya National Highways Authority (KeNHA) and that he understood the significance of the said mark to mean that he had encroached.
17. He [proceeded to testify that he did not know the contractor who had been given the work but when he was referred to Pf exh 5(a), he confirmed that it was a notice by the contractor known as Jepcom Ventures. he confirmed that the said notice had been put up long before the issue of demolition. He also confirmed that Jepcom was the 2nd Defendant who had caused the demolition, but reiterated that as per paragraph 5 of his statement where he had stated that he was never served with any notice of the intended demolition, he was also not aware that the owners of the properties had been served with notices.
18. The Plaintiff was then referred to 2nd Defendant’s document No. 4 (Enforcement Notice dated 14th April 2020) wherein he responded that he had not come across such a document, and that when the police were called, the people who had gone to demolish the wall did not produce any documents. He also stated that he had the map of the surrounding area to his plot which copy he had given to his Counsel but the same had not been produced in evidence.



19. The Plaintiff then stated that all he wanted was compensation for the demolition of his bathrooms and toilets which had not encroached on the road but which had been destroyed. He confirmed that he did not have a valuation report of the same to be produced in evidence.
20. On being cross examined by Counsel for the 2nd Defendant, the Plaintiff confirmed that he had a copy of the transfer document which was part of his list of documents. However after going through his list of documents, he had changed his testimony and confirmed that the document he had alluded to was not part of his evidence and/or list of documents. He also confirmed that a title deed and a lease hold document were documents that constituted ownership and that a receipt was not a document that confirmed ownership.
21. He reiterated that he had acquired the developed property in the year 2013, after purchasing the same from somebody and that he had been paying a visit to the County Government for documents to no avail.
22. He also confirmed that although he had a sale agreement to show that he had purchased the property, the same had not been part of his list of documents. He further confirmed that he did not visit the County Government for due diligence to confirm if the buildings had been approved, but that the perimeter wall, wash rooms and toilets had been destroyed.
23. When referred to the particulars of loss and damage as reflected in his Complaint, he testified that the washrooms were destroyed after court had denied him an injunction. That during that time, he had called upon his Advocate to witness what had happened although he was not present when the property was destroyed.
24. That the perimeter wall had been destroyed on 29th May 2020 wherein the washrooms had been destroyed either in August or September of 2021. He also reiterated that there were neighbors whose properties had also been destroyed, although they did not file suit.
25. In re-examination, the Plaintiff reiterated that at the time he had purchased the suit land in 2013, nobody had lay claim to it whereby he had been paying rates and the County Government had never refused to accept the payments. That by receiving the said rates, the County was aware of his ownership yet they did not give him notice that his land had encroached on their land.
26. When examined by the court, the Plaintiff responded that he had not assessed the damages done to his properties.

The Plaintiff thus closed his case.

27. On the 23rd March 2022, the 1st Defendant's opening statement was to the effect that they had been awarded a contract by the 2nd Defendant to do road works and drainage works in Brooke area of Kericho County. That after confirming all notices and survey had been done, they had commenced works. That they would be calling 1 witness to demonstrate that the Plaintiff was unheeding to the notices despite having encroached on the road reserve.
28. The defence then called Lelgo Kiprono as DW1 who testified that he was an employee of Jepcom Ventures as a site supervisor. That he had recorded his statement on 21st October 2021 which he wished to adopt as his evidence in chief. He then proceeded to testify that Jepcom Ventures Company Ltd was incorporated on the 6th July 2011 as per the certificate of incorporation herein produced as Df Exh1.
29. That in the year 2019 after seeing an advert in the paper, they had tendered and had been awarded the contract on 4th December 2019 as per the notification of award which he produced as Df Exh.2. That it



- had been upon getting the award that they had signed the contract and waited for the commencement of the works which began on 20th March 2020 as per the letter of commencement from the County which he produced as Df Exh.3.
30. That they had then put up the signage almost towards the end of March, and a site office where the day to day works were planned and executed. He produced a photograph of the signage they had put on the site as Df Exh.4.
 31. He then proceeded to testify that the 1st Defendant had taken the County Surveyor to the site to demarcate the boundary and dimensions of the road wherein a report dated 29th May 2020 had been generated and which report had indicated that plot '2A', the Plaintiff's plot, had encroached onto the road reserve by 1.6 meters. His evidence was that they had accompanied the County Surveyor in demarcating and measuring the width of the road and had confirmed that indeed the Plaintiff had encroached onto the road reserve. He concluded that the Plaintiff's suit was therefore not merited.
 32. That the Plaintiff had been notified through a notice by the County Surveyor of his encroachment and there had been a marking 'X' on the building which showed that the building had encroached and was to be demolished.
 33. When examined by the court, the witness stated that the Plaintiff's storied building had also encroached on the road.
 34. On being cross examined by Counsel for the 2nd Defendant, the witness confirmed that the Plaintiff had been notified of the encroachment by the County Government in April, 2020, prior to which they had put up the signage, towards the end of March, 2020. That the surveyor had visited the site on 27th May 2020 for the 1st time and that was when he had done the markings of 'X' to indicate encroachment by the building. That the demolitions had been done on 29th May 2020. That the notice was to the effect that should anyone's building/property be on the road, one ought to remove it.
 35. That on the 27th May 2020, they had only accompanied the surveyor who then did the markings. That the Plaintiff had enough time to act. He also stated that in the cause of their work, they had been attacked by the Plaintiff's son, while armed with a panga, who had threatened the plant operator. The witness confirmed that he knew one Joseph Cheruiyot Chepkwony, as the director of Jepcom Ventures who was in the site office on that day.
 36. That he was not aware of whether the Plaintiff had approached the director or threatened him with a spear as they were in the field. That after having been confronted by the Plaintiff's son, they had stopped the works and the director had called the police to intervene.
 37. That it was true that after they had down the demolition, the Plaintiff had called the police on them wherein they had stopped the work to pave way for investigations on the demolition. That it was not true that they had stopped work because they had no papers but rather it had been because the Plaintiff was demonstrating that his building was being demolished. That the Plaintiff's son was not arrested. That to date, they had not finished carrying out the demolitions as they had been told to await the verdict from the court.
 38. That despite this, they had carried out the works in the other section and that it had been after the Plaintiff had pleaded with them, they had told him to demolish the building by himself since their machines would have caused more havoc. The Plaintiff had not demolished one side of the building. He confirmed that before demolition, there had been a foot-path and that there had been two other persons in that section who had encroached. That the other person had demolished the structure on his own.



39. He also confirmed that there had been a power line running in the middle of the foot path but they had since removed it. That the Plaintiff had filed suit because of the demolition to his building but that they had followed the procedure keenly and the signage had been placed before commencement of the demolition.
40. During re- examination, the witness reiterated that the notices were to guide and show that there was a construction on that area and that if there was an encroachment, it had to be removed. That the marking 'X' was to show that a structure was on the road. That the notice was first issued by the County Government.
41. That they had not completed the demolition because the Plaintiff had requested that he demolishes the building by himself so that he could salvage some material.

The 1st Defendant then closed its case.

42. The 2nd Defendant's opening statement was that it was a County Government established under *the Constitution* and relevant statutes. That it was charged with the responsibility to maintain some specific roads within its jurisdiction. That in the present case, they would call one witness to demonstrate to the court that the Plaintiff had encroached on a public road reserve.
43. DW2, one Sylvester Kipngetich confirmed that he was an Assistant Land Surveyor Kericho County in the Department of Lands, Housing & Physical Planning. That he had recorded his statement on 29th June 2020 which he wished to adopt as his evidence in chief.
44. He proceeded to testify that the County Government had given a contractor, Jepcom Ventures, drainage works and the improvement of roads at Brook. That their position as the department of public works roads and transport, was to have the owner of plot '2A' to surrender 1.6 meters which was part of the road he had encroached when he constructed a perimeter wall and part of the building thereon.
45. That it was upon learning of the encroachment, that on the 8th April 2020 they had made a survey where they had found that the road which plot 2A sat on was a 6 m road. That they had done their demarcation by measuring all the plots, where they had found that most of the plots measured 50x100. That the owner of plot 2A and others had encroached on the road by different measurements ranging from 02-07, while others were okay.
46. That thereafter they had placed markings by putting wooden pegs and sprays on 8th April 2020 wherein some people complied and removed structures that had encroached on the road. That it was after the survey had been done that notices were issued including a notice to plot 2A. That on the 26th May 2020, they had received information from the contractor that some structures had not been removed wherein they had moved to the site and put some markings. He testified that the owners of plots number 2A, plot 7 and plot 35 had not removed their structures.
47. That the Plaintiffs case was that he had not encroached on the road and had challenged the survey exercise. That they had filed the survey report dated 29th May 2020, which he had signed and which he produced as Df exh 5, and which report went hand in hand with a Registry Index Map which was marked as DMFI 6. He also marked the Enforcement Notice dated 14th April 2020 as DMFI 7 and proceeded to seek that the Plaintiff's case be dismissed and for the Plaintiff to surrender the 1.6 meter road he had encroached.
48. When cross examined by Counsel for the Plaintiff, the witness responded that he did not know the exact date when the tender was awarded to Jepcom Company but when he was referred to Df Exh.2,



- he confirmed that the tender was dated 4th December 2019. That they had then carried out their first survey on 8th April 2020.
49. He also confirmed that at the time he conducted the survey, DW1 and some staff of Jepcom Ventures had accompanied them. He also confirmed that the markings had been done on the 8th April 2020 wherein they had found that more than 10 plots had encroached on the road reserve. That whereas some people had demolished their illegal structures, others did not comply and Plot 2A, plot 7 and 35 were amongst the defiant people. That the markings were done on the 26th May 2020 and 27th May 2020 but their 1st survey had been conducted on the 8th April 2020.
 50. That the second survey had been necessary so as check whether people had or had not complied and further, that there had been some concerns raised about the markings and therefore there was need for verification. His evidence was that the Plaintiff was amongst those who had objected to the survey. He confirmed that the second marking was similar to the first markings. That in the second survey, they had to repeat some markings because whereas some people had removed the pegs, some markings had faded. That the Plaintiff's markings were present. That it was not true that they had made the markings for the first time on 27th May 2020.
 51. That on the 8th April 2020, when they had conducted their survey the Plaintiff had showed them the extent of his plot and he was aware of the markings done on 8th April 2020. He confirmed that they had followed the normal procedure when carrying out the demolition and that he knew that the project had been stopped by a court order.
 52. On cross examination by Counsel for the 1st Defendant, in reference to Paragraph 1 (a) of Df exh 6, the witness responded that he had carried out the survey on 8th April 2020, wherein they had made the markings using red spray paint. That they had visited the suit property again on 26th May 2020 and in both the visits the Plaintiff was present. That the Plaintiff's property was marked 'X' and he had indicated that the encroachment area as 1.6 meters.
 53. In re-examination, he had confirmed that they had gone back a second time on 26th May 2020 because some of the plot owners had challenged the survey and wanted to confirm if it was okay. That the Plaintiff had been amongst those who had challenged the initial survey. He also confirmed that the County Government had followed all procedures before removal of structures which had encroached. He confirmed one ought to do the survey first so as know the nature of encroachment before notices are issued.
 54. On the 5th December 2022 by consent it was agreed that DMFI-6 be produced as Df exh 6 wherein George Keter testified as DW3 to the effect that he was a Senior Physical Planner in the County Government of Kericho. That he had attained a degree in Physical Planning, and a Masters' degree in Urban Management.
 55. When referred to the Enforcement Notice dated 14th April 2020, he confirmed that he had signed the said notice and was aware of its contents. That the said Notice was to all developers within Kapkugerwet Market to clear any encroachment within the road that was being tarmacked by a contractor. That they had given members a period of 30 days to clear the service lane so that the contractor could clear the road and place cabro. That the Notice had been served to all the developers. He produced the Notice as Df exh 7.
 56. In cross examination by Counsel for the Plaintiff, the witness confirmed that he had visited the service road where he had found that there was some power line running along the service road. That they did not serve notice to Kenya Power & Lighting Company because power lines were part of service and that was why the road was called a service lane. That the power lines were not a hindrance to the



development of the road since the poles were not interfering with the constructions and were still on site.

57. That all developers were served, he was on the ground and served the notices personally as the author, which was normal. That he knew the Plaintiff and had effected service of the Notice to whoever was staying on the plot. That the developers themselves did not stay on the premises and so they effected service on whoever was there or was operating the business and that was the much he could do. He confirmed that he was aware that the Plaintiff had rental houses and they could have served the tenants but the person they had served promised to give the Notice to the Plaintiff and that was why the matter was in court. He disagreed with Counsel that there was a possibility that the Plaintiff could not have received the Notice
58. When cross examined by Counsel for the 1st Defendant, he responded that their Notice was pursuant to the survey that had noted encroachment. The survey therefore was done to ascertain the width of the land. That the stake holders were involved.
59. When referred to Df. Exh.7 (No.4) and upon reading the same, the witness responded that there had been no approval by the County Government and the same had been based on a prior check from records by the County Government.
60. In reference to No.17 of the same document, he confirmed that the encroachment by the Plaintiff had been by 1.6 Meters. He also indicated that the spray was used as a mark point to show the point of encroachment.
61. In re-examination and in reference to the first page of Df. Exh.7, the witness confirmed that the notice had referred to the owner, developer, agent or occupier. That the person they had found on the portion was the right target and they did not need to serve personally on the developer. That they had served all persons whose properties had encroached on the road.

The 2nd Defendant then closed their case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiffs written submissions.

62. The Plaintiff framed his issues for determination as follows:
 - i. Whether the Plaintiff is a lawful owner of the plot property plot No. 2A Kapkugerwet Market situated at Brook Shopping Centre in Kapkugerwet Location.
 - ii. Whether there was enough notice served upon the Plaintiff concerning demolition of his property.
 - iii. Whether the Plaintiff did encroach onto a public road reserve,
 - iv. Whether the Plaintiff is entitled to the prayers sought.
 - v. Who is entitled to costs.
63. On the first issue for determination as to whether the Plaintiff was the lawful owner of the suit plot No. 2A Kapkugerwet Market, the Plaintiff submitted that it went without saying that from the evidence of the annexure “MKR-1”, MKR-2a & b” and “MKR-3a, b & c” being a sworn affidavit by the vendor, “MKR-2a, & b” being copies of invitation letters and payment receipts for the transfer and “MKR-3a, b& c” being the payment receipts for rates, that the suit property belonged to the Plaintiff.



64. On the Second issue as to whether there had been sufficient notice served upon the Plaintiff concerning demolition of his property, it was the Plaintiff's submission that he was never served with any notice of the intended demolition of his property nor was there any public participation conducted by the 2nd Defendant over construction of a road within brook town. That had he been served with the notice, he could have taken due diligence. That the 1st Defendant in its submissions had admitted having, not served the Plaintiff but had literally erected a notice of the project which had served as the notice.
65. On the third issue for determination as to whether the Plaintiff had encroached or trespassed onto a public road, the Plaintiff's submission was in the negative. That his evidence had been supported by the annexure marked as MKR-1 (A Map) that had shown that plot No. 2A had no road reserve at all.
66. On the issues as to whether the Plaintiff was entitled to the prayers sought, he submitted that he was seeking orders for general and exemplary damages for loss and degradation to his property. That the Defendants herein having acted punitively and without due considerations of his rights, made it necessary and imperative to be awarded general and exemplary damages. That the Defendants had engaged in intentional conduct showing an insolent or scornful disregard for the Plaintiff's rights when they demolished and/or brought down the perimeter wall on the Plaintiff's property leaving the toilets of the 2nd floor hanging dangerously hence subjecting the lives of the Plaintiff and his tenants to health hazard and insecurity.
67. That indeed the county surveyor's report had proved that there was no road reserve passing behind the Plaintiff's parcel of land which then translated to trespass by the Defendants to the Plaintiff's parcel of land, as was held in *Duncan Nderitu Ndegwa vs. K P & L C & Another* (2013) eKLR amongst other decisions.
68. That the Plaintiff having ascertained the extent of damages occasioned to him, relied on a valuer's report dated 10th June 2022 (which was not produced in evidence) wherein the damage had been assessed at Ksh. 2, 057,500/= to which he wished the court to award him as costs of general damages. The Plaintiff further relied on the decision in *Obongo vs. Kisumu Municipal Council* (1971) EA 91 to seek for exemplary damages.
69. On the last issue for determination as to who was entitled to costs, the Plaintiff's submission, to reproduce verbatim was that

“the cost to this suit be catered for by the Plaintiff as “costs follow events” the event being that the Plaintiff filed this frivolous suit wherein she intentionally misled this honorable court to believe that the suit property is her absolute property and that her step-daughter who is the Defendant herein is a trespasser despite having beneficial interest.”

1st Defendant's submissions.

70. Upon analyzing the evidence adduced in court by all parties the 1st Defendant framed its issues for determination as follows ;
 - i. Whether the Plaintiff encroached on a road reserve and whether there was notice issued.
 - ii. Whether the Plaintiff is entitled to the orders sought
 - iii. Who bears the cost of the suit.
71. On the first issue for determination, the 1st Defendant submitted that the suit property had encroached on the road reserve by approximately 1.6 meters and that a notice was served upon all the developers of



- Kapkugerwet Market before the demolitions occurred. That the offending structures had been marked with an 'X', the intention being that the owners should remove the offending structures voluntarily.
72. That the Plaintiff, prior to the demolition of his structures had been aware that part of his building and plot were situated on the road reserve, wherein he had failed to voluntarily remove the said offending structures.
73. That the Survey report produced by the 2nd Defendant had indicated that the encroachment of the road reserve included temporary and permanent structures. That the Land Surveyor had made marks on the structures that had encroached on the road reserve and indicated the actual size of encroachment on the walls and the fences which markings and notice, the Plaintiff had ignored, and which in turn led to the demolition.
74. That the cardinal rule of equity was that he who comes to court of equity must come with clean hands. The Plaintiff in his testimony confirmed that the suit property had encroached on the road reserve by 4 feet (approximately 1.2 meters). In his own admission, the marking 'X' was indicated on the perimeter wall with exact measurements of encroachment being indicated as 1.6 meters. That the map sheet produced in court had indicated the encroachment by the Plaintiff.
75. That Indeed it had been the Plaintiffs own admission that he had purchased a developed property but that he had not been given any documents to confirm that the suit property was well measured and located and had not encroached on the road reserve. That by his own admission, the Plaintiff was well aware of the encroachment into the public land. This knowledge thus defeated his suit and there was therefore no suit capable of founding the prayers he was seeking. The Plaintiff had no proprietary interest in the road reserve, he was therefore a trespasser and the demolition was valid. Reliance was placed on the decision in *Clerkson Onyango Bolo vs. James Asaka & 2 others* [2021] eKLR. The Plaintiff did not produce any independent survey map or report showing that indeed the demarcations of the encroachment part of his plot were not as established by the county land surveyor.
76. Further reliance was placed on the decision in the case of *Jospeh Kaberia Kumari vs County Government of Meru* [2018] eKLR, to submit that the Plaintiff had encroached on the road reserve and that sufficient notices on the intended demolition of the encroachments had been served upon him.
77. On the second issue for determination as to whether the Plaintiff was entitled to the orders sought, the 1st Defendant's submission was to the effect that having established that sufficient notice had been given to the Plaintiff, and there having been evidence that the Plaintiff's plot had encroached on the intended road reserve, that the orders sought by the Plaintiff ought not to be granted as granting the same would amount to allowing the Plaintiff to derive an advantage from his own wrong of encroaching on the road reserve and this would encourage future encroachments. In support of their submission, the 1st Defendant relied on the holding in *Daniel Kamau Mugambi vs. Housing Finance Company of Kenya Ltd* [2006] eKLR which case had quoting the case of *Francis J. K. Ichatha vs. Housing Finance Company of Kenya*, Civil Application No. 108/05.
78. That the Plaintiff had not proved his case to the standard required on balance of probability that he deserved any of the prayers sought in his suit and therefore none ought to be availed to him.
79. On the last issue for determination as to who was to bear the cost of the suit, it was the 1st Defendant's submissions that it was trite law that costs followed event and thus having established that the prayers sought by the Plaintiff were undeserved, that the suit herein be dismissed with costs to the 1st Defendant as is stipulated under Section 27 of the *Civil Procedure Act*.



The 2nd Defendant's submissions.

80. The 2nd Defendant framed their issues for determination as follows;
- i. Whether the Plaintiff is the lawful owner of the parcel of land known as Plot No. 2A Kapkugerwet Market?
 - ii. Whether the Applicant (sic) encroached on the road reserve?
 - iii. Whether the developments on the suit property were approved by the 2nd Defendant?
 - iv. Whether proper notice was issued to the Plaintiff prior to the demolitions?
 - v. Which orders should the court grant?
81. On the first issue for determination, it was the 2nd Defendant's submissions that although the Plaintiff had claimed ownership of the parcel known as Plot No. 2A Kapkugerwet Market, having bought the same, whist developed, (a two storied building with eight rental units) from one Wesley Rasugu who had been originally allotted the same by the 2nd Defendant, the said parcel known as Plot No. 2A Kapkugerwet Market did not reflect in the original map produced as Df exh 6.
82. That it was for this reason, that it could be concluded the said plot was non-existent in as far as official land records of the area was concerned, and it could therefore not be said to legally belong to the Plaintiff. That according to the said original map, it was clear that an alleged subdivision of plot 2A was not officially registered as the said map only showed plot No.2. That further, the affidavit produced by the Plaintiff allegedly sworn by one Wesley Rasugu Onsono had indicated at paragraph 6 that the alleged seller had authorized the Municipal Council to have the property registered in the name of the buyer. The unsigned affidavit was dated 27th September, 2013.
83. Interestingly, the Plaintiff had also produced a letter dated 7th June, 2012 addressed to him and purportedly originating from the town clerk, Kericho, which letter purportedly invited the Plaintiff for a works and town planning committee meeting that was to be held on 14th June, 2012. That the contradictions in the two documents were glaring in that the letter alleged to originate from the 2nd Defendant had pre-dated the alleged affidavit that was supposed to confirm transfer of the suit property to the Plaintiff. That it was not possible for the 2nd Defendant to have invited the Plaintiff for a town planning committee meeting before the Plaintiff had purchased the said property.
84. There further, there had been no sale agreement on the alleged sale/transaction and it was not clear why the Plaintiff did not follow up on the issue of transfer from the year 2013 up to 2020 when the road construction was done.
85. The 2nd Defendant relied on the decision in *Caroline Awinja Ochieng & Another vs. Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR ELC Case 694 of 2012 to submit that the general principle which had been applied by courts in determining a question on ownership of property that was unregistered was to require parties to proof ownership through production of documents that preceded title deeds.
86. That apart from the production of a national identity card, an affidavit, and receipts for payment of rates. The unsigned affidavit allegedly sworn by Wesley Rasugu Onsumu that did not specify the date which he sold the said property, no other document had been produced by the Plaintiff to support the claim that he owned the suit property. That the rate payment receipts alone did not constitute any valid ownership documents as was held in *Abdi Mohamed Kahiya v Fatuma Haji Kasim* [2019] eKLR. That having failed to proof ownership of the suit property, the Plaintiff did not deserve any of the orders sought as he did not have any proprietary interests.



87. On the second issue for determination as to whether the Plaintiff had encroached on the road reserve, the 2nd Defendant submitted that through the production of the survey report which had clearly found that the owner of the suit property (plot number 2A) had actually encroached on the road reserve by 1.6 meters, this question had been answered in the affirmative. That the Plaintiff did not produce any evidence to the contrary, but in his Plaint, he had referred to the road as a foot-path and had accused the 1st Defendant of “digging and expanding the footpath at one side” thereby damaging his property. That the existence of KPLC poles on the road reserve either before or after the demolition did not in any way validate the Plaintiff’s act of encroaching on a road reserve. That indeed during cross-examination, the Plaintiff had confirmed that he did not consult or involve any surveyor at the time of purchasing the said property and therefore in essence, he did not confirm the actual measurements of the suit property, or get an insight on boundaries of the road reserve before purchasing it. That the existence of the road reserve could be confirmed on the map.
88. On the issue as to whether the developments on the suit property had been approved by the 2nd Defendant, it was their submission that apart from deliberately encroaching on the road reserve, the Plaintiff had built a perimeter wall without approval of the plans and development commencement from the 2nd Defendant. That he had not provided as evidence any approvals nor demonstrated that he followed the due procedure before commencing construction of both the perimeter wall and the house/building and it could only be inferred that the said buildings were constructed without approval and therefore were illegal properties which could be legally demolished by the 2nd Defendant upon the issuance and service of notice. Reliance was placed on the provisions of Section 38 of the Physical Planning Act.
89. That in the present case, the 2nd Defendant did not demolish the two storied building allegedly belonging to the Plaintiff, but was only keen on restoring the road reserve wherein it had demolished the perimeter wall which had been constructed on the road reserve after giving the Plaintiff a thirty-day’ notice.
90. To answer to the issue as to whether notice had been issued to the Plaintiff prior to the demolition, it was the 2nd Defendant’s submissions that both the Defendants had proved that sufficient notice had been served upon the Plaintiff before demolitions were done. That the notice was served upon the Plaintiff/his agents more than twice. That during the first instance, the 1st Defendant had erected a notice on the affected area indicating that a contract on improvement of Brook roads and drainage systems was set to commence. That the Plaintiff had also been served with the enforcement notice by the 2nd Defendant’s agent, one George Keter who produced the said notice in court during hearing and which enforcement notice had been addressed to developers within Kapkugrwet Market and had specified that it was targeting encroachments (see paragraph 3 of the said notice). Whereas the notice had specified the conditions that had been contravened as No 4,5,7,8 and 17, it had also indicated at paragraph 6 that it would take effect from 15th May, 2020.
91. That the Plaintiff’s claim that he had not been personally served did not hold any water since the notice could be served on any agent who was found on the affected property, as is evidenced on the first page of the said notice which had indicated that it could be served upon the owner, developer, agent or occupier. DW3 who signed off the said enforcement notice confirmed that he had delivered a copy of the notice upon persons he had found on the suit property on the said date of 14th April, 2020. On the 8th April 2020 and 26th May 2020 when the 2nd Defendant marked the road reserve using wooden pegs and red spray, it was common knowledge which the Plaintiff ought to have known, that his property stood on public land and was due for demolition.



92. On the last issue as to which orders the court should grant, the 2nd Defendant submitted that the Plaintiff's case ought to be dismissed. That his prayers (a) and (b) had been overtaken by events as the illegal perimeter wall and expanded the road had already been demolished. The 2nd Defendant was not interested in meddling with the Plaintiff's use and possession of the other parts of the suit property that were not encroaching on the road and in any event, proprietorship had not been discharged by the Plaintiff. That a permanent injunction could therefore not lie in the circumstance as was held in the case of Kenya Power & Lighting Co. Ltd vs. Sheriff Molana Habib (2018) eKLR cited in Sammy Kemoo Arekai vs. Eliakim W Olweny & another [2021] eKLR.
93. That secondly, costs for general and exemplary damages for loss and degradation to the Plaintiff's property was also not attainable as no valuation or an assessment report to prove or substantiate the losses alleged to have incurred as a result of the demolitions on the property had been produced.
94. The 2nd Defendant sought for the dismissal of the Plaintiff's case with costs and judgment against the Plaintiff be entered as prayed in their counterclaim.

Determination

95. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law herein. I have also considered the uncontroverted facts herein to which that the Plaintiff's wall on suit land referenced as Plot No. 2A Kapkugerwet Market had been demolished by the acts of the Defendants herein.
96. The bone of contention that has been noted herein is whether such parcel of land existed and the proof of ownership of the same. Secondly, whether the said property had encroached on the public road and whether any notice had been issued before the demolition occurred.
97. The Plaintiff's case was that he was the registered lessee to the leasehold property Plot No. 2A Kapkugerwet Market within Kericho County having purchased the same, as a developed property comprising of a two storied building with eight rental units, from the original allottee Wesley Rasugu on the 27th September 2013. That on 27th May 2020, he had been surprised to see markings on his wall whereby on 29th May 2020, without any notice, part of his perimeter wall had been demolished by the 1st Defendant on instructions of the 2nd Defendant. He therefore sought for costs following the damages incurred.
98. That Defendant's defence on the other hand was that having noted through a survey that had been conducted on the 8th April 2020 within Kapkugerwet Market that some of the developers had encroached on the road reserve, they had issued Notices of a period of 30 days to all the said developers to clear the encroachment within the road so that the contractor could clear the road and place cabro. That amongst the structures that encroached on the road reserve was a perimeter wall and part of a building in Plot No. 2A Kapkugerwet Market which had encroached on the reserve road by 1.6 meters.
99. That on the same day, they had subsequently placed markings by putting wooden pegs and an "X" in red spray to warn the developers and owner of the impugned properties as well as the owner of plot '2A', who happened to be the Plaintiff herein, to surrender the 1.6 meters. An Enforcement Notice dated 14th April 2020 had also been issued.
100. By the 26th May 2020, the owners of plots number 2A, plot 7 and plot 35 had not removed their structures wherein demolition of the illegal structures had commenced on the 29th May 2020.
101. The issues that stand out for determination herein are as follows;



- i. Whether the Plaintiff has established proprietorship of plot No. 2A Kapkugerwet Market.
 - ii. Whether plot No. 2A Kapkugerwet Market had encroached on a road reserve.
 - iii. Whether sufficient notice had been issued.
 - iv. Whether the Plaintiff's claim is valid
 - v. Whether the 2nd Defendant's counter claim is valid
 - vi. Who shall pay the Costs.
102. On the first issue for determination, it is trite law, pursuant to the provisions of Sections 107-109 of the *Evidence Act*, that 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 are clear to this effect. In the instant case the Plaintiff's evidence was to the effect that he was the registered lessee to the leasehold property Plot No. 2A Kapkugerwet Market within Kericho County having purchased the same, as a developed property comprising of a two storied building a two storied building with eight rental units, from the original allottee one Wesley Rasugu on the 27th September 2013. In support of his evidence he had produced his identity card as Pf exh 1, an unexecuted affidavit dated the 27th September 2013 as Pf exh 2, receipts of payment of rates dated 4th February 2019 and 24th March 2020 as Pf exh 3 (a)(b), a receipt of payment of transfer fee issued by Kericho County Council dated 14th June 2012 as Pf exh 4 and photographs of the suit plot as Pf exh 5 (a-f).
103. The Defendants on the other hand have contested ownership of the said Plot stating that the said parcel known as Plot No. 2A Kapkugerwet Market did not reflect in the original map produced as Df exh 6 and therefore the said plot was non-existent, in as far as official land records of the area was concerned, and thus it could not be said to legally belong to the Plaintiff.
104. Indeed it has been held that where the title is contested, its root must be investigated. The court has to ascertain that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. There has to be a good compilation of the documents or deeds as well as records of any previous owners leading to the title for example a sale agreement, plot card, lease agreements, allotment letter etc, which documents were missing in the present case. The documents herein produced by the Plaintiff, which had formed the backbone of his claim I find were not legal documents recognized in law as conferring a right of ownership in a property capable of being protected by law.
105. In *Caroline Awinja Ochieng & Another vs. Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR the court had held as follows:
- “In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.
- The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning



the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount , notices, et al.”

106. It was held in the case of *Republic vs. Senior Registrar of Titles Ex-parte Brookside Court Limited* (2012) eKLR, that the statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the [Land Registration Act](#). The provision of Section 24(a) of the [Land Registration Act](#) outlines the interests and rights of a registered proprietor of land as follows;

‘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.....’

107. On the second issue for determination as to whether plot No. 2A Kapkugerwet Market had encroached on a road reserve, it is clear from the evidence herein adduced that despite the rebuttal by the Plaintiff that the said plot had not encroached on the reserve road he had not produced any evidence to counter the survey report dated 29th May 2020 herein produced as Df exh 5, and which report went hand in hand with a registry Index Map (RIM) herein produced as Df exh 6 which had confirmed that indeed plot No. 2A Kapkugerwet Market had encroached on a road reserve by 1.6 meters. I have nothing useful to add.

108. As to whether sufficient notice had been issued, Section 38(1)and (2) of the Physical Planning Act provides as follows:

- 1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve enforcement notice on the owner, occupier or developer of the land.
- 2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

109. In the instant case, there has been no evidence adduced by the Plaintiff that the previous owner of No. 2A Kapkugerwet Market had sought and obtained all the necessary approvals for development of the wall and/or the said property.

110. The Defendants had confirmed that they had complied with the provisions of the law in that they had served all developers within Kapkugerwet Market with an Enforcement Notice dated 14th April 2020, herein produced as Df exh 7, to clear the encroachment within the road within a period of 30



days. Indeed Df exh 7 had clearly addressed the conditions that had been contravened being No.4, 5, 7, 8, and 17. That in addition, markings of an “X” with red paint had been made on all the offending structures but the Plaintiff had chosen to ignore the Notice. That after the expiry of the period given, the offending structures had been demolished on 29th May 2020. I find that there being no evidence adduced to counter this evidence, there had been sufficient notice issued.

111. There having been no evidence as to the proprietorship of the suit land and further the court having found that there had been sufficient notice issued before the offending structures were demolished, the next issue for determination would be whether the Plaintiff’s claim was valid. Indeed he who seeks equity must do equity. In their submissions, the Plaintiff has sought for general and exemplary damages for loss and degradation his property, to a tune of Ksh. 2, 057,500/= as per a valuer’s report dated 10th June 2022.
112. Indeed some claims for consequential loss are capable of being established with precision, for example in this case the expenses incurred after the demolition of the plaintiff’s structures. It is thus a well-established rule of law that the damages can only be recovered only if the aggrieved party proved them with certainty, and not to leave them to speculation or conjecture. Going by the evidence adduced in court, and there having been no proprietorship established or a valuation/assessment report adduced in evidence to prove or substantiate the losses alleged to have incurred as a result of the demolitions of the structures on an alleged plot No 2A Kapkugerwet Market, the Plaintiffs claim on this account cannot stand.
113. The court has taken note of a valuation Survey report dated the 10th June 2022 that was un-procedurally and irregularly inserted in the court record after the closure of both the Plaintiff’s and 1st Defendant’s case and which report, the Plaintiff sought to rely on in his submission as forming a basis on which he sought damages, keeping in mind that the same had not been served upon the Respondents, produced as evidence or subjected to cross examination. The court finds that the said action of “sneaking” of the said report into the court file as an attempt to sway the mind of the court’s mind, ran afoul of legal practice and was indeed an abuse of the court process and I thus proceed to have the report expunged forthwith from the court’s record.
114. In *Joseph Sombo & 4 others v Nyari Investments & 5 others* [2019] eKLR when the court of Appeal was faced with a similar scenario held as follows:

“From the foregoing, it is clear in our minds that the list in question was not part of the record. The list is so long – over 200 pages and the learned trial Judge could not have failed to see it, nor would learned counsel on record then. Had it been part of the record, it would have elicited several questions on cross-examination for instance, why does the list have 17,000 persons and not 15,000; the large number of the under-age and who were suing on their behalf etc.

We are not in the least persuaded that the list formed part of the record before the High Court. We also find that sneaking it in at this point is not just irregular and un procedural, but tantamount to abuse of the process of the court.

The objection by the applicants/respondents in the appeal is well taken. The application is hereby allowed with the result that documents contained between page 18 to page 255 be and are hereby expunged from the record of appeal. Costs of this application will be in the substantive appeal.”
115. In the end, I find that the Plaintiff’s case has not been establish to the required standards of probabilities and I herein proceed to dismiss it with costs.



116. I find in favour of the 2nd Defendant's counterclaim and grant orders sought therein to wit that;

- i. A declaration is herein entered that the Plaintiff encroached on the reserve road adjacent to his parcel namely Plot No. 2 Kapkugerwet Market by 1.6 meters.
- ii. The Plaintiff shall forthwith surrender 1.6 m of the road reserve encroached on the side adjacent to parcel known as Plot No. 2 Kapkugerwet Market.
- iii. The Plaintiff and his agents and/or servants are herein permanently enjoined from encroaching on the road reserve adjacent to parcel known as Plot No. 2 Kapkugerwet Market.
- iv. The 2nd Defendant shall have Costs to the counterclaim.

117 It is ordered

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 13TH DAY OF APRIL 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

