



**Kabiru & another (suing as the administrators of the Estate of Amos Kabiru Kimemia (Deceased)) v Kenya National Highway Authority (Environment and Land Case Civil Suit 149 of 2018) [2022] KEELC 2696 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2696 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 149 OF 2018**

**LA OMOLLO, J**

**MAY 19, 2022**

**BETWEEN**

**SAMUEL MAINA KABIRU ..... 1<sup>ST</sup> PLAINTIFF**

**ELIZABETH GACHAMIU MUIYURO ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF AMOS KABIRU  
KIMEMIA (DECEASED)**

**AND**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiffs filed a Complaint dated 17<sup>th</sup> April, 2018. They aver that land parcel No. Nakuru Municipality Block 16/485 was registered in the joint names of Amos Kabiru Kimemia (deceased) and Hannah Wanjeri Kabiro (deceased).
2. It is their averment that they are the Administrators of the Estate of Amos Kabiru Kimemia by virtue of the Letters of Administration issued on 27<sup>th</sup> April, 2015 in Nairobi High Court Succession Case No. 1940 of 2014 in the matter of the Estate of Amos Kimemia.
3. They aver that by a letter dated 15<sup>th</sup> March, 2018, the Defendant through its regional manager issued a Notice threatening to demolish premises on the suit property alleging that they were built on the road reserve.
4. It is also averred that the premises on the suit property are built within the boundaries of land parcel No. Nakuru Municipality Block 16/485.



5. The Plaintiffs pray for judgement against the Defendant for:
  - a. A declaration that the Notice dated 15th March, 2018 issued by the Defendant and left at the suit premises is illegal, uncalled for and unjustified.
  - b. A permanent injunction restraining the Defendant by itself, its servants and or agent from entering, demolishing any of the shops, houses, water points, power points being and or resting on Nakuru Municipality Block 16/485.
  - c. An order determining the actual boundaries between the road and the parcel of land known as Nakuru Municipality Block 16/485.
  - d. Any other or further relief that this honorable court may deem fit to grant.
6. The Defendant filed its statement of defence dated 26<sup>th</sup> February, 2019 where it states that it issued the Notice dated 15<sup>th</sup> March ,2018 in compliance with Section 49(5) of the Roads Act, 2007 and Section 91(2) of the Traffic Act laws of Kenya.
7. It also states that the Plaintiffs acquired the suit property irregularly and that they did not seek approval for the developed structures from the Defendant.
8. The Defendant further states that the original Registry Index Map titled Nakuru Municipality Block 16 'old' shows that the initial location and beacons of the suit property and the road reserve have been amalgamated into the suit property.
9. The Defendant denies all other allegations in the Plaintiff.

### **Plaintiffs Evidence**

10. At the hearing, one Samuel Maina Kabiru herein after referred to as PW1 testified. It was his evidence that he is one of the Plaintiffs and an Administrator of the Estate of his late father Amos Kabiru Kimemia.
11. He produced a Grant of Letters of Administration issued in succession case No. 1940 of 2014 by the High Court at Nairobi as exhibit P1. It is his evidence that Land parcel No. Nakuru Municipality Block 16/485 is registered in the names of his late father, Amos Kabiru Kimemia and mother, Hannah Wanjeri Kabiru.
12. He relied on his statement dated 25<sup>th</sup> February, 2019 and testified that his suit against the Defendant is for the reason that the Defendant asked them to vacate the building on the suit premises for purposes of demolition.
13. It is his further evidence that when they started construction on the suit premises in 2015, the Defendant's representative visited the place and confirmed that the buildings were not on the road reserve.
14. It is his testimony that they have the title deed to the suit property which he produced as exhibit P2. He also produced the notice of intention to demolish dated 15<sup>th</sup> March, 2018 issued by the Defendant. It is marked as exhibit P3.
15. Pw1 further testified that they commissioned a survey which was conducted and a report dated 3<sup>rd</sup> April, 2018 prepared. The said report was produced as exhibit P4. It is his testimony that the surveyor's report confirmed that that the development on the suit property is not on the road reserve.



16. It is his evidence that they did a valuation of the suit property and it was valued at Kshs. 16,000,000 as at 4<sup>th</sup> April, 2018. It is also his evidence that when the Defendant marked the building for demolition, the tenants who occupied shops within the building had to vacate. He explained that they had twenty-four tenants giving them a monthly income of Kshs. 240,000/=.
17. It is his further evidence that they moved the court seeking orders of temporary injunction against the Defendant pending the hearing and determination of the suit and that the said orders were granted.
18. It was his testimony that the survey they had commissioned showed that they are in their rightful portion and that their title has never been cancelled.
19. He testified that the building was constructed in 2015 and that before construction, they sought the necessary approvals from government agencies and that no objections were lodged.
20. He testified further that the allegations that their suit property was grabbed is not correct because they have the title.
21. He concluded his testimony by praying that the Defendant be restrained from entering their property and that if they want to take their property, they should compensate them.
22. On cross examination, he was referred to paragraph 2 of his statement and confirmed that in 2015 they were building on the suit property when the Defendant's representative went to the suit property but he did not have his name.
23. He also confirmed that he had approvals from the relevant authorities but he did not attach them on his list of documents.
24. He admitted that he received a notice from the Defendant which he had produced as exhibit P3 where he was given thirty days to demolish buildings on the land but he did not demolish because it was their land.
25. He also confirmed that he had engaged the services of a surveyor who is private and licensed. He further confirmed that he has title of the suit land, that the title was obtained after an amalgamation and further that the suit parcel is next to the road. Pw1 confirmed further that the amalgamation was done in 2003 and that he doesn't know which part of the road was hived during amalgamation.
26. He stated that since 2018 he has incurred a loss of Kshs. 240,000/= per month but he did not have any receipts to show that loss. He also admitted that that the building was occupied in the year 2020 when they reduced the rent to encourage people to take up tenancy.
27. He confirmed that he did not serve the Defendant with any demand notice before coming to court.
28. On re-examination he confirmed that his lawyers wrote to the Defendant on 13<sup>th</sup> April, 2018 in response to the notice they had issued.
29. The second witness to testify was one Elizabeth Muiyuro herein after referred to as PW2. She adopted her witness statement dated 1<sup>st</sup> December, 2021 as part of her evidence. She testified that she is one of the Plaintiffs and an Administrator of the Estate of her late father Amos Kabiru Kimemia.
30. It is her evidence that she is aggrieved by the notice for demolition of her business premises in Nakuru Solai Road on land parcel No. Nakuru Municipality Block 16/485 which is registered in the names of her late father Amos Kabiru Kimemia and her late mother Hannah Wanjeri Kabiro.
31. She testified that in the year 2015 when they were putting up the business premises a representative of the Defendant visited the suit premises and confirmed that the building was not on the road reserve.



32. It is her testimony that vide a letter dated 25<sup>th</sup> March, 2015, the County Government of Nakuru through the office of the County Secretary approved their building plans and confirmed that the plot did not constitute any private or utility land and allowed them to develop the property.
33. It was her testimony that they have built within their parcel of land and that when they received the notice of demolition dated 15<sup>th</sup> March, 2018, they engaged a surveyor who confirmed that they are within the boundary.
34. She further testified that their advocate by the name Kamunyu responded to the Defendant's demand letter.
35. It was her evidence that they sought approval of construction of the Municipal Council and NEMA and they got a letter allowing them to go on with the construction.
36. She produced a letter dated 25<sup>th</sup> March, 2015 with the drawings and approvals annexed as exhibit P6 (a) & (b). She also produced the letter in response to the demand letter dated 13<sup>th</sup> April, 2018 as exhibit P7.
37. It is also her evidence that once they completed the building, it was occupied by twenty-four tenants adding that the tenants have since vacated the suit property for fear of demolition. It is her testimony that sometime in the year 2021 they got some of the tenants back.
38. Pw2 testified that the monthly income from the building is approximately Kshs. 240,000/= per month.
39. She concluded her evidence by praying that the Defendant should be restrained from demolishing the premises.
40. The Court noted that Exhibit P7 was not on the list of documents and was neither in the advocate's possession and therefore directed that no further reference would be made to it either in cross-examination or submissions by the parties.
41. On cross examination PW2 confirmed that the land in question is Nakuru Municipality Block 16/485. She stated that she did not know that the suit land was previously amalgamated.
42. She confirmed that they did not have any approvals from the Defendant and also that she did not have details of the Defendant's representative who visited the suit property.
43. She further confirmed that the notice to vacate was for thirty days and also confirmed that they were receiving Kshs. 240,000/= in rental income but she did not have evidence of the said income.
44. PW2 confirmed that they engaged a surveyor who had issued a report and the same was part of the Defendant's documents filed in court.
45. Gibson Wahome testified as PW3. It is his evidence that he is a licensed surveyor and has been practicing since the year 1994. That prior to that he was the provincial surveyor and had qualified in the year 1971 after graduation.
46. He adopted his witness statement dated 10<sup>th</sup> September, 2021 as his evidence and testified that he knows the owner of land parcel No. Nakuru Municipality Block 16/485 as the late Amos Kabiru Kimemia who had gone to his office in the late 1980's and instructed him to conduct some survey work for him.
47. It was his evidence that in the year 2002, the late Kabiru went to his private office with the allotment letters and asked him to survey and combine land parcel No's Nakuru Municipality Block 16/484 and 103.



48. He testified that he carried out the job and followed all the due procedures by taking measurements, preparing the appropriate computations and plans and submitting them to the Director of surveys for numbering and amendment of the Registry Index Map.
49. It is also his evidence that he presented the Part Development Plan and the Letter of Allotment for both plots and the owner got a new title which was Nakuru Municipality Block 16/485.
50. It was his evidence that he was approached to prepare a report exhibit P7 and that the said report was prepared by an assistant in his office.
51. He produced the Part Development Plan dated 11<sup>th</sup> July, 2002 as exhibit P8 and the Surveyors report dated 31<sup>st</sup> July, 2002 as exhibit P9. He also referred to an authentication slip which confirms that the work he had submitted to the Director of Survey had been approved. The authentication slip is dated 20<sup>th</sup> September, 2002 and was produced as exhibit P10.
52. On cross examination PW3 confirmed that he is the one who foresaw the amalgamation in Block 16 and that the owner visited his office on two occasions. He added that he had no reason to ask him for information on public land.
53. He admitted that he assumed that the allotment letter and part development plan were in order.
54. This marked the close of the Plaintiffs case.

#### **Defendant's Case**

55. James Obura Okwaro hereinafter referred to as DW1 testified for the defence.
56. DW1 adopted his witness statement dated 22<sup>nd</sup> March, 2021 as part of his evidence.
57. He testified that the Kenya Highways Authority is established pursuant to Section 3 of the [Kenya Roads Act](#) no. 2 of 2007 to control national roads and road reserves and access to roadside developments, manage, develop, rehabilitate and maintain national roads amongst other functions.
58. It is also his testimony that he is a surveyor employed by the Ministry of Roads in the year 2005 and is currently the Regional Surveyor, South Rift Region of Kenya at the Kenya National Highways Authority. It is his further testimony that he was employed by the Defendant in the year 2009 and in 2012 confirmed as a permanent and pensionable employee.
59. He testified that as a surveyor with the Defendant his duty comprises of protection of the road reserves adding that the road reserves are owned by the Defendant. He explained that road reserves arise from reservation by the Ministry of Lands or by acquisition. It is his further evidence that in this matter the road had been reserved by the government.
60. DW1 further testified that the Defendant protects road reserves by survey and marks for removal any encroachment on the road reserve through issuance of quit notices.
61. He testified that they also do development controls when a person wants to develop by either issuing an objection or no objection.
62. It was also his evidence that they approve roadside development like constructions of culverts which give access to roadside development and also supervise their construction. It is DW3's evidence that in this matter, the suit property is along the Nakuru –Solai road.
63. It is his testimony that on 15<sup>th</sup> March, 2021 he embarked on conducting a resurvey of Nakuru Municipality Block No. 16/485 to establish the extent of the road reserve.



64. He testified further that he obtained the Registry Index Map and other survey plans for the suit property from the Director of Survey on 19<sup>th</sup> March, 2021.
65. It was his further evidence that the maps indicate that the Plaintiffs have encroached on the road reserve. This is because the old Registry Index Map shows the initial location and beacons of the suit property and the road reserve which, he testified, have now been amalgamated to result into the suit property.
66. It is his evidence that he concluded the re-survey of Nakuru Municipality Block 16/485 and established the extent of the road reserve.
67. It was his further his evidence that the road sub width of 200 feet has been reserved adding that the same is equivalent to 60.96 meters. He explained that this is evident from the early survey maps.
68. It is also his evidence that the amalgamation has resulted in encroachment of the road reserve causing the matter to fall within the mandate of the Kenya National Highways Authority.
69. He produced map FR No. 112/83 for Nakuru High School authenticated in the year 1968 which shows the beginning of the road as exhibit D1.
70. He also produced as exhibit D2 a survey map FR No. 142/70 for 28<sup>th</sup> September, 1977, FR No. 158/168 of 1982 as exhibit D3 and FR No. 194/161 of 1990 as exhibit D4.
71. It was his evidence that there has been attempts by developers to excise the parcels and register them as private lands which is demonstrated by two survey maps FR 158/160 and Fr No. 200/97 which he produced as exhibit D5.
72. He testified and gave an example that survey maps have co-ordinates as shown by exhibit D3 which is a map of 1982. The said map has a beacon No. M3 between the road reserve.
73. He also referred to map FR No. 200/97 produced as exhibit D5 where he testified that the survey plans have moved the plot boundaries into the road reserve by 14.6 meters which is calculated from the co-ordinates presented on the survey plans.
74. It is his evidence that the various plans and changes to the road reserve were captured in the survey map produced as exhibit D6. It is his further evidence that exhibit D6 is a combination of various survey plans and it shows the road from Nakuru to Solai and the road from Nakuru to Nairobi. It is his evidence that exhibit D6 shows the progression and width of the road reserve.
75. DW1 explained that the suit parcel has two registration systems adding that on the Registry Index Map the suit parcel is identified as parcel number 485. He explained that the said map uses a scale of 1:2500 adding that the said map shows that the road is sixty meters.
76. He went on to testify that the other registration system is the fixed boundary. He explained that for this type of registration system, boundaries are determined by private surveyors or the Director of Survey and the resultant map is a survey plan and has FR numbers.
77. He testified that the survey plan is prepared by private surveyors and authenticated by the Director of Survey which is used to amend the Registry Index Map.
78. He referred to exhibit D7 and testified that when this dispute arose up they acquired all the maps and noticed that some property owners preferred to register their property over the fixed boundary survey system.
79. He went on to testify that they therefore had to acquire several survey plans adjacent to the suit property with the purpose of showing consistency from the earlier surveys to the current ones.



80. It was further his evidence that fixed survey plans have coordinates and then referred to exhibit P3 as a fixed survey plan and stated that the coordinates are unique and can be established mathematically in case the beacons are destroyed.
81. He testified that after acquiring the maps he plotted the survey plans on paper systematically as per the section of the road in which there was a dispute and the map that he generated after plotting was exhibit P6.
82. He referred to the map exhibit P6 and pointed out that it shows the width of the road reserve as captured in the Registry Index Map and confirmed that they are the same. That the road reserve as appears in the Registry Index Map is the same as the one at page 4 of the map (taken from fixed boundary survey plan).
83. He then referred to map FR No. 158/168 which was produced as exhibit D3 and map FR No. 200/97 produced as Exhibit D5. He explained that these maps are for the adjacent properties along the road. He added that FR No. 158/160 was authenticated by the Director of Surveys in 1982. It is his testimony that the road reserve boundary was M1 M2 M3 with beacons marked.
84. He explained that the surveyor who did the survey of FR 200/97 changed the position and bearing of the road reserve and therefore there is no consistency he added that the position of M3 is visible but the road reserve moved by about thirty meters. It is his evidence that FR 200/97 captured two properties which are land parcel No. 161 and 162 which borders the suit property.
85. He then referred to exhibit D8 where he pointed out that there is only one plot in the middle of the road reserve. Exhibit D8 is FR. No. 200/97 and authenticated in 1990.
86. FR 336/174 was produced as exhibit D9 was authenticated in 1998 and that it shows that there are plots on the road reserve and the road reserve has now been reduced to 30.48 meters from 60 meters.
87. It was also his evidence that the suit property is an amalgamation of two plot 103 and 484 giving rise to 485.
88. DW1 further testified that a look at the two maps, which are 418/98 and Exhibit D8, ably demonstrates that plot no. 484 is hived from a road reserve and the amalgamation is intended to hide it.
89. He testified that map 418/98 was approved in the year 2002 and was a continuation of encroachment on the road reserve. He produced map FR No. 418/19 as exhibit D10.
90. He referred to another map known as FR No. 198/161 which was authenticated in 1990. It was his evidence that it showed a planted strip which is the road reserve and that it is sixty meters. That it has a scale that can be used to show that the planted strip is 30 meters.
91. DW1 testified that when FR 198/161 is compared to the Registry Index map produced as exhibit D7, it shows that the road reserve is still 60 meters. He explained that they obtained the maps from Survey of Kenya which is a government office.
92. It was also his evidence that property FR No. 200/97 (Exhibit D5) and 418/98(Exhibit 10) are partly on the road reserve but 336/174 & 598/182 are fully on the road reserve.
93. DW1 testified that they sent a notice to the Plaintiffs on 15<sup>th</sup> March, 2018 after their surveyors had gone to the suit property and marked the extent of the road reserve adding that they marked the encroached portion with "X" marks and KENHA labels in red paint.



94. He stated that KENHA staff issued the property owner with a thirty days' notice of intended demolition and removal of encroachment on the road reserve and that to date it's only the Plaintiffs who has developed the land while the rest of the people have not.
95. It was also his evidence that they have not demolished the Plaintiffs property.
96. On cross examination he confirmed that the sketch maps on pages 4, 5 and 6 of the Defendant's bundle of documents are his own drawings and that he has appended his name.
97. He also confirmed that the maps are not registered with the Survey of Kenya and that they are for presentation purposes before the court. He confirmed that the drawings are based on the maps from the Survey of Kenya.
98. He confirmed further that the maps from the Survey of Kenya are exhibit P1 which is at page 8, FR 142/70, FR No. 154/134, FR No. 158/168, FR No. 200/97, Fr No. 418/98 and FR NO. 336/174.
99. He also admitted that apart from the sketches, all the other maps are from the government and that the Defendant does not have a separate registration system for maps and relies on government maps.
100. He admitted further that the maps are from the historical records from the year 1960 to date and that he cannot be able to say that any of the maps is illegal.
101. He confirmed that there have been many adjustments on the map and there will continue to be more adjustments.
102. DWI stated that he is not aware of any previous provisional roads that had been converted to estates and denied having knowledge that Naka Estate was one such example.
103. He confirmed that Kunste Hotel is at the junction of Solai Road but denied knowledge that Kunste hotel had suits filed against it.
104. DW1 confirmed that allocation of plots is done by the Ministry of Lands and the Land Department.
105. He was referred to exhibit P1 and stated that it is a 1966 map and it captures the Solai road. He confirmed that the size of the road is 100 feet with the road reserve that is 100 feet wide, equivalent to 30.48 meters.
106. DW1 was also referred to exhibit P2 and confirmed that it is a 1977 map with the road 30.48 meters wide and a boundary line.
107. On exhibit P3, DW1 confirmed that the size of the road is 30.48 meters and that there is a building line.
108. He was also referred to the map at page 11 of the Defendant's bundle where the road is 30.48 meters and includes the building line with FR No. 336/124 overlapping.
109. DW1 was referred to the map at page 12 of the Defendant's bundle and also confirmed that the road was now 30 meters with a planted strip.
110. He also admitted that according the map at page 14 of the Defendant's bundle the road reserved is 30 meters and also has a planting strip.
111. Dw1 stated that the map at page 15 of the Defendant's bundle shows that the road is 30.48 m without the planting strip. He explained that the survey map shows that the planting strip is lost.
112. He was then referred to exhibit P7 and he confirmed that it has entries as late as 1<sup>st</sup> September, 2020 and explained that it is because the maps are continuously updated.



113. He confirmed that the map shows the correct position on the ground and that he was able to locate plot 485 on the map. DW1 explained that the maps contain a disclaimer from the department of Survey that the map is not evidence of boundaries.
114. He also stated that it is not correct that the road reserve is 30.48 meters and that it is also not true that the road including the road reserve adds up to 100 feet which is 30.48 meters.
115. He admitted that as per the 1966 map, the road reserve is 100 feet wide and that the later maps like the one on page 9 of the bundle shows a building line on a road that is 30.48 meters wide which is also the position in the maps of 1977 to 1992.
116. It was his evidence that in 1989, the building line is replaced with another word which is the planting line. He further confirmed that in all the maps the road is described as 30.48 meters and that he is not sure at what point it became 60 meters.
117. He stated that the accurate way to establish the road reserve is using coordinates. He explained that the coordinates are on one side of the road while that the beacons on both sides which give 60 meters as the road reserve on both sides of the road.
118. DW1 stated further that the words are misleading and that it is the co-ordinates that give the exact width of the road reserve. That the co-ordinates are by looking at the old maps of the area and other supporting documents such as the Registry Index Map, Part Development Plans and the town master plans.
119. He confirmed that the 1966 map and all the maps are not wrong and that he is only pinpointing specific properties on the road reserves.
120. He went on to state that there are preferred widths for road reserves. He explained that the Nakuru – Solai Road is class B with the preferred road reserve at 60 meters while for class C road, the road reserve is 40 meters. He stated that this information can be found in the KENHA survey manual and the Physical Planning Regulations.
121. DW1 stated that the Nakuru-Solai Road is within the old municipal boundary of original Nakuru Municipality and therefore the 60 meters for road reserve applies.
122. He admitted to not knowing where the planting strip is and that a building line has various contexts and that he is not sure what it meant for the person drawing the map.
123. He confirmed that the disputed parcel is either the building line or planting strip on the map adding that there is no clear record and so for KENHA, the road reserve means the distance between the boundary one side of the road and the opposite side.
124. He confirmed further that the Director of Survey has never demarcated the beacons for the building or planting strip and that no survey map uniquely describes the width of the planting strip and boundary line.
125. He was then referred to the map at page 9 where he confirmed that the Nairobi Road is indicated as 36.68 meters by the wording and not the coordinates.
126. He confirmed that all survey plans have a drawing with beacon numbers and corresponding coordinates to an accuracy of 3 meters.
127. He also confirmed that no map shows KENHA coordinates adding that KENHA only manages what has been allocated.



128. He admitted that a developer has to first go to the Physical Planning Department and that the Physical Planning department consults with KENHA who in turn issue an objection or no objection.
129. DW1 explained that in the case of KENHA the best reference to size of road reserve. FR No 112/83, 142/70, 154/134 and 158/168. He explained that the survey plan in respect of the suit property was authenticated in the year 2002.
130. He also confirmed that they have been removing people from the road reserve and haven't faced any resistance but in this matter, the Plaintiffs came to court.
131. He stated that the Defendant came into existence in 2007 and that they have been systematically dealing with the remaining encroachment on the road reserve.
132. It was his evidence that there were several plots that they consider to have encroached on the road reserve in the same neighborhood.
133. He testified further that before cancellation of title of the plots encroaching on the road reserve, they conduct a survey and give notices.
134. DW1 admitted that they had not applied for cancellation of the title to the suit property.
135. He stated further that he is a government surveyor under the authority of the Director of Surveys and the head of KENHA Survey Department.
136. DW1 also confirmed that the Defendant usually offers compensation to individuals if it acquires their parcels for road expansion. He said that in the instant suit, however, they are protecting the road reserve and not expanding it.
137. He confirmed further that maps FR No. 112/83 and FR No. 142/70 are survey plans based on fixed surveys and they show the road reserve NS 3, NS 2 & N55 which co-ordinates are on the left facing Solai.
138. He confirmed that he did not have the map in court but had given map FR No. 196/69 which has co-ordinates that show that the disputed land is a road reserve.
139. He admitted that approvals are made after consultation with the Defendant and he has no evidence that the approval was given. He also admitted that he saw the approval in the court documents but it was not given by the Defendant.
140. He further admitted that the approval comes from the Planning department and that ordinarily when a person is seeking approval, they do not go to their offices but they submit it through the Planning Department. He also admitted that some developers write to the Defendant directly.
141. On re-examination he stated that when they are building a road, they leave some land for expansion and they acquire it if it is not enough.
142. He confirmed that the Nakuru – Solai Road is a class B road which should be 60 meters. He explained that the maps he generated are from the survey plan which has co-ordinates that he plotted to generate the sketches for presentation.
143. He also stated that the figures at the top left corner are the co-ordinates which give the distances and bearings. He stated that he is qualified to do that work.



144. He explained that the building line at page 11 of the bundle shows that it is 30.48 meters and that the road is 30.48 meters while at page 13 the building line is 30.48 meters with the road also at 30.48 meters. That this gave a total of 60.98 meters which is equivalent of 200 feet.
145. He explained further that exhibit P7 was obtained from the Director of Surveys and that all the sketches originate from it and it shows a road reserve narrowing at a certain point and then widening again. That the suit parcel is part of the section of the road that has narrowed.
146. He referred to Page 15 of the bundle and referred to FR 336/174 and page 13 FR 200/97. He went on to state that in FR 200/97 there is a mention of a building line 30.48M. Inside the building line is FR 336/176 which has replaced the position of the building line.
147. He also explained that in the earlier maps the building line and the planting line had no co-ordinates and that in relation to the suit property, only a portion of it is encroaching on the road reserve.
148. He explained further that there are many other properties that have encroached but it is only 485 that has developments.
149. He referred to the 1966 map at page 8 of the bundle and stated that the map showed a fixed survey on one side of the road. The other map on the opposite side is FR No. 142/70 and FR No. 154/134 those two maps describe the position of the road reserve using co-ordinates on the opposite side of the road.
150. He also referred to FR No. 112/83 which shows the road reserve boundary on one side of the road. He clarified that when developing property adjacent to the KENHA road reserve a provision is given for access of traffic.
151. The Defendant closed its case.
152. Parties were directed to file and exchange their written submissions.

### **Plaintiffs Submissions.**

153. The Plaintiffs in their submissions gave a summary of their case, the defence case and addressed the court on the following:
  - a. Building approvals.
  - b. Rights conferred on Registration of Land.
  - c. Legal Protection of titles
  - d. Road Reserve
  - e. Loss of Income.
154. On building approvals, the Plaintiffs relied on Section 29 and Section 32(2) of the Physical Planning Act and submitted that before commencing construction they sought approval of development for their property from the County Government which was granted by the County Secretary.
155. On rights conferred on registration of land the Plaintiffs relied on Article 40 of *the Constitution* and Section 24 of the *Land Registration Act* and submitted that every citizen of Kenya has the right to own property in any part of Kenya.
156. On legal protection of title to property the Plaintiffs relied on Section 80 of the *Land Registration Act* and submitted that they were lawfully allocated land parcel Numbers Nakuru Municipality Block



- 16/484 and 103 which were amalgamated into the suit parcel of land Nakuru Municipality Block 16/485.
157. They submitted that they sought a surveyor who established the property's boundaries and drew new plans from which a new title to the amalgamated land was issued. They also submitted that the Defendant did not prove any fraud or mistake in the allocation of the parcels of land and in the issuance of the new title.
158. On the road reserve the Plaintiffs submitted that the Solai-Nyahururu Road is a Class C Road and the size of that road according to the relevant classification is about thirty meters as shown by the oldest Map of 1966.
159. On loss of income the Plaintiffs submitted that the marking of their premises for demolition caused their tenants to vacate as they did not want their businesses destroyed. That the Plaintiffs ended up losing their monthly income and they therefore sought for compensation for loss of rent.
160. The Defendant's in its submissions gave the background of the matter, a summary of the Plaintiffs and Defendant's case and identified the following issues for determination:
- a. What is the width of the road reserve adjacent to the suit property?
  - b. Does the Plaintiffs have good title to the road reserve?
  - c. Whether all approvals were acquired?
  - d. Whether the Plaintiffs are entitled to compensation?
  - e. Whether the Plaintiff has met the threshold for grant of a permanent injunction?
161. On the width of the road reserve adjacent to the suit property the Defendant submitted that the land in dispute in this matter is Nakuru Municipality Block 16/485 which measures approximately 2.903 Hectares. The Nakuru-Solai Road is adjacent to the suit property and falls within the Nakuru Municipality boundary and therefore the road reserve has a width of 60.96 meters which is 200 feet.
162. On whether the Plaintiffs have a good title to the road reserve, the Defendant submitted that the Plaintiffs failed to explain the root of their title.
163. On whether all approvals were acquired the Defendant submitted that it is mandated to grant approvals to any person or body to anyone who wishes to carry out works on road reserves which approval it did not grant to the Plaintiffs.
164. On whether the Plaintiffs are entitled to compensation the Defendant submitted that the Plaintiffs have not pleaded any compensation in their pleadings and since parties are bound by their pleadings, the Plaintiffs are not entitled to any form of compensation.
165. On whether the Plaintiff has met the threshold for grant of permanent injunction it was submitted that the Plaintiffs have not proved that Nakuru Municipality Block 16/485 does not encroach on the road reserve and since an injunction is an equitable remedy, the court has the discretion to either grant or decline to grant the prayer for injunction.

#### **D Analysis and Determination**

166. I have taken into consideration the pleadings, evidence tendered, the rival submissions filed by the parties and judicial decisions attached in support of those submissions.



167. The evidence tendered in this matter, especially by the defence might seem complicated, maybe even intimidating. However, the questions for determination, in my view, are fairly straightforward. They are:
- a. Whether the notice dated 15th March, 2018 issued by the Defendant and left at the suit premises is legal.
  - b. Whether land parcel Nakuru Municipality Block 16/485 is encroaching on the road reserve
  - c. whether orders of permanent injunction should issue against the Defendant restraining it from entering, demolishing any of the shops, houses, water points, power points being and/or resting on Nakuru Municipality Block 16/485.
  - d. Whether this court should issue an order for determination of actual boundaries as between the Nakuru-Solai road and the parcel of land known as Nakuru Municipality Block 16/485.
  - e. The legal effect of approval of building plans vis-a- vis allegation of encroachment.
  - f. Who should pay costs of this suit.
168. I will determine question (a) solely, (b) (c) and (d) together, (e) and (f) solely

**A. whether the notice dated 15th march, 2018 issued by the Defendant and left at the suit premises is legal.**

169. The one and only defence witness (DW1) introduced himself as a surveyor employed by the Ministry of Roads in the year 2005 and deployed to Kenya National Highway Authority in the year 2009 and confirmed as a permanent and pensionable employee in 2012.
170. He stated that road reserves are owned by the Kenya National Highway Authority either by way of acquisition or reservation by the ministry of land.
171. In their submissions, the defendant state that it is a creation of section 3(1) of the [Kenya Roads Act](#). The defendant goes on to mention 49(a) of the [Kenya Roads Act](#) and section 9 (1) of the [Traffic Act](#).
172. The long title of the [Kenya Roads Act](#), 2007 states that it is;
- An Act of Parliament to provide for the establishment of the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority, to provide for the powers and functions of the authorities and for connected purposes.
173. Section 3 of the said Act establishes the Kenya National Highways Authority while section 4 (1) states that the Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.
174. Section 4 (2) sets out the functions and duties of the Kenya National Highways Authority, observing that the said functions and duties are for the purposes of discharging the mandate of the Defendant as set out in section 4 (1). Specifically, the provisions of section 4 are as below
4. Functions of the Authority
    - (1) The Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.
    - (2) For the purposes of discharging its responsibility under subsection (1), the Highways Authority shall have the following functions and duties—



- (a) constructing, upgrading, rehabilitating and maintaining roads under its control;
- (b) controlling national roads and road reserves and access to roadside developments; (emphasis is mine)
- (c) implementing road policies in relation to national roads;
- (d) ensuring adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under this
- (e) ensuring that the quality of road works is in accordance with such standards as may be prescribed by the Minister;
- (f) in collaboration with the Ministry responsible for Transport and the Police Department, overseeing the management of traffic and road safety on national roads;
- (g) collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under this Act;
- (h) monitoring and evaluating the use of national roads;
- (i) planning the development and maintenance of national roads;
- (j) advising the Minister on all issues relating to national roads;
- (k) preparing the road works programmes for all national roads;
- (l) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads; and
- (m) performing such other functions related to the implementation of this Act as may be directed by the Minister.

175. The Defendant also refers to section 49(1) of the *Kenya Roads Act*. It provides as follows

Structures and other works on, over, and below roads or certain other land

- (1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—
  - (a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
  - (b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
  - (c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.



176. The question that invariably follows is what recourse the authority might have in the event of violation of the provisions of section 49(1).

177. The Defendant did not submit on this but a further reading of section 49 (5) and (6) provides the answer and it is as follows;

Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice. (emphasis is mine)

(5) If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.

178. Section 49 (4) states that the notice

- i. should be in writing,
- ii. It should direct the person to remove the unauthorised structure,
- iii. the direction to remove should be within a reasonable period not shorter than 30 days from the date of the notice

179. I have perused the said notice it is in writing, it is directed at Samuel Maina and it directs him to remove the encroachment within 30 days from the date of the notice.

180. In view of the foregoing and in determining the question whether the notice dated 15th March, 2018 issued by the Defendant and left at the suit premises is legal, I find that the notice issued by the defendant was legal.

DIVISION - B. Whether land parcel Nakuru municipality block 16/485 is encroaching on the road reserve.

DIVISION - C. Whether orders of permanent injunction should issue against the Defendant.

**D. Whether an order should issue for determination of actual boundaries as between the Nakuru-Solai road and the suit parcel.**

181. These three questions are related and I will determine them together.

182. The first limb under this heading is whether land parcel Nakuru Municipality Block 16/485 is encroaching on the road reserve and what should be done?

183. The Plaintiffs led evidence which has been recounted in the preceding paragraphs and in summary and relevant in answering this second limb of the question is that they have title documents to the suit property, that on receipt of the notice from the defendant, they engaged a private surveyor whose report shows that they are in occupation of their rightful portion, that they obtained necessary approvals from different government agencies before construction and that no objection was lodged at the various agencies.



184. In support of its position, the plaintiff produced the title deed drawings and approvals from the County Government. These documents are intended to give a history of how the parcel of land was acquired.
185. The surveyor PW3 testified and stated that he was approached by the late Amos kimemia Kabiru in the 1980's and subsequently in the year 2002 when his services were sought to survey a parcel of land and amalgamate it with the one acquired earlier. He explained that in order to complete the task he used part development plans and the letters of allotment in respect of the two parcels of land. He produced
  - a. His report
  - b. Part development Plan dated 11<sup>th</sup> July, 2002
  - c. A surveyor's report
  - d. Authentication slip
186. PW3 explained that the authentication slip confirms that that the work he submitted to the Director of Survey was approved. PW3 explained that he had no reason to question the authenticity of the allotment letter and the Part Development Plan.
187. The Defendant on its part led evidence to the effect that part of the the Plaintiffs' parcel and structures thereon, are encroaching on the road reserve.
188. The defendant produced various maps and survey plans.
189. Exhibit D1-D4. The survey map FR No. 112/83 marks if for Nakuru High School and it shows where the Nakuru -Solai Road begins. The said map was authenticated in 1968. The other maps (Exhibit D2, D3 and D4) produced were authenticated in 1977, 1982 and 1990 respectively.
190. The Defendant's evidence is that there have been attempts, over the years, by developers to excise parcel of land forming part of the road reserve and register them as private land. To demonstrate this phenomena DW1 produced two survey maps as Exhibit D5- FR No. 200/97 and exhibit D3 FR 158/168. On both survey maps there is a beckon marked as M3.
191. In the survey plan FR No. 200/97 (Exhibit D5) the road reserve has been encroached upon to the extent of 14.6 meters.
192. The defence produced Exhibit D6. It comprises of various survey plans which shows the changes to the road reserve over time.
193. The suit parcel can be located on the Registry Index Map produced as Exhibit D7.
194. DW3 went to great lengths in comparing the various survey plans whether arising from the fixed boundary registration system or the Registry Index Maps. His evidence is that the road reserve is consistently shown as being 30 meters until the survey as shown in FR 200/97 (Exhibit D5). This he explains is when the surveyor changed the position of the road reserve. It is his testimony that the road reserve boundary was M1 M2 M3 with beacons marked as can be seen in FR No. 158/160 which was authenticated by the Director of Surveys in 1982 with beacons marked.
195. He explained that the surveyor who did the survey of FR 200/97 changed the position and bearing of the road reserve and therefore there is no consistency- in comparison to the previous survey maps. It is his testimony that the position of M3 is visible but the road reserve moved by about thirty meters.
196. Exhibit D5 the map of 1990 shows one plot in the middle of the road reserve.



197. FR 336/174 of 1998 (Exhibit D9) shows a series of plots on the road reserve and DW3 explains that the road reserve has now been reduced to 30.48 meters from 60 meters.
198. The defence evidence is that the suit property (No. 485) was an amalgamation of two plots i.e. 103 and 484. It's the evidence of the defence that plot no 484 is hived from the road reserve and the amalgamation is intended to conceal 484. This evidence is contained in exhibit D8 – FR No. 200/97 and exhibit D10- FR No. 418/98. The defence states that FR No. 418/98 was approved in 2002 and shows a continued encroachment on the road reserve.
199. In conclusion the defence submits that FR No. 200/97 and 418/98 are partly on the road reserve while FR No. 336/174 and 598/182 are fully on the road reserve. A survey report dated 22/3/21 prepared by DW3 was produced in evidence and the survey map is attached to the report.
200. The Plaintiffs' submissions state that the government resurveyed and allocated the planting line and building line in the 1990s to individuals and that its not for the Defendant to question the actions of the government. However, I have not been pointed to any evidence of allocation.
201. The Plaintiff further submits that if the defendant wished to expand the road it must follow the law and offer compensation to the Plaintiff. The Plaintiff refers the court to the decisions in *Elizabeth Wambui Gitbinji and 29 others Vs Kenya Urban Roads Authority & 4 others* [2019] eKLR and *Gujral Sandeep Singh Raghbir Vs Minister for Public works, Road and Transport County Government of Kajiado & Another* [2018] eKLR in support of its submissions on this point
202. The Defendant's submissions on this point is that the Plaintiff have failed to explain the root of the title Nakuru Municipality Block 16/485 adding that the plaintiffs were also not sure of how the title came about.
203. The Defendants also submit that they have been able to demonstrate that the parcel arose from an amalgamation and that part of the road reserve was hived off.
204. The Defendants submit that PW3 who undertook the amalgamation on behalf of the Plaintiff's testified that he proceeded on the presumption that all documents were in order. In support of this point, the Defendant refers to the decision in *Cycad Properties Limited & Another vs The Attorney General and 4 others* [2013] eKLR, *Republic Vs Minister for Transport & Communication & 5 others Ex Parte Waa Ship Garbage Collector & 15 Others* Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 and the provisions of Section 21 of the *Survey Act*.
205. My analysis of the Plaintiffs' evidence in respect of this question is that they have a title deed, they involved a private surveyor in the process of obtaining the title deed, the said surveyor proceeded to do his work on the faith that the allotment letter and part development plan documents presented to him were proper. Infact, he says he had no reason to ask the deceased to give him information on public land. In turn, he submitted them to the director of survey who then issued him with an authentication slip.
206. I have had to look up the law in order to understand what comprises survey work and what the role of the Director of surveys. There is a *Survey Act* in Kenya. The long title of the Act states that it is
- An Act of parliament to make provision in relation to surveys and for geographical names and the licencing of land surveyors and for connected purposes.



207. The word survey is not defined in the Act. However, Blacks, law dictionary, 11<sup>th</sup> Edition at page 1746 defines survey as
- The measuring of a tract of land and its boundaries and contents; a map indicating the result of such measurement.
208. My curiosity has also led me to query the exact thing that was done by the surveyor in this case considering that the Plaintiff's attaches a lot of value to his report. The report of the surveyor is Exhibit P9. The report which is hand written and has note at the bottom of it which reads;
- “N.B. Ground area was found to be more than that quoted on the PDP and accepted as such since the idea was to extend the parcel to the building line.”
209. This report is prepared by Joseph Mwangi who PW3 states in an assistant in his office.
210. None of the parties has addressed its mind to this note on Exhibit P9. The important thing to note at this point is that the area of the suit parcel, as measured by the surveyor, was found to be more than what was quoted on the PDP.
211. It would seem that the PDP presented to the Director of surveys by PW3 was at variance with the ground measurements.
212. The question that logically follows is; Where did this extra ground area come from? The note on exhibit P9 further states that the scope of the survey work undertaken was to extend the parcel to the building line.
213. Evidence has been led by the defence on the width of the road reserve, building line and planting strip over the years dating back to 1966. DW1's evidence is that the building line and planting strip are words used interchangeably in reference to the road reserve and that the maps produced show a systemic encroachment on the road reserve over the years.
214. I must confess that making sense of all these survey maps produced in evidence was a completely daunting task. I take a lot of comfort in the fact that these maps have been obtained from a government department; Survey of Kenya. The process and the science behind survey and mapping is complex but the expert witness who testified on behalf of the defendant was extremely useful in helping the court understand the process undertaken in re-survey of the Nakuru-Solai Road and contents of the various maps and sketches.
215. The process used to establish encroachment is that DW1 used the fixed survey plans. He explains that these survey plans use coordinates and that the coordinates are unique and can be established mathematically even if the beacons are destroyed.
216. After acquiring maps from Survey of Kenya he plotted the survey plans on paper systematically in accordance with the section of the road in which there was a dispute. The map that he generated after plotting was exhibit D6. He explained that Exhibit D6 shows the width of the road reserve as captured in the Registry Index Map and he confirmed that it is the same as in the fixed boundary plans. His evidence is that the road reserve as appears in the Registry Index Map is the same as the one taken from fixed boundary survey plan.
217. DW1 also used maps for properties adjacent to the suit property. The properties that are along the Nakuru-Solai Road they are: FR No. 158/168(Exhibit D3) and FR No. 200/97 (Exhibit D5). FR No. 158/160 was authenticated by the Director of Surveys in 1982. It is his testimony that the road reserve on this map has boundary was M1 M2 M3 with beacons marked.



218. Importantly, no evidence has been led that points to the fact that the information contained in the maps and survey plans is inaccurate or that the process used is re-survey is flawed.
219. The suit property was extended to the building line as explained in Exhibit P9. The repealed Physical Planning (Building and Development) (Control) Rules 1998 defines a building line as
- A line drawn across a plot such that no building or permanent structure, except a wall of approved design enclosing the plot, may be within the area contained between that line and the nearest road.
220. The said rules state that any road greater than 18m in width the building line shall not be less than 9m. Evidence led by the defence is that the Nakuru Solai Road is a class B road whose road reserve is 60 meters.
221. Evidence has been led and I have no reason to doubt that the best reference to size of road reserve is FR No 112/83, 142/70, 154/134 and 158/168.
222. I have looked at Exhibit D10 i.e. FR No. 418/98 authenticated in 2002 and Exhibit D8 i.e. FR No. 200/97 authenticated in 1990. In Exhibit D10, the size of the road has decreased to 30m and the building line is completely lost and/or missing and in its place, we have parcel No. 484. This parcel No. 484 was amalgamated with parcel No. 103 and gave rise to parcel no. 485.
223. I am persuaded that the surveyor who did the survey as represented in FR 200/97 changed the position and bearing of the road reserve as has been stated in evidence of DW1.
224. There is no doubt in my mind that the building line/ road reserve (I have explained in preceding paragraphs that these words have been used interchangeably in the maps produced in evidence and also as explained by DW1, they mean the same thing) has metamorphosized to parcel no. 484.
225. I find the evidence of the defence plausible is so far as it states that the amalgamation was intended to conceal the excision of the road reserve.
226. Another question worthy of an answer is; If the road reserve as exhibited in the 1968 map- FR No. 112/ 83 i.e. Exhibit D1 was 100 feet, how did Kenya end up with no road reserve in the year 2002 as exhibited by FR No. 418/98 (Exhibit D10)?
227. The two maps, which are 418/98 and FR 200/97 (Exhibit D8), ably demonstrates that plot no. 484 is hived from a road reserve and the amalgamation is intended to hide it.
228. I also note that the Plaintiff has produced a copy of the certificate of lease. However, there is no explanation accompanying ownership or evidence led to cast light on the root of the title. The Plaintiffs mention that there was an allocation by the government but no evidence has been given. I am of the considered view that an explanation of some nature might have helped the Plaintiff assert his proprietary interest over the suit property. The modes of acquisition of land in this country are known and the Plaintiff did not find it necessary to explain how parcel no 484 was acquired.
229. The Plaintiff relies on the decision in *Gujral Sandeep Singh Ragbir Vs Minister for Public Works, Road and Transport County Government of Kajiado & Another* [2018] eKLR. I wish to distinguish this decision to the extent that the Plaintiffs in the current case states that the land was allotted to their deceased father, the allotment letters were not produced in evidence and it is also not clear who allotted the land to him. In the case *Gujral Sandeep (Supra)*, the Plaintiffs were able to explain the root of their title and judgment was entered in their favour.



230. In the case of *Kenya National Highway Authority Vs Shalien Masood Mughal & 5 others* [2017] eKLR the court of Appeal held as follows;

However, in the case before us, Kenha and the other respondents do not challenge the validity of Mughal's title to the disputed plot. Their assertion is that, to the extent that he has, as confirmed in the report by the surveyors, encroached on the road reserve and buffer zone, his title is defeasible and is not entitled to the protection afforded by Article 40 of *the Constitution*. (emphasis is mine) The Article protects proprietary rights but under the current Constitutional regime those rights are not absolute. They can be limited and one of the limitations appears in Article 40 (6) under which the protection does not extend to any property that has been found to have been unlawfully acquired. One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One may even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road reserve for the Nairobi/Mombasa Highway before the disputed plot was created. The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest. Indeed, it is difficult in the circumstances of this case to accept that Mughal was not aware of these facts noting his evidence that he was literate enough to obtain information about the plot from the internet and further noting the information in the public domain from the Ndung'u report which rang alarm bells about irregular/unlawful plot allocations in the country.

231. The Shailien Masood Mughal case (supra) is on all fours with the circumstances in this case. The Plaintiffs have title to land, they do not seem to know where it came from and when it is brought to their attention that it arises from amalgamation of two parcels of land one which is hived off from the road reserve, they are tongue tied. Only Pw3 confirms that the suit parcel was as a result of an amalgamation. In response, they state that they are bonafide allottees and that the original survey work was validated or authenticated by the director of survey.

232. Section 21 of the *Survey Act* provides

21. Duties of licensed surveyors and non-liability of the Government

- (1) Every surveyor shall carry out every survey undertaken by him in such manner as will ensure that the survey accords in all respects with the provisions of this Act and any regulations made thereunder, and shall be responsible for the correctness and completeness of every survey carried out by him or under his supervision: Provided that the Director may, in his discretion in the case of any particular survey, by notice in writing to the surveyor, direct that the standards of accuracy prescribed by such regulations shall be relaxed in such manner, to such extent and subject to such conditions as he shall specify in the notice.
- (2) Neither the Government nor any public officer shall be liable for any defective survey, or any work appertaining thereto, performed by a licensed surveyor, notwithstanding that any plan relating to such survey or work has been authenticated in accordance with the requirements and provisions of this Act



or accepted for registration under any written law for the time being in force relating to the registration of transactions in or of title to land.

233. A reading of section 21 of the *Survey Act* shows that the assertions by the Plaintiffs that the survey work was validated and an authentication slip are on no consequence to this suit for the reason that the government and public officers admit no liability for any defective survey or work pertaining to the survey.
234. Pw3 states that he had no reason to question the title of deceased and lodged the Part development plans and allotment letters with the Director of Survey. He also states that he made no enquiries as to the question of public land.
235. In my view, survey work forms part of due diligence and there is every indication that this was either handled casually or was part of the grand scheme to excise the road reserve. The survey report noted that the area of the suit parcel as contained in the PDP and on the ground are at variance. The plaintiff's do not address this note and did not take any steps to correct it. I asked a rhetorical question in the preceding paragraphs and now take the liberty to answer it; this excess area must be part of the road reserve that completely disappears as shown in FR. No. 418/98 (Exhibit D10).
236. The Plaintiff produced a report on boundary verification. It is marked as Exhibit P4. Pw3 observes that some beacons had been destroyed. DW1's evidence is that there is a beckon for the road reserve identified as M3 in the map FR No. 158/168- a map of 1982. This beckon is missing when DW1 does his re-survey to establish the extent of encroachment on the road reserve. The fact of destroyed beckons as observed by the Plaintiffs, in my view, should have caused them to ask further questions as part of their due diligence. They didn't. It now turns out that the suit parcel is encroaching on the road reserve. The Plaintiffs have themselves to blame.
237. In *Republic Vs Permanent Secretary Ministry of public works & Housing Ex parte Tom Maliachi Stima* [2014] eKLR, the Learned Judge cited with approval the decision in *Republic Vs Minister for Transport & Communication & 5 others EX Parte Waa Ship Garbage Collector & 15 Others* Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 where it was held;
- “Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed. It is clear from section 75 of *the Constitution* that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*.” (Emphasis is mine)
238. Section 91 (1) (a) and (c) and 91 (2) of the *Traffic Act* CAP 403 Laws of Kenya provides that;
1. Every person who without the written permission of the highway authority



- a. Encroaches on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seed thereon or;
  - b. ...
  - c. Digs up, removes or alters in any way the soil or surface of a road, or nay land reserved therefore at the side or sides of thereof..
2. It shall be lawful for the highway authority to remove anything whatsoever which has been placed or erected on a road or land reserved therefore in contravention of this section.
239. In view of the foregoing and in determination of the question (B) I find that a portion of land parcel Nakuru Municipality Block 16/485 encroaches on the road reserve as is evidenced by a systematic enquiry into the numerous maps and survey plans produced in evidence. It follows that orders of permanent injunction restraining the Defendant from removing the encroachment shall not issue; this determines the second limb (C).
240. In light of my determination of the questions in (B) and (C) above, I am of the opinion that it shall not be necessary to issue an order for determination of boundaries as between the Nakuru-Solai Road and the suit property. The process undertaken by the Defendant is based on science and Mathematics and has not challenged. This finding settles the question in (D).

**E. The legal effect of building approvals vis-a vis- allegation of encroachment.**

241. This fifth question for determination might seem inconsequential in light of the determination of the second question but I feel the need to address it nevertheless.
242. The Plaintiff produced in evidence a building approval obtained from county Government of Nakuru- Exhibit P6. It is dated 25<sup>th</sup> March, 2015. At roman (vii) it reads;
- “ The plot not constituting part of any disputed private or public utility allocation.”
243. The letter from the County Government does not state the section or the law pursuant to which it grants the building approval. The Plaintiff has also not led evidence to explain the legal effect of such approval.
244. The Plaintiff, however, asks the court to deem the building approval as evidence that the suit parcel is not encroaching on the road reserve. A building approval cannot translate to an authentication of title or boundary. To draw a conclusion of this nature would be rather absurd.
245. The Defendant submits that it did not grant any approval to the Plaintiff and further that the County Government did not seek any approval on behalf of the Plaintiff. Importantly, no such approvals have been tendered in evidence.
246. The Defendant also led evidence that it usually receives requests for approvals and they come from the planning department. It was also DW1’s evidence that nothing prevents developers from directly seeking these approvals from the Defendant.
247. I must state that the statement by the County Government as contained in roman (vii) is not only reckless but misleading especially when it doesn’t obtain various approvals from other government agencies and does not attach them to its communication to persons seeking approval.
248. Section 49(1) and (2) of the Kenya Road Act 2007 provides;



1. Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission— (emphasis is mine)
    - a. ....
    - b. ....
  2. An Authority may, in its discretion, give or refuse to give permission under this section.
249. I am doubtful that the that the building approval from the County Government operates as a waiver or is intended to operate as a waiver on the part of other government agencies from whom approvals ought to be obtained or a waiver by anyone from asserting their rights either by instituting a claim in court or otherwise.
250. In *Clerkson Onyango Bolo -vs- James Asaka & 2 others* [2021] eKLR, the Learned Judge stated;  
“I am in fact not sympathetic to the Defendants at all. When they built on the road reserve, and it is really immaterial to me whether the building was approved or not, they ought to have ensured that they do not encroach into any of the neighbouring titled properties.”
251. In the same breath, I am not convinced that obtaining approvals for the county government negates the fact of encroachment. The building approval obtained is therefore of no legal consequence in determining this dispute.
252. The question of compensation came up during the trial. I have chosen to ignore it but will very briefly state that parties are bound by their pleadings. It was neither pleaded nor proved.

#### **F. Who should pay costs of this suit.**

253. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).
254. In the case of *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

#### **Disposition.**

255. The Upshot of the foregoing is that the Plaintiffs' suit against the Defendant is dismissed with costs to the Defendant.
256. The execution of this Judgment shall be stayed for 90 days from the date hereof.
257. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19<sup>TH</sup> DAY OF MAY 2022.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

Miss Sengele for the Plaintiffs

MR. Kamonjo for the Defendant



Jeniffer Court Assistant

