



**Marete v Koome & 2 others (Environment & Land Case
97 of 2000) [2024] KEELC 5068 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 97 OF 2000**

CK YANO, J

JULY 4, 2024

BETWEEN

JULIUS MARETE PLAINTIFF

AND

PASTOR MISHECK KOOME 1ST DEFENDANT

SEVENTH DAY ADVENTIST CHURCH 2ND DEFENDANT

MERU TOWN SDA CHURCH 3RD DEFENDANT

JUDGMENT

1. In this case, I am required to write a judgment based on the evidence that was taken by other judges who were seized of the matter before they were transferred. Hon. P.M Njoroge J. took the evidence of P.W 1 partly, while Hon. L. Mbugua J. took the rest of the evidence of P.W 1 and the evidence of P.W 2, P.W 3, P.W 4 and P.W 5 partly. Pursuant to the provisions of order 18 Rule 8(1) of the Civil Procedure Rules, I proceeded with the matter and took the rest of the evidence of P.W 5, and the evidence of D.W 1, D.W 2 and D.W 3.

Plaintiff's Case

2. The plaintiff commenced the suit against the defendants vide a plaint dated 26th January, 2000 which was amended on 10th March 2000. Briefly, the plaintiff's case against the defendants is that on Sunday 23rd December, 2000, the 1st defendant with the agent or servants of the 2nd defendant unlawfully and without any claim of right removed the plaintiff's fencing materials and pushed the fence inside the plaintiff's developed property within Meru Municipality with the intention of grabbing a portion of the same. The plaintiff states that he acquired the plot where he erected a permanent house in or about 1970. That upon the elevation of Meru Urban Council to Meru Municipality status, the said plot was re-named plot No. T91 which on planning being carried out changed to Block 11/207 and when the



- area was re-planned in or about 1997, it changed to New Block II/788. The plaintiff contends that the acts of defendants' agents constitutes trespass to property, unlawful damage to and interfering with registered and developed property, by reason whereof the plaintiff has suffered loss, harm and damage.
3. The plaintiff prays for general damages and a permanent injunction to stop the defendants, their servants or agents from entering or whatsoever interfering with the said property plus costs.
 4. Five witnesses testified in support of the plaintiff's case. Julius Marete, the plaintiff testified as P.W 1. He adopted his witness statement dated 30th August 2013 as his evidence in chief. The plaintiff testified that the case concerns a plot known as Block II Meru Municipality 788 Meru Old town measuring 0.3376 Ha. The plaintiff stated that the plot was allocated to him by the Municipal Council Committee.
 5. The plaintiff stated that in 1970, he built a permanent house on the suit plot and in 1977, original survey of parcels Block Nos. 189 – 206 and 207 renamed plot T91 as Block II/207. He stated that the original survey affected his permanent residential house standing on plot T. 91 (Block II/207). That the original part Nos. 206, 207 and a Government Land were superseded by 1987 re-planned Block II/207 of 0.338 Hectares and 1987 re-planned Block II/207 of 0.338 hectares and 1987 unplanned/deferred Block II/206 of 0.1867 hectares.
 6. The plaintiff stated that Block II/207 measuring 0.338 hectares was allocated to him by the plot allocation committee in 1988. That in 1997, survey F/R 332/107 surveyed 0.338 hectares Block II/207 as Block II/788 and F/R 141/81 surveyed 0.1867 hectares unplanned Block II/206 as Block II/789. That survey Ref F/R 332/107 and F/R 141/81 placed remains of Meru Municipality old slaughter house on Block II/788 and on Block II/789.
 7. The plaintiff testified that he is the legal owner to leasehold Block II/788 with effect from 1st September, 1997. That Block II/788 is registered with the Director of Surveys, Nairobi and also with the District Land Registrar, Meru. He stated that Block II/788 does not adjoin non-existent Block II/206 nor is it adjacent to the said block II/206. The plaintiff stated that Block II/788 was planned, surveyed, approved and registered in accordance with procedure, law and regulations governing County Councils in Kenya.
 8. The plaintiff produced the letter of allotment dated 9th September, 1997 as P exhibit 1. He testified that he paid Kshs. 63,050/= and was issued with a receipt on 13th October, 1997 which he produced as P exhibit 1(a). That he was issued with a lease agreement on 12th February, 1998 and produced the same as P exhibit 2.
 9. The plaintiff testified that he was issued with a certificate of lease dated 18th February, 1999 for 0.3376 Hectares for a term of 99 years from 1st September, 1997. He produced the same as P exhibit 3. He also produced a copy of the green card as P exhibit 3(a) and a letter from the Commissioner of Lands approving issuance of the plaintiff's documents dated 19th February, 1998 as P exhibit 4. The plaintiff further testified that he has been paying rent and rates at the County offices and produced the bundle of receipts as P exhibit 5.
 10. The plaintiff testified that he received a letter dated 13th January, 2000 from Pastor Misheck of Meru S.D.A church stating that his building be demolished and they build their church. The plaintiff stated that he spent a lot of money on the building. The plaintiff stated that the defendants wrote him another letter dated 26th January, 2000 telling him to vacate from the plot. He produced the letters as P exhibits 6(a) and (b). He stated that that was the reason he came to court. The plaintiff stated that when he moved into the plot in 1970, the defendants were not anywhere near there. That he was alone, plus a municipal council slaughter house. That the defendants moved there around 1992. He stated that the



change of plot numbers were made by the council and lands office, but the plot remained the same. He referred to copies of maps dated 5th November, 1997 which he stated he got from Survey of Kenya, Nairobi.

11. The plaintiff further testified that he received a letter dated 4th May, 2010 from Meru Municipal Council asking him to remove the remains of slaughter house which was on his plot to give way. That he was told to claim the costs of removal from SDA church. That this was because he could not develop his plot if the remains of the slaughter house were still there. That the Municipal council had sold the materials to the SDA church. That before then, he had on 6th April, 2010 written complaining about the matter. He produced the two letters as P exhibits 8 and 9. He urged the court to grant him the orders sought plus costs of the suit.
12. The plaintiff was then cross-examined by Mr. Ndubi learned counsel for the defendants and also re-examined by Ms Kiome learned counsel for the plaintiff. He stated inter alia that he had initially filed the case as Meru CMCC 83 of 2000 but was transferred to this court by Oundu, Resident Magistrate. He reiterated that the SDA church does not neighbor him. That he had come to court for the parties to be shown their plots. He stated that plot 788 is his while 789 belongs to the County Government.
13. The plaintiff further stated that there is a SDA church next to his land and there was no other person between them. He maintained that the land was his and accused the church of encroaching on a portion of it. That he did not know the extent of the portion encroached. He stated that his plot on the map is 0.338 hectares but on survey is 0.3376 hectares.
14. On further cross examination, the plaintiff admitted that the church's plot is No. 206, though he did not know how they got it. He stated that he is claiming damages against the defendants for destroying his fence as well as orders of injunction.
15. 2 was Julius Gennings Gichoga. He was a custodian of the plaintiff's documents. He adopted his statement filed in court on 30th August 2013 as his evidence in chief and was cross-examined and re-examined. He testified that he was aware of how the plaintiff got his plot. He reiterated the evidence given by P.W 1. He testified that the property was surveyed on 15th February, 1977 and it included parcel numbers 189 – 207 and a proposed road reserve. P.W 2 testified that on the ground, the plaintiff's building stands on Block II/788 and a church building stands on Block II/789 and there is a disused slaughter house material which falls on either parts of the two plots. P.W 2 stated that he is the one who secured copies of survey reference F/R 332/207 which shows the origin of Block 788 and 789 and says the origin of the 1997 blocks was former part number 206 and 207 and a proposed road reserve. He made reference to both the plaintiff's documents and the defendants' documents and stated that whereas the plaintiff's documents are recorded, the defence documents are not recorded.
16. 3 was Benard Kibira Kamwara, the District Land Registrar Meru Central Land Registry. He prepared a report dated 24th October, 2017 jointly with the surveyor. The report was with regard to Plot nos, 788, 206 and 207 and 789. His findings were that parcel 788 should have respected boundaries of earlier survey of parcel 206 marked by beacons, TN 19 and TN 21. The land registrar testified that his conclusion was made on the basis of what the survey did. That his conclusion was that survey of 207 should be reviewed and marked according to available land. He stated that the cadastral survey of fixed boundaries are mathematically correct and proven, therefore boundary values coordinates are unequally identified. He further stated that each parcel has a green card and a white card. He pointed out that that if land is not having a map sheet number, it does not mean it does not exist. That it is necessary for the registry map sheet number to be indicated in the white card. That the registry map sheet number can also be found in the title in case someone wants to get it on the ground. That it is possible to have land but the R.M sheet number is not indicated in the white card or in title, because the



- title is typed by a typist. That the information in green card or white card is the one that produces the title deed. While stating that he had the green card for parcel 788, the witness stated the same contains the registry map sheet no. 108/3/24/1. That this is what shows where the land is on the ground.
17. When he was shown a survey map by survey of Kenya dated 8th July, 2015, P.W 3 stated that in the map, the registry map sheet number for parcel 788 is there and corresponds to what they have indicated to the court. That the area is 0.3376 hectares which corresponds on what is on the white card of 2017, and corresponds to the acreage in the white card for the year 2000. That parcel 789 is not fully represented in the map. He could not explain the other particulars like F/R 141/81 and that from the map, the acreage of 789 is not indicated.
 18. 3 testified that in their joint report with the surveyor, plot no. 789 is not registered anywhere in the land registry. He could also not see parcels 206 and 207 in the map dated 8th July, 2015. He stated that he had a white card and green card for parcel 206. That the registry map sheet numbers are not indicated and the acreage of 206 is 0.32 hectares as per the white and green cards. He confirmed from P exhibits 1 and 2 corresponds with what is in the green card and in the two maps. The witness stated that he had no lease certificate for parcel no. 206 and did not know when one was issued. He was also shown the defence documents and the witness pointed out that the allottee was given more land than what was allotted. Further, that the area for the defendants is 0.3 hectares (unlike 0.32 hectares in the certificate of lease) for a term of free hold interest, yet most plots in municipalities are leaseholds.
 19. 4 was Jefferson Musyoka Paul who works with the County Physical Planning and Development in Meru County. He testified that he is familiar with the two plots. He stated that in planning, when they discover that there is difficulties in implementing a prepared plan, they can revise, adjust or re-align or even amend the plan to make it possible for it to be implemented. That in this case, the road was passing through the plot affecting an existing building. That is the reason the letter dated 11th May, 1987 in the plaintiff's documents was written to circulate the already prepared amendments so that the road is removed so as not to affect the existing building. He stated that when planning, they take cognizance of what is existing. That the letter for the suit Plot II/207 was issued to inform people that there was to be re-planning.
 20. 4 testified that the plan was approved by the commissioner of lands. That the approval of plans means that only existing survey has to be amended based on the approved plans. That the approved plans give authority to do survey or resurvey. He stated that once a plan has been approved, it is the responsibility of the surveyor to implement the plan and either to assign a new number or not. That in this case, he is aware that new numbers were issued as shown in the maps. That the re-plan was basically for parcel T91 (Block II/207). That Block II means the area was already surveyed. He was not aware that this plan affected any other portion of land.
 21. When shown the surveyor's plan in the plaintiff's bundle, the witness identified the map as belonging to Meru Municipality Block II/788 and he was aware of the details therein. He stated that if the plan was meant to remove a road, it means the road passing that plot has taken some acreage, hence the removal of the road added some acreage to plot T91(206). That the intention of the re-planning was to save the building and the road was not serving any other persons save that plot. As a physical planner, he was aware that letters of allotment are issued by the Commissioner of Lands. He stated that the acreage in the letter of allotment and lease in the plaintiff's exhibits is the same, and the certificate of lease refers to the Registry Index Map (R.I.M) which is the work of the surveyor.
 22. When he was cross examined by Mr. Ndubi, P.W 4 stated inter alia, that the re-planning of parcel T91 (207) did not affect any other neighboring parcels. He stated that the re-planning was done. He further stated that he was aware that there was re-planning from 207 to 788 to remove a road from



- an existing building. He was not aware that the Commissioner of Lands stated that the re-planning is what brought all these problems. He stated that the allotment letter in favour of the plaintiff indicated the acreage as 0.338 Hectares while the lease indicated 0.3376 hectares.
23. 5 was Peter Kimani, the County Surveyor, Meru. He testified that he was aware of parcel 788 and the re-planning of the same from Parcel 207. That they took over from where the physical planner had left the re-planning. That their department which is headed by Director of Survey and Physical Planning implements what the department of planning has proposed, so their work is to actualize what has been planned. He testified that when they received the amended plan from the planning office, they actualized it through carrying out a survey and introduced a new cadastral plan of survey map to support those changes. He stated that, that translates to mean that the plan which was there previously was superseded by the new one.
 24. 5 testified that the first plan was folio number 141 register No. 81 which had been authenticated in 1980. That after re-planning, a road was published. He stated that the first plan had parcels 206 and 207. That the one prepared to support the amendments was folio No. 107 and that the same map was used to amend the registration map (after publication of cadastral plan). That the registration map is the registration instrument. He stated that for the cadastral plan, they usually prepared a new one but indicate that the previous one has been superseded so that members of the public are well informed. That for the registration map, they usually amend the same map but they create a new edition which they publish to support.
 25. 5 stated that he was familiar with the survey plan (map) FR 332/107 which was authenticated and it was to support the re-planning. He stated that that was the current map in their custody as the previous one was superseded. That the plan was submitted to their office on 5th November, 1997 for quality control checks, and it was finally approved and authenticated on 29th October, 1998. He stated that the authentication is usually done by the Director of Survey.
 26. 5 stated that the re-planning affected two parcels, that is Meru Municipality Block 2/205 and 207 and Government land which was a public road. That after the re-survey, which was supported by the re-planning, two more parcels were issued, that is Meru Municipality Block 2/788 and 789. That both the linear dimension measurements and the sides were affected. That there is a road that was to be closed and it authentically affected the size of the parcels. That the road was in the previous plan, and in the re-planned plan, and in the re-plan the road was partially closed resulting in additional area for parcel 788. That the affected parcels were 206, 207 and Government land. P.W 5 stated that after re-planning, parcel 206 was affected in dimension. That when the first survey was done and published in 1980, the size of parcel 206 was 0.32 hectares, and after re-planning and survey was carried out, the measured area changed to 0.1867 Hectares. He stated that even if there was any other survey, it was never submitted to their office for checking.
 27. 5 testified that for parcel 207, the size as per first survey was 0.1203 hectares and after re-planning and survey, the measured size published by their office is 0.3376 hectares. He stated that the common boundary of the two parcels 788 and 789 was affected by the plaintiff as per the original map. That the position of the boundary which was separating the two parcels changed. That the original plan was not reflective of what was there on the ground. P.W 5 stated that once they received a plan from the planning office, they go to the ground and implement. So, their work is to implement what has been planned.
 28. 5 stated that for parcel 788, the same is fully surveyed and its extent is well defined by beacons with coordinates where the size as defined by the four beacons is 0.3376 hectares. For parcel 789, it is as per the plan 332/107, and the size as per the beacons defining that land have not been indicated. P.W 5



stated that once re-planning was done and it was submitted to their office, and they carried out a survey, when submitting to director of survey for quality control checks, other supporting documents must also be availed apart from the plan. He stated that that means that when these submissions were done in 1997 to the director of survey, the only plot which had supporting documents was parcel 788. That all dimensions of parcel 788 and its beacons are lawfully in place. He stated that beacons for parcel 789 are not indicated. That there was survey for parcel 789 done when they were surveying parcel 788, but when they were making submissions to the director of survey, the documents available for approval was for 788. That by then they did not know that members were to be assigned. He stated that the current position is that the job was approved and authenticated by an office and registration map was prepared and revised accordingly. He stated that the registration map was revised for parcel 788, and had not seen a similar map for 789.

29. 5 further stated that parcel 207 now 788 took over the government land. He stated that the letter of allotment for parcel 788 measuring 0.338 hectares was issued to Julius Marete in 1997 when there was already a survey map. That is why they used a number reflected on their map Meru Municipality Block 2/207. That the re-survey was to affect parcel 207. He added that that is the letter of allotment submitted when they were submitting the cadastral plan to the director of survey for checking. He also referred to the certificate of lease issued to the plaintiff. He stated that their work was to produce the Registry Index Map to support the registration process. That the documents they submitted to the chief land registrar are a registration map sheet No. 108/3/2024/1 showing the position of parcel 788 and an area list confirming the size of parcel 788 after the resurvey formerly 204. He stated that there was a correlation between the size and the map sheet number.
30. 5 also referred to the letter of allotment issued to the Seventh Day Adventist Church for un-surveyed plot measuring 0.030 hectares and the terms are “freehold”. He also referred to the certificate of lease for Meru Municipality Block 2/206 issued on 18th July, 1994 and the acreage in the lease is 0.32 hectares. P.W 5 stated that the certificate of lease does not indicate the registry map sheet number which is supposed to be indicated as this is the map which was supplied to be used during the registration of the lease. The witness could not tell why the map sheet number is not indicated. He stated that it is hard to tell if the document is legitimate as the certificate of lease shows a 99 years term which is under a leasehold but the allotment letter was for a freehold. That the allotment letters were being issued by the Commissioner of Lands under leasehold, so he did not know why it was issued under freehold, but changed during the registration process. P.W 5 stated that it was hard to tell if the allotment was legal because even when lease documents and certificate are being prepared, the reference document is usually the allotment letter. He expected the component of certificate of lease and those in allotment letters to be similar. That based on the said allotment letter and certificate of lease, it was his opinion that the certificate of lease is not verifiable due to the anomalies in the size and the confusion on leasehold and freehold and that the certificate of lease has no registry map used to prepare the lease.
31. When he was cross-examined by Mr. Ndubi, P.W 5 stated that by the records he had, he knew parcel 206 and 788. That he had documents for parcel 789 which are a report dated 24th September, 2007 done by his predecessor confirming the size of the plot as 0.1867 Ha. He stated that he did not know the owner of parcel 788 and 206 as the director of survey does not know such records. He was not able to confirm that the initial number 788 was T 91. That the Director Physical Planning is the one who was in a position to confirm that. He stated that his office works closely with the office of physical planner as the proposals from the planner’s office inform the action to be undertaken in the survey office.
32. 5 stated that anything to do with re-planning is done by the office of physical planner, and what was forwarded to them was a re-planned plan (amended plan) to support amendments of parcel 207 to 788. He was not sure if any documents were forwarded to them to support re-planning from T91 to



207. He stated that the re-survey was based on an approval by planning office which they relied on as their authority. He stated that he did not have a copy of the decision which informed them to carry out re-survey from 207 to 788. He further stated that the re-planning affected neighboring parcels, that is mainly 206 and the government land. That technically, it is only those two which were affected. That there are other neighboring parcels but same are not surveyed.
33. 5 stated that the road (public land) was on the ground, but was not sure if it was recreational. He stated that in the past survey, there were 206, 207 and a road neighboring the two parcels. He stated that they did not determine where the road or parcels will be as this was done by the planning office and the survey office implement and uniquely define the position of each parcel after survey. When he was shown documents in the plaintiff's bundle, P.W 5 identified one addressed to the land officer, Meru from the Commissioner of Lands. He stated that one of the recommendations was that the government offices were to undertake a site inspection and suggest a way of resolving the matter amicably. That the DPPPO, the District Surveyor and the District Land Officer and town clerk were to meet and come up with a final decision. Meanwhile, a restriction was to be entered on the second lease for 788 by the District Land Registrar. P.W 5 did not know why the restriction was to be put in place.
34. 5 stated that he was trying to compare the components of the lease and the allocation documents and registration map when he was doubting the lease. He stated that from the documents, there is a dispute. He doubted the existence of parcel 206 which he saw for the first time in court. He could not tell if that lease has been cancelled or not. P.W 5 stated that from their records, parcel 206 ceased to exist once they carried out resurvey which superseded the previous survey. That the re-survey created parcel 788. He stated that the resurvey ought to have affected the neighboring parcels. P.W 5 produced the maps as P exhibits 10 and 11.
35. 5 stated that they work closely with the physical planner, but reiterated that survey is an independent and different office. That planning and re-planning is done by the office of the physical planner, and once they are done, they share the information with the survey office. He stated that parcel No. 207 was surveyed together with other parcels on 5th November, 1997. That after the re-survey was done, he came to know that parcel No. 207 was re-named parcel 788. That he did not go back to resurvey parcel No. 788 as there was no need to do so.
36. 5 stated that his office was bound by the recommendations made by the commissioner of lands who was acknowledging that there was an overlap. He stated that they did not meet because already there was a case in court. He was shown some documents which had parcels 206 and 207. He could not see parcel 788. He stated that the latest document is the survey map which has two parcels No. 788 and 789. The witness stated that he did not know the owner of parcel 789 and did not see parcel 206 in the survey map.
37. When he was re-examined by Ms Kiome, P.W 5 stated that he was aware that the implementation was done on the ground. That after the re-survey, parcels 206, 207 and a public road (government land) were affected. That the map was submitted to the director of survey on 5th November, 1997 and authenticated on 29th October 1998 by the director of surveys. That according to that map, they no longer have parcels 206 and 207, as the new numbers were Meru Municipality Block 788 and 789. He was shown the defendants' documents, including a letter of allotment. He stated that according to the letter of allotment, the SDA church was allocated 0.30 hectares while in the letter dated 28th August 2000, by the Commissioner of Lands referred to the area as 0.32 hectares. That there was no court order stopping the implementation of the recommendation dated 28th August, 2000 by one I.A Machuka for Commissioner of Lands.



38. 5 stated that after re-planning and resurvey, the Director of Surveys issued the resurveyed plots with two parcels number Meru Municipality Block 11/788 and 789, and the cadastral map was published to support those new numbers.

Defendants' Case

39. The defendants filed a joint statement of defence dated 10th March 2000 and filed in court on 13th March 2000 wherein they denied the plaintiff's claim. Since the suit was originally filed at the magistrate's court before it was later transferred to this court, the defendants pleaded that the Chief Magistrate's court lacked jurisdiction to try the suit. It was further pleaded that there was misjoinder and/or joinder of parties as the plaintiff had sued the wrong parties and omitted the proper parties.

40. The defendants denied the existence of title No. Meru Municipality Block II/788 and or that the said title belongs to the plaintiff. The defendants asserted that they were only aware of Meru Municipality Block 11/206 which is registered in the name of the Seventh Day Adventist Church (East Africa) Limited and Meru Municipality Block 11/207 which is owned by the plaintiff. The defendants averred that if a new title known a Meru Municipality Block II/789 exists, the same is void and invalid as it may have been procured by fraudulent misrepresentations on the part of the plaintiff. The defendants enumerated the alleged particulars of fraudulent misrepresentation and prayed for the plaintiff's suit to be dismissed with costs.

41. The defendants also made a counterclaim against the plaintiff for trespass and fraudulent misrepresentation, particulars of which were enumerated. In their counterclaim, the defendants seek the following remedies against the plaintiff-;

- a. A declaration that Meru Municipality Block II/788 is invalid and void.
- b. A declaration that Meru Municipality Block II/206 and Meru Municipality Block II/207 are proper and valid titles existing.
- c. A mandatory injunction to order the plaintiff to pull down his structures and developments presently on Meru Municipality Block II/206 forthwith.
- d. Alternatively, that the plaintiff do compensate the defendants to the extent where he has developed permanent structures.
- e. A permanent injunction to restrain the plaintiff from further trespassing upon Meru Municipality Block II/206.
- f. Any other or further orders that this court may deem fit to grant.

42. Jeremiah M'Njogu (D.W 1) testified on behalf of the defendants and adopted his statement dated 28th February, 2023 as his evidence in chief and produced the defendant's bundle of documents filed in court on 22nd September, 2017 as D exhibits 1 to 22 respectively and was cross-examined and re-examined. The documents produced as exhibits are a letter of allotment and certificate of lease for Meru Municipality Block II/206, letter of allotment and certificate of lease for Meru Municipality Block II/207, letters dated 11th May 1987, 14th October, 1987, 16th June 1994, 19th December, 1997, 4th December, 1997, 3rd June 1998, 18th November, 1999, 26th January, 2000, 28th August 2000, 28th January, 2002, 26th September, 2002, and 5th June 2002, receipts dated 19th June 1992 and 19th December, 1997, minutes dated 2nd September, 1992, proceedings and report dated 24th May, 2007, approved building plans, and green card for Meru Municipality Block II/206.



43. Briefly, D.W 1 stated that his evidence is based on the findings of the Commissioner of Lands and recommendation vide the letter dated 28th August 2000 and 28th January, 2002 addressed to the 3rd defendant. His evidence is that those letters were never acted upon as the plaintiff ignored the same and rushed to court, thereby frustrating the implementation of the Commissioner of Lands recommendations to have the plaintiff's irregularly re-planned plot No. Meru Municipality Block II/788, and have the initial plan/survey be retained. That the plaintiff and the planning and survey offices ignored that recommendation hence the overlap of the plaintiff's parcel over the 3rd defendant's plot No. 206. D.W 1 stated that had the recommendations/findings of the commissioner of lands been implemented, the dispute herein would have been fully resolved. He prays that this court orders/ directs that those recommendations be effected. D.W 1 stated that as discovered and advised by the Commissioner of Lands, it is the illegal re-surveying and re-planning of the plaintiff's plot No. Meru Municipality Block II/T91 into Plot No. Meru Municipality Block II/207 and subsequently to Plot No. Meru Municipality Block II/788 that brought about overlapping of the said plaintiff's plot over the 3rd defendants' plot No. Meru Municipality Block II/206 measuring 0.32 hectares. That the District Physical Planning and Survey offices are, per the Commissioner of Lands letters, to wholly blame for the overlapping which was solely brought about by the illegal re-planning of the plaintiff's plot. That the 3rd defendant's plot No. 206 has never been re-planned and its lease has never been cancelled or any prayer sought for its nullification.
44. D.W 1 pointed out that one of the observations in the report by the Land Registrar, Physical Planner and District Surveyor Meru District was that the plaintiff's developments (i.e house) fell within the defendants plot. His evidence is that the physical planning office, survey office and all other relevant government departments approved the 3rd defendant's development on its plot No. Meru Municipality Block II/206 based on the acreage of 0.32 hectares. That the 3rd defendant proceeded to carry out its developments, among them a massive church building, in accordance with those approvals. That those approvals could not have been passed if the 3rd defendant's acreage was not 0.32 hectares or thereabouts.
45. D.W 1 stated that having looked at the plaintiff's certificate of lease viz a viz the letter of allotment, the acreage in the two documents do not agree. That while the letter of allotment talks of 0.338 hectares, the certificate of lease talks of 0.3376 hectares, a difference of 0.0004 hectares. He stated that the defendants have never owned plot no. Meru Municipality Block 11/789 and have no knowledge or interest in the same. That the 3rd defendant's plot is No. Meru Municipality Block II/206. He urged the court to dismiss the plaintiff's suit and allow the defendants counter claim with costs.
46. When he was cross examined by Ms Kiome, Learned counsel for the plaintiff, D.W 1 stated that he is a member of the church which has been sued, but had not been given a written authority to come and testify. He stated that the dispute is over a boundary between the plaintiff and the defendants' plots. He further stated that the church got its land first in the late 1990's. That he found the house constructed by the plaintiff on his plot No. 207 while the church is on plot No. 206. That the church entered a building which was constructed by the Municipal Council as a slaughter house while the new church was put up in 1996. He stated that the church bought the slaughter house which was on the church land. He admitted that the letter of allotment produced as D exhibit 1 for plot no. Block II/206 was for an area measuring 0.30 hectares while the term of allotment was freehold. That they followed up with the letter of allotment until they obtained certificate of lease produced as D exhibits 3 which was for 0.32 hectares. D.W 1 stated that the people who issued the letter of allotment and the certificate of lease know why they wrote 0.32 hectares instead of 0.30 hectares. That the Registry Map sheet number is not shown on the certificate of lease (for the defendants) unlike that of the plaintiff. When shown the plaintiff's exhibits, D.W 1 confirmed that there was a letter which sought an approval for re-planning



- to avoid a road passing through the plaintiff's residential house, and which request was approved and implemented. He stated that it was not true that the plots on the ground are now Block II/788 and 789. He maintained that the re-planning was condemned by the Commissioner of Lands. He however, admitted that he had no letter of allotment showing that the church was allocated 0.32 hectares.
47. When he was re-examined by Mr. Ndubi, D.W 1 stated that there is no dispute that parcels No. 206 and 207 exist. That the dispute is about the boundary and the acreage. He stated that the plaintiff occupied his plot before the defendants, but that the church's lease is older than the plaintiff's as it is for 1994. He stated that the defendants' letter of allotment indicates the acreage as 0.30 hectares while the certificate of lease indicates 0.32 hectares. He stated that the first document given to the defendants was a PDP and that at the time of issuance of the letter of allotment, the plot was written as un-surveyed plot Block 11/206. That by the time the certificate of lease was issued, the plot had been surveyed. That what confirms the acreage of land is a part development plan (PDP).
48. When he was shown the plaintiff's exhibits, D.W 1 pointed out that the acreage in the letter of allotment is 0.338 hectares while that in the certificate of lease is 0.3376 hectares. He stated that the plaintiff was allocated plot 207 but did not know how the number changed from 207 to 788. That parcel No. 206 has never changed its number.
49. D.W 2 was pastor Meshack Koome, the 1st defendant herein. He stated that he retired in January, 2023. He adopted his statement dated 25th April 2014 as his evidence in chief, and relied on the documents produced as D exhibits 1 to 22 and was cross examined and re-examined. He stated that between January, 1998 and the year 2001, he was the pastor in charge of Meru SDA church (2nd defendant) which is a constituent of the 3rd defendant herein. That upon his transfer to Meru SDA church in January, 1998, his predecessor, one pastor Gerald Nkanata handed over to him a certificate of lease in the name of the 3rd defendant in respect of Meru Municipality Block II/206, a copy of the District valuer's assessment report in respect of the old/disused slaughter house lying on the said plot, receipts for the purchase of the said slaughter house issued to the 3rd defendant as purchaser, approved building plans for construction of the 3rd defendant's church house and other developments on the said plot. The plot measuring 0.32 hectares together with an ongoing church building thereon and the old permanent slaughter house which had been paid for by the 2nd defendant on behalf of the 3rd defendant and a file containing various correspondence and other church records. He stated that until he was transferred from Meru in the year 2001, the 3rd defendant's aforesaid plot was intact under No. 206. This case was filed in the year 2000 when he was still the pastor manning the 2nd defendant. That as a pastor and employee of the 3rd defendant, he did not understand why he was sued as he was not the owner of plot No. Meru Municipality Block II/206. He prayed for the plaintiff's suit to be dismissed with costs.
50. D.W 2 stated that the letter of allotment (D exh 1) was not handed over to him. He stated that the letter of allotment whose acreage was shown as 0.30 hectares was given before survey was done later. That they did not expect any change in the acreage. That they purchased the slaughter house building from the Municipal Council and whoever was there agreed on the purchase price. That they did not buy the land where the slaughter house stood because it was part of their land which had been allocated to them. That the plaintiff wrote to the Municipal Council asking it to remove the slaughter house on block 11/788, but the council asked him to remove it at the church's cost, and handover the demolished materials to the church. D.W 2 stated that they paid for the slaughterhouse because it was the council's property, but on the church's land. That he learnt from the commissioner of lands that there was re-planning, but the survey was not approved. He stated that after the survey, they were given the lease. He did not have a letter of allotment for 0.32 hectares. That if re-surveying was done, the area may change. He stated that the plaintiff did not require permission to remove the slaughter house if it was



- in plot No. 207. That they never participated in any re-survey of plot No. 206 into any other number. That two allotment letters cannot be issued for the same land.
51. D.W 3 was pastor Kathurima Kiengo, a pastor at SDA church Isiolo. He adopted his statement dated 25th April 2014 as his evidence in chief and relied on the documents produced as D. exhibits 1 to 22. He was cross examined and re-examined.
 52. D.W 3 stated that he was posted to Meru Town SDA Church a constituent of the 3rd defendant in December, 2012. That as an agent, servant and employee of the 3rd defendant, he was the custodian of the 3rd defendant's properties, assets, documents and records at the station level. That he had no personal interest and or claim to such and so to his predecessors and the 1st defendant. That in their capacity as employees of the 3rd defendant, they had no capacity to sue or be sued on behalf of the 3rd defendant. That the 3rd defendant ought to have been sued independently.
 53. D.W 3 stated that he had in his custody (on behalf of the 3rd defendant) records in respect of the suit plot Block 11/206, Meru Municipality including the certificate of lease and approved development plans. He stated that this suit was filed long before he was posted to Meru but was in a position to point out the extent and boundaries of the 3rd defendant's plot No. Block 11/206. He also stated that the 1st defendant herein was transferred from Meru town SDA church way back in the year 2001 and had no share or claim of his own in the 3rd defendant's plot. He agreed that there was a difference in the area in the allotment letter and the lease. That the letter of allotment had indicated that the plot was un-surveyed, but the lease was issued as a result of survey with proper size.
 54. When shown the topocadastral map, D.W 3 stated that the slaughter house which is next to the church had crossed to plot Nos. 788 and 789, with a bigger portion on plot 788. That the church side is indicated as plot 789 while the other plot is 788. He could not remember if the church documents had a Part Development Plan (PDP) that was approved by the relevant authorities.
 55. D.W 3 stated that the lease confirms that the church owns plot No. 206, and that there were approvals for the church buildings from the relevant offices. That the approval in respect of plot Block II/206 was done on 0.32 hectares. That the approvals could not have been given if the church did not own 0.32 hectares. He stated that he did not know the owner of plot No. 789.

Plaintiff's Submissions

56. The plaintiff filed submissions dated 17th January, 2024 through the firm of M/s Charles Kariuki & Kiome Associates advocates wherein he gave a background of the case. It is submitted on behalf of the plaintiff that all the documents of title No. Meru Municipality Block 11/788 produced by the plaintiff as exhibits were procedurally processed and issued by the land officials. That the validity of the documents produced by the defendants are in doubt for inter alia, lack of countersigning and lack of approval by the commissioner of Lands, have different areas referring to the same title block 206 and not based on the Part Development Plan PDP, hence inconsistent and fraudulent. That all the evidence by the land officials confirmed that there were gaps in the said defendants' documents.
57. It is submitted on behalf of the plaintiff that the defendants bought the slaughter house materials that were left by the municipal council, and should not confuse the sale of the slaughter house slab with the sale of land where the slab stood. It is submitted that the Municipal Council was not in a position and could not legally sell land to the defendants because it had already allotted the said land to the defendants. That both parties occupy their respective portions of land with the plaintiff occupying his first. The plaintiff's counsel relied on the case of Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR, Mako Abdi Dolal v Ali Duane & 2 others [2019] eKLR and Harison Mwangi



Nyota v Naivasha Municipal Council & 20 others [2019] eKLR. It is further submitted that the power to dispose of public land was vested in two entities: the President and the Commissioner of Lands under Section 3 and 9 of the Government *Land Act* (now repealed) respectively. The plaintiff's counsel submitted that the process of the disposition of government land followed the following procedure: First, the respective Municipal Council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed by carrying out a fact-finding mission to satisfy itself that the land was first of all government land, and secondly, that it was available for disposition. That the second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands, thirdly the determination of certain matters listed under Section 11 of the Government Lands Act (repealed) by the Commissioner of Lands, fourthly, the gazettement of the plots to be sold under section 13 of the said Act fifthly, the sale of the plot by public auction to the highest bidder under Section 15 of that Act, and sixthly, the issuance of an allotment letter to the allottee which is nothing more than offer awaiting the fulfilment of the conditions stipulated therein by the offeree. The plaintiff's counsel relied on the case of Nelson Kazungu Chai & 9 others Vs Pwani University College [2014] eKLR, Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri), Dr. Joseph N.K Arap Ng'ok v Justice Moijo Ole Kieyua & 4 others C.A 50 of 1997, Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others [2014] eKLR and African Line Transport Co. Ltd v A.G, Mombasa HCCC NO. 276 of 2013 and submitted that all his documents were duly signed by the government custodians. That the defendants on the other hand did not produce any PDP or Survey maps to back their claims. The plaintiff's counsel also cited Section 107 and 108 of the *Evidence Act* and submitted that it is trite Law that whoever asserts the existence of a legal right or liability is encumbered with the burden of proving the existence of that right or liability. It is submitted that a good case has been made in favour of the plaintiff and that he has proven his case on a balance of probabilities. The court was urged to rule in favour of the plaintiff and award him costs.

Defendants' Submissions

58. The defendants filed their submissions dated 6th February, 2024 through the firm of M/S Ndubi Ondubi & Associates Advocates who also gave a summary of the case. It is submitted on behalf of the defendants that the plaintiff's evidence and submissions over the legality and or otherwise of the 3rd defendant's lease over LR No. Meru Municipality Block 11/206 does not stem from the plaintiff's pleadings and cannot, therefore be an issue for determination in the plaintiff's suit. The defendants' counsel relied on the case of Njeru & another v Nyakundi (Civil appeal E021 of 2021 [2022] KEHC 13963 [eKLR] and cited paragraph 7A, 8A and 9A of the amended pleadings. It is submitted that it could appear from the said paragraphs that the plaintiff's cause of action is merely purported and or alleged damage and or interference by the 1st and 2nd defendants with the plaintiff's fence, timber, off cuts and other fencing materials. That there is nowhere in the amended pleadings that the plaintiff has pleaded anything against the 3rd defendant who is the registered proprietor of LR. Meru Municipality Block 11/206. It is submitted that the plaintiff's evidence and submissions to the effect that the 3rd defendant's lease over LR. Meru Municipality Block II/206 is a fraud has no basis and an afterthought which cannot in law help salvage and or cure the plaintiff's otherwise various pleadings.
59. It is further submitted that without there being any evidence to support the matters pleaded at paragraph 7A of the amended pleadings, and in the absence of any prayer to interfere with the 3rd defendant's lease over LR. No. Meru Municipality Block II/206, the court has no otherwise but to dismiss the plaintiff's suit with costs. That the court cannot also grant general damages and issue a permanent injunction in a vacuum and on the basis of mere assertions. The defendants counsel relied on the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde High Court Civil Appeal (Machakos)*



Civil Appeal No. 57 of 2017, Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & another [2014] eKLR and Avenue Car Hire & another v Slipha Wanjiru Muthegu, Civil Appeal No. 302 of 1997, and cited Order 17 Rule 2 of the Civil Procedure Rules.

60. On the alleged re-planning of Parcel No. Meru Municipality Block II/206 and 207 as submitted by the plaintiff, it is submitted on behalf of the defendants that the same is not the subject of the plaintiff's pleadings. That the plaintiff's pleadings are all about alleged damage to the plaintiff's properties and pushing of the fence into the plaintiff's plot 788 (old plot No. 207). That the plaintiff is emphatic and clear that the owner of Parcel No. 789 is not known, and if he wished to have the 3rd defendant's lease over LR No. Meru Municipality Block II/206 substituted with Meru Municipality Block II/789, he ought to have pleaded so in his plaint. That the plaintiff's pleadings do not at all or anywhere challenge the 3rd defendant's lease and or acreage over LR No. Meru Municipality Block II/206.
61. The defendants' counsel referred to the letter dated 28th August 2000 by the Commissioner of Lands which was preceded by another letter dated 18th November, 1999 and submitted that the plaintiff is by law estopped from running away from the said documents. It is submitted that even assuming that the plaintiff had invited this court to implement the plaintiff's re-planned/re-surveyed plot No. Meru Municipality Block II/788 on the ground, there is no way the court would proceed to recognize the said survey in the face of the aforesaid letters by the Commissioner of Lands. That the best the court can do is direct the recommendations of the Commissioner of Lands be implemented on the ground. That it is only by doing so that a lasting solution to this old matter can be found.
62. It was submitted on behalf of the defendants that the plaintiff should not be allowed to depart from his own pleadings. The defendants' counsel relied on the case of Daniel Otieno Migore v South Nyanza Sugar co. Ltd [2018] eKLR which relied on the decision in Adetoun Oladeju (Nigo v Nigeria Breweries PLC SC 91/2002 and Raila Amolo Odinga & another v IEBC & 2 others [2017] eKLR.
63. It is further submitted that it is clear from the evidence adduced that the acreage in an allotment letter need not agree with the one in the certificate of lease/ title and that the correct acreage is only verified after land is surveyed. That there is nothing unusual about the defendants' acreage as captured in the lease for LR. No. Meru Municipality Block II/206 and the plaintiff's evidence and submissions on the difference of acreage shown in the allotment letter and the certificate of lease of the 3rd defendant's plot is not only an afterthought not born out of the plaintiff's pleadings, but a misconceived and irrelevant notion tailored at misleading the court to grant orders not sought in the plaintiff's pleadings. That in any event, the plaintiff did not sue the Commissioner of Lands and the lands office.
64. On the defendant's counterclaim, it was pointed out that the plaintiff did not file a reply to the defendants defence and defence to the defendants' counterclaim. The defendants cited Order 2 Rule 12 and 2(1) (1) of the Civil Procedure Rules and submitted that their statement of defence herein is and ought to be taken as having been admitted by the plaintiff, and that the counterclaim ought to be allowed as no controverting evidence has/was adduced by the plaintiff to necessitate denial of the same. The defendant's counsel cited Sections 25 and 26 of the Registration of land Act which provide that a certificate of title is final and conclusive proof of ownership of land. The defendants urged the court to dismiss the plaintiff's suit with costs and allow the counterclaim with costs.

Determination

65. I have considered the pleadings, the evidence adduced together with the documents produced by the parties as exhibits as well as the submissions filed. The dispute herein hinges on a boundary between the plaintiff's plot No. Meru Municipality Block II/788 (previously plot No. T91 and later Block II/207) and the defendants' plot No. Meru Municipality Block II/206 which the plaintiff stated was renamed



Meru Municipality Block II/789 though disputed by the defendants). It is not in dispute that the two plots border each other.

66. The plaintiff's evidence is that he was allotted his plot measuring 0.338 hectares while the 3rd defendant was allotted plot no. Meru Municipality Block 11/206. That according to the letter of allotment in respect of the defendants plot, the same measures 0.030 Hectares. That in 1987, there was re-planning and a re-survey giving rise to Meru Municipality Block 11/788 and 789 respectively replacing the original Nos 206 and 207 and superseding the original plan. It is the result of the survey that created serious confusion with the two plots apparently overlapping with the result that part of the plaintiff's land and indeed structures are on the defendants' plot and vice versa. The plaintiff claims general damages for trespass and a permanent injunction against the defendants. The defendants have counterclaimed against the plaintiff and seek a declaration that Meru Municipality Block II/206 or Block II /788) is invalid and void, a declaration that Meru Municipality Block II/206 and Meru Municipality Block II/207 are the proper and valid titles, a mandatory injunction directed to the plaintiff to pull down his structures and developments on Block II/206. In the alternative, the defendants seek compensation to the extent where the plaintiff has developed permanent structures and a permanent injunction against him. The issue is which of the parties has proved his/their case on a balance of probabilities and what appropriate reliefs should issue. I will proceed to determine these issues together as they are intertwined.
67. I have perused the documents produced by the parties as exhibits in support of their respective cases. The plaintiff produced the letter of allotment in his name dated 9th September, 1997 for plot No. Meru Municipality Block II/207 measuring 0.338 Hectares (P exhibit 1) while the defendants produced a letter of allotment dated 7th May 1992 in the name of Seventh Day Adventist Church E.A for Meru Town un-surveyed church plot Block II/206 measuring 0.030 hectares or thereabouts. It is clear that the plots that were allocated to the parties herein were un-surveyed. The back page of each of the said letters of allotment stated as follows-;
- “If the above plot is still un-surveyed at the time you commence building, you should exercise the greatest care to ensure that any building or other works are contained within the boundaries of the plot for should you inadvertently overstep the aforesaid boundaries the cost of removal and reconstruction must be borne by you.”
68. The court (W. Ouko J as he then was) on 7th December, 2009 ordered by way of a preliminary decree in terms of Section 2 (explanation) and pursuant to the provisions of Section 159 of the Registered Land Act (now repealed) “That the District Land Registrar, District Surveyor and the District Planning Officer of the area where the two plots in question are situated, in the company of the parties and/or their counsel to conduct further survey of the two plots, with the view of fixing the boundary of the said plots, taking into account the existing structure and the original acreage of each plot”. That judgment has never been reviewed or set aside on appeal. The defendants' application dated 28th September, 2011 seeking to inter alia, declare the said judgment and preliminary decree a nullity was dismissed by Lesiit J on 3rd November 2011.
69. On 30th May 2017, and 25th September, 2017, the court (Mbugua J) ordered the land Registrar, the Surveyor and the Physical Planner, Meru County, to file their reports in respect to Meru Municipality Block II/788, 206 and 207 and to avail relevant documents. Following those orders, one J.M Paul, the County Physical Planning Officer, Meru filed a report dated 19th September, 2017. The said report stated as follows:

“Meru Municipality Block Ii/788,



Meru Municipality Block II/788 was created by part Development Plan (PDP) number M167/87/2 which was prepared on the 5th May 1987 certified by the Director of physical planning on 18th June 1987 and approved by the commissioner of Lands on 30th January, 1988 vide plan approval number 64. See annex 1a copy of approved PDP number 64. The site referenced by this approved PDP number 65 is occupied by Julius Marete as per the ground situation and the plan.

Meru Municipality Block II/789

Meru Municipality Block II/789 was as a result of PDP number 167/92/3 dated 27th March 1992 approved by the Commissioner of Lands on 30th April 1992 vide plan approval number 77. See annex 2 which is a copy of approved PDP number 77. The ground situation show this site is occupied by Seventh Day Adventist church and the approved PDP number 77 indicate the same.

Meru Municipality Block 11/788 and 789 are reflected in the survey map Meru Municipality Block II. See annex 3 which is an extract of survey map Meru Municipality Block II. This office has no records indicating/showing Meru Municipality Block II/206.”

70. On 31st October, 2017, the District Land Registrar, Meru Central and the District Surveyor filed a report dated 24th October, 2017 which stated as follows:-

“The parcels in dispute are Meru Municipality Block II/206 registered in the name of Seventh Day Adventist Church (East Africa) Limited and measuring 0.32 Ha and Meru Municipality Block II/788 registered in the name of Julius Marete Ibutu measuring 0.33 Ha. Both have been issued with lease certificates. The Seventh Day Adventist Church (East Africa) Limited acquired their lease first on 8th July, 1994 while Julius Marete acquired his on 18th February, 1999 five years later.

According to cadastral maps FR. No. 141/81, parcel No. 206 has an area of 0.320 Ha while parcel 788 has 0.1203 Ha. However, according to cadastral map No. 332/107 area of parcel No. 788 is 0.3372 ha but this will result into encroachment into parcel 206 which cannot be cancelled after registration. Parcel No. 789 does not exist and if it does will result into double allocation and raise conflict with parcel 206 owned by the church.

Conclusion

Finally, we found that the survey work on parcel 788 should have respected boundaries of earlier survey on parcel No. 206 marked by beacon TN 19 & TN 21. Therefore, the survey of parcel No. 207 should be reviewed and marked according to available land. Cadastral survey of fixed boundaries are mathematically accurate and proven. Therefore, boundary values coordinates are uniquely identified.”

71. While testifying, the County Physical Planning and Development Officer, Meru County (P.W 4) stated that in planning, when they discover that there is difficulties in implementing a prepared plan, they can revise, adjust and re-align or even amend the plan to make it possible for it to be implemented. He stated that in this case, there was a road passing through the plot affecting an existing building, and so a letter was written to circulate the already prepared amendments so that the road could be removed so that it does not affect the existing building. He stated that the plan was approved by the Commissioner of Lands. The witness further stated that the approval of plans means that only existing survey has to be amended based on the approved plans. That the approved plans give authority to do survey or re-survey, and that once a plan has been approved, it was the responsibility of the surveyor to implement



the plan and to either assign a new number or not. His evidence was that in this case new numbers were issued. That if the plan was meant to remove a road, it means that the road passing through that plot had taken some acreage, hence the removal of the road added some acreage to the plot. That the intention of the re-plan was to save the building. According to P.W 4 the re-planning of parcel T. 91 (207) did not affect other neighboring parcels.

72. Peter Kimani, the County Surveyor, Meru testified as P.W 5. He stated that he was aware of the re-planning of parcel No. 207 to 788. He further stated that their office took over from where the physical planner had left after re-planning. P.W 5 stated that their office implements what the department of planning has proposed, and therefore their work is to actualize what has been planned. That when they received the amended plan from the planning office, they actualized it through carrying out a survey and introduced a new cadastral plan of survey map to support those changes. That that meant that the plan which was there previously was superseded by the new one which was finally approved and authenticated by the Director of Survey on 29th October, 1998. P.W 5 stated that the re-planning affect parcels Nos. Meru Municipality Block II/205 and 207 and government land (Public road). That after the resurvey which was supported by the re-planning, two numbers were issued, being Meru Municipality Block II/788 and 789. That since the road was partially closed, it resulted in additional area for parcel No. 788. That for parcel 206, after re-planning, it was affected in dimension. That when the first survey was done and published in 1980, the size of parcel 206 was 0.32 hectares, and after re-planning and survey, the area changed to 0.1867 hectares. That for parcel 207, the size as per first survey was 0.1203 hectares and after re-planning and survey, the measured size published by the survey office is 0.3376 hectares. P.W 5 stated that after the re-planning and survey, the position of the boundary separating the two parcels changed. According to him, all dimensions of parcel 788 and its beacons are lawfully in place. P.W 5 stated that after re-survey, initially they had two parcels 206 and 207 as well as a public road (Government Land), and after re-planning of parcels 206 and 207 and the government land, it resulted in parcels 788 and 789. That the government land was affected partially. He stated that parcel 207 (now 788) is the one which took over the government land.
73. Going by the evidence on record, it is clear that the plaintiff was issued with a letter of allotment for parcel No. Meru Municipality Block II/207 measuring 0.338 hectares and issued with a certificate of lease for 0.3376 hectares while the 3rd defendant was issued with a letter of allotment for un-surveyed plot No. Block II/206 measuring 0.030 hectares, while the certificate of lease indicates 0.32 hectares. According to the letters of allotment, if the plots were un-surveyed at the time, the parties were required to undertake any building or other works within the boundaries of the plot. It is also clear that there was a public road (government land) which affected the plaintiff's plot. This necessitated re-planning and re-survey and the plaintiff's plot became number 788 while the defendant's parcel became number 789. The evidence adduced by the plaintiff (and in particular that of P.W 5 – the County Surveyor as well as the County Physical Planning Officer - P.W 4) confirm that the plaintiff's parcel 207 (now 788) is the one which took over the government land (public road). The evidence on record indicates that the re-planning and re-survey which superseded the earlier ones affected the two parcels. The documentary evidence that have been produced herein also support the fact that there was re-planning and re-survey of the two parcels and that the disputed portion of land falls within the plaintiff's parcel number Meru Municipality Block II/788 and not on the defendants' plot. This was supported by the evidence adduced by the expert witnesses namely, the county Physical Planning Officer (P.W 4), the County Surveyor (P.W 5) and the District Land Registrar (P.W 3). In my considered view, the defendants failed to prove that the re-planning and re-survey was invalid and void as the same were not done fraudulently. It is my view, that the same was lawfully undertaken. It must be appreciated that plots within urban centres such as the ones herein are subject to re-planning and re-survey, especially where planning of public utilities such as public roads would be affected.



74. The upshot of the above is that having considered and appraised the evidence and the law I come to the conclusion that the plaintiff has proved his case on a balance of probabilities and is entitled to the order of permanent injunction. I am however not persuaded that the plaintiff is entitled to general damages. Whereas a party need not prove that he suffered any specific damage or loss to be awarded damages, the court appreciates that the dispute herein arose through the re-planning and re-survey done by the lands officials and cannot be attributed to any of the parties to the suit. It is also my finding that the defendants have also failed to prove their counterclaim on a balance of probabilities and the same must fail.
75. In the circumstances, and for the reasons I have given above I enter judgment in favour of the plaintiff and against the defendants in the following terms-;
- a. A permanent injunction is hereby issued to stop the defendants, their servants or agents from entering or whatsoever interfering with the plaintiff's Parcel No. Meru Municipality Block II/788 (old Block II/207).
 - b. The defendants' counterclaim is dismissed.
 - c. The defendants to pay the plaintiff the costs of and incidental to this suit.
76. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF JULY, 2024

IN THE PRESENCE OF

Court Assistant – Tupet

Ndubi for defendants

Ms Gikunda holding brief for Ms Kiome for plaintiff

C.K YANO

JUDGE

