



**Mugiira v Rukunga & 2 others (Enviromental and Land Originating Summons
14 of 2020) [2024] KEELC 435 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 14 OF 2020**

CK NZILI, J

JANUARY 31, 2024

BETWEEN

ELIAS KIRIMI MUGIIRA PLAINTIFF

AND

DANIEL MAITHIMA RUKUNGA 1ST DEFENDANT

JAMES MURITHI ARIMI 2ND DEFENDANT

M'RUKUNGA M'MBOROTHI MUKETHA 3RD DEFENDANT

JUDGMENT

1. Through an amended originating summons dated 2.3.2023, the plaintiff seeks to be declared owner of 50 ft by 100 ft out of commercial Plot No.146 Meru Municipality on account of adverse possession. The plaintiff averred that his late father, Nahashon Mugira, was allotted the land in 1995 and took possession. He averred that in May 2020, the 1st defendant allegedly trespassed onto the land, removed his boundaries, demanded him to demolish the house or vacate the land, proceeded to take possession, and eventually demolished all the structures therein rendering him destitute.
2. The plaintiff averred that he reported the matter to the police, of which the 1st defendant alleged that the suit land had changed ownership to the 2nd defendant, who had leased it to him. The plaintiff termed the alleged allotment letter dated 20.12.1995, lease agreement and consent by the County Government of Meru dated 1.1.2020 and 21.1.2020 issued to the defendants as forgeries. Further, the plaintiff averred that the 1st defendant made eviction threats to his late father, which he eventually effected, deposited building materials, and embarked on developing the plot since 22.5.2020, despite a court order to maintain the status quo. He termed the eviction and developments therein as unlawful and illegal.
3. The 1st, 2nd, and 3rd defendants opposed the claim through replying and further affidavits sworn on 29.6.2020 and 6.4.2023 respectively. The 1st defendant averred that Plot No. Block II/696 was next



- to where he has been running his garage since 1996, which plot was exclusively occupied by the 2nd defendant and not the plaintiff herein. The 1st defendant averred that due to a need to expand his garage for motor repairs parking, and storage, he approached the 3rd defendant to lease his plot, who informed him that he had sold it to the 2nd defendant. The 1st defendant averred he then approached the 2nd defendant, who confirmed the ownership position and proceeded to orally lease out the plot to him with effect from 2016.
4. The 1st defendant averred after the transfer was effected in favor of the 2nd defendant on 1.1.2020, that he formally leased out the plot at a fee of Kshs 720,000/= as per the lease agreement attached as an annexure DMR "1", fenced, leveled the ground and built a garage annex as per photographs attached as annexure marked DMR "2". He denied that the plaintiff had been on the land as an owner or occupier since it was the 2nd defendant who had been paying county rates and rents.
 5. The 2nd defendant averred that in 2016, he bought Plot No. Block 11/696 Meru Municipality from the 3rd defendant, who had been allocated the plot by the defunct Municipal Council of Meru since 1995. The 2nd defendant averred the 3rd defendant on 10.2.2020 applied for a change of ownership from his name, which was allowed by the land and planning committee minutes number Min/LPPUDPW, Comm/15/05/2018, took vacant possession and leased it out to the 1st defendant to expand his garage. The 2nd defendant averred that on 1.1.2020 the 1st defendant further leased the plot for another three years. He denied that the plaintiff had been occupying or owning the plot as alleged, as he was paying rates per the annexed receipt.
 6. The 3rd defendant, on his part, averred that Plot No. Block II/696 was the same as Block No. 11/696 Meru Municipality, which was allotted to him in 1995 as per a copy of the allotment letter dated 20.12.1995, attached as annexure marked MMM" 1". Similarly, the 3rd defendant averred that he took possession of the plot before and after the allotment until when he sold it to the 2nd defendant and applied for the transfer to the new owner, which was effected on 15.1.2020 as per the copy of consent from the County Government of Meru attached as annexure marked MMM "2".
 7. The 3rd defendant averred that the 2nd defendant leased out the plot from him since 2016, where he had been operating a motor garage. He denied any alleged occupation or ownership of the plot by the plaintiff. In a further affidavit following an amendment of the originating summons, the 1st defendant denied the change of the subject matter from Block 11/696 Meru Municipality to commercial Plot No. 146 Meru Municipality. He insisted that the plot he was occupying was Block 11/696 Meru Municipality. Further, he insisted that if the plot numbers were, the plaintiff had not attached any allotment letter for commercial Plot No. 146 Meru Municipality in a different form than allocated to the 3rd defendant.
 8. The 1st defendant averred that before he leased and built a modern motor garage, the plot was owned by the 2nd defendant, not the plaintiff or any of his children.
 9. The 1st defendant averred his occupation and developments were visible and captured in the scene visit report attached as annexure DMR 3 (a) & (b), and therefore, it would not have been possible for him to forcefully evict or occupy the plot when there was a court order obtained on 26.5.2020, for he had been on the plot since 1.1.2020. He said there were no specific orders to cease construction until he completed the garage, given that as of 27.5.2020, he was the one in occupation and not the plaintiff.
 10. At trial, Nahashon Mugiira testified as PW 1 and adopted the supporting affidavit sworn on 22.7.2022 as his evidence in chief. He told the court he had been in occupation of the suit land since 1995, developing it as per photographs produced as P. Exh No. 1 (a), (b), (c), (d), (e), and (f). PW 1 said that



- by the time he was evicted, there was a court order dated 27.5.2020 produced as P. Exh No. 2; he had obtained an allotment letter and the area map, which he produced as P. Exh No. 3.
11. PW 1 said that before he was taken ill, he used to live on the plot, as confirmed in the scene visit dated 30.10.2020. He produced the report as P. Exh No. (4) and urged the court to a subsisting court order dated 27.10.2020, which was defied by the 1st defendant when he fenced off his land measuring 50 ft by 100 ft.
 12. In cross-examination, PW 1 said his allotment letter had a plot number, which he knew before he lost sight or memory. He insisted he was allocated the plot by the defunct Municipal Council of Meru and had been paying rent and rates. PW 1 said that, no one else had occupied the plot since 1985 except him until he heard about the defendants and lodged complaints with the police. He insisted the eviction occurred during the pendency of a court order when the 1st defendant chased him away and started erecting permanent developments on the land.
 13. Elias Kirimi Mugiira testified as PW 2 and adopted his witness statement dated 2.3.2022 as his evidence in chief. He associated himself with the evidence of PW 1 and produced a copy of an allotment letter dated 30.11.1995, Part Development Plan dated 3.8.1995, area map, letters of grant ad litem, bundle of photographs, an allotment letter dated 20.12.1995 to the 3rd defendant and a Part Development Plan (PDP) as D. Exh No's (5), (6), (7), (8), (9), (10) and 11 respectively. PW 2 confirmed that PW1 was evicted from the plot during the pendency of a court order. He insisted the construction by the 1st defendant happened after the order of status quo was issued. Regardless of the plot number, PW 2 said the subject land was where PW 1 lived before the eviction.
 14. PW 2 termed the defendant's documents as forgeries since it appeared the allotment letter was issued in 1995 while the PDP was prepared in 2015, and the certificate of lease referred to a block plot and not a commercial plot. Further PW 2 said the developments by the 1st defendant on the land were undertaken contrary to the court order. PW 2 told the court the 1st defendant destroyed his late father's house, coffee and the avocado trees. He said all the water and electricity bills belonging to PW 1 over the plot were destroyed during the eviction.
 15. In addition, PW 2 told the court he was basing his claim on adverse possession and plot ownership. PW 2 said all the developments in his photographs were destroyed during the eviction, after which he made a police report. PW 2 termed the allotment letter and the PDP held by the defendants as inconsistent with legal processes on land acquisition, especially the minutes and the consent. He termed commercial Plot No. 146 as different from Block II/696 Meru Municipality. Further, PW 2 said P. Exh No. (2) seems to have been prepared 18 years after an allotment letter was issued to the holder.
 16. PW 2 said the eviction occurred in June 2020 during the pendency of a court order. Asked by the court, PW 2 said his late father was allocated the plot in 1995 and complied with the conditions set in the allotment letter through an acceptance letter and payment within the statutory set period of 30 days.
 17. James Muirithi Arimi testified as DW 1 and relied entirely on his replying affidavit sworn on 29.6.2020 as his evidence in chief. In cross-examination, he told the court that he was the one who signed the lease agreement and appended his identity card number. He also confirmed leasing the plot to the 1st defendant in January 2020 for Kshs 720,000/=. As to the lease agreement, DW 1 said it was DW 2 who took it to him after he cleared the purchase price in 2020. DW 1 said he bought the land from the 3rd defendant and paid him a deposit of Kshs 900,000/=. He said he cleared the balance of Kshs 500,000/= in January 2020, leaving a balance of Kshs 100,000/=:, which was used to cover transaction expenses.
 18. DW 1 said he was given an allotment letter by the 3rd defendant, but he did not attend the land office to verify its authenticity. He also said he had no record of paying Kshs 1,500,000/= for the plot. As to



- the consent from, the County Government of Meru DW 1 said the 1st defendant procured it since he never attended any meeting for board minutes. He said the 2nd defendant authorized the transfer to his name in May 2020. Further, DW 1 said the tenant had cleared the rent in installments, with the last payment in 2022. He said he was satisfied that the 3rd defendant was the valid owner before he bought the plot. DW 1 also said he was unaware of any anomalies or irregularities in the ownership documents handed over to him by the 3rd defendant. He also added that the locality has both commercial and residential plots.
19. Daniel Rukunga testified as DW 2 and adopted his two affidavits sworn on 29.6.2020 and 6.4.2023 as his evidence in chief. He produced a copy of the lease certificate dated 1.1.2020 as D. Exh No. (2) and photographs as D. Exh No. (3) (a) & (b). He said the garage was situated on four plots, including Plot No. 696. DW 2 said he took vacant possession of the plot in 2016 as a lessee of the 3rd defendant until it was bought by the 2nd defendant. He denied that the plaintiff had owned or occupied the plot since 1995. DW 2 said he has been on the plot all along and was he was in occupation of the plot, unlike the plaintiff, by the time an order to maintain the status quo was issued. Therefore, he was never stopped from utilizing the plot.
 20. Further, DW 2 also said that the plot was approximately half an acre, which he fenced off, and he put up a perimeter stone wall in January 2020. DW 2 mentioned the four plots as No. 694, 695, 401, and 696, per their allotment letters. DW 2 further said he entered the plot under the authority of the 3rd defendant, who eventually sold the plot to the 2nd defendant. He also said that the land was leased to him before it came under the name of the former landlord. Nonetheless, DW 2 denied service of any court order stopping his developments on the suit land. He admitted that he never conducted any official search to establish the valid owner since he knew the owner after he brought copies of allotment letters and a survey plan bearing a land office stamp showing plot No.'s 696 – 699.
 21. Additionally, DW 2 said he had been on the land since 1996 and was conversant with its locality and history. DW 2 insisted he paid all the rent due to the new landlord even though he had no acknowledgment receipts. He said he completed the perimeter wall in August/September 2020, since the Deputy Registrar never told him to cease further developments during the scene visit. He termed the photographs produced by the plaintiff as unreflective of the plot in dispute.
 22. DW 2, in re-examination, said it was the 2nd defendant who produced an allotment letter and a duly stamped survey plan showing Plots No 696 – 699. DW 2 also said that the PDP produced by the plaintiff did not refer to Plot No. 696. DW 2 said rates payments were effected by the lessor on 21.5.2020 before the suit was filed. He termed Plot No. 146 as strange to him. Additionally, he signed the lease agreement before Jackson Muriungi advocate.
 23. With the close of defense testimony, parties were directed to file written submissions. The plaintiff relies on written submissions dated 3.12.2023. It is submitted that the late Nahashon Mungira was allocated a commercial Plot No. 146 Meru Municipality on 30.11.1995, which he was then occupying. On this, the plaintiff submitted that he had produced an allotment letter, a PDP, and a map for the land in Gakoromone market, which was a commercial and not a residential plot.
 24. Further, the plaintiff submitted that the 1st defendant was running a garage business next to the plot only to forcefully take it over developing it after pulling down his house. He terms the purported documents of allocation held by the defendants as questionable, suspects and in conflict with the law on allocation of plots. As to the evidence of the 2nd defendant, the plaintiff submitted that no contract was produced between the 1st and 2nd defendant relating to the suit land over the sale or lease of the plot. Further, the plaintiff submitted that the transactions between the 1st, 2nd, and 3rd defendants were marred with irregularities and inconsistencies contrary to the land allocation procedure. The plaintiff



- submitted from the pleadings, and his evidence was clear that he had been on the plot for over 12 years and was evicted against a court order.
25. On the alleged ownership of the suit property by the 2nd defendant, the plaintiff submitted the PDP held by the 2nd defendant, dated almost 20 years after his alleged allotment letter, was irregular. Further, the plaintiff submitted the 2nd defendant admitted that he never signed any lease agreement before an advocate or visited the land office to effect any changes to the land register. Therefore, all the documents appear to have been authored by the 1st defendant. The plaintiff submitted that the documents held by the defendants were false documents made with the intent to defraud or to deceive. The plaintiff urged the court to declare him the sole owner of the plot, unlike the defendants, who should be ordered to vacate the land.
 26. The defendants relied on written submissions dated 11.12.2023 and isolated four issues for the court's determination. On the descriptions of the suit land, the defendants submitted their pleadings; Plot No Block II/696 Meru Municipality was the land owned by the 2nd defendant, who acquired it from the 3rd defendant and leased it to the 1st defendant. The defendants submitted a close look at the plaintiff's two allotment letters. NM 1 "a" was for residential Plot No. 146 Meru Municipality, allegedly issued to the late Nahashon Mugiira in 1995.
 27. The defendants submitted that though the plaintiff alleged full compliance with the conditions set in the allotment letter, no bankers cheque, a letter of acceptance, or evidence of payment for annual land rates or rents. Additionally, the defendants submitted that the plaintiff failed to produce any extract of the register or title to demonstrate who the registered owner of Plot No. 146 Meru Municipality was for this court to rectify such a title register.
 28. Commenting on the scene visit report, the plaintiffs submitted the report establishing that Plot No. "Block II/696 was among four Plots No's. 694, 696, and 401, were surrounded by a commercial perimeter wall where the garage operated by the 1st defendant was ongoing.
 29. The defendants submitted no scene report for plot No. 146 Meru Municipality, the subject to the amended originating summons was produced showing the pleaded developments, such as mature coffee, avocado, bananas, mango trees, cattle, sheep, subsistence farming, and built houses belonging to the plaintiff with effect from 1968. Unfortunately, the defendants submitted such features were also missing in the photographs produced by the plaintiff.
 30. The defendants submitted that it was unfortunate that after the closure of the defendant, the plaintiff made an unsuccessful attempt for the land registrar to visit the locus in quo to ascertain where Plot No. 146 and Plot No. Block 2/696 were situated, leaving doubts as to whether the plaintiff knew anything about Plot No. 146 vis a vis block 2/696 Meru under occupation by the 1st defendant.
 31. On adverse possession, the defendants submitted the plaintiff under Section 38 of (*Cap 22*), Order 37 Rule 7 (2) *Civil Procedure Rules* should have attached a certified extract of the title to the land in question. Reliance was placed on *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) eKLR. The defendants submitted that the plaintiff failed to prove the five primary conditions on adverse possession given the averments by the 3rd defendant that he was allotted plot No. Block 2/696 in the year 1995, took vacant possession, sold it to the 2nd defendant in 2016, transferred it in 2020, and subsequently leased it to the 1st defendant, who has been operating a garage since 1996, and fenced off, leveled the ground and built a garage annex.



32. The defendants submitted that no evidence was availed that the plaintiff had raised any alarm over the years, developed the plot, or dispossessed the defendants of their possession for 12 years. Reliance was placed on *Tabitha Waittherero Kimani v Joshua Nganga* (2017) eKLR.
33. On whether the 1st defendant was a beneficial owner of Block 2/696, relying on *Black Laws Dictionary* 11th Edition, the defendants submitted that the 1st defendant had demonstrated he had leased the plot from the 2nd defendant, took vacant possession and caused developments thereon with the approval of the other defendants and payments of land rates long before the suit was instituted which evidence was corroborated by all the defendants.
34. The defendants submitted that the plaintiff was not entitled to the reliefs sought in the summons for Plot No, the status developments and locality of Plot No. 146 Meru Municipality were undefined and unknown. In the absence of a title for Plot No. 146 Meru Municipality, the defendants submitted an order for rectification of the title could not issue and so was the order for the defendants to vacate or be evicted from commercial Plots No. 146 Meru Municipality. The defendants urged the court to find the amended originating summons lacking merits and to dismiss it with costs.
35. The court has carefully reviewed the pleadings, evidence tendered by the party's, written submissions, and the law. The issues calling for the court's determination are:
- i. If the plaintiff was allocated commercial Plot No. 146 Meru Municipality by the defunct Municipal Council of Meru.
 - ii. If the plaintiff met and complied with the terms and conditions in the allotment letter and took vacant possession.
 - iii. If commercial Plot No. 146 Meru Municipality was the same as Block No. II/696 allegedly allotted to the 3rd defendant.
 - iv. If the plaintiff and the 3rd defendant were allocated and took vacant possession of the same parcel of land.
 - v. If the defendants fraudulently acquired and took possession on the ground for Plot No. 146 Meru Municipality and unlawfully evicted the plaintiff from the suit land,
 - vi. If the plaintiff can sustain a claim for adverse possession and plot allocation concurrently.
 - vii. If the plaintiff has met the ingredients of adverse possession.
 - viii. If the plaintiff is entitled to the reliefs sought.
36. The primary pleadings in this suit is the amended originating summons dated 2.3.2023, which was opposed through the replying affidavits and further affidavits by Daniel Maitima Rukunga, James Murimi Arimi, and M'Rukunga M'Mborothi sworn on 29.6.2020 and 6.4.2023.
37. In the amended originating summons, the plaintiff restricted his claim to commercial Plot No. 146 Meru Municipality, which he had been in occupation of and had developed since 1968 and proceeded to be allocated in 1995. The plaintiff averred on grounds numbers 6 & 7 of the amended originating summons that the defendants used forged documents to purport that land parcel Commercial Plot No. 146 Meru Municipality, was their land as Block II/696 Meru Municipality, where they illegally evicted his late father and started developments thereon, despite an existing court order.



38. The plaintiff swore an affidavit dated 2.3.2023 that he was suing on behalf of the estate of the late Nahashon Mugira, the original allottee and occupier of the suit land until May 2020, when he was allegedly illegally evicted from the land by the defendants.
39. In response to the amended originating summons, the 1st defendant swore a further affidavit dated 6.4.2023, saying the subject matter had been changed in the amended originating summons from Block II/696 to commercial plot No. 146 Meru Municipality, which parcel of land he termed unknown to him for he was on Plot Block 11/696 Meru Municipality as a lessee with effect from 2016 by the 2nd defendant who had lawfully acquired it from the 3rd defendant.
40. To sustain his claim, the plaintiff called two witnesses, Nahashon Mugiira and Elias Kirimi Mugiira, as PW 1 and PW 2. PW 1 adopted his supporting affidavit dated 22.7.2022 as his evidence in chief and produced P. Exh No. 1(a) - (f) an allotment letter, area map as P. Exh No. 2 (a) & (b) and a scene visit report as P. Exh No. 3. His evidence was that he had been on the land since 1985. On his part, PW2 relied on his witness statement dated 2.3.2022 and produced an allotment letter dated 30.11.1995, part development plan dated 3.8.1995, area map, letter of grant ad litem, photographs, letter of allotment to the 3rd defendant dated 20.12.1995 and a PDP as P. Exh No's. 5 - 11. PW 2 said he based his claim on both adverse possession and ownership. Further, PW 2 attacked the defendant's alleged ownership documents as inconsistent, unprocedural, and contrary to the law on land allocation.
41. In trite law, parties are bound by their pleadings, and issues flow from them. See [Raila Odinga & others v IEBC](#) (2017) eKLR and [Stephen Mutinda Mule v IEBC](#) (2013) eKLR. In this suit, the plaintiff, on 2.3.2023, filed a list of issues, a case summary, pre-trial questions, a list of witnesses, and documents. One issue for determination was the locality on the ground of commercial plot No. 146 Meru Municipality and Block 11/696 and if the two referred to the same on land. Further, the plaintiff isolated the issue of whether he was allocated the same parcel of land the ground as the 3rd defendant and if the land was a commercial or residential property.
42. PW 2, on his part, produced a letter of allotment dated 30.11.1995, a PDP map dated 3.8.1995, an area map, an allotment letter dated 20.12.1996 to the 3rd defendant, and a PDP map accompanying it. It is trite law that the burden of proof lies with whoever is likely to lose if specific facts remained unproved under Sections 107, 108, 109, and 112 of the [Evidence Act](#).
43. In [Anne Wambui Ndiritu v Joseph Kiprono Rokpoi & another](#) (2015) eKLR, the Court of Appeal held that, "As a general proposition under Sections 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is, however, the evidential burden that is cast upon any party, the burden of proving any particular fact, he desires the court to believe its existence, which is captured in Section 109 and 112 of [the Act](#)". See also [Evans Nyakwara v Cleopas Bwana Ongaro](#) (2015) eKLR, [William Kabogo Gitau v George Thuo & others](#) (2010) 1 KLR 526 and [Palace Investment Ltd v Geoffrey Kariuki Mwenda & another](#) (2015) eKLR.
44. The in essence the plaintiff ought to have first established the authenticity of the documents show that he was lawfully and legally allocated commercial plot No. 146 Meru Municipality and complied with all the terms and conditions set out in the letter of allotment dated 30.11.1995. Clause 2 required the deceased Nahashon Mugiira to write and submit an acceptance letter within 30 days of the date, to pay standard premium, conveyancing fees, registration fees, rates, stamp duty, survey fees, road and drain fees, and approval and planning fees.



45. As to adverse possession, the plaintiff was supposed to attach an extract for commercial Plot No. 146/ Meru Municipality showing the property was registered and owned by the person against whom he claims to have dispossessed off or discontinued his possession for 12 years.
46. It is trite law that an allotment letter does not confer title to property. See *Stephen Mburu & others v Comet Merchants Ltd and another* (2012) eKLR, *Veronica Wangari Kabogo v Julius Githome & others* (2017) eKLR. In *Evans Kafusi Mcharo v Permanent Secretary Ministry of Road Public Works & Housing & another* (2013) eKLR, the Court cited *John Mukora Wachibi and others v Minister for Lands and 6 others* (2013) eKLR.
47. A letter of allotment is not proof of a title but a step in the land allotment process. In *Wreck Motors Enterprises v the Commissioner of Lands C. A No. 71 of 1997*, the Court of Appeal held that title to land typically comes into existence after issuance of a letter of allotment, meeting the conditions stated therein and actual issuance of a title document. In *Dr. Joseph N.K Ngok v Moiwo Ole Keiwua & others* (1997) eKLR, the Court said titles to lease of property comes typically into existence after issuance of a letter of allotment meeting the conditions stated therein and actual issuance of title documents under the law.
48. Regarding double allocation in *Nelson Kazungu Chai & 9 others v. Pwani University College* (2017) eKLR, the Court said that once land was allocated, it ceased to be an unalienated land, capable of reallocation. Mutungi J in *Muthithi Investments Ltd v Andrew S Kyendo & others* (2014) eKLR, held that until there is acceptance and compliance with the terms of allotment, a letter of allotment remained just an intention on the part of the city council, which it could rescind and that based on competing interests the interest of the holder of a validly registered title would be superior to that of an holder of a letter of allotment.
49. As to ingredients of adverse possession, the court in *Mtana Lewa v Kabindi Ngala Mwangandi* (2005) eKLR held that adverse possession occurs where a person takes possession of land, asserts rights over it, and the person having title omits or neglects to take action against such a person in asserting of his title for a period of 12 years.
50. To this end, under Order 37 Rule 7 (2) of the *Civil Procedure Rules*, the plaintiff was expected to attach a certified copy of the extract to the title commercial Plot No.1 46 Meru Municipality. The allotment letter produced in the name of the 3rd defendant was not an extract of title or evidence of title under Order 37 Rule 7 (2) *Civil Procedure Rules* as read together with Sections 24, 25, and 26 of the *Land Registration Act*. As held in *Moses Chepkonga Cherono v Margaret Njoki Kinyanjui* (2017) eKLR and *Kyeyu v Omutut* (1990) KLR 709, the failure to annex a copy of extract for commercial Plot 146 Meru Municipality, was fatal to the plaintiff's case. The owner had to be established. See *Wambugu v Njuguna* (1983) KLR 172. The plaintiff's case must therefore fail because of the failure to identify the land claimed under adverse possession.
51. Adverse possession is a fact to be observed upon land. It is not to be seen in a title. See *Gachuma Gacheru v Maina Kabuchwa* (2016) eKLR, *Maweu v Lin Ranching & Farming Corporation Society* (1985) eKLR and *Mbui v Maranya* (1993) eKLR. In *Wambugu v. Njuguna* (*supra*), the court said the proper way of assessing proof of adverse possession is whether or not the title holder has been disposed of or has discontinued his possession for 12 years and not whether or not the claimant has been on the land the requisite number of 12 years.
52. The onus was on the plaintiff to prove that the actual owner knew he was on the land, without interruption and permission. See *Mbira v Gachubi* (2003) 1 EALR 13. Further, in *Wilson Kazungu Katana & others v Salim Abdalla Bakshwein and another* (2015) eKLR, the Court observed that the



- identification of the land in possession of an adverse possessor was an essential and integral part of the process of proving adverse possession. The Court cited *Gitbu v Ndeete* (1984) KLR 776 that an adverse possessor must prove the portion, sizes, and location of the land he seeks to be decreed to him.
53. To this end, the plaintiff was obligated to identify the owner the size and the locality of the land. In this instance, the affidavit of PW 1 sworn on 6.5.2020, admitted that the 3rd defendant was the owner of Block II/696 Meru Municipality. How and when the land changed from Block 11/696 Meru Municipality to commercial Plot No. 146 Meru Municipality, as per the witness statement of PW 2, remained unclear.
 54. PW 1, in his initial affidavit, had not assessed any allocation claims for the same land. The issue only arose when the amended originating summons was filed. PW 1 had testified before this court and had never tendered any evidence identifying Block 2/696 as the same parcel of land as the one allocated as per P. Exh No 3. The other reason the plaintiff's adverse possession must fail is that under Section (41) (1) (v) of Cap 22, government property cannot be subject to adverse possession. See *Faraj Maharus v JB Martin* (2005) eKLR and *David Toroitich v County Council of Kaibatek* (2005) eKLR.
 55. Regarding allotment, it is trite law that when a land title is in dispute, all the paper trail towards its acquisition comes into question. In *Hubert L. Martin & 2 others v Margaret JKamar & 5 others* (2016) eKLR, the court said that when two or more titles over the same land face a court, an investigation must be made to discover which of the two titles should be upheld, starting with the root of the title and all the processes and procedures that brought forth the titles without a break in the chain of acquisition. Further, the court said each party must show their title has a good foundation. The exact position was taken in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR. The Court observed that a proprietor must go beyond the instrument of title, prove the legality of how he acquired it show if it was legal, formal, and free of any encumbrances.
 56. Sections 12 – 17 of the repealed *Government Lands Act* governed the steps to acquire town plots. PW 1 and PW 2 did not produce any letters of acceptance made within 30 days after PW 1 was given P. Exh No. 3. There was no evidence that the plaintiff complied with any terms and conditions set out in the letter of allotment, before the expiry of the 30 days with effect from 30.11.1995. There was no evidence that the plaintiff sought an extension of the letter of offer and subsequently accepted it. See *Bubaki Investment Co. Ltd v. National Land Commission & others* (2015) eKLR.
 57. There was no evidence tendered by the plaintiff that there was gazettelement and sale of the land in line with Sections 11, 13, and 15 of the Government *Land Act* (repealed). The plaintiff produced no cadastral survey map, authentication, approval by the Director of Surveys, and a beacon certificate. The plaintiff did not produce anything to show the issuance of a land reference number or, finally, a certificate of lease for commercial Plot No. 146 Meru Municipality.
 58. The plaintiff was duty bound to show that he had a better title for the suit land, which was also the plot illegally and unprocedurally allocated to the 3rd defendant as Block II/696 Meru. As indicated above, no attempt was made by the plaintiff to establish the nexus between commercial Plot No. 146 Meru Municipality and Block 2/696 Meru. The easiest thing would have been to call for a summons to the allotting authority to produce documents to that effect or for the County Land Surveyor and the Land Registrar to ascertain the position on the ground and furnish a report to that effect before the court. Even after the plaintiff isolated the issue in May 2023, he did nothing until he closed his case and eventually, the defendants offered their testimony. The seeking of a second scene visit came too late.
 59. When the court ordered a scene visit for 3.7.2020, the plaintiff did not seek the Land Surveyor, Land Registrar, and the Town Physical Planner to accompany the Deputy Registrar to establish the status of



the two plots. The plaintiffs did not point out any of his beacons during the scene visit. The plaintiff produced no minutes showing that he was lawfully and legally allocated the land.

60. The particulars of forgery, illegality, and fraud regarding the documents used by the 2nd and 3rd defendants to acquire the land were not pleaded at all. Even after the defendants filed their supporting documents for Block II/696, the plaintiff did not object to their production during the defense hearing and or seek to subject them to any forensic examination on account of forgery, fraud, or illegality.
61. Fraud must be strictly pleaded and proved to a balance higher than in an ordinary suit but below proof beyond reasonable doubt. See *Vijay Morjaria v Nasingh Madhusingh Darbar & another* (2000) eKLR and *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2005) eKLR. In this suit, the plaintiff did not plead or prove any irregularities, illegalities, or unprocedural means, which the 2nd and 3rd defendants used to acquire Block II/696 as if it was commercial Plot No. 146 Meru Municipality. No letter of complaint was availed to show whether the plaintiff ever raised objections with the allotting authority and sought to reverse the allocation of the plot to the 2nd and 3rd defendants on account of prior allocation, occupation of the suit land and or forgery.
62. The upshot is that the amended originating summons dated 2.3.2023 lacks merits. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31ST DAY OF JANUARY 2024

HON. CK NZILI

JUDGE

In presence of

C.A Kananu/Mukami

Plaintiff

Miss Kaimenyi for Atheru for Defendants

Miss Kerubo for Aketch for the Plaintiffs

