



**Ikiao & another v Kamencu (Environment & Land Case
E008 of 2022) [2024] KEELC 4325 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4325 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2022**

CK NZILI, J

MAY 22, 2024

BETWEEN

JENNIFFER KANARIO IKIAO 1ST PLAINTIFF

DOUGLAS IKAMATI 2ND PLAINTIFF

AND

ZAKAYO KAMENCU DEFENDANT

JUDGMENT

1. The plaintiffs approached the court through a plaint dated 26.5.2022 as the registered proprietors of Plots No. 133 and 134 Kianjai Market. The complaint was that the defendant, as the owner of an adjoining Plot No. 92, trespassed into their plots in 2019 and embarked on putting up permanent buildings therein without any consent, color of right, or justification.
2. The plaintiffs averred that despite complaints with the relevant departments at the County Government of Meru over the issue and notification of the encroachment, the defendant, unperturbed, proceeded with the illegal developments. The plaintiffs sought a permanent injunction, declaration that they were the legal owners of the plots, eviction, and demolition of the structures on their land, and general damages for trespass.
3. The defendant opposed the suit through a notice of preliminary objection dated 13.12.2022 on lack of locus standi; that the 2nd plaintiff was a faceless individual; the suit was as vexatious, frivolous, and an abuse of the court process. In addition, the defendant filed an amended statement of defense and counterclaim dated 24.3.2023. He averred that he was allocated Plot No. 92 Kianjai Market in 1992 and his building plans were approved then, hence the alleged trespass to Plot No's. 133 & 134, fifteen years later could be legally possible.
4. The defendant averred that after the 1st plaintiff had made a complaint with the County Government of Meru, he received a letter dated 20.4.2020 to cease all the construction works on his plot pending the



- determination of the case by the relevant department. He was also requested to provide the relevant ownership documents. The defendant denied that the 2nd plaintiff was party to such a complaint or made a separate one concerning his plot.
5. The defendant averred that he provided the county department with all his ownership documents and never received any response to his letters dated 27.4.2020 and 22.10.2020. The defendant averred that he similarly made a criminal complaint against the plaintiffs, of which the county department made a report to the Director of Criminal Investigations (DCI) that did not indicate that the plaintiff's plots were adjacent to his plot.
 6. The defendant averred that the plaintiffs sued him in Tigania Law Courts, where he was cited for contempt of court but successfully appealed in Meru ELCA 43 of 2020; otherwise, he had stopped the construction following the issuance of a temporary injunction in Tigania E.L.C. No. 17 of 2020.
 7. Additionally, the defendant averred that after the appeal, he continued with the construction in line with the approvals and permits for two years with no finding being made by the department of the county on any encroachment on the plaintiff's land, and the judgment in the appeal above directed parties to revert to the position they were before Tigania E.L.C No. 17 of 2020 was filed.
 8. The defendant averred that he had already completed construction on his plot in accordance with the approvals above and permits, and tenants had already occupied his building. The defendant averred that he has been in full possession of Plot No. 92 for over 30 years, exercising full rights exclusively, openly, and continuously, including various developments there. He averred that the plaintiffs slept on any rights they may have had for over 13 years, only to raise a complaint while he was at the roofing stage.
 9. By way of a counterclaim, the defendant averred that he acquired approvals for the construction work in 2017 and commenced construction soon thereafter that, only for the complaints by the plaintiffs to be revived through this suit while at the roofing stage. The defendant averred that following the fresh complaint, a county departmental report was issued with no finding on trespass to Plot No's. 133 and 134. He termed the report as marred with collusion and lacking vital details.
 10. Further, the defendant averred that despite providing all documents of ownership to the County Government of Meru, no response was made, and in the absence of the same and coupled with the decision by the court in the alluded appeal, he proceeded to complete the developments he had started in the plot, only for the plaintiffs to file this suit, while he was taking in tenants, following completion of the building.
 11. The defendant averred that as a result of the temporary injunction issued, he has suffered substantial loss including loss of tenants who had to vacate the plot in compliance with the court orders. The defendant counterclaimed for a declaration that he owns Plot No. 92 Kianjai Market after amalgamations of Plot No's. 52 & 53 and a special purpose plot whose dimensions are 54 x 24.4 x 48.8m x 24m, a declaration that the plaintiff's plots do not adjoin Plot No. 92 and mesne profits of Kshs.265,000/= per month from 20.4.2020.
 12. The plaintiff filed a reply to the amended defense and defense to the counterclaim, denying the contents of the amended defense and counterclaim. By a reply to the defense to the counterclaim dated 24.5.2023, the defendant termed the defense to the counterclaim as general and a mere denial. He averred that his plot bordered the Kenya National Highway Authority road and had no space for a plot to be squeezed in between it and the road, as claimed by the plaintiffs. The defendant averred that no evidence had been provided showing the exact location of Plot No's. 133 & 134 as adjoining his plot.



Additionally, the defendant averred that the construction is entirely on Plot No. 92, which had not encroached onto the plaintiff's plots, whose exact locality was unknown.

13. Following the pre-trial conference and other preliminary matters, the suit commenced for hearing on 25.9.2023. Jeniffer Kanario Ikiao testified as PW 1 after adopting her witness statement dated 26.5.2022. She told the court that 2nd plaintiff was his nephew, the son of her sister-in-law.
14. PW 1 told the court that she owns Plot No. 133 Kianjai Market, while the 2nd plaintiff owned Plot No. 134, all of which were along Meru – Maua road. She claimed that the defendant trespassed into her plot in March 2020 by erecting a fence encompassing all the two plots and eventually constructed a building therein.
15. Further, PW 1 told the court that she acquired the plot in 2007 after applying for the same from the defunct Nyambene County Council. She also told the court that the plot was surveyed and beacons effected on the ground, following all the requisite processes.
16. As exhibits, PW 1 relied on minutes extracts of the county council of Nyambene dated 29.5.2007 approving her Application No. 25179, receipts for payment of Kshs.400/= dated 30.5.2007 and 31.5.2007, indication of the plot dated 31.5.2007, letter dated 22.5.2008 to the district physical planning officer, letter dated 16.10.2008 to the district road engineer, public health officer, and physical planning containing the building plans, letter form the defunct county Council of Nyambene Ref No. NCC/6/02/2008, building plans, notification of approval of development permission, receipt form the district public health office dated 29.10.2008, receipt number. 1832520 as certificate of compliance, official receipts dated 13.11.2008, 31.5.2007, 20.6.2013, I.D. card, annual land rates receipts dated 25.1.2013, plot rent receipts dated 26.5.2015, 13.11.2008, letter dated 15.4.2020, from the county director of physical planning, letter dated 20.4.2020 addressed to the defendant by the county department report thereof, letter dated 10.10.1990 by the defendant, receipts dated 30.1.2020 and 11.9.1990 belonging to the defendant, minutes of a full council meeting dated 22.5.2007, minutes by the planning committee dated 9.5.2006, 5.10.2006 and 22.5.2007, bundle of receipts dated 17.2.2023 all produced as P. Exh No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 MFI 1P 13, M.F.I. P 14, 16, 17, 18, 19, 20, M.F.I. P 25, 22, 23, 24, 25, 26 and 27, respectively.
17. In addition, PW 1 told the court that the defendant had erected a building on her plot without her consent or approval; hence, she was unable to utilize her plot. She prayed for the building to be demolished and compensation to be paid to her. PW 1 told the court that she had no interest in Plot No. 92, which was separate and distinct from her plot.
18. In cross-examination, PW 1 told the court that she acquired the plot at the age of 24 years, measuring 40 ft by 80 ft in 2007, which was underdeveloped. She said her ownership was regularized as per the minutes she has produced as exhibits but was yet to acquire the title documents. PW 1 told the court that it was only after the encroachment that the defendant erected a signpost on her land.
19. Similarly, PW 1 told the court she made a complaint through a letter dated 15.4.2020 after the defendant encroached on her plot. She confirmed that her husband was a Member of the County Assembly (M.C.A). for the Kianjai Ward between 2017 – 2022. Further, she denied knowledge of the criminal complaint lodged against her and the 2nd plaintiff by the defendant on alleged fake plot ownership documents.
20. In re-examination, PW 1 told the court she had never been summoned or charged with any criminal offense relating to the alleged complaint by the defendant, for she has never tampered with any official government documents relating to her plot. PW 1 told the court she was yet to commence any developments on her plot, which she acquired before her husband became the area M.C.A. She



- confirmed that the water tank and a sawmill belonging to the defendant had been in existence for a long time. She complained that the defendant extended his plot to cover the whole of Plot No. 133 & 134 and erected a building therein, which she prayed for its demolition.
21. Douglas Kinyua Ikamati testified as PW 2 and adopted his witness statement dated 26.5.2022 as his evidence in chief. He confirmed that Plot No. 134 belonged to him, measuring 40 ft by 80 ft as per allocation, minutes, and a letter dated 22.5.2008 and 23.10.2008. He said that he had also applied for approval of his building plans vide application No. NCCI/6/02/2008. Similarly, PW 2 confirmed that as per Items No 8, 9, 10, 11 & 12 of his bundle of documents, he has been paying land rates. He produced items No 8, 9, 10, 11 & 12 in his bundle of documents as P. Exh No's. 28-34, respectively.
 22. PW 2 told the court that after allocation, he was shown the plot on the ground, which neighbors plot no. 133 and plot no. 136, which the defendant has extensively trespassed into and developed without his consent or justification. PW 2 said he was validly allocated Plot No. 134, which is distinct and separate from Plot No. 92.
 23. In cross-examination, PW 2 said that the trespass occurred while he was out of town, working in Marsabit, and raised his complaint through the 1st plaintiff, even though his plot number may not be captured in the correspondence letters sent and received by PW 1. He confirmed that the identification card number used in the plot application letter and issuance belonged to him and that the names appearing therein were his.
 24. PW 2 said that he had authorized the 1st plaintiff to sue on his behalf as per the signature made in the documents on 26.5.2020. He said the positioning of the three plots would be known by the County Government of Meru, which had established the element of encroachment by the defendant on the two plots. He said that his beacons to the plot, as erected therein by the town council, were uprooted by the defendant. He said that his subdivision plans were approved in 2008 and has been paying annual rates since 2007.
 25. Solomon Mwongo testified as PW 3. As a registered planner, he confirmed that the County Government of Meru prepared the memo dated 29.4.2021 as a reaction to a letter from the DCI Nairobi, seeking authentication of the documents on ownership presented to the office. He told the court that he visited the locus in quo after the defendant made a complaint. He produced the report as P. Exh No. 21 (a), (b) & (c).
 26. As per the layout plan dated 1989 for the area, PW 3 told the court that the three plots appeared distinct, separate, and different both on paper and on the ground. He admitted that the map had no reference number for the market and had no fixed boundary survey. He produced the same as P. Exh. No. 35. PW 3 told the court that during the scene visit, it was established that Plot No. 92 was 168 ft by 72 ft and did not cover Plots No. 133, 134, and 135. PW3 said that during the visit, they were able to pick the coordinates of the three plots. He produced a Google map as P. Exh No. 26.
 27. PW 3, in cross-examination, told the court that the layout map for the Kianjai Market was prepared on 6.12.1986 and that Plot No's. 130A & 130B were at the bottom. He said that it was not a must that the naming of the plot numbers is sequential. He said that as per P. Exh No. 22, the two plots were 40 ft by 80 ft, while as per a letter dated February 1991, Plot No. 92 was 168 ft by 72 ft.
 28. PW 3 said that an ordinary map, unlike the one produced as P. Exh No. 35, has reference numbers and signatures. Regarding P. Exh No. 22, PW 3 told the court that Eric Munene, a county surveyor, was the one who carried out the survey and produced P. Exh No. 36. He said that even though he signed the letter dated 20.4.2020, the issue of the complaint by the defendant was not determined by his department after it stopped his developments on Plot No. 92. Regarding the annexures by the



- defendant to his letter dated 22.10.2020, PW 3 told the court that it was not the defendants, even though David Arithi had written a letter dated 5.8.2022 to say that the defendant's plot exists in their records. He produced the letter as D. Exh No. (1). With this evidence, the plaintiffs closed their case.
29. Zakayo John Kamenchu testified as DW 1 and adopted his witness statement dated 29.11.2022 as his evidence in chief. He told the court that on 28.8.1990 he wrote to the then Minister for Local Governments for the allocation of Plots No. 53, 52 and a space marked for special purpose in Kianjai market which the application was acknowledged by a letter dated 11.9.1990. After that, he said that he forwarded two copies of a plan drawn by the district physical planner as per a letter dated 18.9.1990 to the ministry, which recommended his application for the plots by a letter dated 15.10.1990 written to the County Clerk, Meru County Council and copied to the District Commissioner Meru District, as the chairman of the plot's allocation committee.
 30. DW 1 told the court that following recommendations by the County Council of Meru through minutes dated 4.10.1990, he was allocated the plot as indicated in a letter dated 1.2.1991 and an internal memo dated 31.1.1992 seeking plot rent. DW 1 told the court that he paid the plot rent on 1.2.1991 and has since dutifully paid them to date. He said the plot was shown to him and beacons fixed for which he fenced off the plot.
 31. DW 1 said that he wrote to the clerk of Meru County Council on 10.2.1992, forwarding his building plans for commercial developments that were approved and signed by the town clerk. Similarly, he said that he was licensed as a saw miller by the Ministry of Environment and Natural Resources Sat Decagon Investment Ltd Saw Mill, where he erected a large sign board along the highway and at the entrance. He said he used to sell timber and sawdust to the locals between 1992 and 2018 and erected a permanent powerhouse, three-phase electricity county, stores, latrines, kitchen, caretaker quarters overhead tank, timber shed, and poller bench, and nobody had raised any complaints on an alleged encroachment of the neighboring plots.
 32. Further, DW 1 told the court that on 7.4.2017, he submitted an Environmental Assessment Impact (E.I.A.) report to the National Environmental Management Authority (NEMA) for approval of the proposed commercial development of his plot, which was acknowledged, approved, and a license issued on 7.9.2017. Similarly, DW 1 told the court that he applied for approvals of his developments with the National Construction Authority, who issued him with a certificate of compliance on 5.7.2018, following which he commenced developments of a three-story building in accordance with the development plans issued in 1992. He said that in 2020 he was ordered to apply for their renewal, which he did on 24.2.2020, and the county physical planner approved the renewal.
 33. Moreso, DW 1 said that when the construction was at the roofing stage, he received a letter dated 22.4.2022 from the County Government of Meru that the 1st plaintiff and the chair Kianjai Jua Kali Association were claiming encroachment of their plots and that his developments had not complied with the county governments regulations and to stop any further developments on his plot. He said that none of the complaints arose from the 2nd plaintiff.
 34. DW 1 told the court that in compliance with the letter, he wrote to the Director of Physical Planning and Urban Development in the county in response to their letter by his letter dated 23.4.2020 and forwarded the requested documents. The defendant also averred that due to Covid 19 containment measures, he did not find the officers at the office but also posted the letters through registered post and after failing to receive a response after six months he wrote another letter dated 22.10.2020 and another one through his lawyers dated 10.6.2021 followed by a criminal complaint dated September 2022 against the plaintiffs.



35. Similarly, DW 1 told the court that the DCI issued a letter dated 6.11.2020 to the county government, who issued a report through a memo dated 24.4.2021, which was silent on the alleged trespass. DW 1 told the court that he disputed the site visit and that the memo was never supplied to him until before this court; therefore, he eventually engaged an independent land surveyor who prepared a report that was different from the measurements taken by the county officials who had prepared the memo, leading to a conclusion that his plot was not the one the county offices measured. Further, he said the report by his land surveyor matched the plan drawn by the physical planner in 1990.
36. DW 1 told the court that after obtaining the memo, the plaintiff sued him in Tigania Law Courts seeking restraining orders on 29.4.2020, where they obtained interim orders and a claim for contempt, after which he successfully appealed in Meru E.L.C. No. 43 of 2020, that was allowed in May 2022, and he resumed completion of his building which had reached roofing stage.
37. DW 1 told the court that his building was completed and had taken in tenants who had applied for business permits, which the County Government of Meru issued on 24.6.2022 and later on acquired an occupation certificate for the residential houses from the Ministry of Health on 15.11.2022. he produced a copy of the letter from the Ministry of Local Government as D. Exh No. (2) a forwarding letter and the plan dated 18.10.1990 as D. Exh No. (3), letter dated 15.10.1990 as D. Exh No. (4), county council indication of the plot as 1.2.1991 as D. Exh No. (5) a bundle of plot rent receipts as D. Exh No. (6), bundle of application letters and approval of building plans dated 10.2.1992 as D. Exh No. (7), a bundle of letters from the Ministry of Environment and Natural Resources dated 4.2.1992 as D. Exh No. (8), an E.I.A report dated April 2017 as D. Exh No. (9), E.I.A license dated 7.9.2017 as D. Exh No. (10), National Construction Authority certificate of compliance as D. Exh No. (11), renewal of building plans receipts dated 24.2.2020 as D. Exh No. (12), a letter from the county government of Meru dated 20.4.2020 as D. Exh No. (13) letters to the Director of Physical Planning Meru County government dated 23.4.2020, 22.10.2020, and 10.6.2021 as D. Exh No. 14, 15 & 16, copy of O.B record number 17/21/9/2021 as D. Exh No. (17), copy of a letter to the DCIO dated 6.11.2020 as D. Exh No. (18), a report from the County Government of Meru Department of Urban Planning dated 29.4.2021 as D. Exh No. (19), a further report dated 24.6.2022 as D. Exh No. (20), a land surveyor report dated November 2022 as D. Exh No. (21), a letter dated 20.7.2022 from the DCI to the National Bureau of Registration as D. Exh No. (22), copy of pleadings in Tigania E.L.C. No. 17 of 2020 as D. Exh No. (23), a valuation report dated 3.8.2020 as D. Exh No. (24), copy of the judgment in E.L.C. No. 43 of 2020 as D. Exh No. (25), un-updated valuation report dated 25.10.2020 as D. Exh No. (26), business permit, and a receipt dated 24.6.2022 as D. Exh No. (27) occupation certificate dated 15.9.2020 as D. Exh No. (28), a list of tenants as D. Exh No. (29), plots receipts for 1991-2023 as D. Exh No. (30), a supervisor's certificate of 20204 as D. Exh No. (31) a building contract dated 16.1.2019 as D. Exh No. (32), pre-technicians certificate dated 9.3.1991 as D. Exh No. (33), letter of offer from Rivatex dated 22.12.1975 as D. Exh No. (34), Diploma certificate of the land surveyor dated 22.4.2013 as D. Exh No. (35), certificate of survey license dated 20.6.2019 as D. Exh No. (36) and a practicing certificate dated 6.1.2023 as D. Exh No. 37. The defendant urged the court to allow his counterclaim.
38. In cross-examination, DW 1 told the court that as the then Permanent Secretary Ministry of Manpower Development, he made a request for three plots situated in Kianjai Market then under the County Council of Meru, whose total measurements were indicated in the letters.
39. DW 1 said that the procedure then was for the town planning and markets committee to deal with the request under the Trust *Land Act*, whose chairman was the District commissioner while the secretary was the town clerk.



40. The defendant told the court that once the application was made, the county commissioner would give an approval, authorize his development plans, show him the plot, pitch the beacons, and eventually issue a letter of allocation, which he has dated 1.2.1991. He refuted the plaintiff's claim since the map allegedly produced on their behalf was not authentic, given his plots initially were Plots No. 53, 52, and an area earmarked for special purposes. He said that the request to the ministry was because his plot was extraordinary. He also doubted the authenticity of D. Exh No. (19) since it was not signed or based on D. Exh No. (1) and a change of dimensions of his plot. DW 1 insisted that the valuation report produced as D. Exh No. 24 was clear that there were amalgamations of the three plots to produce Plot No. 92.
41. John Kinyua, Andrew Linkaya, Tarcisio Baariu and James Kiijo Mururu testified as DW 2, 3, 4 & 5. DW 2 confirmed the existence of four beacons marking the boundaries of the defendant's plot. On his part, DW 3 confirmed that he witnessed the installation of electricity on the defendant's plot who was then operating a sawmill that DW 4 was operating for many years. DW 5 confirmed preparing two valuation reports dated 3.8.2020 and 25.10.2022, based on the original letters of allocation and approvals. He said that apart from the documents provided to him by the defendants, he also visited the County Government of Meru offices to verify and authenticate the documentation.
42. Eric Ndui, a licensed land surveyor, testified as D.W. 6. He told the court that following instructions by D.W. 1, he undertook a report dated November 2022 and produced it as D. Exh No. (25). He said that he visited the site on 15.9.2022, a trapexon plot which has a building on the font size at the completion stage according to DW 6; he took out coordinates of the plot as per the boundaries shown to him by the defendant and in accordance with the county council map attached to the allotment letter. He doubted the authenticity of P. Exh No. (19) for the maker was not a licensed land surveyor.
43. Further, DW 6 said that D. Exh No. (3) contained a plan prepared by the then Ministry of Local Government and which appeared on page (150) of D. Exh No. (24). He said his measurements showed that the defendant's plot was 0.175 ha as opposed to 0.0427 ha as per the memo by the County Government of Meru. DW 6 said that his report was close to the dimensions given by the Ministry of Local Government, which totaled 0.1124 ha. Before the close of the defence case, parties were directed, as per the ruling dated 21.2.2024, to view for comparison the original documents availed to the court by the defendant and satisfy themselves as to their authenticity.
44. By a consent dated 11.3.2024, the parties' respective advocates on record confirmed the verification of the original documents vis a vis what the defendant produced before the court, namely D. Exh No's. 2, 3, 4, 5, 6, 7, 12, 27 and 30 as per the list dated 28.2.2024 and received on the court on 12.3.2024.
45. The parties were also directed to file written submissions by 13.3.2024 and relied on written submissions dated 11.3.2024. The plaintiffs isolated six issues for the court's determination, namely:
- i. The custodians of the official legal maps of the plot allocation.
 - ii. Was Plot No. 92 acquired procedurally or unprocedurally.
 - iii. Has trespass been proved?
 - iv. Is the defendant liable for trespass?
 - v. What is the fate of his illegal structures?
46. The plaintiffs submitted that through the testimony of PW 1, PW 2, and PW 3, who confirm not only ownership but also the existence of the two plots both in the maps and on the ground as per standard measurements of plots in the Kianjai Market which is 50ft by 100ft. The plaintiffs submitted that



- PW 2 produced a memo dated 29.4.2021, its attachments, and a report filed as P. Exh No. 23-29. The plaintiffs submitted that the defendant was evasive, dodgy, and arrogant in his evidence which added no value to his case.
47. Moreso, the plaintiffs submitted that the process of plot allocation before the advent of the devolved system started with the application, followed by deliberations in the town planning and markets committee, and finally, the deliberations of the full council meeting, which would regularize the allocations. The plaintiffs submitted that the defendant never followed that procedure, and therefore, logically, it follows that only the county physical planning and the county survey department had custody of the official plot size documents.
 48. The defendant relied on written submissions dated 13.3.2024, where he isolated four issues for determination. On ownership of Plot No. 92, the defendant submitted that as per Section 107 (1) of the *Evidence Act*, the burden rested on he who desires a court to give judgment as to any legal right or liability by proving the existence of such facts. In this case, the defendant submitted on ownership as held in *Wangui and 2 Others vs Wangui and another (Environment and Land Appeal No. 3 of 2021)* (2022) KEELC 3755 (K.L.R.) (29th June 2022) (Judgment), that though D. Exh No. (1), (2), (3), (4), (5), (6) & (30), the defendant was able to trace the history of his plot allocation from 11th September – 15.5.2023, measuring 168 ft by 72 ft. The defendant submitted his documents had an unbroken chain showing how he acquired the plot, which the plaintiffs did not controvert.
 49. On the locality of his plot vis a vis the plaintiff's plots, the defendant submitted that D. Exh No. 3 had attached a plan which D.W. 5 confirmed its legality and implication. Further, the defendant submitted that D. Exh no. Seven were an application and building plans that were approved within a year of his plot allocation, further clarification of the locality of his plot adjoining Meru-Maua road. Additionally, the defendant submitted that D. Exh No. 9 shows the locality of his plot, including pictures thereof as read together with D. Exh No. (10), 14, 15, 21, 24 & 25.
 50. Moreover, the defendant submitted that DW's 2, 3, 4, 5 & 6 corroborated his oral and documentary evidence on the locality of his plot, the presence of beacons, developments to it since 1992 to present dimensions of his plot, neighborhood of his plot, coordinates to it and the relationship of his plot with documents held by the County Government of Meru. The defendant submitted that the testimony of his witnesses was reliable on matters of fact and professional expertise, especially DW 5 and DW 6. Reliance was placed on *Stephen Kinini Wang'ondu vs. The Ark Ltd* (2016) eKLR.
 51. Commenting on the plaintiff's evidence, the defendant submitted that it was contradictory to the locality, existence and neighborhood of Plot No. 92 and other plots.
 52. Further the defendant submitted that the 2nd plaintiff appeared uncertain of the locality of his plot and could not explain whether or not he complained with the County Government of Meru regarding the alleged trespass. The defendant submitted that the 2nd plaintiff was also unable to explain the discrepancy of the names in the plot allocation compared to his names as per his identification card.
 53. Again, the defendant submitted that the plaintiffs were unable to provide evidence of occupation of their plots or whether the two adjoin Plot No. 92. Regarding the testimony of PW 3, the defendant submitted that as a planner, he confirmed the existence of Plot No. 92, its dimensions, but it was unable to establish whether adjoined Plots No. 133 and 134. Further, it was submitted that PW 3 confirmed no further action was taken on P. Exh No. 21 (a) and D. Exh No. (13) due to this case, and similarly, he was unable to explain why D. Exh No's. (14), (15) & (16) were not responded to.
 54. The defendant submitted that PW 3 attempted to produce market plans that lacked dates, signatures, and reference numbers. Additionally, it was submitted that PW 3 produced P. Exh No. 35, allegedly



generated by a county survey by Eric Munene Njiru, which had no date or signature. Therefore, it was submitted that the explanation by PW 3 on the size of the respective plots, their sequencing, and numbering was conjured up and highly improbable.

55. Regarding D. Exh No. (19) as well as P. Exh. No. 21(b), the defendant submitted that it confirmed the allocation of Plot No. 92 did not refer to Plot No. 133 and 134 but mention a legalization of a general trade plot with no number given nor did it refer to any adjoining plots. The defendant submitted that the report was made following a criminal complaint as per D. Exh No. (18) and contained measurements which, as per DW 6, related to a different plot and not Plot No. 92.
56. The defendant submitted that PW 3 did not appear as a credible witness since he was not a licensed surveyor capable of offering expert evidence under Section 36 of the [Survey Act](#). In the absence of a licensed surveyor from the county government of Meru, the defendant submitted that the plaintiffs were unable to prove superimposition of Plots No 133 and 134 by Plot No. 92 and vice versa, as to amount to trespass.
57. The issues calling for my determination are:
- i. If the plaintiffs have proved ownership of Plot No. 133 and 134 Kianjai Market.
 - ii. If the plaintiff's plots have been encroached upon by Plot No. 92.
 - iii. If the defendant's developments on plot no. 92 Kianjai Market have encroached upon and are erected on Plot No's 133 & 134 Kianjai Market.
 - iv. Whether the defendant was justified in developing Plot No. 92.
 - v. If the plaintiff is entitled to the reliefs sought.
 - vi. If the defendant has proved ownership of Plot No. 92.
 - vii. If the defendant has proved interference of his developments by the plaintiffs.
 - viii. If the defendant is entitled to the reliefs sought in the counterclaim.
 - ix. What is the order as to costs?
58. The plaintiffs claim that they were allocated Plot No. 133 and 134 through town planning and market committee Minutes No. T.P./13/2007/(b) 4 and T.P. & M/3/2007 A (b) 3, respectively, by the defunct Nyambene County Council. In support of their claims, the plaintiffs produced a minutes extract dated 29.05 2007 showing that the 1st plaintiff's Application No. 25/79 for permission to legalize G trade Kianjai Market was approved by the committee sitting on 22.5.2007. The 2nd plaintiff relied on minutes extracts dated 28.5.2007 showing that his Application No. 25180 for G/trade Kianjai Market was approved. The plaintiffs, also at the trial, relied on receipts for the payment of plot rents, copies of indications of plot number, and a bundle of applications for development permission, building plans, and approvals of development permissions produced as P. Exh No's. 1-27.
59. Section 3 (3) of the [Trespass Act](#) defines trespass to land as consisting of any unjustifiable intrusion by one person upon as the land in the possession of another. In *Charles Ogejo Ochieng vs Geoffrey Okumu* (1995) eKLR, the court held that trespass was an injury to a possessory right and, therefore, a proper plaintiff in an action for trespass to land was the person who is deemed to have been in possession at the time of the trespass.



60. In *Jamal Salim vs Yusuf Abdulahi Abdi & another* (2018), eKLR at issue was ownership of Plot No. 39 and 40 vested in the County Plot No. 39 Council of Tana River alleged to have been trespassed into and commenced putting up a petrol station. The defendant alleged that the appellant was constructing on Plot No. 84 allocated to him by the county.
61. A town clerk had been called to testify, but his evidence was lacking documents on the consolidation of Plot No's 39 and 40 to give rise to Plot 84. The trial court had found that the respondent had failed to establish ownership of the plot. A land surveyor's report was later prepared, and an application for review was made for the trial court to relook at the issue and find the plots distinct. The trial court allowed a retrial to the extent of the surveyor's report and one additional witness a district surveyor who disagreed with the initial land survey leading to the retrial regarding the actual locality of the plots.
62. The trial court dismissed the suit once more. On appeal, Angote J set aside the dismissal and allowed the respondent's claim. At the Court of Appeal, the private land surveyors report was challenged as inadmissible. The court held that trespass had not been proved since it was not clear if the plot No's. 39 and 40 had been consolidated to give rise to Plot No. 84 whether the three plots were distinct or whether the constructions of the said petrol station were on the respondent's plot. The court cited RE B (children) F.C. (UKHL) 35 that if a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened and that there was no room for finding that it might have happened and that the fact either happened or it did not.
63. In *KPLC vs Mburu (Civil Appeal NO. 130 of 2019)* (2022) KECA 512 (K.L.R.) (6th May 2022) Judgment), at issue were illegal power lines crossing the respondent's property. The issue was the correct position of the boundary between the respondent's property and Plot No. 47. The court observed that a determination of whether the powerline was within the boundaries of Plot No. 50 was necessary before the court could conclude that the power lines were with the respondent's property. The court held that under Section 18 of the [Land Registration Act](#), an establishment of boundaries was within the jurisdiction of the land registrar.
64. In *Kihara Kiunjuri vs Harrison Mahcaria Waithaka and others* (2021) eKLR, the court cited *Evans Nyakwara vs Cleophas Bwana Ongaro* (2015) eKLR the legal burden lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issue. Further, the court cited *William Kabogo Gitau vs George Thuo & others* (2010) 1 KLR 526 that a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place in percentage terms 51% as opposed to 49% of the opposing party being said to have established his case on a balance of probabilities.
65. In this suit the burden was on the plaintiffs to not only prove trespass but also ownership of the plots as well as occupation before the alleged trespass by the defendant in 2020. In *Dr. Arap Ngok vs Ole Keiwua & 4 others* (1997) eKLR, the court held that where a title to land is in dispute, every paper trail towards its acquisition becomes critical. In *Weston Gitonga & 10 others vs Peter Rugu Gikanga and another* (2017) eKLR, there was a contestation about whether Plot No. 2114 existed on the ground. The court held that the evidence from the lawful authority for the allocation of plots was critical to determine if Plot No. 2114 existed on the ground, before formal registration in 1990 and its ownership by the deceased.
66. In this suit, the plaintiffs relied solely on exhibits issued by the defunct Nyambene County Council. Evidence of allocation letters was missing. The documents produced do not show the size of the two plots. The plaintiffs did not call the allocating authority to produce the register of plots. In *Kagwanja vs Town Clerk Town Council of Molo and others Environment and Land Case 85 of 2013* (2024) KEELC 722 (K.L.R.) (15th February (2024) (Judgment), the court observed that the plaintiff in the



- counterclaim had failed to call evidence to shed light on the process that gave rise to his allocation of the suit parcel of land. The court cited Republic vs City Council of N.R.B. and others (2014) eKLR that once an allotment letter is issued and the allottee meets the conditions therein, the land is no longer available for allotment since a letter of allotment confers an absolute right of ownership unless challenged by the allotting authority on account of fraud, mistake, misrepresentation or illegality. See Republic vs Municipal Council of Garissa Exparte Mohammad Salat & others (2014) eKLR and Rukaga Ali Mohamad vs David Gikonyo & another Kisumu HCCA 9 of 2004.
67. The onus was on the plaintiffs to demonstrate that Plot No. 133 & 134 were allocated to them in compliance with Sections 9, 13 & 14 of the Government *Land Act* (repealed), the retired Constitution, Trusts *Land Act*, and the Local Government Act (repealed). In Moses Okatch Owuor and another vs AG. & another (2017) eKLR, the court held that under the repealed Government Lands Act, a PDP had to be drawn and approved by the Commissioner of Lands or the minister for lands before any unalienated government land could be allocated. Section 53 of the Trust *Land Act* provides that the Commissioner would alienate the land on behalf of a county council. The essential documents involved a beacon certificate, deed plans, full county council minutes, and part development plans.
 68. Alienating trust land requires an application letter followed by an approval. The next step was a letter of allotment duly paid for. A part development plan would then be prepared and approved by all the necessary authorities. See Rinya Hospital Ltd vs Awendo Town Council and others (2010) eKLR and Mary Mukami Kariithi vs Dentopak Agencies Ltd & others (2021) eKLR.
 69. The exhibits produced by the plaintiffs were neither original copies nor certified by the issuing authorities. See Rakesh Mohindra vs Anita Beri and others Supreme Court of India Appeal No. 13361 of 2015 cited with approval in Paul Nduati Mwangi vs Stephen Ngotho Mwangi & others (2022) eKLR.
 70. In Juma vs Mohamed and another Civil Appeal No. E113 of 2022 (2024) KECA (292) (K.L.R.) (8th March 2024) Judgment, the court held that the trial court and the appellate judges were justified to reject reliance on documents that were not certified as required of public documents. Further, the court held that documents produced by the appellant had failed to meet the evidential threshold to support the claim.
 71. Coming to the aspect of trespass, the plaintiffs were unable to call a town physical planner or county land surveyor and county clerk to produce a report showing the locality and boundaries of their plots vis a vis that of the defendant. As indicated above, the plaintiff's exhibits of allocation did not contain the plot size and or measurements. The plots register from the allocating authority was not produced to ascertain the size, locality and measurements of Plot No's. 133 and 134. See Edward Furaha Nzaro vs Jimal salat Abdille (2020) eKLR.
 72. In *Mwinyifaki vs Munyika E & L Appeal 16 of 2015* KEELC 17323 (K.L.R.) (9th May 2023) (Judgment), the court cited Jeniffer Nyambura Kamau vs Humphrey Mbaka (2013) eKLR the court held that under Section 108 of the *Evidence Act*, the burden lies on that person who would fail if the other side gave no evidence at all. It is the plaintiffs who sought the court to find the encroachment on their plots by the defendant. It is the plaintiffs who should have brought evidence by way of maps, photographs, valuation reports and a report showing the extent of encroachment of their plots by the defendant. See Metian Kael Nkoibon vs Weinard Station Nyeri Court of Appeal No. 265 of 2015, Hannington Nyandiko Adongo vs Philemon Obuto Okwengu and others (2016) eKLR, Isaac E. N Okero & another vs Tom Soya Okwach & another (2021) eKLR and Nakuru Industries Ltd vs S.S Mehta & Sons (2016) eKLR.



73. In the circumstances and guided by the preceding case law, I find no trespass proved against the defendant.
74. The next issue is whether the defendant proved his counterclaim against the plaintiffs. A counterclaim is a standalone suit as per Order 7 of the Civil Procedure Rules. The counterclaim filed by the defendant had no titular heading. Being a suit in its right, Order 7 Rules 3 & 8 of the Civil Procedure Rules require that it has a plaintiff and a defendant. It is the same reason why a counterclaim must have a verifying affidavit, just the same way a plaint under Order 7 Rule 1 (2) of the Civil Procedure Rules must have a verifying affidavit. See *Stephen Marigi Gathigi vs Gabriel Gatheca Gitura & others* (2010) eKLR.
75. In *Manju Naul vs George Macheho Mungai & others* (2017) eKLR, the court observed that a counterclaim contains assertions that the defendants could have made by starting a suit if the plaintiff had not already begun a suit against him. The court said a counterclaim is governed by the same rules as the claims made by the plaintiff, save that it would be part of the answer that the defendant has produced in response to the plaintiff's claim and is an independent cause of action.
76. Order 7 Rule (8) of the Civil Procedure Rules, therefore, grants a defendant permission to raise a counterclaim against the plaintiff and any other person. Order 7 Rule 3 of the Civil Procedure Rules provides that a counterclaim shall have the same effect as a cross-suit and enables a court to pronounce a final judgment in the same suit. See *Deposit Protection Fund Board vs Sunbeam Supermarket Ltd & others* HCCC No. 3099 of 1996 and *Trade Bank Ltd and another vs Elysium Ltd & others* HCCC No. 1848 of 1997.
77. Similarly, Order 7 Rule 8 of the Civil Procedure Rules provides that a defendant who sets up any counterclaim which raises questions between himself and the plaintiff shall add to the title of his defense a further title similar to the title in a plaint setting forth the names of all persons who if such counterclaim were to be enforced by cross action would be defendants to such cross action and shall deliver to the court his defense for such service on such of them as are parties to the action together with his defense for service on the plaintiff.
78. Order 7 Rule 11 of the Civil Procedure Rules provides that a party named in a defense as a party to a counterclaim has to deliver a reply within 15 days upon service. Order 7 Rule 12 of the Civil Procedure Rules provides that a party named as a defendant in a counterclaim may contend that the claim thereby raised ought not to be disposed of by way of a counterclaim. See *Brek Sulum Hemed vs Constituency Development Fund Board and another* (2017) eKLR.
79. From the look of the counterclaim filed by the defendant, it offends the rules on filing a counterclaim. It has no plaintiff or defendant. It does not disclose who it is brought against. It does not describe who the parties are. My finding is that the counterclaim is defective in law.
80. Coming to the defendant's defence, the whole of it is based on an assertion that the defendant was lawfully allocated Plot No. 92 in 1990 and followed the correct procedure for the allocation of plots at the time.
81. The defendant produced an application letter that he made to the then Minister for Local Government and the town clerk of Meru County Council. He also produced an application and approval of the building plans. Accompanying the Minister's approval, the defendant pleaded and testified that a plan was drawn showing the locality and the dimensions of his plot, which has remained so all along, including when he renewed his building plans, applied for licenses and permits from both the national construction authority and the National Environment Management Authority which bodies issued him with licenses and permits.



82. It is trite law, as submitted by the defendant, that under Sections 107-112 of the *Evidence Act*, the burden of proof lies on he who wants the court to believe the existence of specific facts in issue. See *Wangui vs Wangui* (supra). In *Dima Management Ltd vs County Government of Mombasa and others* Petition 8 E010 of 2021 (2023) KESC 30 (K.L.R.) (21st April 2023) (Judgment) at issue was whether the alienation of the suit land was unprocedural and unlawful for lack of a PDP from the Director of Physical Planning and central regional authority in compliance with the Land Planning Act, the Government *Land Act*, Section 117 of the repealed Constitution and Section 13 of the Trust *Land Act*. The court cited *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership, and one has to go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free of any encumbrances.
83. In this suit, the defendant asserted that his allotment of Plot No. 92 Kianjai Market was legal, regular, and procedural as per the then-prevailing legal regime. The onus on the defendant to confirm the ownership of his plot from the allocating authority by availing or producing an allotment letter, deed plan, beacon certificate, survey plans showing the boundaries and extent of his property, produce any approved development plans, and lastly, provide a part development plan.
84. In *Nelson Kazungu Chai & others vs. Pwani University* (2014) eKLR, the court said that it is trite law that under the repealed Government *Land Act*, a PDP was a condition precedent before an allocation of any unalienated government land. Further, in *African Line Transport Co. Ltd vs AG* (2007) eKLR, the court said planning comes first, then surveying, and that a PDP invariably accompanies a letter of allotment with a definite number that the department of the survey would use for surveying.
85. In *Funzi Development Ltd & others vs County Council of Kwale* (2014) eKLR, the court held that a title registered proprietor acquires an absolute and indefeasible itself only if the allocation is legal, proper, and regular. In *Mbau Saw Mills Ltd vs A.G. and others* (2014) eKLR, the court cited *Dr. Joseph M.K Ngok vs Mojjo Ole Keiwua & others* (supra) that a title to land property typically comes into existence after issuance of a letter of allotment meeting the conditions stated in such a letter and actual issuance of a title document in accordance with the law. The court said Article 40 of *the Constitution* presupposes that a person who claims property rights has acquired the property through a legal process.
86. In *Jimmy Githuki Kiago and another vs. Transitional authority and others* (2019) eKLR at issue was whether minutes of the 8th defendant town planning committee were legally effective to re-plan the suit premises without recourse to the Ministry of Lands so as to convert public utility plots into commercial and residential plots. The court observed that Section 29 of the Physical Planning Act (repealed) gave the local authorities power over developmental control, prevention of subdivisions of land consideration and approval of development applications and re-planning of any area as per Section 5 thereof. The court held that the minutes of the town planning and market committee to re-plan the suit land without recourse to the Ministry of Land to convert public utility plots into commercial and residential plots was illegal.
87. The defendant wants this court to declare him the legal owner of Plot No. 92 and for mesne profits occasioned by the plaintiffs' interference with the enjoyment of his land since his developments were approved way back in 1991, by the allotting authority and other government agencies. The defendant had the duty to call the allocating authority to show the location of his plot, establish if it was included in the plots register for the area, confirm the issuance of a beacon certificate, and produce an authentic map for the area showing the locality of his plot.
88. The defendant has submitted that the custodian of all the documents of ownership was the County Government of Meru. Though the defendant produced original documents, it would have been



prudent for the issuing authority to be called to verify and ascertain that they legally and procedurally allocated Plot No. 92 to the defendant. PW 3 and the reports that they made, including D. Exh No. 21-25, were not produced by the makers.

89. PW 3 confirmed that a town surveyor and a physical planner were not the makers of the reports. There is no dispute that the County Government of Meru is the owner of the plot. It was important for the defendant to produce an authentic letter of allotment and approvals of his plot allocation by the full council meeting minutes. Even though the defendant wrote three letters for the County Government of Meru to verify his ownership documents, he should have done more to follow up on the confirmation of ownership, locality, dimensions, and the eventual issuance of a formal allotment letter, without necessarily assuming that all was well and moving on with his developments. A beacon certificate was not availed. The defendant did not produce an authentic area map. PW 3 was unable to produce a register of plots and a bonafide map for the Kianjai Market. See *Salome Warware vs George Muna & another* (2015) eKLR. Authentication of public documents is critical in court. See *Okiya Okoiti & others vs AG* (2020) eKLR.
90. Sections 117 and 145 of the repealed Constitution, as read together with the Trust [Land Act](#), granted county council powers to subdivide and make grants to citizens for the development of markets. Sections 75 & 118 of the retired Constitution had to be complied with. It was upon the defendant to prove every chain of the allocation and acquisition of the plot by seeking the assistance of the allocating authority and authenticating his documents. See *Habiba Jattani Guyo vs. Hassan Galgalo & another* (2021) eKLR. Section 80 of the [Evidence Act](#) was not complied with.
91. A PDP plan or deed plan duly approved by the relevant authorities was not produced. The plan attached to D. Exh No. 1 and referred to by DW5 and DW 6 is neither a PDP nor deed plan.
92. D.W. 1 testified that he sought the approval of the Minister for Local Government since it was a double plot. Under Section 53 of the Trust [Land Act](#), it was the Commissioner of Lands who used to administer trust land for each county council. It was the Commissioner of Land as an agent of the council who could alienate with the express authorization of the concerned county council. See *Banola Mkalindi Rhigho vs Michael Seth Kaseme Malindi* H.C.C. no. 168 of 2012.
93. Section 4 of the Trust [Land Act](#) mandated the county council to divide a trust land vested in it if such subdivision appeared to be necessary or expedient for purposes of the Act. In *Seth Michael Kaseme vs Selina K Ade* (2013) eKLR, the court held that a letter of allotment was an offer that must be accepted within a specified period by an allottee and must be accompanied by an approved development plan.
94. The defendant alleged and testified that he was allocated the plot by Meru County Council, the predecessor of Nyambene County Council, and the County Government of Meru, adjoining a road reserve of Meru-Maua road, which in no way encroached on the plaintiff's plots.
95. The defendant pleaded and testified that he had enjoyed continuous and uninterrupted possession of his plot until April 2020, when the plaintiffs lodged a complaint with the County Government of Meru and eventually sued him in Tigania E.L.C. No. 17 of 2020, for trespass and obtained a temporary injunction and orders of contempt against him, necessitating Meru E.L.C. No. 43 of 2020.
96. So, the question of ownership, locality, measurements and dimension is critical to whether the defendant should be declared the bonafide owner of Plot No. 92 Kianjai market proof of ownership is through bonafide documents from the allocating authority. As held in *Wangui vs Wangui* (supra), the documents must not leave a doubt in the mind of the court that the holder of the documents is the one entitled to the property.



97. D. Exh No. (1) is a letter dated 15.5.2023. The witness alleged to have produced it, PW 3, whom the defendant submitted that he lacked credibility. The defendant now wants to rely on evidence from a witness who he thinks did not assist him. It was not enough to waive D. Exh No. (1), (2), (3), (4), (5), (6) & (30) without an authentic letter of allotment, backed by a full council meeting minutes of the defunct County Council of Meru, who under the Section 117 of the retired Constitution as read together with Trust *Land Act* was the legal regime governing the allocation of two plots.
98. An authorization letter from the Ministry of Local Government and a letter from the town clerk of the defunct County Council of Meru could not supersede the law. The two documents cannot be, and this court cannot solely rely on them to declare the defendant the owner of the plot. For instance, the defendant's testimony was that Plot No. 92 arose out of an amalgamation of Plots No's. 52, 53, and a special-purpose plot. There must, therefore, have been a register in existence showing who were the initial owners of those plots and the change of their status after the merger.
99. The designation of space as a special-purpose in the land has a meaning. It could be an unused or open space designated for service and enjoyment by the public. Its conversion to private use must have been backed by full county council minutes and a survey plan. Once the special purpose plot was set aside, it remained vested in the county council, which was at liberty to assign to it any other use provided the correct procedure under the obtaining law was followed. There must be a change of user involving the full County Council and the Director of Physical Planning.
100. In *Kepha Marebe and 365 others vs Benson T. Mwangi and another* (2015) eKLR at issue on appeal was whether an allotment made to the respondents was irregular as it had been made unilaterally by the council without consultation or information from the appellants who were the beneficiaries or users for the special purpose plot and whether the title was protected by law. The court said that public land was not a birthday cake for mere chopping up and distributing to favored allottees. It held that public land was a rare commodity ring-fenced by constitutional, statutory and regulatory framework to ensure environmental sustainability and intergenerational equity.
101. The court observed that the council could not alienate the special purpose plot for the construction of a nuclear plant, a brewery, or other environmentally untenable developments, without recourse to the appellants. The court further said that where properties are held in common, there is always a need to share rights of support, shelter and protection, passage and provisions of water, gas, sewerage, drainage, electricity, garbage, air and other services of whatever nature over the parcel. The court cited with approval *Ruth Wamuchii Kamau vs Monica Miraw Kamau Civil Appeal No. 45 of 1993*, that an easement is a convenience to be exercised by one land owner over the land of a neighbor without participation in the profit of that other land and once created it is annexed to the land so that the benefit of it passes with the dominant tenement.
102. The court further said a residential estate that chokes itself with buildings and does not have open space risks an unhealthy environment. The court made a finding that the appellants had rights over the special purpose plot and other open undeveloped spaces by way of easements, both positive and negative. The court said that under the Land Planning Act cap 303 (repealed), Regulation (11) (2) (c), public special purpose spaces were defined as non-profit making purposes for the enjoyment of the appellants.
103. Citing *Black's Law Dictionary 8th Edition*, page 137, the court said a special purpose property means relating to or designating a species kind or individual thing, designed for a particular purpose, unusual, extraordinary, or one that has a unique design or layout. The court said that special purpose may not be a term of art, but in their view, a plot marked special purpose had a user that was out of the ordinary use of the entire original parcel, which was for the benefit of the Kimathi estate as a whole. The court



- said that the evidence relating to the change of user of the disputed plot and the process of approval was shrouded in mischief without following up the Government *Land Act*, the Local Government Act, the *Survey Act*, and the Physical Planning Act.
104. Applying the preceding case law to the instant suit, the defendant pleaded that he holds a valid title to Plot No 92. If Plot No. 92 arose out of an amalgamation of two plots and a special purpose plot, the burden of proof was upon him to trace the root of his title and demonstrate that it was regularly, legally, procedurally, and lawfully obtained. Apart from the Minister's approval, the defunct full County Council of Meru had to approve and pass through minutes recommendations of the town planning and markets committee minutes on the change of user and amalgamation of the plots and the special purpose plot to create Plot No. 92.
 105. In *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri Civil Appeal No. 6 of 26 and 27 of 2011*, the court said as a court of law and equity shall suffer no wrong without a remedy, and no man shall benefit from his wrongdoing, and equity detests unjust enrichment. In *Kefa Nyaga Kariuki & 4 others vs County Government of Embu (2019) eKLR*, at issue was a surrendered land to the county said to be more than enough under the Physical Planning Act (repealed). The court said the town planning committee was proper in rejecting the plaintiff's request for re-planning of the surrendered plot for the council had an exclusive duty under Section 29 of the Physical Planning Act to control development within its area of jurisdiction but in consultation with the Director of Physical Planning. In *Jimmy Gichuki Kiago & another, Transitional Authority & others (2019) eKLR*, the court held that the minutes or resolutions of the town planning committee were legally ineffective or incapable of re-planning the suit premises without recourse to the Ministry of Lands so as to convert public utility plots into the commercial and residential plot and especially the involvement of the physical planning department.
 106. In this suit, the defendant availed no evidence to show that there was an approved change of user of the special purpose plot and recommendations to amalgamate it with Plot No's 52 & 53. Further, the defendant failed to produce any approvals, consents, and or endorsements by the relevant department in 1991 or 1992 by the Director of Physical Planning, the Commissioner of Lands, the town clerk, and the chairman of the district allocation committee.
 107. In *Caroget Investment Ltd vs Aster Holdings Ltd & others (2019) eKLR*, at issue was whether the 1st respondents had lawfully acquired title to the property after amalgamation of two plots. The history of the plots had been given by the custodian of the documents that are the registrar of titles. The survey office had produced a deed plan containing the size and dimensions of the plot with a plan number and a signature, which had anomalies in the transfer and was subject to C.I.D. investigation. The court termed the case as a shameless, outright Kenyan style of land grabbing where there had been collusion with some officials contrary to sections 20-22 of the repealed Registration of Titles Act.
 108. The court said the land registration system in Kenya was a product of the Torrens system of registration that places a premium on the accuracy of the land register that must mirror all registrable interests affecting land, and the government as the keeper of the master record guarantees the accuracy of that record for a title deed to be said to be indefeasible. The court cited with approval *James Henry Mundiari t/a Kabarak Development Services vs Tradewheel (K) Ltd (1987) eKLR*, that where two parties assert completing proprietary interest over one parcel of land, each must produce evidence in support of his claim.
 109. In the counterclaim, the defendant has attacked the weakness of the plaintiff's suit by pleading that the council owns the land (*jus tertii*) and that he was the validly allotted owner of Plot No. 92, first in time than the plaintiff's allocation in 2007. The defendant can only sustain that position on the strength of



- validly issued title documents of his own. See Samuel Otieno Otieno vs Municipal Council of Malindi & another (2015) eKLR.
110. The defendant's counterclaim will succeed on the strength of his case and not on the weakness of the plaintiff's cause. To seek to be declared the owner of a valid plot no. 92, the defendant has to stand on a pedestal of legality with a preponderance of material evidence.
 111. It is the defendant who made a complaint to the C.I.D. department that the plaintiffs were holding fake documents and claiming trespass to their plots. No forensic report has been availed from the Land Fraud Unit of the CID showing that the plaintiff's documents are false, and those held by the defendant are authentic.
 112. D. Exh No. 1 did not attach any official records, namely the register for the plots that were merged to form Plot No. 92. D. Exh No. (19), which was also produced as P. Exh No. (21) (b), has been attacked by the defendant as containing measurements that were found by DW 6 as erroneous in his D. Exh No. (21). Similarly, it was attacked as prepared by an unqualified person under Section 36 of the Survey Act.
 113. D. Exh No. (5) is dated 1.2.1994 and contains no full county council meeting minutes approving the allocation at the recommendation of the town planning and markets committee. It does not contain any measurements or allocation laid down by the various laws cited above. The plans attached to the letter have no author, signature, plan number, or approval signature by either the director of physical planning or the land surveyors' office of the Meru County Council.
 114. D. Exh No. (3), though authored by the defendant, was not made to the allocating authority, the County Council of Meru. It did not refer to the amalgamation of Plots No's 52, 53, and the special purpose Plot. The indication of plot number dated 1.2.1991 had no plot measurements. D. Exh No. 4 dated 15.10.1990, which is said to be the authority from the Minister for Local Government, refers to Plots No. 52, 53, and a special-purpose plot. It was only a recommendation to the District Commissioner as the chair of the allocation to assist the defendant in the allocation of the proposed plots. It cannot be termed as an approval that superseded the legal process of plot allocation.
 115. With these glaring gaps, it remains unclear to this court whether there was any formal communication of the approval of the defendant's application for the three plots in line with the law. Apart from the plot rent receipts, the defendant has been unable to provide any official communication from the county clerk, Meru County Council, and the chairman of the plot allocation committee forwarding any letter of allotment to the defendant containing any terms and conditions after the approval or amalgamation of Plots No. 52 & 53 and change of user of the special purpose plot henceforth known as Plot No. 92 whose measurements were and are 54 x 24.4 m x 48.8x24m.
 116. The defendant has failed to trace and produce ownership documents from the issuing authority. The register for the plots would show the exact size, locality, and neighborhood of the defendant's plot. It was the issuing authority that had requested the parties to provide proof of ownership of their respective plots. Similarly, the defendant had complained to the DCIO. The defendant did not call the two entities to provide this court with finality the registered owners of the three plots, their sizes, dimensions, locality and possessory status. Without such proof, the court is unable to declare the defendant as the owner of the Plot No. 92 Kianjai Market, emanating from the amalgamation of Plot No. 52, 53, and a special purpose plot with dimensions of 54m x 24.4m x 48.8m x 24m that does not adjoin the plaintiff's plot but a road reserve.
 117. As to mesne profits at the rate of Kshs.265,000/= from 20.4.2020, special damages must be specifically pleaded and proved.



118. The upshot is that both the plaint and the amended defense and counterclaim are dismissed. Each party is to bear their own costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 22ND DAY OF MAY, 2024

In presence of

C.A Kananu

Mr. Mokuu for plaintiffs

Mr. Kamenchu the defendant

HON. C K NZILI

JUDGE

ELC E008 OF 2022 - JUDGMENT	0
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