



**Kimoli v County Government of Kitui & another (Environment & Land
Case 5 of 2021) [2023] KEELC 15694 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 5 OF 2021
LG KIMANI, J
FEBRUARY 16, 2023**

BETWEEN

FELIX KIKUYU KIMOLI PLAINTIFF

AND

COUNTY GOVERNMENT OF KITUI 1ST DEFENDANT

SAMUEL M. KATHINDAI 2ND DEFENDANT

JUDGMENT

1. Before the court is a suit instituted by way of a Plaint dated 10th June 2015 where the Plaintiff claims to have purchased Plot number 11(PDP/KTI/29/98/1/11) Kitui in July 2011 from Joseph Mumo Kimoli and Plot 12(PDP/KTI/29/98/1/12) Kitui from Philip Nzuki. He stated that he has at all times been in possession of the said Plots and enjoyed peaceable and uninterrupted occupation until late January 2010 when the 2nd Defendant encroached onto the plots and constructed residential houses. Upon raising the issue with the 1st Defendant, they issued an encroachment notice to the neighboring plot owners to vacate and remove all the deposited materials.
2. Unknown to the Plaintiff, the 1st Defendant had already irregularly and unlawfully allocated the said plot to the 2nd Defendant but he was informed by the 1st Defendant that he would be compensated by being given another plot of a similar size.
3. On or about June 2011, the 1st defendant did an amendment to the development plan to reflect the situation on the ground and residential plots A-F were achieved and the plaintiff was compensated by being given plots E and F. However he discovered that the plots he was given were Plot number 18 in the old plan and it belonged to someone else. The said amendments were never implemented by the 1st Defendant except that his original plots 11 and 12 were renamed E and F and his attempts to regain the properties have been futile.



4. The Plaintiff averred that the 2nd Defendant built several residential houses on the suit properties to the detriment of the Plaintiff who has been unable to develop the same as planned despite having acquired approved plans in early January 2011. According to the Plaintiff, if he had continued with construction he would have been fetching a total monthly rental income of Ksh 280, 000/= which he continues to lose.
5. The Plaintiff prays for the following orders:
 - a) A declaration that the Plaintiff is the legal owner of Plot number 11(renamed E) (PDP/KTI/29/98/1/11) and 12(renamed F) (PDP/KTI/29/98/1/12) situate in Kitui in the Republic of Kenya.
 - b) An injunction compelling the Defendants to remove forthwith any structures illegally erected on the Plaintiff's plot number 11(renamed E) (PDP/KTI/29/98/1/11) AND 12(renamed F) (PDP/KTI/29/98/1/12) or in default thereof, the Plaintiff do proceed and remove such structures at the cost of the Defendants.
 - c) A permanent injunction restraining the Defendants whether by themselves, their employees, servants or agents or otherwise howsoever from interfering with the occupation and ownership of or transferring, alienating or in any other manner dealing with plot number 11 (renamed E) (PDP/KTI/29/98/1/11) and 12 (renamed F) (PDP/KTI/29/98/1/12).
 - d) In the alternative, an order for payment by the Defendants to the plaintiff the full value of plot number 11 (renamed E) (PDP/KTI/29/98/1/11) and 12 (renamed F) (PDP/KTI/29/98/1/12) at the market rates as at the judgment date.
 - e) Payment of loss of user from 1st June 2012 until the date of delivery of vacant possession
 - f) General damages
 - g) Costs and interests at court rates
 - h) Any other relief that the Honourable Court deems fit and just to grant.
6. The 1st Defendant filed a statement of defence denying the contents of the Plaintiff and further stated that a complaint was raised by various plot owners including the plaintiff on the issues of plot sizes and developments on the wrong plots as identified on the ground but the complaints were resolved through the Physical Planning Liaison Committee of the Municipal Council of Kitui on 26.5.2011 to the satisfaction of all the parties involved.
7. The 2nd Defendant filed a statement of defence denying the contents of the Plaintiff and the allegation that he was developing the plaintiff's plots as alleged. He stated that he owns plots 8 and 10 which he started developing in the year 2010 after obtaining all the necessary approvals and that he never received any complaint or dispute as to ownership or a notice of encroachment.
8. The 2nd Defendant avers that from the Part Development Plan provided by the Plaintiff, his plots are situated opposite the Plaintiff's plots and are not on the same side of the road. Further, the 2nd defendant stated that while the plaintiff was purchasing plot 11 in 2011, he had already developed his property in the year 2010 and he could therefore not have been purchasing property that was already developed. The 2nd Defendant therefore states that the claim against him is totally misplaced.



Summary of Evidence at the Trial Court

The Plaintiff's Case

9. PW 1 Felix Kikuyu Kimoli, the Plaintiff adopted his witness statement where he reiterated the averments made in the plaint. He stated that he was the owner and has been in possession plot No. 11 since 2011 which he purchased from Joseph Mumo Kimoli who had purchased it from Emily Munanie while Plot No.12 was purchased from Philip Nzuki in July 2005.
10. He stated that encroachment started in 2010 when the 2nd defendant built rental units on the plots. That he raised the issue with the 1st defendant who issued encroachment notices to the neighbouring plot owners to vacate and remove all deposited materials but the encroachers did not heed to the notices.
11. The plaintiff confirmed that he has been paying rates and has lost income since he had intended to construct rental units where he would have been earning Ksh 280, 000 per month. Upon cross-examination, the plaintiff stated that he was shown the properties by the County Government by a person known as Kimeu but was not given a beacon certificate and neither were the plot sizes confirmed to him.
12. The plaintiff further confirmed having attended the Liaison committee meeting to verify the plots on the ground and the plots were allocated new numbers from Plots A-F. That during the meeting he confirmed to the Committee that the plots that were under construction belonged to him and he also notified the 2nd Defendant that he had encroached onto his plot. He stated that he never got a replacement plot and still owns plot numbers 11 and 12.
13. PW 2 Joseph Muli Kimoli adopted his witness statement and further stated that he knew the plaintiff and that he sold Plot No.11 to him through an agreement dated 16th January 2011 and he was paid Ksh 500, 000 in 2005. He stated that they formalized their agreement for sale in 2011 because there were intruders who had constructed on the suit property. On cross-examination he confirmed that he never went to the plot to confirm the encroachment and that he was only told by the plaintiff that it was the 2nd Defendant who had constructed on the plot he had sold to him. He confirmed that the Plaintiff was the one paying the rates.
14. PW 3, Boniface Kibiy Terer a registered valuer stated that he was instructed by the Plaintiff herein to prepare a valuation report on the suit property and visited the site on 21/10/2013 to determine the value of the plots. He valued the plots at Ksh 1, 150,000 each and both at Ksh 2, 300,000 together. His estimation of monthly rental income was Ksh 280, 000.

Defence Case

15. DW 1, the 2nd defendant, Samuel Mwanzia Kathindai adopted his witness statement and reiterated the averments made in his defence as summarized above. He confirmed that he owns plots 8 and 10 located in the same zone as the ones owned by the Plaintiff. That he started developing the plots in 2010 and he has never received any complaints on his ownership and neither did he receive an encroachment notice. That prayer 1 relating to plot No. 8 of the plaint does not lie since plot 8 is owned jointly with Rose Kathooko Mwanza who is not a party to this suit.
16. He stated that he was not involved in the discussions between the plaintiff and the 1st defendant where the plaintiff was to be given alternative plots to replace his plots 11 and 12. According to the 2nd



- defendant, he did not know the Plaintiff before the filing of this case and did not have any discussions with him or receive notices with regard to his occupation of his plot.
17. On cross-examination, he stated that he had a letter of allotment for Plot No.8 and an agreement for sale for plot no. 10 but did not have council minutes. He stated that he acquired Plot no. 8 on 22nd August, 2008 though it was dated 7th July, 1998 and stated that it was a typographical error that he did not take responsibility for.
 18. He confirmed from the Minutes that the original allottee was Julius Narangwi and not him and could not identify his plot on the map as asked to. He identified the buildings on the Plaintiff's bundle as his.
 19. The 2nd defendant stated that when he was given the plots, survey was done by the County but he did not pay for it and therefore did not have the receipts and that he did not have a Title Deed to the property. He confirmed that the total rent that he collects from the suit property is about Ksh 50, 000 per month. He stated that he commenced construction in mid-2008 and completed it in November, 2010. He stated that the person who showed him the location of the plot was one Kimeu who works for the county council of Kitui.
 20. On cross-examination by counsel for the 1st Defendant, he confirmed that the maps in the Plaintiff's bundle of documents are not certified by the County Government of Kitui and the person renaming Plots numbers E and F as 11 and 12 is not from the County Government. He stated that he was not involved in the exercise of renaming the plots as his plots 8 and 10 were not part of the process.
 21. The 1st Defendant closed his case without calling any witnesses.

Plaintiff's Written submissions

22. The Plaintiff submitted that the Plaintiff acquired Plot Number 12(PDP/KTI/29/98/1/12) renamed F from Philip Nzuki who had initially been allotted the said plot by the 1st Defendant as per its Notification of Allocation letter dated 22nd September 1997 and the minutes of the full council meeting held on 5th July 2005. The Plaintiff also submitted that he purchased Plot number 11(PDP/KTI/29/98/1/11) renamed E from Joseph Mumo Kimoli sometime in 2007 and had possession of it but the agreement was formalized in July 2011 and the plot had originally been allocated to Emily Munanie on 16th September 1997 and transferred to Joseph Mumo Kimoli in the year 2005 evidenced by Transfer of Plot No.11 (exhibit 2) , Notification of Plot allocation dated 18/09/1997(exhibit 3) and the Minutes of the Kitui District Plot Allocation Committee held on 16th January 1998 also confirmed by PW 2. He also evidenced ownership with rates payment receipts.
23. According to the Plaintiff, he has demonstrated with documentary evidence how he acquired the properties giving a clear history of how the plots were transferred from the original allottees to himself and how he has been meeting his obligations and urged the Court to declare him the owner of the 2 plots.
24. Quoting from Section 3 of the *Trespass Act* CAP 294, the Plaintiff submitted that the 2nd Defendant confirmed the construction of the buildings on his plot but did not produce any approvals contrary to Section 30 of the *Physical Planning Act* which was applicable then. It is the Plaintiff's submission that the plots 11 and 12 were clearly identified to him by the 1st Defendant on 11th March 2010 through a demarcation and survey process for which he paid and that the 2nd defendant has not produced any document showing how he identified plots 8 and 10. On the contrary, the Plaintiff obtained an approved plan and paid the necessary fees.



25. Counsel relied on the case of *Waas Enterprises Ltd v City Council of Nairobi & Another* (2014) eKLR that under Article 40 of the [Constitution](#) and that no person should be deprived of his right to property or be restricted in his enjoyment of the same. They also relied on the case of [Bandari Investments & Co. Ltd v Martin Chiponda & 139 others](#) (2022) eKLR where the court determined that it has the powers to grant a permanent injunction if it feels that the rights of a party have been infringed, violated and/or threatened.
26. Relying on the principles established by the court in *Mrao v First American Bank of Kenya and 2 others* [2003] KLR 125, the Plaintiff submitted that he has established that he is the owner of Plot Number 11 and 12 on which the 2nd Defendant admitted to having constructed on without proof of ownership or the necessary approval.
27. On irreparable loss, the Plaintiff relied on the case of [Banis Africa Venture Limited v National Land Commission](#) [2021] eKLR where the court held that the injury should be irreparable and continuous and that damages cannot be substituted for the loss which is occasioned by a clear breach of the law.
28. On balance of convenience, the Plaintiff submitted that the harm that would be occasioned by the removal of the illegal structures on the Plaintiff's property does not compare to the denial of the Plaintiff's right to utilize his legitimately acquired property. He relied on the case of [JM v SMK & 4 others](#) (2022) eKLR.
29. The Plaintiff submitted that he engaged a surveyor sometime in March 2011 and was issued with a bill of quantities for construction which construction should have commenced on 1st March 2011. The plaintiff stated that he has been unable to develop his properties or receive any income from Plot numbers 11 and 12 valued at a rental income of Ksh 280, 000 a month and Ksh 3, 360,000 annually. Submitting that he ought to be compensated this amount, the Plaintiff cited the the holding in [Joseph Mutua Zakayo v County Government of Makeni & 9 others](#) [2020] eKLR.

1st Defendant's submissions

30. The 1st Defendant submitted that the Plaintiff has failed to prove his case against the 1st Defendant and his case should therefore be dismissed.
31. Counsel for the 1st Defendant submitted that the Plaintiff failed to prove that the 1st Defendant permitted and/or allowed the 2nd Defendant to develop any buildings or structures on the Plots 11 and 12 as claimed and that the Plaintiff did not produce a single complaint that he lodged with the 1st Defendant after discovering that his alleged properties and been encroached onto.
32. According to the 1st Defendant, the documents of ownership were also questionable and their acquisition from the previous owners was also questioned and no satisfactory explanation was preferred.
33. Regarding the Valuation report produced by the Plaintiff, the 1st Defendant submitted that the valuer failed to satisfactorily explain how he established the location of the disputed properties. Counsel for the 1st Defendant submitted that failure to call a surveyor to testify on the actual position on the ground of plots 11 and 12 and plots 8 and 10 left the actual position of the plots undetermined.
34. Counsel for the 2nd Defendant did not file his submissions within the time granted by the court on the date the matter was reserved for judgement.



Analysis and Determination

35. I have considered the pleadings filed by the parties, evidence adduced and the submissions filed by Counsel for the parties. In my view the following issues arise for determination:
- a. Whether the Plaintiff is the owner of Plot Number 11(PDP/KTI/29/98/1/11) and Plot number 12 (Plot Number 12 (PDP/KTI/29/98/1/12)
 - b. Whether the 2nd Defendant encroached and/or /trespassed onto the Plaintiffs plots.
 - c. What orders should the court make?
 - d. Who will bear the costs of the suit?

A. Whether the Plaintiff is the owner of Plot Number 11(PDP/KTI/29/98/1/11) and Plot number 12 (Plot Number 12 (PDP/KTI/29/98/1/12)

36. It is to be noted from the pleadings that the defendants do not specifically deny the plaintiff ownership of the plot numbers 11(PDP/KTI/29/98/1/11) and plot number 12 (Plot Number 12 (PDP/KTI/29/98/1/12) which became E and F. As proof of ownership of the plots the plaintiff produced in evidence documents tracing allocation of plot number 12 to Felix Nzuki and transferred to the plaintiff. He produced a letter titled “Transfer of Plot No. 12 Zone 040(PDP/KTI/29/98/1) which is written by the Town clerk Municipal Council of Kitui addressed to the plaintiff and confirms that the transfer was recommended by the Municipal council’s Works, Housing and Planning committee meeting held on 10th May 2005 under minute 9/2005 (9) and adopted by the full council meeting held on 5th July 2005.
37. On plot number 11, the documents traced ownership from allocation by Kitui Municipal Council to Emily Munanie who then transferred the plot to Joseph Mumo Kimoli. The plaintiff produced a letter titled “Transfer of Plot No. 11 Zone 040(PDP/KTI/29/98/1) written by the Town clerk Municipal Council of Kitui addressed to Joseph Mumo Kimoli confirming that the transfer was recommended by the Municipal council’s Works, Housing and Planning committee meeting held on 10th May 2005 under minute 9/2005 (9) and adopted by the full council meeting held on 5th July 2005. The said Joseph Mumo Kimoli then transferred the plot to the plaintiff by an agreement dated 18th January 2011.
38. The plaintiff further produced the minutes of meetings of the Kitui District Plot Allocation Committee meeting held on 16th January 1998 which meeting allocated plots in Zone 040 and allocated plot 11 to Emily Munanie and plot 12 to Philip Nzuki.
39. From the evidence adduced I am satisfied that Municipal Council of Kitui the predecessor of the 1st Defendant allocated Plot Number 11(PDP/KTI/29/98/1) to Emily Munanie who transferred it to Joseph Mumo Kimoli and acknowledged the eventual transfer of the plot to the plaintiff. Further that the Municipal Council of Kitui allocated Plot number 12 (PDP/KTI/29/98/1) to Philip Nzuki who transferred it to the Plaintiff and thus the Plaintiff owns the said plots.
40. However the plaintiff claims that in late January 2010, the 2nd Defendant allegedly encroached and constructed residential houses on the plots. Upon raising the issue with the 1st Defendant, they issued an encroachment notice to the neighboring plot owners to vacate the said plot and remove all the deposited materials, but the said materials were never removed. The plaintiff exhibited letters written by the Municipal Council of Kitui dated 28th January 2011 addressed to Ken Malusi and Titus Kilonzi Mutinda. The two letters state that the addressees have with intent to develop plot number



14 deposited materials on plot numbers 11 and 12 which belong to the plaintiff herein. The two were directed to remove the said materials. The second letter adduced in evidence is the one dated 2nd March 2011 written by the District Physical Planning Officer –Kitui, Secretary Kitui Municipal Physical Planning and Liaison Committee addressed to Kenendy Malusi plot 14, Titus Mutinda plot 15, Felix Kimoli plot 11 and 12 and Nzomei Mulwa plot 17 and the subject matter of the letter is ZONE 040 PDP/KTI/29/98/1. The letter indicated that the issues of encroachment would be discussed in a meeting of the Kitui Municipal Physical Planning Liaison Committee to be held on 31st March 2011 and all the addressees were invited to attend the meeting and to carry with them all relevant documents. It appears that the meeting did not take place on 31st March 2011 but the meeting is shown to have taken place on 26th May 2011. In attendance at the meeting was Kennedy Malusi, Penina Mutinda, Felix Kimoli and Nzemi Mulwa.

41. The District Physical Planner raised the issue concerning what he called the conflicting situation experienced at the area captured by plan KTI/29/98/1. The complainants were indicated as Kennedy Malusi, Titus Mutinda, Felix Kimoli and Nzemi Mulwa. It was decided as follows;

“The members after a lengthy discussion and site visit recommended that the ground be picked and planned to reflect the ground situation each of the four members to get equal sizes depending on the number of plots each claims.

In the revised plan the claimants will get their plots as follows;

1. Felix Kimoli to get plots E and F instead of 11 and 12 in the old plan
2. Kennedy Malusi will be number A instead of 14 in the old plan
3. Nzemi Mulwa will get plot D instead of 17 in the old plan
4. Titus K. Mutinda to get plot B instead of 15 in the old plan

ACTION: District Surveyor-Kitui

District Physical Planning Officer –Kitui

Town Planner-Kitui Municipal Council

After preparing the plan the District Planner was to forward the revised plan to the Municipal Council to change their records accordingly.

42. Subsequent to the above meeting, a letter dated 8th June 2011 from the District Physical Planning Officer was written to the Town Clerk confirming the amendment that had been made at the above meeting affecting plots near Kefri in Kitui town and the creation of plots A to F. Thereafter a letter was written by the Town Clerk Kitui to the Commissioner of Lands notifying of the changes or corrections of the situation on the ground near KEFRI-KITUI TOWN PDP NO. KTI/29/11/02 where ownership of plots claimed changed as indicated herein before. It was indicated in the said letter that the council had effected the changes in its records and requested the Commissioner of lands to process ownership documents as appropriate. An amended copy of the part development plan was then attached and the same is attached to the plaintiff's list of documents.
43. From the deliberations of the above meeting of the Kitui Municipal Physical Planning Liaison Committee the plaintiff was allocated plot numbers E and F to take the place of plot numbers 11 and 12 in the old plan. My interpretation of what transpired at the meeting was that the new numbers referred to different plots and that the plaintiff no longer owned the initial plots 11 and 12 if at all they existed on the ground. Indeed, the plaintiff produced in evidence a 2nd part Development plan dated



8th June, 2011 showing the locations of plots A – F and the same differed from the initial plan dated 16th January, 1998.

44. From the chronology of events as shown above it is clear that the reason the plaintiff and other plot owners appeared before the liaison committee was because the ground location of plot numbers 11 and 12 together with the other plots that were the subject of the proceedings was unclear had a problem and there were complaints of encroachment. However, the proceedings before the liaison committee brought more problems than solutions since the plaintiff found himself allocated plots that were owned by someone else since he discovered that plots E and F allocated were situated where plot number 18 was located on the old plan. Thus the allocation of the plots to the plaintiff was a double allocation of the same plot to two different people.
45. In my view the recourse for the plaintiff in the circumstances was to follow through with the process commenced by the proceedings of Physical Planning Liaison Committees. The Physical Planning Liaison Committee was regulated under Section 10 of the *Physical Planning Act* CAP 286 which Act was in force at the time of the acts complained of in this suit. The said section provided for a National Physical Planning Liaison Committee and other Liaison Committees and their functions were as follows:

“ 10 The functions of the National Physical Planning Liaison Committee shall be:

- (1) (a)
- (2) The functions of other liaison committees shall be-
- (a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act.”
- (b) to enquire into and determine conflicting claims made in respect of applications for development permission;
- (c) to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land;
- (d) to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguarding areas; and
- (e) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act



46. Having found that the plot allocated by the Liaison Committee was not available for allocation, I am of the view that the plaintiff had the recourse to appeal the decision of the Liaison committee as provided under Section 15 of the then *Physical Planning Act* which states as follows;
- (1) Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.
 - (2) The National Liaison Committee may reverse, confirm or vary the decision appealed against.
 - (3) The provisions of this Act relating to the determination by the Director or local authority of objections to physical development plans or development applications, as the case may be, or the determination of an appeal under section 13, shall apply *mutatis mutandis* to the determination of appeals by the National Liaison Committee under this section.
 - (4) Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court.
47. In the case of *Republic v City Council of Nairobi & 3 Others* [2014] eKLR, Odunga, J. had this to say about land that has already been allotted to someone else:

“Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

48. From the foregoing it is my finding that the plots E and F allocated by the liaison committee to the plaintiff replaced plot numbers 11 and 12 and the decision of the committee was not merely a process of renaming and allocating the plots new numbers.

B. Whether the 2nd Defendant encroached and/or /trespassed onto the Plaintiffs plots.

49. The plaintiff claims that the 2nd defendant encroached on his land in January 2010, and constructed residential houses. Upon raising the issue with the 1st defendant, an encroachment notice was issued to the neighboring plot owners to vacate the said plots and remove all the deposited materials, which were never removed.
50. On the other hand the 2nd defendant confirmed that he owns plots 8 and 10 located in the same zone as the ones owned by the Plaintiff. That he started developing the plots especially number 8 in 2010 and he never received any complaints on his ownership and neither did he receive an encroachment notice. He produced in evidence a copy of a letter of allotment issued by the department of lands to himself and Rose Kathooko Mwanza for plot No 8 PDP/KTI/29/98 and a sale agreement between himself and Rose Kathooko Mwanza as purchasers and one Mwema Malonza Muli for the purchase of plot number 10.
51. The plaintiff produced in evidence a part development plan dated 16th January 1998 which is the same date as the date when the Municipal council of Kitui made the initial allocation of plots. The said plan shows the locations of plot numbers 11 and 12 claimed by the plaintiff and plots 8 and 10 claimed by the 2nd defendant. The said plots are clearly separate and distinct and there seems to be no possibility



of overlapping. The question that seeks determination from this issue is the location of the suit plots in relation to the location of the 2nd defendant's plots or the location where he has constructed the residential buildings he is accused of building on plots 11 and 12.

52. The Plaintiff claims encroachment notices were issued to the 2nd defendant. However, the letters produced in court are letters written by the Municipal Council of Kitui dated 28th January 2011 addressed to Ken Malusi and Titus Kilonzi Mutinda. The two letters state that the addressees have with intent to develop plot number 14 deposited materials on plot numbers 11 and 12 which belong to the plaintiff herein. The two were directed to remove the said materials. The second letter adduced in evidence is the one dated 2nd March 2011 addressed to Kennedy Malusi plot 14 Titus Mutinda plot 15, Felix Kimoli plot 11 and 12 and Nzomei Mulwa plot 17 and the subject matter of the letter is ZONE 040 PDP/KTI/29/98/1. The letter indicated that the issues of encroachment had been dealt with in a meeting of the Kitui Municipal Physical Planning Liaison committee meeting of 28th October, 2009 and the same issue would be discussed in a meeting to be held on 31st March, 2011 and all the addressees were invited to attend the meeting and to carry with them all relevant documents. It appears that the meeting did not take place on 31st March but meeting is shown to have taken place on 26th May, 2011.
53. From the second letter dated 2nd March, 2011 it appears that the issue complained of was not new to the parties as it had been dealt with at a previous meeting.
54. At the liaison committee meeting the issue for consideration was raised, the conflicting situation experienced at the area captured by plan KTI/29/98/1 and the complainants were indicated as the persons listed above Kennedy Malusi, Titus Mutinda, Felix Kimoli and Nzombi Mulwa.
55. The proceedings and decision of the liaison committee are captured elsewhere in this judgment and the same need not be repeated. However, it is to be noted that in all the complaints, the 2nd defendant was not mentioned and as he contended he did not attend the meetings held by the Planning Liaison Committee and never participated. It appears that the plaintiff did not initially have any complaint of trespass and/or encroachment against the 2nd defendant. If he noted that the 2nd defendant had encroached onto his land in January, 2010, why did he not raise a complaint against him immediately and in any event at the time when the letters were issued by the Municipal Council of Kitui to the other plot owners Kennedy Malusi, Titus Mutinda, and Nzombi Mulwa in January and March of 2011?
56. According to the 2nd defendant he commenced construction of the residential houses in the year 2010 before the Plaintiff's complaint about encroachment. The question then still begs why did the plaintiff not complain about the 2nd defendant's alleged encroachment and why was the 2nd defendant not one of the parties to the proceedings before the Liaison Committee?
57. In his evidence the plaintiff claimed that he paid survey fees and was shown the location of his plots by one Kimeu who works for the 1st defendant. However, the two receipts exhibited show that he paid on 11th March 2011. He could also not confirm if the said Kimeu was a surveyor as he could not remember his designation. He further confirmed that he was not given a beacon certificate. By this time the 2nd defendant had already completed construction.
58. What becomes clear from evidence adduced is that by 28th January 2011 and 2nd March 2014 when the encroachment notices were written, the plaintiff must have known or believed that the persons encroaching on his plots were Kennedy Malusi, Titus Mutinda and Nzomei Mulwa as they are the ones who had referred the matter to the District Physical Planning Office. When the plaintiff was shown the physical location of his plots as he states on 11th March 2011 he would have been able to confirm that the encroacher was the 2nd defendant. The question arises as to why did he not join the 2nd defendant to the proceedings before the liaison committee?



59. The meeting of the liaison committee took place on 26th May 2011 and the issue of the conflicting situation experienced on the ground in the area under dispute was presented to the Committee and a decision was made. It is to be noted that among the members of the said committee present included the District Physical Planning Officer, the District Surveyor and the Chairman Municipal Town Planning and Works committee among others. These are professionals that ought to have decided with finality the issue of location of the different plots and the claim of encroachment, if any. However, it appears for some reason the plaintiff did not present the 2nd defendant as the person encroaching on his plots and even as the committee was carrying out verification the plaintiff confirmed that he did not reveal the 2nd defendant as the person who was encroaching on his plots.
60. In my view the reason the plaintiff took this position was because he knew that the 2nd defendant was not the trespasser and he had confirmed this position when he went on the ground with Kimeu. It is to be noted that on cross examination the plaintiff confirmed that the person who wrote the encroachment notices was the same Kimeu who showed to him where his plots were. In my view it would have been expected that he would have written an encroachment notice to the 2nd defendant similar to the one he wrote to the other plot owners. The said Kimeu was also present in attendance at the meeting of the liaison committee.
61. Section 3 (1) of the Trespass Act, Cap 294 as quoted by the Plaintiff provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
62. According to the 10th Edition of Black’s Law Dictionary trespass is defined as follows;
- “ An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. *Clark & Lindsell on Torts*, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason.”
63. In my view from the exposition above, the plaintiff did not adduce evidence to show that the 2nd defendant encroached on his plots. He did not satisfy the court that the location of his initial plots 11 and 12 was the same location the 2nd defendant had constructed his houses. Section 107 of the Evidence Act Cap 80 provides that; -
- “ Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
64. In the present case the burden of proof rested with the plaintiff as the party who desires the court to give judgment as to his legal right and he was the party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and the principle is amplified by the learned authors of the leading Text Book;- The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
- “ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.



14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

3. What orders should the court make?

65. In light of the above discussion it is my view that the onus lay on the 1st Defendant’s predecessor the Municipal Council of Kitui having allocated the suit plots to the plaintiff and having confirmed the transfers of the plots to the plaintiff they ought to have confirmed the exact location of the plots and to ensure that the plots were not claimed by third parties. The 1st defendant on realizing that plot numbers 11 and 12 had issues on the ground attempted to offer a solution by allocating alternative plots to the plaintiff. However, the alternative plots did not offer a solution since the same were owned by someone else. The plaintiff is thus left in a position where he holds documents allocating him land but no actual land. In my view if the plots allocated to the plaintiff do not exist then the 1st defendant should be held liable to compensate him.

66. In an almost similar case where the court held the institution that issued allotment letters responsible to the plaintiffs Munyao Sila J held in the case of *Miriam Mbeke Nyamasyo & 2 others v Dishon Odhiambo & 6 others* [2021] eKLR ;

“I am surprised that in its defence, the 7th defendant pleaded that it does not recognize the plaintiffs yet it is the very 7th defendant or its predecessor, who issued allotment letters to the plaintiffs. The defence of the 7th defendant was in the circumstances malicious. The plaintiffs have availed letters of complaints of encroachment to the 7th defendant but the 7th defendant has not taken any steps to stop the developments that the 1st – 6th defendants or other occupants of the Scheme are undertaking without approval. The 7th defendant’s conduct must be chastised. In those circumstances, the costs of this suit will be paid jointly and/or severally by all the defendants.”

67. Further in the case of *Francis Mwaura Kungu v Bernard Muceke & another* [2017] eKLR the court held that the Nairobi County Council being the custodian of all the necessary records was liable to compensate the plaintiff a victim of double allocation. The court stated;

“In the above case the judge held that the 2nd defendant had made a mistake in making the double allocation and as the 2nd defendant had shown a willingness to allocate an alternative plot to remedy the situation the court ordered the 2nd defendant to compensate the plaintiff by allocating to the plaintiff a similar plot of equivalent size in the same locality. In the present case before me the 2nd defendant has admitted there was double allocation and that mistake can only be attributed to the 2nd defendant who was the custodian of all the necessary records. It is my finding that the 2nd defendant would be liable to compensate the plaintiff.



68. In the case of *Fremar Construction Co. Ltd* [HC Milimani Commercial Case No. 206 of 2001] Kasango, J. while considering the quantum of damages available on a breach of contract cited the case of *Njoroge v Kenya Commercial Bank Ltd* [1992] LLR 2357 where it was held: -

“It means that the appellant is entitled to, in terms of money, to be put in the same position as he was immediately before he was wrongfully deprived of his land and the development being and erected thereon. Since he cannot now, have the return of his land, this court can only deal with the matter in terms of money.”

69. The plaintiff makes an alternative prayer for an order for payment by the Defendants the full value of Plot number 11(renamedE) (PDP/KTI/29/98/1/11) AND 12(renamed F) (PDP/KTI/29/98/1/12) at the market rates as at the judgment date. I am persuaded that the plaintiff is entitled to compensation for the value of the plots. The plaintiff adduced in evidence a valuation report by Legend Valuers Ltd dated 24th October 2013. The said report gives a valuation of the two plots in the sum of Ksh 1,150,000/= each making a total of Ksh 2,300,000/=. The report has considered the prime location of the allocated plots and the fact that the area is fenced and the possible income from the plots in case of development. The report further considered the comparable sale of similar plots. I am of the view that the said estimation of value of the plots is reasonable. Even though the plaintiff claims compensation at the current market rates, the plaintiff had the opportunity to adduce an updated valuation report but did not avail one. The said value is considered adequate for purposes of placing the plaintiff in the position he was immediately before he was wrongfully deprived of his land since he cannot now, have the return of his land.

70. In my view the plaintiff is also entitled to general damages for having been kept out of the plots that he had acquired legally. The plaintiff claims that he intended to construct houses whose details are to be found in the bill of quantities attached to the plaintiffs list of documents. He states that the proposed construction would have earned him the sum of yearly rental income in the sum of Ksh 3,200,000/=. It is noted that the plaintiff obtained the approval for construction after the 2nd defendants construction was completed and it is not clear how the approval for construction would have been granted while it was alleged that there was a building already in place. Further, it has not been shown that the plaintiff had the financial capacity to carry out the construction. There is also no evidence of the basis upon which the proposed rental income was arrived at. I would therefore consider the estimation of income to be speculative and of no probative value. In the case of *Gami Properties Limited v National Social Security Fund Board of Trustees & Chief Land Registrar* [2021] eKLR the court of appeal stated concerning a claim as the one made herein;

Finally, there is the claim for Ksh 18,870,226.81 said to have been incurred in preparation of the feasibility studies, and architectural plans which the Judge rejected on grounds that it “is far too remote.” In the well-known case of *Hadley & Another v Baxendale & Others* [1843 – 60] ALL ER 461 on which the learned judge relied, the court stated that:

“... Now we think the proper rule in such a case as the present is this:.....Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.....Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It



is said that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule.”

71. The question of damages is addressed in the book, *The Law of Real Property*, 8th Edition, Page 694, Sir Robert Megarry and Sir William Wade where it state as follows:

“ a) The General Rule.

An action for damages is the primary remedy under the law of contract, though it is less important in relation to contracts for the sale of land than specific performance. The measure of damages is the loss to the claimant from the non-performance of the contract. A vendor, for example can recover the difference between the price agreed to be paid and the net value of the property left on his hands, giving credit for any deposit paid by the purchaser. A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs.” [Emphasis added]

72. In *Halsbury’s Laws of England*, Volume 12, 4th Edition at paragraph 1183 it is stated:

“...Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain” [Emphasis added]

73. In the present case the plaintiff lost his property when in 2011 the 1st defendant’s efforts to compensate him with an alternative plot failed. The valuation report shows that the Plots were valued at Ksh 1, 1500, 000/= in the year 2013. The Plaintiff testified that he purchased plot No. 11 at the sum of Ksh 500,000 in the year 2005 and the value had more than doubled by the year 2013 according to the valuation given by Legend Valuers Ltd. I have taken into account all the above factors and in my estimation in assessing an award of damages for loss of bargain I will award the sum of Ksh 1,150,000 for each plot.

74. The final orders of the court are as follows;

1. The plaintiff’s suit against the 2nd defendant is hereby dismissed with costs to be paid by the 1st defendant.
2. Judgment is hereby entered in favour of the plaintiff against the 1st defendant in the following terms;



- a. Payment of the sum of Ksh 1,150,000/= as compensation for plot number 11 (renamed E) (PDP/KTI/29/98/1/11)
 - b. Payment of the sum of Ksh 1,150,000/= as compensation for plot number 12 (renamed F) (PDP/KTI/29/98/1/12)
 - c. General damages in the sum of Ksh 2,300,000/-
 - d. Interest to accrue on (A), (B) and (C) above at court rates from the date of judgment.
 - e. Costs of the suit are hereby awarded to the plaintiff to be paid by the 1st defendant.
3. All other prayers in the plaint are hereby disallowed.

DELIVERED, DATED AND SIGNED AT KITUI THIS 16TH DAY OF FEBRUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court in the presence of-

M/s Ngala holding brief for Mwalimu for 1st defendant

Kimuli for the 2nd defendant

N/A for the Plaintiff

