REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 215 OF 2017

FORMERLY MERU ELC. 08 OF 2015

FORMERLY EMBU ELC. 266 OF 2015

MUTEGI MUGWETWA.....PLAINTIFF

VERSUS

COUNTY MINISTER OF LANDS, PHYSICAL PLANNING

ENERGY & ICT COUNTY GOVERNMENT OF THARAKA NITHI.....1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI.....2ND DEFENDANT

THE DIRECTOR GENERAL (KENYA URBAN RURAL AUTHORITY).....3RD DEFENDANT

KENYA URBAN ROADS AUTHORITY.....4TH DEFENDANT

THE REGIONAL MANAGER-UPPER EASTERN (KENYA URBAN ROADS AUTHORITY) ....5TH DEFENDANT

TERRITORIAL WORKS (K) LTD.....6TH DEFENDANT

AND

CHUKA IGAMBANG'OMBE DEVELOPMENT ASSOCIATION.....INTERESTED PARTY

JUDGMENT

1. Due to the nature of this case, I find it necessary to reproduce in full the apposite plaint so that the basis for the orders sought in this suit can be properly laid.

2. The plaint in this suit is dated 10th February, 2015 and states as follows:

PLAINT____Fast Truck

1. The Plaintiff is adult male of sound mind and a business man in Chuka town in the Republic of Kenya. His address of service for purposes of this suit is care of M/s Ajaa Olubayi & Company Advocates, Rehani House, 10th Floor, Kenyatta Avenue/Koinange Street, P. O. Box 42481 – 00100, Nairobi.

2. The 1st defendant is the Minister acting in the capacity as the Head of Ministry of Lands, Physical Planning, Energy and ICT in the County Government of Tharaka Nithi. (Summons of service to be effected through the plaintiff's advocates office).

3. The 2nd defendant is the County Government provided for under Article 176 of the Constitution of Kenya and Cap 265, Laws of Kenya. (Summons of service to be effected through the plaintiff's advocates office).

4. The 3rd defendant is the (sic) acting in the capacity as the head of administrator (sic) of Kenya urban roads authority appointed under Cap 408, Laws of Kenya. (Summons of service to be effected through the plaintiff's advocates office).

5. The 4th defendant is a body corporate established under Cap 408, Laws of Kenya. (Summons of service to be effected through the plaintiff's advocates office).

6. The 5th defendant is the (sic) acting in the capacity as the regional manager-upper Eastern region of Kenya Urban Roads Authority appointed under Cap 408, Laws of Kenya. (Summons of service to be effected through the plaintiff's advocates office).

7. The 6th defendant is a limited liability (sic) established under Cap 486, Laws of Kenya. (Summons of service to be effected through the plaintiff's advocates office).

8. The plaintiff is the registered owner of all that properties known as Title Numbers Chuka town 3/ and 4 in Tharaka Nithi County Measuring Area Approximately 0.046 Ha. Each. (hereinafter referred to as the suit property).

9. On 4th August, 1980 and 8th April, 1998, the plaintiff was issued with the certificate of leases for a term of 99 years commencing in the year 1975 and1994 respectively by the Land Registrar upon meeting all the requirements in the law.

10. In the year 1991, the plaintiff's plan for construction of the commercial buildings on title number Chuka town/4 was approved by the Physical Planning Officer, District Health Officer and Clerk of Municipal of Chuka.

11. On 20th March, 2006, survey of Kenya issued the plaintiff with a registry index map (R.I.M) which R.I.M is based on approved survey plan F/R 115/18 Chuka Township that indicates that his suit property is not encroaching on the road reserve.

12. The plaintiff has immense investments with huge capital outlay to a tune of 200,000,000 million on construction of the commercial buildings, shops, hardware, banks, petrol station, restaurant and or any other structures erected on the properties known as Title Numbers Chuka Town/3 and 4 in Tharaka Nithi County.

13. The plaintiff is apprehensive that the demolitions being carried on by the defendants in Chuka Township will occasion to him great loss and damage if his commercial buildings, shops, hardware,

banks, petrol station, restaurant and or any structures erected on the properties known as Title Numbers Chuka Town/3 and 4 in Tharaka Nithi County are demolished.

14. Tenants of the plaintiff, the Barclays bank of Kenya, the Gulf Energy limited who have invested huge capital to uplift the face of Chuka town will also suffer loss and damage if the defendants demolish the suit properties.

15. The on-going demolition of properties in Chuka Township by the defendants is illegal, un-procedural and contrary to the Constitution of Kenya, international conventions and without an order of the court or a notice.

16. Numerous businessmen and women have been left grappling with losses because of the demolition of their properties worth millions of shillings by the defendants at the wee hour of the night in unorthodox style and manner.

17. The defendants have vehemently declined to call a meeting with the plaintiff to deliberate/resolve the boundary dispute or if his properties are encroaching road reserve.

18. The plaintiff is wary that the defendants will not advertise nor serve me with a notice of intention to demolish his (sic) commercial buildings, shops, hardware, banks, petrol station, restaurant and or any structures erected on the properties on the suit property.

19. The on-going demolition of the properties by the defendants in Chuka Town is irregular, illegal and carried in unorthodox manner because:-

i) It is un-procedural contrary to the constitution of Kenya, international convention and/or without an order of the court or notice given.

ii) The defendants never convene meetings to deliberate on the boundary dispute.

iii) The defendants never serves a notice of intention to demolish.

iv) The defendants have never advertised their intention to demolish structures in Chuka town.

v) No mark is put on properties or buildings intended for demolition.

vi) Demolition at wee hour of the nigh recklessly and negligently without taking into account safety precaution.

20. The plaintiff is reasonably apprehensive that unless the defendants are restrained by an order of this honourable court from demolishing, the defendants will undoubtedly demolish his structures on title numbers Chuka Town 3 and 4 in Tharaka Nithi County and I will suffer irreparable loss and damage.

21. It is the right of the plaintiff to be protected by this honourable court from defendants illegal and unlawful demolition of my property without following laid down procedure and the law.

22. For reason stated in paragraph 19 hereinabove, the defendants are aware that the alleged act of demolition is illegal and contrary to the laid down procedure.

23. There is no other suit pending between the parties hereto in this suit or any other court concerning the same subject matter.

24. The cause of action arose in Chuka Town within the jurisdiction of this honourable court.

Reasons wherefore the plaintiff prays for judgment against the defendants for:

(a) A permanent injunction restraining the defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolishing and or in any manner whatsoever interfering with the plaintiff's commercial buildings, shops, hardware, banks, petrol station, restaurant, and other structures erected on the properties known as title number Chuka Town/3 and 4 in Tharaka Nithi County.

(b) A declaration that the property known as title number Chuka Town/3 and 4 in Tharaka Nithi County belongs to the plaintiff.

(c) General damages.

(d) Cost of this suit.

Dated at Nairobi this 10th day of February,2015

AJAA OLUBAYI & COMPANY

ADVOCATES FOR THE PLAINTIFF

3. This suit was filed at Embu as ELC No. 266 of 2015, then became Meru ELC No. 8 of 2015 and is now Chuka ELC No. 215 of 2017.

4. The 1st and 2nd defendants defence is reproduced in full hereblow:-

1ST AND 2ND DEFENDANTS DEFENCE

1. Save what is hereinafter expressly admitted, the defendants deny each and every allegation contained in the plaint as if each was set out and denied seriatim.

2. The defendants admit the descriptive parts of paragraphs 1, 2, 3, 4, 5, 6 and 7 of the plaint save to deny that the 2nd defendant exists by dint of the provisions of Cap 265 Laws of Kenya. The defendants address of service for the purposes of this suit shall be care of: M/s Murango Mwenda & Company, Advocates, Teachers House, 2nd Floor, P. O. Box 1163-60200, Meru.

3. The defendants do not admit the contents of paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 of the plaint and the plaintiff is put into strict proof thereof.

4. The defendant states in further defence that, currently there is one road works going on in Chuka Township for improvement of roads to bitumen standards, in accordance with the development plans prepared in 1988.

5. Before the commencement of the actual works, the defendants gave notice to all persons who have structures on road reserves, public lands, to remove them or face demolition at the owner's costs.

6. The defendant states that the plaintiff's building standing on parcel No. 4, Chuka township was found to have encroached upon the public road leading to Chuka Boys High School under construction. The plaintiff was required to remove the encroachment to enable the road construction works to proceed to no avail.

7. The defendants' states that all other persons who had built structures encroaching the said road, voluntary removed the structures, pursuant to the notice, but the plaintiff has refused to remove the offending structure, thereby bringing to a halt construction of the road to the prejudice of the public

good.

8. The defendants' states that the plaintiff rights are not under any threat of infringement, the necessary notice was issued and that it is the plaintiff who has erected illegal building encroaching on the public road reserve.

9. The defendants state that the suit is incompetent, bad in law, frivolous and shall apply to have it struck out at the commencement of the hearing.

Reasons wherefore, the defendants pray for the dismissal of the suit with costs.

DATED AT MERU THIS 3RD DAY OF MARCH, 2015

FOR: MURANGO MWENDA & CO.

ADVOCATE FOR THE 1ST & 2ND DEFENDANT

5. The 3rd, 4th and 5th defendants defence is reproduced in full herebelow:-

3RD, 4TH AND 5TH DEFENDANTS STATEMENT OF DEFENCE

1. Save what is expressly admitted in defence, the 3rd, 4th and 5th defendants deny each allegation of facts pleaded in the plaint as though the same were set out wholly traversed seriatim and verbatim.

2. The 3rd, 4th and 5th defendants admit the descriptive parts of paragraphs 1-7 of the plaint being mere description of parties in this suit save to add that their address of service for the purpose of this suit is The Honourable Attorney General and Department of Justice, Miriga Mieru Building, 2nd floor, opposite St. Paul MCK Church, P. O. Box 51-60200 Meru.

3. The 3rd, 4th and 5th defendants are strangers and have no knowledge of the ownership of the properties known as title numbers Chuka Town 3 and 4 in Tharaka Nithi County measuring approximately 0.064 Ha as alleged in paragraph 8 of the plaint and put the plaintiff to strict proof thereof.

4. The 3rd, 4th and 5th defendants deny in TOTO the allegations set out in paragraph 9 of the plaint and put the plaintiff to strict proof thereof.

5. The 3rd, 4th and 5th defendants deny the allegations set out in paragraph 10 of the plaint and further aver that they deny that there was no (sic) approval by the physical planning officer, District Health Officer and Clerk Municipal of Chuka and put the plaintiff to strict proof thereof.

6. The 3rd, 4thand 5th defendants deny the allegations set out in paragraph 11 of the plaint and aver that the plaintiff does not have any approved survey plan as alleged and further that the plaintiff has encroached on a road reserve, the plaintiff to strict proof thereof.

7. The 3rd, 4th and 5th defendants are strangers and have no knowledge of the allegations of investment as alleged in paragraph 12 of the plaint and the plaintiff is put to strict proof thereof.

8. The 3rd, 4th and 5th defendants deny the allegations set out in paragraph 13 of the plaint and further aver that he will suffer any loss and damage as alleged because the plaintiff has constructed on a road reserve, they aver that the demolition in Chuka Town is meant for the expansion of the roads within the town which will benefit the public at large and not the plaintiff only, the plaintiff is put to prove of the allegations thereof.

9. The 3rd, 4th and 5th defendants have no knowledge of the allegations set in paragraph 14 of the plaint and the plaintiff is put to strict proof thereof.

10. The 3rd, 4th and 5th defendants deny the allegations set out in paragraph 15 of the plaint and aver that the demolition exercise in Chuka Town is lawful and legal the plaintiff is put to strict proof of the allegations thereof.

11. The 3rd, 4th and 5th defendants are strangers and have no knowledge of the allegations alleged in paragraph 16 of the plaint and the plaintiff is put to strict proof thereof.

12. The 3rd, 4th and 5th defendants deny in TOTO the allegations set out in paragraph 17 of the plaint and put the plaintiff to strict proof thereof.

13. The 3rd, 4th and 5th defendants deny the allegations set out in paragraph 18 of the plaint and put the plaintiff to strict proof thereof.

14. The 3rd, 4th and 5th defendants deny in TOTO the allegations set out in paragraph 19 of the plaint and further deny all the reasons of irregularity and illegality as stated thereof and put the plaintiff to strict proof thereof.

15. The 3rd, 4th and 5th defendants have no knowledge of the allegations alleged in paragraph 20 of the plaint and the plaintiff is put to strict proof thereof.

16. The 3rd, 4th and 5th defendants deny the allegations set out in paragraph 21 of the plaint and further aver that no right has been infringed on which need to be protected as alleged and the plaintiff is put to strict proof thereof.

17. The 3rd, 4th and 5th defendants are strangers and have no knowledge of the allegations alleged in paragraph 22 of the plaint and the plaintiff is put to strict proof thereof.

18. The 3rd, 4th and 5th defendants admit paragraph 23 of the plaint.

19. The 3rd, 4th and 5th defendants shall before the hearing of this suit raise and argue a notice of preliminary objection that:

1. This suit offends provisions of provisions of section 13A of the Government proceedings Act Cap 40 Laws of Kenya.

2. This suit offends provisions of section 12(1) of the Government proceedings Act Cap 40 Laws of Kenya.

3. The plaintiff has not disclosed any cause of action against the 3rd, 4th and 5th defendants.

20. The jurisdiction of this honourable court is admitted.

Reasons wherefore: the 3rd, 4thand 5th defendants pray that this honourable court dismiss this suit with costs.

DATED AT MERU THIS 17TH DAY OF FEBRUARY, 2015

J. KUNG'U (MS)

PRINCIPAL LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL

AND DEPARTMENT OF JUSTICE

6. The suit had been handled at Embu and Meru. It then came to Chuka.

7. On **11th July, 2017**, this court delivered two rulings

8. The 1st ruling is reproduced in full herebelow.

REPUBLIC OF KENYA

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CHUKA ELC CASE NO. 215 OF 2017

FORMERLY EMBU ELC CASE NO.266 OF 2015

FORMERLY MERU ELC CASE NO.8 OF 2015

MUTEGI MUGWETWA…….....
……..PLAINTIFF

VERSUS

COUNTY MINISTER OF LANDS, PHYSICAL PLANNING

ENERGY & ICT COUNTY GOVERNMENT OF THARAKA NITHI.....1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI …….....2ND DEFENDANT

(KENYA URBAN RURAL AUTHORITY)…….…….....3RD DEFENDANT

KENYA URBAN ROADS AUTHORITY…….....…….....4TH DEFENDANT

THE REGIONAL MANAGER-UPPER EASTERN

(KENYA URBAN ROADS AUTHORITY) ……...…….5TH DEFENDANT

TERRITORIAL WORKS (K) LTD……..…….....…….6TH DEFENDANT

RULING

1. Pending the court's ruling on jurisdictional issues appertaining to this suit which concern proceedings that took place in the High Court before the Supreme Court pronounced itself on the jurisdiction of the High Court vis-à-vis Courts of equal status, the parties proffered a consent to maintain status quo which consent is in the following terms:

"The status quo be maintained restraining the defendants either by themselves, their agents or servants and other interested parties from demolishing plaintiff's commercial building erected on Chuka Town, No. 3 and 4 pending the ruling."

2. The consent is adopted as an order of this court and the said order takes effect immediately.

3. The ruling concerning the jurisdictional issues raised by the parties to be delivered on **31.7.2017**.

Delivered in open court at Chuka this 11th day of July, 2017 in the presence of:

CA: Ndegwa

Mwiti h/b Murango Mwenda for 1st defendant

Murimi Murango for the plaintiff

Miss Kungu for 3rd, 4th and 5th defendants

Miss Kungu h/b Waweru for proposed interested party

P. M. NJOROGE

JUDGE

9. The second ruling is reproduced in full herebelow:-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 215 OF 2017

FORMERLY EMBU ELC CASE NO.266 OF 2015

FORMERLY MERU ELC CASE NO.8 OF 2015

MUTEGI MUGWETWA…..……..
……..PLAINTIFF

VERSUS

COUNTY MINISTER OF LANDS, PHYSICAL PLANNING

ENERGY & ICT COUNTY GOVERNMENT OF THARAKA NITHI ….....……..1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI …….....2ND DEFENDANT

(KENYA URBAN RURAL AUTHORITY)…….....….3RD DEFENDANT

KENYA URBAN ROADS AUTHORITY…….....….....4TH DEFENDANT

THE REGIONAL MANAGER-UPPER EASTERN

(KENYA URBAN ROADS AUTHORITY) …….5TH DEFENDANT

TERRITORIAL WORKS (K) LTD…….....…….6TH DEFENDANT

RULING

1. This application is dated 1st February, 2016 and seeks orders that:

    1. The Applicant herein, Chuka Igamba'ombe Development Association be joined in these proceedings as an interested party forewith.

    2. The Applicant be granted leave to file pleadings in response to the suit herein.

    3. That the costs of this application be provided for:

2. On 11.7.2017, the other parties indicated that they were not opposed to the application.

3. In the circumstances, the application is allowed.

4. Costs shall be in the cause

5. It is so ordered.

Delivered in open court at Chuka this 11th day of July, 2017 in the presence of:

CA: Ndegwa

Mwiti h/b Murango Mwenda for 1st defendant

Murimi Murango for the plaintiff

Miss Kungu for 3rd, 4th and 5th defendants

Miss Kungu h/b Wawerufor proposed interested party.

P. M. NJOROGE

JUDGE

10. On **31st July, 2017**, this court delivered a ruling concerning the status of the proceedings which took place before this suit was transferred to this court. The ruling is reproduced in full herebelow:-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 215 OF 2017

FORMERLY EMBU ELC CASE NO.266 OF 2015

FORMERLY MERU ELC CASE NO.8 OF 2015

MUTEGI MUGWETWA……..……..PLAINTIFF

VERSUS

COUNTY MINISTER OF LANDS, PHYSICAL PLANNING

ENERGY & ICT COUNTY GOVERNMENT OF THARAKA NITHI ……..1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI…….....2ND DEFENDANT

(KENYA URBAN RURAL AUTHORITY)…….....….3RD DEFENDANT

KENYA URBAN ROADS AUTHORITY…….....….....4TH DEFENDANT

THE REGIONAL MANAGER-UPPER EASTERN

(KENYA URBAN ROADS AUTHORITY) …….5TH DEFENDANT

TERRITORIAL WORKS (K) LTD…….....….6TH DEFENDANT

RULING

1. An oral application was made on **11.7.2017** requesting the court to pronounce itself regarding the validity of orders issued by the High Court in this matter when the high court had no jurisdiction to hear land matters.

2. **Mr. Murimi Murango** representing the plaintiff framed the matter this way: ***"We need directions regarding if orders issued in matters heard before the High Court which had no jurisdiction are not void ab initio."***

3. **Miss Kung'u** representing the **3rd, 4th and 5th** defendants supported **Mr Murimi's oral application.** Miss Kung'u also held brief for Mr Waweru Gatonye the interested parties' advocate. **Mr. Mwiti** holding brief for **Mr Murango Mwenda,** the **1st defendant's advocate**, also supported the application.

4. I have carefully considered the application. I need not reinvent the wheel. The issue of jurisdiction should be tackled the minute it is raised. In the celebrated case of "***The MV SS Lilian S," Justice Nyarangi, JA,*** opined as follows:

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

5. The Supreme Court in the case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank and Two others – Sup. Ct. Civil Application No. 2 of 2011 opined as follows:

> ***"A court's jurisdiction follows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings."***

6. Article 165 (5) of the Constitution of Kenya is pellucid that:

> ***"(5) The High Court shall not have jurisdiction in respect of matters:-***
>
> > ***(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or***
> >
> > ***(b) falling within the jurisdiction of the courts contemplated in Article 162(2)."***

7. The Environment and Land Court is one of the two courts contemplated by Article 162 (2) of the Constitution.

8. The Supreme Court in the case of Republic (Appellant) AND Karisa Chengo & 2 others (Respondents), Petition No. 5 of 2015 pronounced itself eruditely concerning jurisdiction of the High Court vis-à-vis courts of equal status.

9. From the foregoing authorities and provisions of the law, it is clear that the High Court, after the Environment and Land Court was established, did not have jurisdiction to entertain Environment and Land matters.

10. I do note that this suit was filed in the year 2015 when the Environment and Land Court had been in existence for several years. I opine that the High Court had no justification or business in entertaining an environment and land suit when it had no jurisdiction to do so.

11. I wish to allude to an issue raised by Miss Kung'u, for the AG representing the 3rd, 4th and 5th defendants. Miss Kung'u, while supporting the oral application by Mr. Murimi for the plaintiff, asked the court to take into cognizance public policy that court orders cannot be issued in vain and therefore urged the court to validate orders issued by the High Court in this matter before it was transferred to this court.

12. **Burrough, J, in M Richardson versus Melish (1824) 2 Bing 252** opined as follows: "***Public policy is a very unruly horse, and when you get astride it you never know where it will carry you."*** This case was quoted with approval by **Lord Bramwell in Mogul Steamship Co. Ltd versus Mc Gregor, Gow & Others, [1982] AC 25.**

13. In the Kenyan context public policy cannot carry one to a situation where a court may contrive jurisdiction when it has none. As Justice Nyarangi, J.A, opined in the case of ***"The MV Lilian SS," "Jurisdiction is everything."***

14. The Supreme Court in S C Petition No. 5 of 2015 (supra) eruditely and definitively pronounced itself in this area. It said: "…***Lack of jurisdiction thus renders a court's decision void as opposed to voidable. When an act is void, it is a nullity ab initio. It cannot found any legal proceedings."*** This court cannot validate proceedings conducted by a court which lacked jurisdiction. Orders made by the High Court concerning this suit are ***null and void ab initio.***

15. I find as follows:

1. Proceedings conducted in the High Court before this suit was transferred to this court are null and void.

2. Orders issued in those proceedings are void and, therefore, unenforceable.

3. Pleadings filed in this suit before and after this suit was transferred to this court are valid and if any applications have not been heard by this court, they will be heard afresh.

4. Following parties' intimation by consent on 11.7.2017 that status quo be maintained restraining the defendants by themselves, their agents or servants or interested parties from demolishing the plaintiff's commercial building erected on Chuka Town Plot Nos. 3 and 4, it is hereby ordered that status quo be maintained until further orders or directions are issued by the court.

5. It is so ordered.

Delivered in open court at Chuka this 31st day of July, 2017 in the presence of:

CA: Ndegwa

Murimi Murango for the plaintiff

Kiongo for 3rd, 4th and 5th defendants

Kiongo h/b Waweru Gatonye for alleged contemnors

P. M. NJOROGE

JUDGE

11. On **7th November**, **2017,** this court delivered a ruling containing a consent arrived at by the parties concerning a visit to the locus in quo and maintenance of status quo. The ruling is reproduced in full herebelow:-

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VERSUS

COUNTY MINISTER OF LANDS, PHYSICAL PLANNING

ENERGY & ICT COUNTY GOVERNMENT OF THARAKA NITHI …….....1ST

DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI …….....2ND DEFENDANT

(KENYA URBAN RURAL AUTHORITY)…….….....….3RD DEFENDANT

KENYA URBAN ROADS AUTHORITY…….....4TH DEFENDANT

THE REGIONAL MANAGER-UPPER EASTERN

(KENYA URBAN ROADS AUTHORITY) ……...…….5TH DEFENDANT

TERRITORIAL WORKS (K) LTD…….……...….....….6TH DEFENDANT

RULING

1. On 7th November, 2017 the plaintiff's advocate and the advocate representing the 3rd to 5th defendants proffered a consent which they asked the court to adopt as its order. The consent is in the following terms:

> "That by consent:
>
> **1.The** Executive Officer, the Land Registrar, Land Surveyor and the Surveyors of the parties do visit the scene and prepare report within 45 days.
>
> Costs be in the cause to be borne by the plaintiff
>
> **2.The** status quo be maintained
>
> Signed:
>
> Murimi Murango for the plaintiff
>
> Kiongo for the 3rd to 5th defendant & also h/b for Waweru Gatonye for interested parties.

2. The consent is adopted as an order of this court.

3. Mr.Murimi Murango for the plaintiff and Mr. Kiongo for 3rd to 5th defendants are directed to take charge regarding implementation of this consent.

4. It is so ordered.

Delivered in open court at Chuka this 7th day of November, 2017 in the presence of:

CA: Ndegwa

Murimi Murango for the plaintiff

Kiongo for 3rd to 5th defendants

Kiongo h/b for Gatonye for the interested party

P. M. NJOROGE

JUDGE

12. The site visit could not take place as envisaged because on **7th February**, **2018** M/s Murango Mwenda the advocate for the 1st and 2nd defendants and M/s Kungu, the advocate for the 5th Respondent came to court and reported that the plaintiff, who was a licensed gun holder, had threatened Mr. Murango Mwenda. This report was taken seriously and as a result, this court cancelled the site visit poised to take place on **9th December, 2018** pending a resolution of the issues arising out of this serious report. This matter was ventilated in court and the court expressed its concerns. The plaintiff denied the report. Being Mr. Mwenda's word against the plaintiff's word, no effective measures could be taken but all the parties were on 20th March, 2018 cautioned that no threats against the persons involved in this suit should, in future, be made. On the same day, it was agreed that the apposite site visit would take place between **16th and 20th April, 2018** and all parties were ordered to fully comply with order 11, CPR before **7th May, 2018**.

13. On **7th May, 2018**, full compliance with order 11, CPR, by all the parties was confirmed.

14. The site visit Reports are reproduced herebelow:-

SCENE VISIT REPORT AS FILED BY THE CEO CHUKA LAW COURTS

A. This report is prepared pursuant to court orders issued on 20th March, 2018 to visit scene and report to be prepared. The details of the order of the court were inter alia as follows:

1.As had been agreed by consent on 7.1.2017, status quo to continue being maintained.

2. The Executive Officer, the Land Registrar, the Land Survey, the Physical Planner, and surveyors of various parties, if they so wish to visit the scene and a report to be prepared by the Land Registrar, the Land Surveyor and the Physical Planner either jointly or separately BUT this court executive officer to give his report separately detailing the comments and the findings given to him by the land registrar, Land Surveyor and Surveyors representing the litigants may also, if they so wish file their reports.

3. The reports envisaged by paragraph 2 hereof to be filed in court within the next 30 days.

4. The interested party to file apposite documents within 30 days of today failing which hearing of this suit will proceed without its participation

5. Mr. Martin Njeru Nyaga to regularize his professional status in this matter within the next 21 days.

6. The 1st, 2nd and 3rd to 5th defendants to take charge regarding implementation of order 2 above.

7. Directions on 20.3.2018

B. In pursuance to the orders, the parties agreed to visit the scene on Friday the 20th April, 2018 at 10.00am.

On 20th April, 2018 at 10.00am the advocates for all the parties, the State Counsel for the 3rd to 5th

defendants, County Physical Planning Office, District Surveyor, District Land Registrar, Engineer – CEC Lands and Environment of Tharaka Nithi County, Private Surveyor representing individual parties converged at Chuka Law Court at CEO's Office to strategize on how to implement the court orders.

The team introduced themselves

Those who were present were:

1.Murimi Murango - Advocate for the Plaintiff

2.John Obel - Surveyor for Plaintiff

Daniel Osewe - Surveyor for Plaintiff

Versus

3.Murango Mwenda - Advocate for the 1st and 2nd defendants

4.Miss.Kungu - Senior State Counsel for 3rd to 5th defendants

5.Dorcas Munga - Senior Surveyor for Kura

6.Ken Opunge - District Surveyor

7.Johnson Ojwang - Chief Executive Officer – Chuka Law Courts

8.Ndegwa Francis - ELC Clerk

9.Mwenda - County Physical Planning Officer

10.Winnie Muguro - The District Land Registrar

11.Rono

12.Prof. Njoka VC - Chuka University For interested party

13.Kabii Mugambi - Surveyor For interested party

14.Eng. Giti - CEC Roads For intersted party

C. Thereafter our entourage proceeded to the site in dispute and on my arrival/found the parties assembled waiting for us.

At the scene I held a short meeting with team to sort out issues of how to implement the court orders.

After our brief meeting the team came to a consensus that since the issue in dispute is about encroachment of the road reserve, we needed to get some briefing only from two (2) government officers ie department of planning and surveyor. We started the briefing from the department of physical planning (Mr. A. Mwenda).

1.Mr. A. Mwenda Riungu – The County Physical Planner

"From his presentation during the site visit on 20th April, 2018 he referred th team to;

- The existence of Chuka town development plan Ref. 350/69/1 approved on 19th January, 1970 as

development plan on how the width of the road as 15 metres.

- A part development plan prepared in 1976 Ref. no. 350/76/1 and approved on 5th January, 1977 proposed the road width to 20 metres.
- Chuka Development plan Ref. M. 350/85/3 of 1985 and approved on 20th May, 1988 as approved development plan No. 13 indicates the road width as 20 metres wide.
- According to his briefing the plan reference which was approved on 20th May,1988 superseded all other development plans previously done.

2. Mr. Ken A Opuge –District Surveyor – Chuka

"From his presentation"

He made reference mainly from Map. Ref.No. 115/18 which was prepard in 1970 which shows the width of the road as 11.2 metres.

- The surveyor plan refers the survey that was done by the survey of Kenya completed in 1969 and finally approved in 1970. It shows 10 plots were surveyed ie Chuka Township 1 -10 plots.
- He further referred to survey plan F/R 199/29. The plan reflected the survey that was done by the survey of Kenya and published in 1988.
- The plan shows the width of the road as 18 metrs.
- This shows that 16 plots were surveyed ie 15-30 plots
- On the same plan parcel No. Chuka/16-19 are deemed to have encroached to the 18 metre road reserve by approximately 2 metre (scaled from survey plan).
- Chuka Township/5, 27-30 have not been shown on RIM by the process of amendment.
- The survey was carried out and approved as per the provisions of Chuka development plan 1988.
- The plan shows that there existed permanent structures at the time of survey particularly parcel number Chuka Township 16-19 and 27-30 in conclusion he stated that the survey plan is not in conflict with the development plan of 1988.

Survey plan for 494/18

- The plan show the survey data for Chuka Township/5
- Originally Chuka Township/5 was surveyed as per survey plan F/R 115/18. However the survey records have since been updated as per survey plan F/R 494/18.
- RIM has been amended as per F/R 494/18
- The survey plan and RIM, shows that the width of the road along that section as 18 metres.
- In the brief the survey plan F/R. 494/18 is NOT in conflict with the development plan.

D. After hearing the brief presentation from the county physical planning officer and District Surveyor of Meru Sub county I requested them to take a physical measurement on the ground to confirm what extent the road has been encroached. Measurement was carried out in three phases.

- Our first physical measurement was taken at the property in issue the property neighbours a petrol station to the right as you come from Consolata Hospital to Chuka Township joining the main highway Nairobi –Meu road, several shops to the left and other shops on the opposite side of the road and width of the road show 11 metres along that section showing that the road reserve falls on 7 metres strip.
- The second measurement was taken between the shops in middle between Consolata Hospital and the building in issue shows the width as 16 metres along that section which indicates that the adjacent shops show 2 – 4 strip on road reserve.
- The third measurement was done at Catholic Consolata Hospital width of the road reflects 18 metres.

OBSERVATION

I observed the following;

- Both physical planning officer and district surveyor agree that the width of the road should reflect between 18 metres to 20 metres so as to correspond with the current development plan Ref. No. M.350/85/3 of 1985 and approved on 20th May, 1988.
- No doubt that the building in question and other few shops along that section encroached the road and it falls on the 7 m – 4 m strip on the road reserve.
- The physical measurement taken on 20th April, 2018 during site visit demonstrates inconsistency of the width of the road 11 m, 16m and 18 m respectively.
- Physical measurements taken on the ground shows that plot reference Chuka Township/3 and 4 width of road as 11.2 metres.
- The current development plan Ref. No. 350/85/3 and approved on 20th May, 1988 supersedes the previous plan.

Recommendation

Upon taking physical measurement on ground and from the presentation made by both County Physical Planning Officer and the District Surveyors on 20th April, 2018 during the visit I hereby make this report that there is encroachment of the road reserve and there is need to expand the width of the road along that section to 18 m or 20 m to allow the ongoing construction of the road to continue.

Report prepared by Johnson Ojwang' this 4th day of May, 2018

SIGNED BY JOHNSON O. OJWANG

CEO/COURT ADMINISTRATOR,

CHUKA LAW COURTS.

15. **RE: REPORT ON COURT SITE VISIT CHUKKA TOWNSHIP/3 & 4 ON 20TH APRIL, 2018**

I do acknowledge being part of the team that visited the site.

The following observations were made;

1.The existing road with at Chuka township/3 &4 was 11.2 meters.

2.Further measurements were taken along the Chuka-Kaanwa road and adjacent plots. The existing road width from Consolata Hospital to Chuka/Township/5 just next to Chuka/Township/4 was approximately 16 metres.

3.After the existing ground measurements were taken the team agreed to refer to the existing town development plans and survey plans available.

4.In reference to Chuka town development plan Ref. 350/69/1, approved on 19thJanuary, 1970 as development plan No. 1 the road width size is 15 metres. (Plan attached for ease of reference).

5.A part development plan prepared I 1976 ref No. 350/76/1, and approved on 5th January, 1977 for purpose of plot allocation indicates the area as user 5 – old commercial plot to be improved.

The proposed road size as per this plan is 20 metres wide. (Plan attached for ease of reference).

6.The Chuka development plan Ref M.350/85/3 of 1985 and approved on 20th May, 1988 as approved development plan NO. 13, indicates the road width as 20 metres wide. (plan attached for ease of reference)

In view of the above, I wish to submit that as per Chuka town development plans;

a.The development on plot No. Chuka township/4 has encroached the road reserve.

b.All developments within the area covered by Chuka town development plan are bound to adhere to the plan for compliance.

c.Any approval of a development/building plan that comes after the approval of any development plan is bound to follow the approved development plan for compliance standardization and coherence.

d.It is also important to note that the road in question runs from Kaanwa to Mt.Kenya Forest Chuka gate as a continuous road.

A.MWENDA RIUNGU,

COUNTY PHYSICAL PLANNER.

16. **DISTRICT SURVEYOR'S REPORT**

1. **Authority:** Refer to:-

Chuka ELC Case No. 215 of 2017

Formerly Embu ELC Case No. 266 of 2015

Formerly Meru ELC Case no. 8 of 2015

The report has been prepared pursuant to the provisions of Survey Act Cap 299, Laws of Kenya.

(Refer to part v – The conduct of surveys and part VII – Survey Plans and records).

2. Aim of the report

To visit the scene and prepare a status report

3. Datums/Reference Plans used:

F/RS 115/18, 199/29, 494/18 and registry index map sheet No. 122/3/8/12 of Chuka Township.

(Source: Survey of Kenya, Ruaraka)

Chuka Town Development Plan Reference No. M350/85/3 approved on 20.5.1988.

(Source: Director of Physical Planning, Ardhi House, Nairobi. The plan to be availed by the physical planner)

4. Methodology:

Descriptive and comparative approach

4.1 Introduction:

The role of a land surveyor is to execute development plans on the ground using precise observations and measurements.

The survey data is submitted to director of surveys for checking, approval and authentication. A development plan is basically an approximation subject to ground survey. The deviations should be within tolerance.

4. <u>Survey plan F/R 115/18</u>

- The survey plan reflects the survey that was done by survey of Kenya, completed in 1969 and finally approved in 1970.
- The plan shows that 10 plots were surveyed ie Chuka Township/1-10.
- According to the survey plan F/R 115/18, the width of the road is 10.70 m. The 10.70m dimension is not explicitly indicated on the plan. However, it can be derived through computations using the co-ordinates provided on the plan.
- The survey plan shows the correct and original positions of the boundaries of the 10 plots that were surveyed at the time.
- The survey plan provided a basis upon which the registry index map was amended, and subsequent lease certificates issued to the developers.
- According to our records, the boundaries of Chuka Township/1-4 are intact and the width is 10.70m along that section. The RIM for Chuka Township also reflects the same.

4. development plan

- There exists a development plan for the whole of Chuka town. The plan reference number is M350/85/3, which was approved on 20.5.1988.
- According to the briefing by the physical planner at the scene on 20.4.2018, there existed other development plans prior to the current development plan which was approved on 20.5.1988.
- A development plan is basically an approximation, subject to ground survey. It is a guide that shows the approximate geospatial positions of developments in a town.
- According to the development plan, the width of The road is provided as 20m. However, upon ground survey, the widths of the road along certain sections have been surveyed as 18m. This is shown on survey plans F/R199/29 and 494/18. These surveys were done after the development plan was approved on 20.5.1988.
- The development plan is in conflict with the survey plan R/R 115/18.

<u>4.4. Survey plan F/R 199/29</u>

- The survey plan reflects the survey that was done by survey of Kenya and published in 1988, after the current development plan was prepared and approved on 20.5.1988.

- The plan shows the width of the road as 18m

- The plans shows that 16 plots were surveyed ie 15-30.

- On the same plan, parcels numbers Chuka Township/16-19 are deemed to have encroached on the 18 m road reserve by approximately 2m (scaled from the survey plan).

- The RIM has been amended to show Chuka Township/16-26.However, Chuka Township/5, 27-30 have not been shown on the RIM by the process of amendment.

- the survey was carried out and approved as per the provisions of the Chuka Development Plan of 1988.

- The plan shows that there existed permanent structures at the time of survey, particularly parcels number Chuka Township/16-19 and 27-30.

- In summary, the survey plan is not in conflict with the development plan of 1988.

4.5 survey plan F/R 494/18

- The plan shows the survey data for Chuka Township/5

- originally, Chuka Township/5 was surveyed as per survey plan F/R 115/18. However, the survey records have since been updated as per survey plan F/R 494/18

-The RIM has been amended as per F/R 494/18

- The survey plan and RIM, shows that the width of the road along that section as 18m

- In brief, the survey plan F/R 494/18 is not in conflict with the development plan.

4.6 The impact of the approved development plan M350/85/3 on the existing survey represented by survey plan F/R 115/18

The purpose of this brief is to provide a theoretical nexus between the development plan and the survey plan F/R 115/18, particularly with regard to Chuka Township/1-5. The following pertinent details have been observed.

- The theoretical and ground position of Chuka Township/1 is no longer tenable. This is becaue, its position falls on the 60 m road reserve ie Chuka – Meru highway.
- The boundaries of Chuka Township/6-9 remained intact.
- The road expansion along the contested area was done on one side, such that the boundaries of Chuka Township/1-5 that borders the 10.70m road must be moved by 7.30m due north, if the intent and purposes of the development plan is to be implemented on the ground along that section.

    Chuka Township/5 has since been resurveyed to effect the change. (See survey plan F/R 94/18).

- The areas (acreages) of Chuka Township/2/4 will be reduced accordingly.
- There exists a permanent building that straddles Chuka Township/3-4, such that, if the development plan is implemented on the ground, along that section, then it will be deemed to have encroached. The building falls on the 7.30m strip.

Note: The development of survey has not been authorized to carry out any new survey to effect the changes occasioned by the development plan on the survey represented by plan F/R 115/18, particularly with regard to parcel numbers Chuka Township/1-4.

The authority could be in the form of:-

i. A Court order

ii. A letter from National Land Commission (Provided that the decision is not contested before a court of law) or

iii. Consent of the developers

In a nutshell, the width of the road along that section is 10.70m as per the survey records.

5. recommendation/conclusions

i. There is need to expand the width of the road along that section to 18m to accommodate the present and future developments. However, the honourable court in its own wisdom shall determine the fate of the existing building on the 7.30m strip, which shall be deemed to have encroached as a consequence of he said expansion.

ii. The survey records for Chuka Township/1 should be expunged. The theoretical and ground position of the said plot is untenable.

iii. The national land commission, being the manager of public land on behalf of national/county governments, should also be invited to provide an advisory, more so in an event where an approved development plan is in conflict with an existing survey plan/record.

iv. The survey of Kenya will comply with the decision the honourable court.

6.0 Annexures

i) F/R 115/18

ii) f/r 199/29

iii) F/R 494/18

iv) RIM Sheet No. 122/3/8/12

Report prepared by: Ken A. Opuge Sign ….Date:25.4.2018

DISTRICT SURVEYOR, CHUKA.

17. PLAINTIFF'S SURVEYOR'S REPORT ON PLOT NOS. 3 AND 4 IN RELATION TO PROPOSED 18 M ROAD IN CHUKA TOWNSHIP THARAKA NITHI COUNTY

1. GENERAL

1. 1 I hold a BSC in Engineering degree of the University of East Africa, 1967 (Annexure Q1)

1.2 I am a full member of the Institution of Surveyors of Kenya, since 1982 (Annexure Q2)

1.3 I am a certified Land Surveyor (East Africa0 since 1988 (Annexure Q3)

1.4 I am a licensed surveyor No. 123 (Kenya) of the Land Surveyors Board since 1988 (Annexure Q4)

1.5 I hold a practicing certificate No. 2018/063 for 2018 (Annexure Q5).

1.6. I hold a certificate of good standing of the institution of surveyors of Kenya (Annexure Q6)

2.0 TERMS OF REFERENCE (TOR)

2.1 Instructions from Murimi Murango & Associates Advocates to resurvey plot Nos.3 & 4.

3.0 SCOPE OF WORK OF THE TOR

3.1 Acquisition of data (information prior to survey) from the Ministry of Lands.

3.2. Beacons search and re-establishment

3.3. Re-survey and inspect parcels 3 and 4 in order to establish if the buildings as constructed have encroached into the road reserve as alleged by KURA and County Government and report on:-

3.3.1 Area of land that has encroached on the road reserve and road widths.

3.3. 2 Process of survey and approvals

3.3. 3 Analysis of ground, physical planning and survey maps used.

3.3. 4 A production of a detailed summarized map/plan delineating the maps and ground positions.

3.3. 5 Appear during the scheduled ground visit by the court on 20th April, 2018

4.0 SURVEYING WORK

4.1. Authority: Instructions from the registered proprietor and advocates

4.2 Date of surveying: February 2018

4.3. Surveyors: Geomatics services Ltd (Licensed Land Surveyors)

4.4 Datum: Survey Plans F/R 115/18, 185/71, 199/29, 544/120 and 486/182 (Annextures M1 – M5)

4.5 Methodology

All the relevant maps/plans/development plans were acquired from the relevant authorities, in particular the survey of Kenya, County Government and physical Planning Department (Ministry of Lands). The F/Rs and development plans were scanned and geo-referenced on UTM. The geo-referenced coordinates were used to search for control beacons and plot positions. Using a Topcon Total Station equipment a Ray trace traverse was run from TR1 to TR7 with opening ray to TRAV 1 (ipcu old) and closing ray to ray 4(ipcu old). The swing and scale factor for the ray trace was + 4d 10m 0.49s and 0.998850796. TR7 was used to search for corner beacons of plot Nos 3 & 4 which were not found. TR 7 and used to re-establish the corner beacons of the parcels and checked from a checkpoint established between TR7 AND TR6. Buildings were picked from block corners and plotted by AUTOCAD software. Ground and map analysis was done using ARCGIS software. (Attached see the combined analysis of ground, map and road positions).

5.0 FINDINGS

5.1 Data (information prior to survey0 from the ministry of lands

i. F/R Nos. 129/29, - 115/181 and RIM were found in the Ministry of Lands records. The RIM is marked as Annexure M7.

ii. The Chuka Development Plans are:-

a) No. 350/69/1 of 1970 (see Annexure P1)

b) No. 350/76/1 of 1977 (see Annexure P2)

c) No. 350/85/3 of 1988 (see Annexure P3)

5.2 Beacons search and re-establishment

All the old beacons were missing due to existing developments, forming the basis for re-establishment.

5.3 The building constructed on plots No. 3 & 4 (Alleged encroachments):

Based on the valid survey plans and documents, none of the buildings as constructed has encroached into any road reserve.

5.4 The width of the road under construction on the survey plans and ground:

i) The width of the road according to the valid survey plan F/R No. 115/18 is 10.6m. (Annexure M1)

ii) The width of the road according to the Registry Index Map (R.I.M) is 10m. Annexure M7.

iii) The width of the road between the buildings on the ground is 10.8 m.

5.5 Analysis:

F/R No.129/29 marked as Annexure M3 has overlapped into the old survey on F/R No. 115/18 marked as Annexure M1. (See analysis of map and ground positons marked s Annexure M7).

5.6 Process of survey and approvals

The approved Physical Development Plan is subject to survey and the survey must be authenticated by the Director of Surveys, Ministry of ands under the Survey Act (Cap 299 of the Laws of Kenya)

5.7 Observations during the ground visit by the court

As a team of professionals from private, County and National Government visited the site together with court representatives. The professionals disagreed on the following:

i) Conflicting data/information prior to the exercise

ii) Conflicting methodologies by various professionals

iii) Conflicting equipment to be used for the exercise, among others.

iv) Persons not qualified appearing to give evidence on land disputes

v) Absence of National Land Commission representatives among others. In summary the illegal exercise offends, the existing procedures, laws and regulations governing land dispute resolutions and the constitution. The process of this dispute resolution was unclear and could result to complexity and ambiguity.

6.0 CONCLUSSIONS

6.1 The dispute is between public and private land

6.2 The court should decline the invitation to hear and determine the dispute on grounds of identified illegalities and that it lacks jurisdiction.

6.3 The alleged encroachment is ill motivated, lacks basis, justification, and merit inland laws and is eschewed to irregularly/illegally acquire private land through a flawed/faulty acquisition process.

7.0 Remarks

7.1 Land was re-categorized into public, private and community lands. Disputes relating to public land including roads are heard and determined by the National Land Commission and the courts lack jurisdiction.

Note that the courts may run the risk of determining this case on illegalities as the dispute is between public and private land.

7.2 PDPs are sketches of proposals and do not guarantee the existence of a parcel or a road until survey has been done and they should not be used/misused to determined disputes.

8.0 RECOMMENDATIONS

8.1. To determine the dispute through survey, F/R No. 129/29 and the part development plans which are overlapping on the old F/R No. 115/18 should be invalidated and expunged from the list of authorities and evidences.

8.2 This is private land and if there is need for acquiring it for public good, we recommend compulsory acquisition transaction to commence subject to payment of just and prompt compensation. Please see the disclaimer noted on the physical development plans.

8.3 The dispute should be referred to the National Land Commission for fresh and lawful hearing and determination.

Sign……..

J.D.Obel

Licensed surveyor 123

For: Geomatics services Ltd

18. **SCENE VISIT BY THE EMBU DEPUTY REGISTRAR AT CHUKA TOWN ON 6.3.2015**

On 6.3.2015, I visited the locus in quo as ordered by the court. Those who were present were;

1. Mulango Mwenda for the 1st and 2nd defendants;

2. Ms Kungu for 3rd, 4th and 5th defendants

3. The 6th defendant in person

In my visit I found that the property in issue is a two storied building which houses a church, Barclays Bank and other businesses. This property neighbours a petrol station to the right, several shops to the left and other shops on the opposite side of the road.

I took photographs of the scene which captured the property in question, the road that is under construction and the neighbourhood. I found that both sides of the road have been dug up for construction in preparation for construction of the road.

I found that part of the front part of the property in issue appears to have been built on the road. From the edge of the other buildings on the same side of the road, this structure eats into the road for about 12.9 feet. The intrusion is obvious even without the benefit of technical verification.

I also found that the distance between the shops on the opposite sides of the road is approximately 57.1 feet while that from the property in issue to the shops on the opposite side of the road is approximately 48.3 feet.

I found too that other properties had been demolished to pave way for construction of the road.

I attach the photographs taken in verification of the work carried out on that day.

V.O NYAKUNDI,

DEPUTY REGISTRAR.

19. Oral hearing of the suit commenced on 11th June, 2019

20. The parties agreed to file written submissions. On **1st April, 2019,** the Plaintiff was directed to file written submissions within 21 days and the defendants were to do so within 21 days after receipt of the Plaintiff's written submissions. The parties were directed to come to court for directions on **22nd May, 2019**.

21. For whatever reason, the plaintiff did not comply with the court's order for him to file his written submissions within 21 days of 1st April, 2019. Hence on 22nd May, 2019, the defendants and the Interested Party reported that they could not file their written submissions because the plaintiff had not filed and served them with his submissions. Advocate Dennis Muthomi holding brief for advocates Njeru and Murimi, the plaintiff's advocates told the court that the plaintiff was only seeking seven days to file and exchange his written submissions. The court allowed this request.

22. On 23rd September, 2019, Mr. Murango Mwenda, who held brief for all the defendants complained that the plaintiff had caused a delay of over four months and asked the court to expunge the plaintiff's written submissions, which had just been filed, for having been filed outside the stipulated time and therefore in disobedience of court orders. In the interest of justice, the court deemed the plaintiff's submissions as having been properly filed.

23. On **7th October, 2019**, all parties confirmed that they had filed their written submissions.

24. The plaintiff's written submissions are reproduced in full herebelow without alterations whatsoever, including corrections of spelling or other mistakes, if any exist.

PLAINTIFF'S WRITTEN SUBMISSIONS

Introduction

1. By a Plaint dated 10th February 2015, the Plaintiff seeks for judgement against the Defendants for:

a) A permanent injunction restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolishing and or in any manner whatsoever interfering with the Plaintiff's commercial buildings, shops, hardware, Banks, Petrol station, restaurant and other structures erected on the properties known as Title Number Chuka Town/3 and 4 in Tharaka Nithi County.

b) A declaration that the property known as title Number Chuka Town/3 and 4 in Tharaka Nithi County.

c) General Damages

d) Costs of this suit

2. The Defendants entered appearance and filed Defence on the following dates:

a) 1st and 2nd Defendants filed Defence on 4th March,2015 and Dated 3rd March, 2015.

b) 3rd, 4th and 5th Defendants entered a Defence dated 17th February,2015 and filed on even date.

c) A request for Interlocutory Judgement dated 30th March 2015 was filed on the same date by the

Plaintiff's Advocate for the failure of the 6th Defendant to enter Appearance or file Defence.

d) Interested Party's statement filed Defence on 2nd March,2018 and dated 28th February 2018.

Un-disputed Facts.

3. The suit is un-opposed by the 6th Defendants and it remains uncontroverted as such.

4. The Plaintiff is the registered owner of all those properties known as Title Numbers 3 and 4 in Tharaka Nithi County Measuring Area Approximately 0.046 Ha each.

5. Certificate of Lease for the Title Numbers 4 and 3 were issued to the Plaintiff on 4th August 1980 and on 8th April 1998 for a term of 99 Years commencing in the year 1975 and 1994 respectively.

6. A commercial building is erected on Title Number 4 and Title Number 3 is leased to Gulf Energy as a Petrol Station.

7. Buildings plans were Approved for construction of the Commercial Building erected on Title Number 4.

8. Title Number 3 and 4 has a fixed survey.

9. The Width of the Road in dispute between Title Number 3 and 4 is 10.8 Meters as Per FR/ No.115/18.

10. The proposed expansion of the road to 20 Meters as outlined in the Plan Reference Number M350/85/3 Approved in 1988.

11. Parties herein are bound by their pleadings and evidence on record.

Issues For Determination

12. The Plaintiffs adopt the followings issues for determination by the court.

i. Whether the Plaintiff is the registered owner of all those title Number 3 and 4 situated at Chuka Town?

ii. Whether the Plaintiff's commercial building erected on Title Number 4 has encroached on the road reserve?

iii. Whether the petrol station erected on Title Number 3 has encroached on the road reserve?

iv. Whether the Plaintiff was given ample notice before the intended demolition of his commercial building erected on Title Numbers 3 and 4?

v. Whether the Plaintiff was granted a fair hearing before the intended demolition of his commercial building erected on Title Numbers 3 and 4?

vi. Whether the Defendants should be permanently restrained interfering or demolishing Plaintiff's properties erected on Title Number 3 and 4?

vii. Whether the Plaintiff is entitled to General damages?

viii. Who will pay costs of this suit?

Discussion and Analysis

1) Whether the Plaintiff is the registered owner of all those titles Number 3and 4 situated at Chuka Town?

13. It is not in dispute that the Plaintiff is the registered owner of all those titles Number 3 and 4 measuring Approximately 0.046 Ha(each)respectively. See exhibit at page 1 to 8 in the Plaintiff's list and bundle of documents.

14. ***Article 40 of the Constitution*** guarantees every person the right to property. It protects a person from being **arbitrarily** deprived of his property by the state or a person. This right is not absolute and is qualified by sub-article (3) thereof which recognizes that a person may be deprived of his land by the state only where such deprivation:-

> ***a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***
>
> ***b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-***
>
> > ***i. requires prompt payment in full, of just compensation to the person; and***
> >
> > ***ii. allows any person who has an interest in, or right over, that property a right of access to a court of law***

15. **Article 60(1) (b)** of the Constitution enshrines the principle of security of land rights while **Article 64** recognizes private ownership of land.

16. The Plaintiff stated he is registered owner of all those titles Numbers 3 and 4 and the Certificates of Lease were issued to him by the Land Registrar. He produced Green Card as ***Exhibit 2 and searches as Exhibit 3***

17. Further, he stated that he purchased Title Number 4 at an auction which was conducted by the Kenya Commercial Bank in exercise of its statutory power of sale.

18. It is our submissions that Certificates of Lease were issued to the Plaintiff under the Registered Land Act (RLA), now Repealed Land Registration Act No 3 of 2012. ***Section 24 and 25 the Land Registration Act*** created absolute ownership of land upon registration with all rights and privileges thereto, while ***Section 26(1)*** of the said Act creates indefeasibility of title. The Plaintiff's Certificates of Lease can only be impugned on the basis of fraud or misrepresentation and or if acquired unlawfully.

19. In case of ***Wreck Motors Enterprises –vs- The Commissioner of Lands and Others Nairobi LLR 5066 (Civil Appeal No. 71 of 1997) Court of Appeal held, Title to*** *landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions . In the case of* ***Dr. Joseph N.K. Arap Ng'ok v Justice Moijo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported).*** *Court of Appeal held that Sections 23(1) of the Registration of Titles Act reads as follows: -*

> *"Section 23 (1) now successor section 26 of the Registration of Land Act No.3 of 2012 that;-*
>
> *The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrance's, easements, restrictions and conditions*

contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."

20. No *evidence* was put forward by the Defence at the trial to rebut evidence of the Plaintiff that the Titles Number 3 and 4 were lawfully acquired.

21. We submit that the rectification of the register in regard to a registered title can only be affected if fraud is proved under **Section 80 of the Land Registration Act, 2012. Section 80 (1) provides thus:-**

80 (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended of it is satisfied that any registration was obtained made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

2) <u>Whether the Plaintiff's commercial building erected on Title Number 4 has encroached on the road reserve?</u>

22. The clearest evidence that the said Plaintiff's commercial building erected on Title Number 4 has not encroached on the road reserve is found in the requirements of **Part VI, Preservation of Survey Marks**, Sections 24, 27(1) and 28 of the Survey Act (Cap 299, Laws of Kenya) which say –

"24. *Every trigonometrical station, fundamental benchmark and boundary beacon erected or placed for the purpose of defining the boundaries of any holding or land shall be shown on the place (if any) attached to, or referred to in, any document or instrument purporting to contest, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title, or interest, whether vested or contingent to, or in or over such holding or land, being a document or instrument which is required to be registered, or is ineffectual until registered, under any written law for the time being in force relating to the registration of transactions in or of title to land."*

and Section 27(1) says

"27. It shall be the duty of every grantee to ascertain within sixty days after he has received his grant, that the survey marks shown on any plan attached to his grant or referred to therein are in place as shown on the plan."

And Section 28, places the onus for protection of the marks upon the owner in the following respect:-

"28. Every owner or occupier of land shall take all reasonable measures to protect every survey mark erected or placed on the land owned or occupied by him."

23. It is the Plaintiff's contention that the building plans were approved by all relevant Government Authorities before he embarked on construction of the commercial building on title Number 4. See ***Exhibit 4(a) and 4(b) at page 8 and 9***in the Plaintiff's list and bundle of documents.

24. Further, the Plaintiff stated that the commercial building was built within the beacons leaving 2.5 Meters foot path and the road under construction had already passed through his building

erected on title Number 4.

25. The Plaintiff evidence was supported by Mr. Obel, the Surveyor (PW1) who adduced **Exbihit 1**. He stated that the commercial building was erected on Title Number 4 and was within the beacons and fixed boundaries of title Number 4.

26. It was the PW-1 testimony that Title Number 4 was surveyed in 1969 with cadastral map. The map is certified and authenticated by the signature of the Director of Survey. ***See M-3 in the PW1 report- Survey Plan-Folio No.115/18.***

27. ***Section 32 of the survey Act*** *states that,*

> *"No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya"*

28. PW-1further stated that Survey Plan-Folio No.115/18 has survey control points known as co-ordinates which demarcated the boundary beacons of the plaintiff's suit property on the ground. The survey he referred to as cadastral survey and has fixed boundaries. He further stated that boundary beacons of the plaintiff suit property are fixed boundaries and define the area of the suit property which is 0.046 hectares and the width of the road 10.8 meters on the ground.

29. It's the PW-1 evidence that proposed PDP approved in 1988 is a proposal and is not an authority in fixed survey.

30. PW-1 further stated that PDP of 1988 conflicts with fixed survey of 1969,1970 and 1977.and thus it has not been implemented on the ground as it will contravene the survey Plan which survey plan(s) are overlapping as well.

31. The evidence of the PW-1 is corroborated by the report of the District Surveyor, one Mr. Ken Opuge filed in court on 25th April,2018

32. In his report, the District Surveyor noted that Survey Plan FR115/18 the width of the road is 10.70Meters which dimension are derived through computations using co-ordinates provided on the plan.

33. Further, the District surveyor noted that according to records in the survey department, the boundaries of Chuka Town 1 to 4 are intact and the width is 10.70 meters which dimension are equally reflected in the Registry Index Map.

34. The District Surveyor concluded that the department of survey has not received any instructions to effect changes occasioned by the proposed PDP 350/855/3 approved in 1988.

35. DW-1 on cross examination admitted that title Number 4 has beacons and fixed survey.

36. It is on record that DW-1 did not tender any document before the court to proof he was a registered Physical Planner in the confines of Physical Planners Registration Act No. 3 of 1996 or tender authority to testify in court.

37. It is our submission that his evidence is inadmissible and should be expunged.

38. It was also admitted by the DW2 – in her statement filed in court 30th April 2015 and of even date and during cross examination that parcels number 4 was surveyed in 1969 based on survey number F/R No115 and certificate of lease issued.

39. DW-2 further stated that Title Number 4 has fixed survey and was not a general boundary.

40. DW-3 testimony was marred by discrepancies and half-truths. His testimony is not to be believed; it does not offer any guidance to the court.

41. It is our submissions that Plaintiff Title Number 4 has a fixed survey and the commercial building erected thereon has not encroached on the road reserve or occupies 110 meters as alleged by the defendants. And the burden of proof shifts to the Defendants within the confines of Section 107 of the Evidence Act.

42. It is on record that on 20th August 2018 parties disagreed with methodology of establishing whether or not the said commercial building has encroached on the road reserve. To a larger extend the defendants opted to use a tape measure on a fixed survey.

43. In the case of ***Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR,*** court held as follows:*"The type of survey that generated the Registry Index Map is what was known as "general boundaries" which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean "the approximate boundaries and the approximate situation only of the parcel." Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons."*

44. ***Section 2 of the Survey Act*** *defines survey* mark as "any trigonometrical station, fundamental benchmark, bench mark, boundary beacon, peg, picket mark or pole, whether above or below the surface of the ground, which is fixed, placed or set up by, or under the direction of a surveyor for the purpose of any survey under this Act"

45. "***The Role of the Registry Index Map (RIM) in Land Management in Kenya", Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of "General Boundaries" or "approximate boundaries."***

46. ***The paper defines "General Boundaries" as follows:***

"A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process."

47. *In the case of* ***Samuel Wangau Vs. AG & 2 others (2009) eKLR,*** *it was held as follows:*

"However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District land surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute"

48. **Section 18 of the Land Registration Act** states as follows:

"18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel land have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the

boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).

49. **Section 24 of Survey Act** states as follows:-

> "*Every trigonometrically station, fundamental benchmark and boundary beacon erected or placed for the purpose of defining the boundaries of any holding or land shall be shown on the plan (if any) attached to, or referred to in, any document or instrument purporting to confer, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title or interest, whether vested or contingent to, in or over such holding or land, being a document or instrument which is required to be registered, or is ineffectual until registered, under any written law for the time being in force relating to the registration of transactions in or of title to land*."

50. We submit that the defendants have failed to rebut the Plaintiff's evidence that his Title Number 4 has a fixed survey and the building erected thereon has not encroached on the road reserve.

51. ***In the case of Family Care Ltd –vs- Public Procurement Administrative Review Board and Others High Court Petition No 43 of 2012****it was held that where there is a clear statutory provision which dictates how a certain legal or statutory procedure should be undertaken, that procedure cannot be overlooked by invoking public interest.*

3) <u>Whether the petrol station erected on Title Number 3 has encroached on the road reserve?</u>

52. We reiterate issue 2 above and submit that it is on record that DW1 and DW2 confirmed in cross examination that they have no issue with Title Number 3.

53. Pleadings and evidence on record confirms the above position.

54. DW3-Prof Njoka stated in cross examination that he had issue with Title number 3 because it had encroached on the road reserve.

55. It is on record that Prof.Njoka could not articulate the issue he had with title number 3 or prove how it has encroached on the said road reserve.

56. It is our submission that he who alleges that title number 3 has encroached on the road must prove, thus the burden shifts to DW3 to prove the contrary within the confines of Section 107 of the Evidence Act.

4) <u>Whether the Plaintiff was given ample notice before the intended demolition of his commercial building erected on Title Numbers 3 and 4?</u>

57. ***Halsbury's Laws of England*** **Judicial Review (Volume 61 (2010) 5th Edition) Para. 639,** it is stated as follows with respect to the right to notice and opportunity to be heard:-

> ***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in***

conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule.…However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice.The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations."

58. The ***Fair Administrative Action Act, 2015*** ("the Act") was enacted to illuminate and expand the values espoused under Article 47 of the Constitution that provides the following broad parameters which bodies undertaking administrative action have to adhere to.

59. Based on Article 47 (2) of the Constitution, it was our submissions that the said provision imposes an obligation on administrative bodies and decision makers to give reasons for their decision. However, in this case, the plaintiff was not personally served with a notice of the intended demolition of his commercial building erected on title number 4 and petrol station on title number 3 and thus would constitute to trespass for which the Defendants would be liable.

60. The Plaintiff stated in cross examination that he was not personally served with any notice. He never saw the advert allegedly placed in standard Newspaper of 30thOctober 2014.See page 43 in the Plaintiff's list and bundle of documents.

61. In Re-examination, the plaintiff stated that his title number 3 and 4 were not mentioned or listed in the said advert of 30th October 2014 and or the said Removal notice dated 16th January 2015.

62. The plaintiff stated that he filed the present suit because he was apprehensive that his commercial building erected on title 3 and 4 would be demolished in the wee hours of the night without notice.

63. PW2 supported the plaintiff's case and in cross examination he stated that demolition within Chuka town was done at wee hour of the night by the defendants. He further stated the Removal Notice at page 51 in the plaintiffs list and bundle of documents specifically referred to plot number 260 as opposed to Title numbers 3 and 4.

64. Dw-1 admitted in cross examination that he was aware of the demolition of properties in Chuka town.

65. DW3- Prof. Njoka in cross examination he stated that he was not "a demolisher" and he was not "a tarmacker"

66. It is our submissions that the advert of 30th October 2014 did not specifically state the properties that were on the road reserve and the plaintiff's suit properties being title Numbers 3 and 4 were not listed among those that had encroached on the road reserve.

67. ***Halsbury's Laws of England*****Judicial Review, (Volume 61 (2010) 5th Edition) which states as follows:-**

"Although it is still correct to say that there is no general duty, arising from requirements of procedural fairness, to give reasons for an administrative decision; in a substantial number of cases a duty to provide reasons has been found to exist on the particular facts

of the case. In these cases the conclusion was that having regard to the nature of the interest concerned and the impact of the decision on that interest, and all other relevant considerations, a reasoned decision was required. Reasons may also be required if a decision appears to be aberrant and requires explanation."

68. It is the plaintiff's case that despite the weighty issues going to the heart of the defendants' jurisdiction, they failed to serve notice to the plaintiff with written reasons for intended demolition of his properties erected on the suit parcels of land and thus, the defendants discriminated the plaintiff in violation of his right to fair and equal treatment guaranteed under Article 27 of the Constitution.

69. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court of Appeal held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

70. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

71. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

72. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose

procedures are laid down by statute are masters of their own procedures. <u>Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed</u>." [Emphasis mine].

73. It is our submissions that the Plaintiff was never given the reasons for the decision for intention to demolish his properties. Article 47(2) states:

> ***"Every person has the right to be given written reasons for any administrative action that is taken against him."***

74. We thus submit that relying on above cited authorities anadvert in the newspaper does not meet the tenets of article 47(2) of the Constitution.

75. The Court of Appeal observed in the case of **Dry Associates Ltd v Capital Markets Authority and another, Petition No. 328 of 2011,** as follows with regard to **Article 47:**

> *"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law ... but is to be measured against the standards established by the Constitution."*

5) <u>Whether the Plaintiff was granted a fair hearing before the intended demolition of his commercial building erected on Title Numbers 3 and 4?.</u>

76. **Section 95 of the County Government Act provides that:-***County communication framework (1) A County government shall establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county, which may include— (a) television stations; (b) information communication technology centres; (c) websites; (d) community radio stations; (e) public meetings; and (f) traditional media. (2) The county government shall encourage and facilitate other means of mass communication including traditional media*

77. In the case of **<u>Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. *817 6*</u>**it was held***: "The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.***

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> ***"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. <u>Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed</u>."* [Emphasis** mine].

79. It is our submission that the defendants have not tendered any evidence to support that public Participation was conducted as alleged in paragraph 6 of the Interested Party'sStatement of Defence. No minutes of the said meetings were produced before this court. The burden of proof shift to the Defendantsto rebut on the contrary.

80. It is our submission that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard as outlined in Article 47(2) of the constitution and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.

81. **De Smith, in his *Judicial Review of Administrative Action*, (1980) at Pg 161 observed**, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."*

82. It is our submission that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

6) <u>Whether the Defendants should be permanently restrained from interfering or demolishing Plaintiff's properties erected on Title Number 3 and 4?</u>

83. It is our submission that demolition was carried out at wee hour of the night at Chuka which implicates the defendants in the wanton and destructive practice that undermine the rules of natural justice.

84. The plaintiff filed the present suit seeking protection of his right to property which rights were at risks of being violated by the defendants through demolition of his investments with capital outlay to a tune of Kshs.200,000,000.00on the title number 3 and 4.

85. It was evidence of the Plaintiff, PW2 that demolition of shops in Chuka Town was carried out at night in a way that it undermined any sound conception of justice.

86. It our humble submission that the Plaintiff has proved his case on a balance of probability to warrant the orders sought in particularly permanent injunction.

87. The question begs whether injunction could be issued against the Government and the County Government being part of the Government***. In the case of Rwanyarare and Others v Attorney-General*** *(Supra) dealt with whether an injunction could be issued against the Government in proceedings for enforcement of fundamental rights and freedoms. The Court concluded that the statutory prohibition against the issuing of an injunction against the government was contrary to the Constitution.*

88. Justice Mutungi held that that when the devolved units i.e that County Governments were created following the enactment of the Constitution 2010 and subsequently the County Government Act, 2012 was enacted, the Government Proceedings Act, Cap 40 Laws of Kenya which hitherto applied to the National Government was not amended to align it to the post 2010 position where the Constitution created two distinct levels of Government. The County Government Act, 2012 did not expressly apply the provisions of the **Government Proceedings Act**. In the case of ***Josephat Gathee Kibuchi –vs- Kirinyanga County Council [2015] eKLR*** cited by the 1st respondent to support the 1st respondent's submission that the court lacks jurisdiction to grant an injunction against the County Governments by reason of section 16 of the **Government Proceedings Act**, **Muchemi, J.** was considering whether execution against the County Government ought to be done in accordance with Section 21 of the **Government Proceedings Act**. The County Government in that instance was arguing the Government Proceedings Act does not apply to it. The Judge after considering the various definitions of government came to the conclusion that Section 21 of the Act was applicable to County Governments. She observed thus:-

> ***"In view of the foregoing definitions, a County Government is part of the state or government. The constitution of Kenya establishes two levels of government being the National and County Government. The provisions of Section 21 of the Government Proceedings Act are therefore applicable to proceedings relating to a County Government."***

89. In the case *of* ***James Muigai Thugu –vs- County Government of Trans-Nzoia & 2 Others [2015] eKLR, Obaga, J.*** while considering the application of Section 16 (2) of the Government Proceedings Act to County Governments stated as follows:

"The aforesaid Act forbids courts from giving an injunction against the Government. The Section quoted hereinabove extends the same protection to Government officers. The Act was in place even before the devolved system of Government came into force. The question which then arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was the intention then the Government Proceedings Act would have been amended to expressly include County Government. I therefore do not find that the County Government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers."

90. Justice Mutungi further held *that While it is apparent that the law is in a state of flux in as far as the application of the* ***Government Proceedings Act*** *to County Governments is concerned as seen from the divergent judicial opinions, there is necessity to have the law settled to achieve consistency. My own view is that Section 16 (2) of the* ***Act****, even if the* ***Act*** *is held to be applicable to County Governments cannot be a complete bar to grant of injunctions against the County Governments. Whether or not an injunction can be granted against a County Government should depend on the merits, facts and circumstances of each case. The Act, even if held to be applicable should be applied with necessary modifications to take account of the peculiar circumstances that the devolved system of government has brought into play. I therefore hold that Section 16 (2) of the* ***Government Proceedings Act*** *is not a bar to the court granting an injunction against a County Government where the conditions for grant of an injunction are satisfied by the applicant".*

91. In the case of *Gujrah Sandeep Singh versus Minister of Public Works, Roads & Transport County Government of Kajiado & Another [2018] eKLR Lady Justice Christine Ochieng issued an order of permanent injunction against the County Government of Kajiado.*

7. <u>Whether the Plaintiff is entitled to General damages?</u>

92. It is our submission that the intended actions of the Defendants and Interested Party which have no basis in law were aimed at causing the Plaintiff loss of business by rousing despondency in the Plaintiff's tenants so as to make them vacate the Plaintiff's premises;

93. It is the Plaintiff's case that the actions of the Defendants and Interested Party were not only vexatious, malicious and injurious to the Plaintiff's character but also meant to deprive the Plaintiff business and his constitutional right to quiet enjoyment of his property and therefore submit that the Defendants and Interested Party are liable for damages;

94. The answer as to whether the Plaintiff is entitled to General Damagesis yes.

Section 13(7) of the Environment and Land Court Act NO. 19 of 2011 provides as follows:-

"13.(7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including-

(a) interim or permanent preservation orders including injunctions,

(b) prerogative orders,

(c) award of damages,

(d)compensation,

(e) specific performance,

(f) restitution,

(g) declaration or ,

(h) costs."

93. We submit that failure by the Defendants to serve the Plaintiff personally with the notice of intended demolition, the Plaintiff is indeed entitled to damages for Kshs. 3 Million;

94. Further the Plaintiff is entitled to exemplary damages in the sum of Kshs. 20 Million, we rely on the case of **Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR,** Justice Sila Munyao held as follows:**'In my view, this is a fit case for the award of exemplary damages. In the case of Rookes v Barnard (1964) 1 All ER 367, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. Rookes v Barnard, received the stamp of approval of the East African Court of Appeal in the case of Obongo v Kisumu Council (1971) EA 91. In the matter, Spry V.P stated as follows at page 95 :-"I am therefore of the opinion that this court should regard Rookes v Barnard as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967." Apart from the case of Obongo v Kisumu Council, the case of Rookes v Barnard has been applied in Kenya in various decisions. These include the cases of C A M v Royal Media Services Limited [2013] eKLR, C.A at Nairobi Civil Appeal No. Civil Appeal No. 283 of 2005, Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR, Court of Appeal at Kisumu Civil Appeal No. 84 of 2009; and, Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR, High Court at Mombasa, Civil Suit No. 290 of 2000. The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrongdoer could chose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages, he would still be better off if he proceeds to commit the wrong. Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building.'**

95. We submit that as a result of the intended demolition, the tenants occupying the commercial building erected on Title No. 4 were made to vacate the premises causing loss and mental anguish to the Plaintiff

8) Who will pay costs of this suit?

96. The Plaintiff having proved his case on the balance of probability, It is our submission that costs generally follow the event therefore costs of this suit be borne jointly and severally by the Defendants and the Interested Party;

And it so prayed.

DATED at NAIROBI this 23rd day of September, 2019.

MARTIN NJERU NYAGA & MURIMI MURANGO

ADVOVATES FOR THE PLAINTIFF

25. The 3rd, 4th and 5th defendants written submissions are reproduced herebelow without alterations whatsoever, including correction of spelling or other mistakes, if any exist.

3RD, 4TH& 5THDEFENDANTS' WRITTEN SUBMISSIONS

May it please you your Ladyship,

A. INTRODUCTION

1. These submissions are made pursuant to the directions issued by this honorable court on 1st April, 2019.

2. This suit, the plaintiff moved this court by way of Plaint that was filed along an application under certificate on the 10th February, 2015.

3. The Plaintiff herein seeks for;

a) A permanent injunction restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidation, trespassing upon, demolishing and or in any manner whatsoever interfering with the Plaintiff's commercial buildings, shops, hardware, banks, petrol station, restaurant and other structures erected on the properties known as Title Number Chuka Town 3/4 in TharakaNithi County.

b) A declaration that the property known as title Number Chuka Town 3/4 in TharakaNithi County belongs to the plaintiff.

c) General damages

d) Cost of this suit

4. The 3rd, 4th and 5th defendants through the Hon. Attorney General filed their statement of defence on 17th February 2015.

5. The 3rd -5th Defendants in their defence categorically deny the Plaintiff's case and firmly pray the suit be dismissed with cost.

6. The 3rd -5thDefendants' Counsel has read the 1st and 2nd defendants' submission and wish to associate themselves with the same and wish to add as follow;

ISSUES FOR DETERMINATION

7. Your Lordship, the defendants wishes to submit on the following issues for your determination;

i. Whether the Suit Property Encroached the Road Reserve

ii. Whether the Plaintiff is entitled to an order of permanent injunction as prayed

iii. Whether the Plaintiff is entitled to General damages

THE 3RD -5TH DEFENDANTS' CASE IN THE SUIT

8. Your Lordship, the Chuka town was established in the year 1913 and was first planned in the year 1969.

9. In 2013 stakeholders from Chuka town in conjunction with 4th Defendants identified roads to be upgraded when the town marked 100years. The upgrading of the road involved roads leading to institution like hospitals, schools, law courts, police station and banks to bitumen standards.

10. As a result the 4th Defendant commenced the upgrading and rehabilitation of the roads within Chuka town and contracted the 5th Defendant herein, Territorial Works (K) Limited to carry out the work. The contract commenced on or about 8th July 2014 and was to end on 7th July 2015.

11. The 4th Defendant surveyor, who testified before this court and has participated during the site visit, carried out a detailed ground and topographical survey on proposal roads and during the survey they established the parameter for the road corridor provided by the development plan which guides both surveyor and physical planners.

12. After the survey was carried out, it was established that buildings were erected on road reserve area and others had encroached on the road.

13. As a result we instructed the contractor to proceed with areas that were not encroached and in the meantime notice was issued by County Government of Tharaka Nithi to all persons who had built on road reserve/ corridors to demolish their buildings.

14. The plot owners on their own initiative started demolishing the buildings to pave way to the construction of the road.

15. My Lord it's the evidence and affirmation of the 4th Defendant that none of its officers were never involved or participated in the demolition of the building for their mandate is clearly stipulated in the Road Act.

16. My Lord the Plaintiff despite being served by the notice opted to ignore and instead moved to the High Court in Meru under certificate where the court granted interim orders pending the hearing and determination of this suit.

17. The Plaintiff alleges that the intended demolition was irregular, illegal and carried in unorthodox manner.

18. The Defendants and the Interested party hold that the Property, the subject matter of this suit, encroached a road reserved and therefore the same must be removed to pave way for the road construction exercise to be completed.

A. <u>Whether the suit property encroached the road reserve</u>

19. Your Lordship, the following facts were not disputed during the hearing;

i. That the Road Reserve currently stands less than 12M (or thereabouts) wide

ii. That there existed a 1988 development plan for Chuka Township that designated the road reserve passing through the suit property as 18M

iii. That the Building at the Suit property was constructed after 1991

20. Your Lordship, as was clearly stated by all the parties in the suit, the width of the road reserve fronting the development in the suit property is less than 12M. The Approved Physical Development Plan of 1988 made provisions for an 18M road.

21. It is thus our submission that since the development of the building was commenced in 1991, the same ought to have been in strict compliance with the Development Plan that was in existence then. Any development that does not comply with the Plan is irregular and illegal.

22. We thus submit that the development by the Plaintiff in as far as it reduces the road reserve by close to 6M (from 18M to less than 12M) went against the mandatory provisions of the Physical

Planning Act which requires strict adherence to the Approved Development Plans.

23. It is therefore our submissions that the building encroached on a road reserve and was thus required to be demolished by the County Government in exercise of its rights under Section 30 of the Physical Planning Act.

24. **In the case of Republic v Municipal Council of Naivasha & another Ex-Parte Esther Wanjiru & another [2015] eKLR (Supra)** the court held that ;

> *"It will be seen that under Section 29 (3), local authorities (whose functions have now been taken over by County Governments) had power to control developments within their jurisdiction. Under Section 30 (4) the local authorities could compel a person to restore the land back to its original position and if this is not done, the local authority could do it themselves. It cannot therefore be argued that there is no statutory obligation to demolish a building which is not in conformity with the Physical Planning Act. The development in the purported plot No. 199 is in clear contravention of the Physical Planning Act as I have demonstrated earlier. There is a duty imposed upon the 1st respondent, and now its successor in title, to enforce these provisions.*

25. Your Lordship, on the issue of Development plans having not complied with the Plan, it is not in dispute that the Plaintiff applied and was granted the building plan approval by the predecessor of the 2nd Defendant. Compliance with the approval is what is in issue.

26. The 2nd Defendant's witness, Mr. Mwenda, testified that had the Plaintiff complied with the approved building Plans, the Road reserved would have remained as 18M as is anticipated by the Approved Development Plan.

27. Indeed, it was Mr. Mwenda's uncontroverted evidence, that the building stands in an area of 50 by 110 Ft, an area much bigger than the size of the Plot which is 50 by 100 ft. The said Building, according to Mr. Mwenda, has thus encroached both on the frontal and rear roads to an extend that there is no rear road.

28. In the case of ***Joseph Kamau Kahungu v John Kunyiha Kamau & 4 others [2019] eKLR***, the court in dismissing the Plaintiff's action held that what he had fenced was bigger than what was on his title. The court held thus;

> *"In the circumstances, I find that the Plaintiff has not established on a balance of probabilities that he deserves the orders sought, the court having found that the fencing of parcel No. Nyandarua/Olkalou Salient/2739 had covered almost the entire parcel No. Nyandarua/Olkalou Salient/2740, and further that the area of parcel No.Nyandarua/Olkalou salient/2739 as fenced on the ground was also bigger than the registered area, it therefore follows that the titles that the Plaintiff holds do not tally with the acreage of his land on the ground and as such the same needs to be amended."*

B. Whether the Plaintiff is entitled to an order of permanent injunction as prayed

My Lord we wish to reply entirely with the sentiment of the 1st and 2nd Defendants' Submission in respect to Injunction against the Government.

C. Whether the Plaintiff is entitled to General damages

29. As is trite law, an injunction is a equitable remedy. One of the cardinal rule of equity is that he who comes to court of equity must come with clean hands.

30. We submit that the Plaintiff has no such clean hands in this suit. Your lordship, by failing to adhere to the approved building plans, the Plaintiff brought this

31. Your Lordship, we therefore submit that the Plaintiff is a victim of his on disobedience to the law and the approved building plans. He is thus not entitled to the orders sought.

32. In the above case of Republic v Municipal Council of Naivasha & another Ex-Parte Esther Wanjiru& another [2015] eKLR, Justice Sila granted the Applicant 90 days to demolish the building failure to which the county would do so. He held thus;

> *"So as to give effect to these provisions, and having held that the plot No. 199 cannot be allowed to exist in the new site, I give the interested party 90 days, which ought to be deemed as the requisite notice under Section 30 (4) (a) of the Physical Planning Act, to demolish the structures that she had built therein and restore the land to the original position. If she does not do so, then I issue an order of mandamus compelling the County Government of Nakuru, the successor of the 1st respondent, to proceed and demolish the structures and restore the land to its original state and recover the costs thereof from the interested party."*

CONCLUSION

33. Your Lordship, having stated as aforementioned, we submit that the Plaintiff is not entitled to the orders sought and pray that the suit be dismissed with cost.

Dated at Meru 20th day ofSeptember ,2019

Ms. J. Kung'u

Deputy Chief State Counsel

For Honorable Attorney

26. The interested party's written submissions are reproduced in full herebelow without alterations whatsoever, including correction of spelling or other mistakes, if any exist.

INTERESTED PARTY'S WRITTEN SUBMISSIONSS

May it please you your Lordship,

A. INTRODUCTION

1. These submissions are made pursuant to the directions issued by this honourable court on 1st April, 2019.

2.This suit, the subject of these submissions, was filed by the Plaintiff on the 10th February, 2015.

3.The Interested Party, vide an application dated 1st February,2016, sought to be joined in these proceedings as thus and the said application was subsequently allowed by this Honourable Court.

4.The interested party, upon being allowed to join the proceedings filed a statement of defence dated 28thFebruary, 2018 together with a bundle of documents. The Interested party also filed a witness statement by Prof. Erastus Nyaga Njoka on 7thMay, 2018 and a supplementary bundle of documents dated the same date.

THE INTEREST OF THE INTERESTED PARTY IN THE SUIT

5.Your Lordship, the Interested party is not a busy body in these proceedings. It's interest, as was stated by its witness, Prof. Erastus Njoka, was based on its efforts to foster sustainable Development across Chuka County. The Interested party is thus a champion of the development

agenda in Chuka.

6.The Interested Party is the successor of Chuka Centenery Committee (4C) that organized the commemoration of the 100 years since the establishment of Chuka Town. The 4C successfully lobbied the attendance of H.E Uhuru Kenyatta, the President of Kenya, for the commemoration.

7.It during the commemoration ceremony that the President pledged to allocate funds for the tarmacking of all roads in Chuka Town

8.After the commemoration ceremony and the 4C having accomplished its mission, the stakeholders of that Committee initiated the establishment of Chuka Igambang'ombe Development Association (CIDA) to foster sustainable development and further follow up on the pledges made by various leaders during the ceremony. CIDA was thus formed with that agenda in mind.

BACKGROUND OF THE DISPUTE

9.The pledge by the President, as referred hereinabove, to allocate funds for the road tarmacking project seemed to have borne fruits with the floating of tenders by KURA for the project.

10.The floating of the said tenders was joyful relief for the residents of Chuka who have for the longest time persevered poor road network right to the township. The 4th Defendant thereafter awarded the contract to the 6th Defendant. This marked the commencement of the project.

11.Various stakeholders meetings were organized to sensitize the members of the public on the importance of the project and it was unanimously agreed that all residents with the structures that have encroached the road reserves would immediately demolish such structures.

12.Majority of the owners of the structures that had encroached the road reserves obediently removed the same and this allowed the commencement of the project.

13.The plaintiff however did not heed to the call and instead moved to the High Court in Embu, sought and was granted interim orders pending the hearing and determination of this suit.

14.The Plaintiff alleges that the intended demolition was irregular, illegal and carried in unorthodox manner.

15.The Defendants and the Interested party hold that the Property, the subject matter of this suit, encroached a road reserved and therefore the same must be removed to pave way for the road construction exercise to be completed.

ISSUES FOR DETERMINATION

16.Your Lordship, the Interested party wishes to submit on the following issues for your determination;

i. Whether the Suit Property Encroached the Road Reserve

ii. Whether the Plaintiff is entitled to an order of permanent injunction as prayed

iii. Whether the Plaintiff is entitled to General damages

A.THE SUIT PROPERTY HAS ENCROACHED ON A ROAD RESERVE

17.Your Lordship, the following facts were not disputed during the hearing;

i. That the Road Reserve currently stands less than 12M (or thereabouts) wide

ii. That there existed a 1988 development plan for Chuka Township that designated the road reserve passing through the suit property as 18M

iii. That the Building at the Suit property was constructed after 1991

18.Your Lordship, with that in mind, we wish to submit as follows;

DEVELOPMENT PLANS AND DEVELOPMENTS MADE SUBSEQUENT TO THE APPROVAL OF A DEVELOPMENT PLAN

19.Your Lordship, Section 16 of the Physical Planning Act provides for purposes of a regional Development Plan, it states thus;

"(1) A regional physical development plan may be prepared by the Director with reference to any Government land, trust land or private land within the area of authority of a county council ***for the purpose of*** *improving the land and providing for the proper physical development of such land,* ***and securing suitable provision for transportation, public purposes, utilities*** *and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purposes.*

(2) For the purposes of subsection (1), a regional physical development plan may provide for planning, replanning, or reconstructing the whole or part of the area comprised in the plan, and for controlling the order, nature and direction of development in such area." (Emphasis is ours)

20.Your Lordship, the Act further makes provisions as to the preparations and approvals of the Physical Development Plans in section 17 to 21 of the Act. Under the Act, once a Physical Development Plan is prepared, a notice shall be issued requesting any interested person who desires to make any representations against, or objections to the plan, to the Director not later than sixty days after the date of the first publication of the notice or such date as is specified in the notice[1]

21.Where no objection is raised, the Director shall Forward the same to the Minister for approval and Publication.

22.Once the Minister receives the Plan, he shall approve the same with or without conditions.[2]

23.Once a Development Plan is approved, section 21(3) makes the following explicit provision;

> "*On the approval of the regional physical development plan no development shall take place on any land unless it is in conformity with the approved plan."*

24.Your Lordship, the above provisions mirrors the provisions of the Town Planning Act, CAP 137 that was repealed upon the assent of the Physical Planning Act. **Section 18 to 27** makes similar provisions under the repealed **Town Planning Act.**

25.Indeed, section 25 of the Repealed Town Planning Act stated thus;

> *"When a scheme has been finally approved by the Director as aforesaid it shall be the duty of the local authority to observe and to enforce the observance of the requirements of the scheme in respect of all development of any description thereafter undertaken within the area to which the scheme applies, whether by the local authority or by any person, and, save with the consent in writing of the Director,* ***the local authority shall not thereafter undertake or permit any alteration or modification of any existing buildings or works if such modification or alteration would tend to prevent or delay their being brought into conformity with the requirements of the approved scheme.***

26.Your Lordship, from the above provisions of both the current Act and the previous one, it is not difficult to deduce that any development must comply with the existing development Plan.

27.Indeed, your brother Justice Munyao Sila held in the case of **Republic v Municipal Council of Naivasha & another Ex-Parte Esther Wanjiru & another [2015] eKLR** that;

> *"Pursuant to the Physical Planning Act (CAP 286), authorities can only implement an approved plan. Section 21 of the Physical Planning Act, (CAP 286) indeed provides that no development shall take place on any land unless it is in conformity with the approved plan. There is a very elaborate procedure outlined in the Physical Planning Act on how plans are supposed to be approved. Generally, such plans are supposed to be drawn and published for comments before approval. It is only after approval that such plan can be implemented. It was argued that the physical planning Act does not apply here but it does. It came into force in 1996 and the matters complained of took place in the year 2006."*

THE DEVELOPMENT IN THE SUIT PROPERTY DID NOT COMPLY WITH THE PROVISIONS OF THE PHYSICAL PLANNING ACT & THE PHYSICAL DEVELOPMENT PLAN OF 1988?

28.Your Lordship, as was clearly stated by all the parties in the suit, the width of the road reserve fronting the development in the suit property is less than 12M. The Approved Physical Development Plan of 1988 made provisions for an 18M road.

29.It is thus our submission that since the development of the building was commenced in 1991, the same ought to have been in strict compliance with the Development Plan that was in existence then. Any development that does not comply with the Plan is irregular and illegal.

30.We thus submit that the development by the Plaintiff in as far as it reduce the road reserve by close to 6M (from 18M to less than 12M) went against the mandatory provisions of the Physical Planning Act which requires strict adherence to the Approved Development Plans.

31.It is therefore our submissions that the building encroached on a road reserve and was thus required to be demolished by the County Government in exercise of its rights under Section 30 of the Physical Planning Act.

32.In the case of Republic v Municipal Council of Naivasha & another Ex-Parte Esther Wanjiru & another [2015] eKLR (Supra)the court held that ;

> *"It will be seen that under Section 29 (3), local authorities (whose functions have now been taken over by County Governments) had power to control developments within their jurisdiction. Under Section 30 (4) the local authorities could compel a person to restore the land back to its original position and if this is not done, the local authority could do it themselves. It cannot therefore be argued that there is no statutory obligation to demolish a building which is not in conformity with the Physical Planning Act. The development in the purported plot No. 199 is in clear contravention of the Physical Planning Act as I have demonstrated earlier. There is a duty imposed upon the 1st respondent, and now its successor in title, to enforce these provisions.*

THE DEVELOPMENT/BUILDING DID NOT COMPLY WITH THE APPROVED BUILDING PLANS

33.Your Lordship, it is not in dispute that the Plaintiff applied and was granted the building plan approval by the predecessor of the 2nd Defendant. Compliance with the approval is what is in issue.

34. The 2nd Defendant's witness, Mr. Mwenda, testified that had the Plaintiff complied with the approved building Plans, the Road reserved would have remained as 18M as is anticipated by the

Approved Development Plan.

35.Indeed, it was Mr. Mwenda's uncontroverted evidence, that the building stands in an area of 50 by 110 Ft, an area much bigger than the size of the Plot which is 50 by 100 ft. The said Building, according to Mr. Mwenda, has thus encroached both on the frontal and rear roads to an extend that there is no rear road.

36.In the case of***Joseph Kamau Kahungu v John Kunyiha Kamau& 4 others [2019] eKLR***, the court in dismissing the Plaintiff's action held that what he had fenced was bigger than what was on his title. The court held thus;

> *"In the circumstances, I find that the Plaintiff has not established on a balance of probabilities that he deserves the orders sought, the court having found that the fencing of parcel No. Nyandarua/Olkalou Salient/2739 had covered almost the entire parcel No. Nyandarua/Olkalou Salient/2740, and further that the area of parcel No. Nyandarua/Olkalou salient/2739 as fenced on the ground was also bigger than the registered area, it therefore follows that the titles that the Plaintiff holds do not tally with the acreage of his land on the ground and as such the same needs to be amended."*

B. THE PLAINTIFF IS NOT ENTITLED TO THE ORDERS SOUGHT

37.As is trite law, an injunction is a equitable remedy. One of the cardinal rule of equity is that he who comes to court of equity must come with clean hands.

38.We submit that the Plaintiff has no such clean hands in this suit. Your lordship, by failing to adhere to the approved building plans, the Plaintiff brought this

39.Your Lordship, we therefore submit that the Plaintiff is a victim of his on disobedience to the law and the approved building plans. He is thus not entitled to the orders sought.

40.In the above case of Republic v Municipal Council of Naivasha & another Ex-Parte Esther Wanjiru& another [2015] eKLR, Justice Sila granted the Applicant 90 days to demolish the building failure to which the county would do so. He held thus;

> *"So as to give effect to these provisions, and having held that the plot No. 199 cannot be allowed to exist in the new site, I give the interested party 90 days, which ought to be deemed as the requisite notice under Section 30 (4) (a) of the Physical Planning Act, to demolish the structures that she had built therein and restore the land to the original position. If she does not do so, then I issue an order of mandamus compelling the County Government of Nakuru, the successor of the 1st respondent, to proceed and demolish the structures and restore the land to its original state and recover the costs thereof from the interested party."*

C. CONCLUSION

41.Your Lordship, having stated as aforementioned, we submit that the Plaintiff is not entitled to the orders sought and pray that the suit be dismissed with cost.

Dated at NAIROBI this 20th day of September 2019

WAWERU GATONYE & CO.

ADVOCATES FOR THE INTERESTED PARTY

27. The 1st and 2nd defendants' written submissions are reproduced in full herebelow without alterations whatsoever, including correction of spelling or other mistakes, if any exist.

1ST& 2ND DEFENDANTS' SUBMISSIONS

In his plaint dated 10/2/2015 the plaintiff seeks three reliefs against all the defendants. Firstly, he seeks an order of permanent injunction and a declaration that L.R. NO CHUKA TOWN/3 and 4 belong to the plaintiff. He also seeks general damages.

The 1st and 2nd defendant filed a statement of defence on the 4/3/2015 denying the plaintiff's claim and seeking dismissal of the suit. The other Co-defendants likewise filed their defences and the case went through a full trail. Parties called their respective witnesses including professionals who made reports and orally testified in court.

There is evidence on record from both sides that is not in contention. The construction of the road from Chuka High School through Chuka Township is not in dispute. It is also not in dispute that the construction is being done by Territorial Works under a contract by the 3rd defendant. That the two parcels of land in Chuka Town/3 & 4 are registered in the name of the plaintiff is also not in dispute. That the 2nd defendant gave notice to all persons who have buildings encroaching on the aforesaid road before the commencements of the works is also not in dispute. It is also not in dispute that the plaintiff has buildings on the two parcels of land.

What came out as the real dispute is whether or not the plaintiff's buildings on the two parcels of land have encroached on the road under construction thereby obstructing the works.

After receiving the evidence on record and the applicable law, we frame issues for consideration by this court as follows:-

> ***1) Whether or not an order of injunction can issue against the defendants***
>
> ***2) Whether or not the plaintiff's developments on L.R. NO CHUKA TOWN/3 & 4 have encroached on the road or/and road reserve.***
>
> ***3) Who pays the costs of the suit***

WHETHER AN ORDER OF INJUNCTION CAN ISSUE AGAINST DEFENDANTS

The Constitution of Kenya 2010 establishes two levels of governments. The National Government of Kenya headed by the president and the County Government headed by the Governor. We make reference to Article 6 and 189 of the Constitution. On the basis of the constitutional provisions creating two levels of government, the 2nd defendant is a government for all intents and purposes and therefore the provisions of Section 16 of the Government Proceedings Act are applicable. The section reads:-

> ***(1) "where in any civil proceedings by or against the government, the court shall, subject to the provisions of this Act have power to make all such orders as it has power to make in proceedings between subjects and otherwise give such appropriate relief as the case may require provided that:-***
>
> > ***i. Where in any proceedings against the government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance but may I lieu thereof make an order declaration of the rights of the parties, and***
> >
> > ***ii. In any proceedings against the government for the recovery of that or other property, the court shall not make an order for the recovery of the land or the delivery of the property but may in lieu thereof, make an order declaring that the***

plaintiff is entitled as against the government to the land or property, or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make an order against an office of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the governments.

The 1st and 2nd defendants herein being County Government falls within the safeguards of S. 16 of the Government Proceedings Act. The section provides complete insulation of the defendant against any order of injunction. The 1st 2nd defendant are subject of the Government Proceedings Act and as well as Order 29 of the Civil Procedure Rules. This was clearly stated in the case of **REPUBLIC –VS- ATTORNEY GENERAL & ANOTHER – EX-PARTE STEPHEN WANYEEROKI (2016) eKLR.**

"It follows that the provisions of the government proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adoptions, qualifications, and exceptions necessary to bring it into conformity with the constitution. One such construction would be the reality that Government is now at two levels and Article 189 (1) of the constitution requires that the constitutional status and institutions of government at both National and County levels be respected. In my view such respect cannot be achieved unless both levels of government are treated equally and one such are would be with respect to execution proceedings.

The suit referred to herein related to execution against the county government. However, of great importance is the finding that the provisions of Government Proceedings Act apply to proceedings against the county Government.

The rationale behind these provisions is in recognition of the fact that it would be impossible for government to carry out its public obligations if injunctions were allowed to issue. The operations of government would be crippled and brought to a halt with serious loss of public funds and denial of services to the public.

We submit that to hold that the government proceedings Act does not apply to the devolved unit of government would be to trivialise the importance of devolved system of governance with disastrous results.

Order 29 rule (2) (2) of the Civil Procedure Rules provides that:-

No order against the Government may be made under:

a) Order 14, Rule 4 (impounding documents)

b) Order 22 (execution of decree and orders)

c) Order 23 (Attachments of debts)

d) Order 40 (injunctions)

e) Order 41 (Appointment of receivers)

Clearly, the 1st and 2nd defendants fall within the scope of government. There is an express prohibition against issuance of injunctions. The effect of these provisions just like under the Government Proceedings Act is to protect and insulate the government or any government officer where the order would be an order against the government, from any form of injunction.

The provisions of the Government Proceedings Act and order 29 (2) of the Civil Procedure Rules, ousts the authority of the Honourable court to make any order of injunction against the 1st and 2nd defendants. The plaintiff's remedy lies elsewhere in form of claim for damages, or /and compensation for any loss or damage that might suffice.

Unfortunately for the plaintiff, there is no such relief sought and the court can only grant that is which is prayed for.

WHETHER THE PLAINTIFF'S DEVELOPMENTS ON L.R. NO CHUKA TOWN/3 & 4 HAVE ENCROACHED ON PUBLIC LAND

The National Government through the 4th defendant commissioned the improvement of roads within Chuka Township to bitumen standards in or about July, 2014. The works were to be carried out by the 6th defendant. The 1st and 2nd defendants being responsible for the management of the township, being a devolved function, proceeded to issue a Public Notice dated 30/10/2014, requiring all persons who have encroached on any public road and road reserves, way leaves or public land to remove those offending structures or face demolition. The Notice was for 90 days and was carried out in the Standard Newspaper, a publication with national circulation.

Following this public notice, all persons with the exception of the plaintiff voluntarily removed their offending structures on the road or road reserve. The plaintiff's immediate neighbours pulled back all their buildings leaving the plaintiff's building as the only ones protruding into the road, an act of impunity on his part.

The 1st and 2nd defendants' submission is that the plaintiff has not proved his case against the defendants on a balance of probabilities. There is absolutely no evidence of wrong doing established against the defendants herein. The construction of the road is a National Government Funded Project and the contract to construct was not executed by the 1st and 2nd defendants but rather between the 6th defendant and the National Government. Because of this, clearly the plaintiff has no cause of action against the 1st and 2nd defendants herein.

More importantly, the defendants submit that the plaintiff's committed an illegality by extending his developments of Plot No Chuka Town/3 & 4 into road thereby interfering with the construction of the road, Kaanwa – Chuka Road.

The plaintiff produced documents of ownership of the two plots in issue. They are 15 metres by 30 metres in size. It is clear from the evidence of DW1 Alfred Mwenda that when the plaintiff was constructing his houses, he extended the area available for him to do so. At the time of testifying, the witness had 12 years working experience. He is a member of Kenya Institute of planners. He took the court through the planning stages Chuka Town has passed. He testified that the Kaanwa Chuka – forest Road has a width of 18 metres. He produced various official documents to prove this. He was also part of the team that visited locus in quo pursuant to order of this court. Physical measurements were taken in the presence of the plaintiff and his surveyors and other representatives. The compiled report is part of the record of this honourable court, and we refer the court to the same.

It was his evidence that the plaintiff's building exceeds in length, the 100ft allocated according to POP Ref 350/7611, and has encroached on the road. In the front, he testified that the building on plot No 4 encroached the road by 4 metres. There is also a further encroachment at the rear where the plaintiff's building has completely blocked the access road. In short, the plaintiff's building sits in an area bigger than the plot.

The plaintiff admitted that when he built the house the 1988 Physical Development Plan in respect to Chuka Town was in force. He further admitted in cross-examination that he did not care to look at the Development Plan applicable at the time he commenced his building. The plaintiff appears

to have relied on alleged survey plans. However, any survey plans must be in conformity with the development plans. The Physical Planning Act is clear on this. It is because of the plaintiff's failure to observe the Development Plan that the road is narrower when it reaches his plot. The evidence of DW1 is clear that the road constructed is 16 metres up to Plot No 5 which shares a common boundary with Plot No 4. At Plot No 4, the road narrows to 11 metres, because of the encroachment by the plaintiff. Immediately after Plot No 4towards Plot No 3, the road widens again to 16 metres.

PW 1, Mr J D Obed, a surveyor called by the plaintiff and who participated in the physical exercise of measurements ordered by the court, agreed that any survey must be based on Physical Development Plan. By the time the plaintiff built the house, there was in force Physical Development Plan which he did not respect. His contention that there was survey done on the plot in 1969 based on an existing Physical Development Plan is not correct because he did not produce any such Physical Development Plan that enabled the survey to be done in 1969. The survey plans referred to by PW1 does not have any reference to an existing Physical Development Plan as should be the case. No Physical Development Plan for Chuka had been developed as at the time of the alleged survey.

The Physical Development Plan takes precedence and is superior to survey plans and the RIM as well. If the court were to take the testimony of PW1, that there was survey done in 1969, then the question that remains answered is, the survey was based on which Physical Development Plan, as the first Physical Development Plan was approved in 1970? When the witness was confronted with that question, here merely said,

> ***"The survey of 1969 must have been based on Physical Development Plan prior to that date".***

However, he did not produce any such physical Development Plan, leaving the court to conclude that the first Physical Development Plan for Chuka was developed in 1970, and there was no other prior to that date. The physical Development Plan of 1970 is clearly marked NO 1.

We also draw the attention of the court that the two plots do not appear in the registry Index Map produced by the plaintiff and the 1st and 2nd defendants.

The evidence of DW1 finds support and strong corroboration from the evidence of DW2 who also participated in the physical measurements of the road and the plots in dispute. She testified clearly that the plaintiff's development on the plots in dispute encroaches on the road under construction. The encroachment is very significant and part of the plaintiff's building need to be knocked down to give away to the road.

CAN THE PLAINTIFF GET THE RELIEF SOUGHT

We submit that for the simple reason that he plaintiff seeks an order of injunction against the government the relief sought can not issue. Even on merit, the plaintiff has failed to demonstrate, with sufficient evidence that the 1st and 2nd defendants have interfered with his properties in any manner Indeed, what has clearly come out herein is that the plaintiff has encroached on a public road. He can not therefore benefit from, his wrongful acts. He can not get an order for compensation either because it is not pleaded or prayed for.

In the upshot, we pray that the suit be dismissed with costs.

DATED AT MERU THIS 20TH DAY OF AUGUST, 2019

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE 1ST & 2ND DEFENDANTS

28. PW1, Dominic Obel told the court that he was a licensed surveyor as evidenced by his Licence No. 123 granted to him by the Land Surveyor's board. He narrated his long service with the Government of Kenya between 1967 and 1997. He produced his report apposite to the site visit made on 20th April, 2018. A conspectus of his evidence in chief, in cross-examination and in re-examination was that the alleged encroachment upon the road reserve by the plaintiff's construction(s) on plots numbers 3 and 4 Chuka Town lacked any basis. It was his opinion that this court lacked jurisdiction to hear and determine this case as the dispute herein involved a dispute between public and private land and, according to him, the dispute should be heard by the National Land Commission.

29. Respectfully, I do not agree with the position taken by PW1. It is interesting that he is the plaintiff's witness. Surely, the plaintiff should not have filed this suit in this court if indeed this court lacks jurisdiction to handle this dispute. Or otherwise the plaintiff, upon advice of his expert witness, should have withdrawn this suit.

30. PW2, Frederick Nkoroi Nthigai, told the court that he was a businessman and a resident of Chuka since his birth. His evidence was that on **16th January**, **2015** the Kenya Urban Roads Authority, the 4th defendant, gave a Notice for stall owners to remove them. He went on to say that the notice was in the nature of a general letter which did not mention the name of any person. He told the court that he was not affected by the notice but his children were affected. He told the court that he did not know that the County Government had issued an earlier notice. He denied knowledge of a Notice issued by the County Government requiring unapproved structures to be regularized or be demolished and requiring all structures encroaching upon road reserves to be removed. PW2 was also unequivocal that he did not know those individuals who demolished stalls or other structures. But since the notice he had referred to was issued by the Kenya Urban Roads Authority, his conjecture was that the impugned demolitions had been conducted by the 4th defendant.

31. PW2 was unequivocal that the impugned demolitions were conducted in the wee hours of the night but added that he was not there when the demolitions were conducted.

32. PW3, Mutegi Mugwetwa, the plaintiff, asked the court to adopt his witness statement dated 30th April, 2015 as his evidence in this suit. Since this statement forms an important part of the plaintiff's evidence, it is reproduced in full herebelow.

PLAINTIFF'S STATEMENT NO. 1

1. My name is Mutegi Mugwetwa of Post Office Box Number 82-60400 Chuka in the Republic of Kenya.

2. I am a businessman in Chuka town.

3. I am the plaintiff in this suit and the registered owner of title numbers 3 and 4 Chuka Township.

4. Shadrack Njoka Kirera was the first registered owner of title number 4, the lease issued to him on 25th March, 1976.

5. I purchased property known as title number 4 with existing building thereof for Kenya Shillings Two Hundred and Thirty Five Thousand (Kshs.235,000/=) through an auction done by the Kenya Commercial Bank for failure of the first registered owner to service a loan secured on the title number 4. See page 1 copy of the lease in the list and bundle of documents.

6. I was issued with a title for said property on 4th day of August, 1980 for a term of 99 years from the 1st day of November, 1975. See page 1-8 copies of the lease in the list and bundle of documents.

7 .I pulled the existing building down to put a commercial building after approval of the building plan in the year 1991 and 2002 respectively by the relevant authorities. See page 9 approved copy of the building plan for the ground floor and see page 10 approved copy of the building plan for the hall in the list and buddle of documents.

8. On 8th day of April, 1998, I was issued with a lease for parcel number 3 Chuka Township by the Land Registrar – Chuka. See page 11-12 copies of the said lease in the list and bundle of documents.

9. I filed this suit in court after witnessing buildings and shops in Chuka Town being demolished at wee hour of the night without court order or notice of intention to demolish as provided in Article 47(2) of the Constitution of Kenya.

10. I was apprehensive that my commercial building erected on plot No. 4 which comprises of offices, restaurant, hardware, Barclays bank and petrol station erected on plot No. 3 were to be demolished on an allegation that they were on the road reserve.

11. The value of petrol station and its ancillary facilities erected on plot No. 3 worth Kshs.95,000,000/= million and commercial building erected on plot No. 4 worth Ksh.110,000/= Million. See page 13-29 of the said valuation report prepared by Stephen Maina Warutere in the list and buddle of documents.

12. Construction of both the commercial building on plot No. 4 and petrol station on plot N. 3 following a cadastral plan FR/115/18 done in the year 1969. Zachary Kariuki Wanyeki, the Land Surveyor surveyed and confirmed the ground position.

13. Engineer M. O. Gumbi in his affidavit sworn on 26th February, 2015 and filed in court on 27th day of February, 2015 on behalf of 3rd, 4th and 5th defendants at paragraph 13 confirms that Kura as a state corporation does not carry out demolitions on public or private property but they identify the encroachments on road corridors and prepare reports to National Land Commission for further action which duty they have declined or ignorantly failed to do. See page 30-44 of the said affidavit of Engineer M.O. Gumbi in the list and buddle of documents.

14. Prayers in the plaint be granted as prayed.

15. That is all.

Signed…….. Mutegi Mugwetwa Date: 30.4.2015

33. The court notes that the plaintiff had on **11th February, 2015** filed another statement dated **10th February, 2015** which is also reproduced in full herebelow:

PLAINTIFF'S STATEMENT

I, Mutegi Mugwetwa of Post Office Box Number 82-60400 Chuka in the Republic of Kenya do hereby make oath and state that;

1. My name is Mutegi Mugwetwa and the plaintiff in this suit.

2. I tender my documents to support my case in a single paginated bundle filed in court as a list and bundle of documents which I have annexed as "MM-1" (from 1 to 36).

3. I am the registered owner of all that properties known as Title Numbers Chuka town 3/ and 4 in Tharaka Nithi County measuring Area approximately 0.046 Ha. Each (Hereinafter referred to as the suit properties).

4. On 4th August, 1980 and 8th April, 1998, I was issued with the certificate of leases for a term of 99 years commencing in the year 1975 and 1994 respectively by the Land Registrar upon meeting all the requirements in the law.

5. In the year 1991, my plan for construction of the commercial buildings on title Numbers Chuka town/4 was approved by the Physical Planning Officer, District Health Officer and Clerk of Municipal of Chuka.

6. On 20th March, 2006, survey of Kenya issued me with a registry index Map (R.I.M) which R.I.M is based on approved survey plan F/R 115/18 Chuka Township that indicates that my suit property is not encroaching on the road reserve.

7. I have immense investments with huge capital outlay to a tune of 205,000,000 million on construction of the commercial buildings, shops, hardware, banks, petrol station, restaurant and or any other structures erected on the properties known as title numbers Chuka Town/3 and 4 in Tharaka Nithi County.

8. I am apprehensive that the demolitions being carried on by the defendants in Chuka Township will occasion to me great loss and damage if my commercial buildings, shops, hardware, banks, petrol station, restaurant and or any structures erected on the properties known as Title numbers Chuka Town/3 and 4 in Tharaka Nithi County are demolished.

9. My tenants, the Barclays bank of Kenya, the Gulf Energy limited who have invested huge capital to uplift the face of Chuka town will also suffer loss and damage if the defendants demolish my suit properties.

10. The on-going demolition of properties in Chuka Township by the defendants is illegal, un-procedural and contrary to the constitution of Kenya, international conventions and without an order of the court or a notice.

11. Numerous businessmen and women have been left grappling with losses because of the demolition of their properties worth millions of shillings by the defendants at the wee hour of the night in unorthodox style and manner.

12. The defendants have vehemently declined to call a meeting with me to deliberate/resolve the boundary dispute or if my properties are encroaching road reserve.

13. I am wary that the defendants will not advertise nor serve me with a notice of intention to demolish my commercial buildings, shops, hardware, banks, petrol station, restaurant and or any structures erected on the properties on the suit property.

14. The on-going demolition of the properties by the defendants in Chuka town is irregular, illegal and carried in unorthodox manner because:-

i) It is un-procedural, contrary to the Constitution of Kenya, international Conventions and/or without an order of the court or notice given.

ii) The Defendants never convene meetings to deliberate on the boundary dispute.

iii)The Defendants never serve a notice of intention to demolish.

iv)The defendants have never advertised their intention to demolish structures in Chuka town.

v) No mark is put on properties or buildings intended for demolition.

vi) Demolition at wee hour of the night recklessly and negligently without taking into account safety precaution.

15. I am reasonably apprehensive that unless the defendants are restrained by an order of this honourable court from demolition, the defendants will undoubtedly demolish my structures on title numbers Chuka Town 3 and 4 in Tharaka Nithi County and I will suffer irreparable loss and damage.

16. Unless injunctive orders sought herein are granted, I shall suffer irreparable loss and damage as a result of defendants act of intended demolition on my property.

17. It is my right to be protected by this honourable court from defendants illegal and unlawful demolition of my property without following laid down procedure and the law.

Signed……Mutegi Mugwetwa Date: 10.2.2015

34. More or less, PW3's oral evidence was congruent to what he had averred in his witness statements. He testified that he never saw the Notice issued by the 4th defendant in the "Standard' newspaper of 30th October, 2014. He further told the court that the notice did not contain his name. Regarding plot No. 5 whose owner allegedly complied with the 2nd defendant's notices to remove structures which encroached upon road reserves, he told the court that he did not know why the owner demolished part of his building and pushed it back.

35. PW3 told the court that he did not know that Chuka Township had a Physical Development Plan. He testified that when he got his plots, they had beacons erected in 1969. He went on to say that building plans for plot NO. 4 were done and approved in 1991. He further went on to say that he did not need a development permit as the Council which was the 2nd defendant's predecessor had already approved his building plans. He went on to blame Mr. Murango Mwenda, the 1st and 2nd defendants advocate, for having not properly advised him as he was his advocate at the time his building plans were approved.

36. A conspectus of PW3's evidence during his evidence in chief, cross-examination and re-examination was that his constructions on the subject plots were properly erected and should be allowed to stand and he should, therefore, be granted the orders he sought in his plaint. During cross-examination, however, PW1 owned up that his property was not demolished because he had a court order prohibiting demolition BUT added that adjoining plots were demolished.

37. PW3 produced as his exhibits a bundle of documents which contained apposite searches, and approved buildings plans for plot No. 4. He also produced approval for its foundation given in 1991. He testified that approval for the rest of his building was granted in 2003.

38. DW1, Alfred Mwenda, told the court that he was the County Physical Planner seconded to Tharaka County Government by the National Government. He testified that he was a Physical Planner registered by the Physical Planner's Registration Board. He went on to explain that physical plans guided development in applicable areas and this guidance concerned development, subdivisions, change of user, allocation of land and extension of leases. He told the court that where plans were in existence, these activities should be done in accordance with those plans. He testified that there were plans made between 1970 and 1988 but these were part development plans (PDPs). He was unequivocal that the 1988 development plan was approved on **20th May,1988** by the Commissioner of Lands and was the only existing plan. He further stated that plot Nos. 3 and 4 were reflected in the plan and went on to add that having seen the building plans for plot No. 4, it was his opinion that the construction thereon had encroached on the road. He further testified that instead of the plaintiff using 0.046 Hectares as per the lease document, computation of the area the building occupied showed that it had occupied 0.06 Hectares. According to him this was contrary to the development plan.

39. DW1 went on to claim that the plaintiff had put up more storeys than the two approved ones. He

asserted that having built more storeys than those approved and having encroached upon the road and the service lane at the back of the plot, no compensation was tenable to the plaintiff. He produced his report apposite to the site visit (op.cit) which took place on 20th April, 2018.

40. In his evidence in chief, in his cross-examination and in his re-examination DW1 was insistent that the plaintiff's construction on plot No. 4 had encroached upon the road reserve and he stuck by his report apposite to the site visit that took place on 20th April, 2018. DW1 was insistent that Plot No. 4 encroached on a public space of approximately 0.014 Hectares.

41. DW2, Dorcas Kanana Gitonga Mungai, told the court that she was a Senior Land Surveyor at the Kenya Urban Roads Authority. Her evidence was that Plot No. 4, Chuka Town encroached upon the apposite road. She also said that there was no entry in the Registry Index Map showing that Plot No. 4 had been properly surveyed. It was her evidence that Plot No. 3 was no longer an issue in this suit.

42. DW2, in some material respects, gave garbled evidence and came out as a witness who was not very conversant with the issues at hand. She said that though plot Numbers 5, 8 and 9 were developed she did not know who their developers were. She denied being in cahoots with Professor Erastus Nyaga Njoka with regard to how the apposite road was to be constructed. She was unclear if or if not Gazettment could change the size of a road on the ground. She denied that there was politics and malice behind the non-completion of the apposite road as according to the plaintiff's advocate there was enough space that should have been used to complete the road.

43. DW2 told the court that she possessed a Bachelor of Science degree in surveying and photogrammetry and that she also possessed a Masters degree in Geo Spatial Information Systems [GIS]. She went on to say that she was a PHD registered student in Remote Sensing.

44. Although in some respects DW2 gave garbled evidence, she still maintained that the plaintiff had encroached upon the apposite road. She disagreed with PW1's computations concerning the subject road.

45. DW3, Professor Erastus Nyaga Njoka, told the court that he was the Vice-chancellor of Chuka Univeristy. He asked the court to adopt his witness statement as his evidence.

46. A conspectus of his evidence was that the only interest his Association, the Interested Party, had was to ensure that public interest was safe guarded and that the plaintiff's impunity through encroaching upon a pubic road was thwarted. He told the court that he held no grudge against the plaintiff who he described as a friend who was married to his niece.

47. He testified that he and others had formed a Chuka Centenary Celebrations Committee (4CS) to commemorate one hundred (100) years of the existence of Chuka Town. He told the court that 4Cs had transformed itself into the Chuka Igamba Ng'ombe Development Association which spearheaded construction of the Town Roads which the plaintiff sabotaged by failing to remove his encroachment on the subject road whereas all other encrochers removed their encroaching structures.

48. DW3 told the court that during President Kibaki's reign, he, the President, had authorized tarmacking of Town Roads but people resisted this development. He went on to say that the problem became worse when PW2, who was the mayor, effectively destroyed Chuka Town by allocating plots on roads.

49. He was unequivocal that his association spearheaded the granting of funds by the President for tarmacking of Town Roads. Hitherto, he averred, the town had been reduced to a slum. He said that he had lived around Chuka Town since childhood and was aware that the plaintiff started constructing his building in 1991 and, therefore, should have conformed to the Development Plan which had been approved in 1988.

50. DW3's cross-examination by Mr. Martin Njeru, the plaintiff's lawyer, turned rather acrimonious and at one time Mr. Njeru asked DW3 whether or not he was aware that he suffered from Narcissistic Personality Disorder (NPD). I upheld the objection by the Interested Party's advocate against this

personalized and rather insulting line of cross-examination.

51. DW3 agreed that plot numbers 6,7, and 8 belonged to his deceased father. He said that he was not the administrator of his father's estate. He was unequivocal that all affected owners of plots which had encroached upon the road except the plaintiff removed the encroaching parts voluntarily and, therefore, they did not seek to obtain a court order to stop demolitions thereof.

52. Issues regarding where DW3 obtained his education, which he said was in Russia and Israel, came up but in this court's opinion, this line of cross-examination was not relevant to the issues which required determination in this suit. DW3 told the court that even without being an expert in road construction, he could observe that it was only the plaintiff's plot that encroached upon the road, therefore, making it impossible for the apposite road to be completed.

53. I frame the issues for determination in this suit as follows:

(i) Has the plaintiff's structures erected on title numbers Chuka Town 3 and 4 encroached upon a public road?

(ii) Is the plaintiff entitled to an order for permanent injunction against the defendants themselves, their agents and/or servants?

(iii) Is the plaintiff entitled to a declaration that the property known as title numbers Chuka Town/3 and 4 in Tharaka Nithi County belonged to him?

(iv) Is the plaintiff entitled to general damages?

(v) Who will pay costs apposite to this suit?

54. I have carefully considered the pleadings, other filings and the written submissions filed by the parties in support of their assertions. I opine that all case authorities proffered by the parties are good law and precedents in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. I have taken all of them into account when arriving at the findings, decisions and determinations I have made in this judgment.

55. The case of Wreck Motors Enterprises versus the Commissioner of Lands and Others, ***Nairobi LLR 5066 (Civil Appeal No. 71 of 1997) Court of Appeal*** holds that a title document is valid after issuance of a letter of allotment, meeting prescribed conditions and issuance of the apposite title. The case of Dr. Joseph N. K. Arap Ng'ok versus Justice Moijo Ole Keiwa and 4 others Civil Application No. NA1.60 of 1997 (unreported), Court of Appeal, holds that a certificate of title should be taken by all courts as conclusive evidence that the proprietor thereof is the absolute and indefeasible owner.

56. The above authorities are good authorities in their facts and circumstances. However, there is the other issue to be determined. Whereas the plaintiff is the legal owner of plot numbers 3 and 4, Chuka Town, has he confined the buildings and structures he has put up thereon to the area delineated by his title documents? This question will be answered later on.

57. The case of Family Care Ltd versus Public Procurement Administrative Review Board and Others, High Court Petition No. 43 of 2012, also proffered by the plaintiff, holds that clear statutory provisions regarding legal or statutory procedures should not be debunked by mere invocation of public interest. The plaintiff further proffered Halsbury's Laws of England Judicial Review (Volume 61 (2010) 5th Edition, Paragraph 639 (op.cit) for his assertion that people should be accorded a fair hearing before decisions negatively affecting them are made. The other cases proffered by the plaintiff, which are: Judicial Service Commission versus Mbalu Mutava and Another [2015] eKLR, President of the Republic of South African versus South African Rugby Football Union and Others (CCT16/98)2000 (1) SA1, Baker versus Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6, Kenya Revenue Authority versus Menginya Salim Murgani, Civil Appeal No. 108 of 2009, Court of Appeal, Dry Associates Ltd versus Capital

Markets Authority and Another Petition No. 328 of 2011 ALL uphold the importance of administrative and Procedural fairness. The case of Dry Associates Ltd (op.cit) is pellucid that Article 47 of the Constitution is intended to subject administrative processes to constitutional discipline.

58. The plaintiff proffered cases regarding if or if not injunctions can be granted against County Governments. The case of Josephat Gathee Kibuchi versus Kirinyaga County Council [2015] eKLR does not support the plaintiff's assertion that the provisions of the Government Proceedings Act are not applicable in suits involving County Governments. This case pellucidly held that section 21 of the Government Proceedings Act was applicable to proceedings relating to County Governments. It does not support the general tenor of the plaintiff's assertion that parties cannot rely on the Government Proceedings Act to deny them orders they seek against County Governments. This dicey legal area has now been clarified by section 2 of The Government Proceedings Amendment Act, 2015, which says that section 21 of the Act shall, with necessary modifications, apply to any civil proceedings by or against a County Government, or in any proceedings in connection with any arbitration in which a County Government is a party. The case of James Muigai Thugu versus County Government of Trans Nzoia and 2 Others, [2015] eKLR held that injunctions could be issued against County Governments. And so did the case of Gujrah Sandeep Singh versus Minister of Public Works, Roads & Transport, County Government of Kajiado and Another, [201] eKLR.

59. The cases proffered by the plaintiff in support of his assertion that he is entitled to General Damages, by and large, concern awards for exemplary damages. I do note that in his plaint, the plaintiff does not crave exemplary damages. Damages always follow the event if a litigant succeeds in his suit. This issue will be appropriately addressed in my determination of this suit.

60. The 1st and 2nd defendants proffered the following case authority in support of their assertions:-

> ***Republic Versus Attorney General and Another – Exparte Stephen Wanyeeroki [2016] eKLR***. This case held that, Mutatis Mutandis, the provisions of the Government Proceedings Act apply to civil suits involving County Governments.

61. The 3rd, 4th and 5th defendants proffered the following case authorities:

> ***(i) Republic versus Municipal Council of Naivasha and Another Ex-parte Esther Wanjiru and Another [2015] eKLR*** – This case held that Local Authorities and now County Governments had power to control developments within their areas of jurisdiction and had a statutory obligation to demolish buildings which were not in conformity with the Physical Planning Act.
>
> ***(ii) Joseph Kamau Kahungu versus John Kunyiha Kamau and 4 Others [2019] eKLR*** – In this case, the court found that where the plaintiff had fenced an area bigger than his registered area, his suit merited dismissal and the suit was indeed dismissed.
>
> ***(iii) Republic versus Municipal Council of Naivasha and Another Exparte Esther Wanjiru and Another [2015] eKLR*** - In this case it was held that the County Government had power under section 34(4) of the Physical Planning Act to demolish structures put up against the provisions of the Physical Planning Act.

62. The Interested Party proffered the case of Republic versus Municipal Council of Naivasha and Another Ex-parte Esther Wanjiru and Another [2015] eKLR (op.cit). The principles enunciated in this case have been elaborated upon in an earlier part of this judgment.

63. This court is categorical that Mr. Mwenda, the County Physical Planning Officer, whose work is supervised by the Director of Planning, is qualified to perform his planning duties. Also, Mr. Ken Opange, the District Surveyor whose work is supervised by the Director of Surveys is qualified to perform his surveying duties.

64. The plaintiff's position is that his building and structures on plot Nos. 3 and 4, Chuka Town are on

properties for which he has titles. The defendants' and the interested party's position is that the plaintiff has extended his buildings and structures beyond the area contained in his lease documents and thereby encroached on the public road infront of his building.

65. Although this court in its ruling delivered on 31st July, 2017 questioned the integrity of the proceedings which had taken place before this suit came to this court, on account that they took place in the High Court and not in the Environment and Land Court, I take cognizance of the Scene Report (op.cit) filed by Hon. V.O. Nyakundi the Deputy Registrar, Embu High Court, pertinent to his visit to the locus in quo on 6th March, 2015. The Scene Report was unequivocal that the subject ***"property appeared to have been built on the road."*** He went on to state that from the edge of the other buildings on the same side of the road, "***this structure eats into the road for about 12.9 feet. The intrusion is obvious even without the benefit of technical verification."*** The Deputy Registrar went on to state: ***"I found too that the other properties had been demolished to pave way for construction of the road."***

66. findings contained in the Scene Visit report filed by the Embu High Court Deputy Registrar are corroborated by the Scene Visit report filed by Mr.Johnson O. Ojwang, this court's Chief Executive Officer concerning a scene visit made by the parties on 20th April, 2018. This report states:

> ***"Upon taking physical measurement on ground and from the presentation made by both County Physical Planning Officer and the District Surveyor on 20th April, 2018 during the visit, I hereby make this report that there is encroachment of the road reserve and there is need to expand the width of the road along that section to 18 m or 20 m to allow the ongoing construction of the road to continue."***

67. This is a civil case. My duty is to find on a balance of probability who between the plaintiff and the other parties convinces/convince the court on the evidence before it that he/she/it has proved the tendered assertions. On a careful analysis of the evidence before me, I find that the plaintiff has encroached upon the road infront of his plots. Although the 4th defendant has told the court that it has no issues concerning plot No. 3 Chuka Town, as the plaint mentions plots No. 3 and 4 Chuka Municipality, the declaration or denial of declaration sought in the plaintiff's plaint must cover both plots.

68. I find that the plaintiff had knowledge of the Notice issued by the 3rd defendant through the Standard Newspaper on 30th October, 2014 requiring all persons who had encroached on any public road and road reserves, way leaves or public land to remove those offending structures or face demolition of the same. Although the plaintiff's name was not mentioned in the notice, as the court has already found, he was one of the encroachers. I do not agree that he was not accorded fair administrative or procedural fairness. Instead of waiting for the 2nd defendant to issue the necessary notice to him personally as required by the Physical Planning Act, he rushed to court and obtained injunctive orders against the defendants. Having done that the defendants had no other option than to defend themselves in court.

69. The plaintiff has not in any way controverted the defendants and the interested party's assertion that he had extended his buildings and structures beyond the area he owned as shown in his lease documents. His argument is that he has titles to plot Numbers 3 and 4. There is no contestation that the plots belong to him. But that does not allow him to put up buildings and structures beyond the area that belongs to him. That amounts to encroachment. When the encroachment concerns a public road, this encroachment should be veritably frowned upon and deprecated. It is not only against public policy but also amounts to despicable impunity. This affects the present and future generations. If allowed to pass, there will be no roads for future generations. Defunct local authorities and county governments cannot be allowed to allocate public roads to individuals or to condone encroachment thereon.

70. I need not reinvent the wheel in as far as matters concerning road reserves go. The Court of Appeal through Waki JA in Kenya Highways Authority versus Shalein Masood Mughal and 5 Others opined as follows:

> ***"[37]…The fact of the matter is that there was in existence of a road reserve before the disputed***

plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 metres which in law did not have to be noted in any land register. It is an overriding interest and not an equtable interest."

"[44]… I have found that the road reserve existed before the disputed plot. It was an overriding legal interest unaffected by the rights of any subsequent purchaser whether such purchaser had notice of it or not"

71. In the circumstances of the present case, and by extrapolation, the road existed before the plaintiff put up his buildings and structures on plot Nos. 3 and 4, Chuka Town. It was not open to the plaintiff to alienate part of it by encroaching upon it.

72. From the foregoing, I find that part of the plaintiff's structure erected on Title Numbers 3 and 4 Chuka Town has encroached on a public road. For this reason the plaintiff is not entitled to an order for permanent injunction against the defendants themselves, their agents and/or servants. Although plots Nos. 3 and 4 Chuka Town belong to the plaintiff, he is not entitled to a declaration that his ownership of the said plots includes ownership of the portions of the public road and any other public portions he may have encroached upon.

73. For the above reasons, I find that this suit merits dismissal.

74. From the foregoing, it is pellucid that the plaintiff is not entitled to general damages and costs of this suit. A public interest issue ensues. It is this: Can long usage legalize an illegality arising out of an unlawful use of public land? I opine that no length of usage can sanitize an illegality. In this case, it is not disputed that the apposite development plan was approved in 1988. From the evidence before court, and indeed from the plaintiff's evidence, his building plans were approved in 1991 and in 2003 or thereabout. That was years after the apposite Development plan came into effect in 1988.Once a development plan is approved, the Physical Planning Act decrees that no development should take place on any land unless it is in conformity with the approved plan. The plaintiff's buildings and structures on the subject plots and especially on plot No. 4, Chuka Town were not constructed in conformity with the apposite development plan.

75. Having said that, I do not find it necessary to consider if or if not injunctive orders can be issued against county governments. However, with the extension of the application of section 21 of the Government Proceedings Act to County Governments, it is clear that county governments are being given a parity in civil proceedings commensurate to that one statutorily accorded to the National Government. The prayer for a permanent injunction in the plaint being an omnibus one in that it is directed at the 3rd defendant and other defendants, I would have found it difficult to grant it to the plaintiff. But this amounts to a mere pyrrhic academic exercise, as I have already found that the plaintiff is not entitled to this prayer. I, therefore, make no definitive finding on this issue.

76. In the circumstances I issue judgment in the following terms:

a. This suit is hereby dismissed.

b. The plaintiff is given 90 days to remove the offending portions of his building/structures, and this order is deemed as the requisite notice under section 30(4) of the Physical Planning Act **FAILING** which the County Government of Tharaka Nithi is entitled to demolish the offending portions of the plaintiff's buildings/structures.

c. Costs shall follow the event and are awarded to the 2nd defendant, the 3rd defendant and the Interested Party.

d. For avoidance of doubt, no costs are awarded to the 6th defendant who did not, in any meaningful way, participate in these proceedings.

77. Orders accordingly.

Delivered in open Court at Chuka this 4th day of December, 2019 in the presence of:

CA: Ndegwa

Murimi Murango for the Plaintiff

Murango Mwenda for 1st and 2nd Respondents

Miss Kungu for 3rd to 5th Respondents

Murango Mwenda h/b Rono for the Interested Party

P. M. NJOROGE,

JUDGE.

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[1]Section 19(2) of the Physical Planning Act.

[2]Section 20(2) of the Physical Planning Act.