



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 376 OF 2004

PARK TOWERS LIMITED.....PLAINTIFF

VERSUS

MOSES CHEGE.....1ST DEFENDANT

CASPER CHURU.....2ND DEFENDANT

DAVID ROTICH.....3RD DEFENDANT

JAMES MWANGI.....4TH DEFENDANT

GRACE NYAMBURA.....5TH DEFENDANT

JANE MUTHONI.....6TH DEFENDANT

MINUA KAMUNJO.....7TH DEFENDANT

NAIROBI CITY COUNCIL.....8TH DEFENDANT

JUDGEMENT

INTRODUCTION:

The Plaintiff initially filed this suit against the Defendants in the Resident Magistrate's court as **RMCC NO. 2854 of 2000**. The Plaintiff sought inter alia injunctive orders against the Defendants and a declaratory order that being the sole registered proprietor of **L.R.NO.209/8408** and **L.R.NO. 209/8409** respectively (herein after referred to as "**the suit properties**") was entitled to quiet possession thereof and to the daily collections arising from the operations on the said suit properties.

On 6th June 2000 an ex-parte order of injunction was granted pending the hearing inter partes of the application and on 14th June 2000 the injunction was by consent of the parties confirmed and a further order issued for accounts to be determined at the hearing of the suit. On 30th June 2004 the Plaintiff applied and was allowed to have the suit transferred to the High Court and was further allowed to amend the Plaintiff. The suit upon transfer was renumbered **HCCC NO.376 of 2004**. The Plaintiff yet again on 14th February 2008 made an oral application to be further allowed to amend the Plaintiff and the request was granted resulting in the filing of the re-amended plaintiff dated 30th April, 2008 on the 23rd September 2008. It is on the basis of this plaintiff that evidence was led.

By the amended plaintiff the plaintiff principally sought orders of injunction to restrain the Defendants from interfering with the plaintiffs maintenance and management of the suit properties pending the hearing of the suit and further sought an injunction against the Defendants restraining them from cancelling, revoking or in any manner interfering with the plaintiffs existing business permits and/or licences. The plaintiffs further sought an order against the Defendants for accounts and for the Defendants to refund all the revenue they had collected from the plaintiffs plots **L.R. NO. 209/8408** and **L.R.NO. 209/8409** respectively. Additionally the plaintiff sought a declaration that the plaintiff being the sole registered owner of all those parcels of land described as **L.R. NO. 209/8408** and **L.R. NO.209/8409** Nairobi are entitled to quiet possession thereof and all takings rightly arising from its daily operations thereon. The plaintiff further sought the following prayers under the amended prayer (f) of the plaintiff.

i. Refund of revenue arising out of daily collection from March 2000 to July 2005 amounting to Kshs.48,825,500/00.

ii. (a) Damages and loss of revenue arising out of daily collection of Kshs.25,000/- per day from July 2005 until determination of this suit.

iii. An order that the 2nd Defendant to furnish accounts for all revenue collection from L.R. NO. 209/8408 and 209/8409 respectively from March 2000 to 19th July 2005.

iv. Alternative the Plaintiff to be at liberty to furnish its own accounts.

The Plaintiff vide its re amended plaint contend that they were at all material times the registered owner of all those parcels of land described as **L.R.NO.209/8408** and **L.R. NO.209/8409** together with all developments and buildings thereon and as such registered owners managed and maintained the properties for the purposes of parking for various motor vehicles plying within and out of Nairobi and also for offloading and storing farm produce at a fee on daily basis which were subsequently sold at the adjacent land Retail Market by the retailers.

The plaintiff further contended that it applied for and had been issued with the yearly permits after paying the stipulated fees to the 8th Defendant to operate its business on the suit properties and that the plaintiff had engaged the services of 20 employees for the collection of the relevant parking fees and user's fees. The plaintiff avers that sometimes on or about 26th March 2000 the Defendants without prior consultation with or consent of the plaintiff began interfering with the collection of revenue by the plaintiff's agents and the Defendants commenced collecting revenue from the retailers on the plaintiff's plot adjacent to the retail market thus denying the plaintiff its daily collection which the plaintiff approximated at between Kshs.20,000/- and Kshs.25,000/- per day. The plaintiff avers that owing to the interference and intrusion by the Defendants it was rendered unable to service its Bank loan taken on the security of the two plots due to the with holding of the daily takings by the Defendants precipitating in the institution of this suit for redress.

The Defendants filed a joint amended defence and counter claim dated 2nd February 2006. The Defendants made a general denial of the contents of paragraphs 4 to 14 of the plaintiff's amended plaint and further pleaded under paragraphs 8 and 9 of the amended defence that the Plaintiff acquired title to the suit property by virtue of an allocation which was done in favour of the plaintiff fraudulently and/or irregularly by certain employees or agents of the 8th Defendant and contended that by reason of the fraud and/or irregularity the 8th Defendant was entitled to an order of nullification of the certificate of allocation and cancellation of the certificate of Title which was issued pursuant to the allocation. The Defendants under the counter claim sought judgment against the plaintiff for:-

a. A declaration that the said allocation was illegal.

b. An order that the allocation be nullified and the certificate of title that was issued pursuant to the said allocation be cancelled and the property do revert to the 8th Defendant.

c. Costs and interest.

BRIEF BACK GROUND

To contextualize the matter and the issues it is necessary to briefly set out the background to the dispute. The suit properties being **L.R.NO.209/8408** and **L.R.NO.209/8409** were further to grant **NOS.I.R.66528** and **I.R.66529** respectively dated 28th July 1995 registered in favour of the Nairobi City Council on 1st August 1995 for a term of 99 years from 1/5/1965.

The Nairobi City Council by a tenancy agreement dated 30th July 1979 had let the premises previously described as "**Matatu Bus Station**" to **Solomon Kitundu Munyoki** and **Julius Muthoka Ndolo** trading under the firm name of "**Usalama Peugeot Joint Services**". Upon the suit property being titled and registered in favour of the Nairobi City council the said **Solomon Kitundu Munywoki** and **Julius Muthoka Ndolo** together with other persons applied for a lease for the suit premises from the City Council. The Nairobi City Council granted a lease for the remainder of the term of 99 years from 1/5/1965 (less the last three (3) days thereof) to **M/S Joseph Mulu Mutisya, Solomon Kitundu Munyoki, Julius Muthoka Ndolo** and **Peter Munyoki Kyengo** in regard to each of the two properties for appropriate consideration.

The leases were dated 4th March 1995 (amended to 1996) and were duly stamped and registered against the respective titles on 26/3/1996. Upon registration of the leases the lessees became the registered owners of the suit properties and were entitled to deal with the suit properties as such owners. By a transfer of lease made on 5th August 1996 the said **Joseph Mulu Mutisya, Solomon Kitundu Munywoki, Julius Ndolo** and **Peter Munyoki Kyengo** transferred (assigned) their interest in the suit properties to Park Towers Limited the plaintiff herein for consideration and with the consent of the City Council of Nairobi. The transfers of lease were duly registered on 12th August 1996 and henceforth the plaintiff became the registered owner of the two suit properties. The plaintiff after the transfer of the leases took possession and started utilising the suit properties and in July 1997 had its development plans approved by the City Council and had secured the funds to undertake the development and in this regard had offered the suit properties as security for a loan advance of Kshs.55,000,000/- by both Giro Bank Limited and Credit & Commerce Bank Limited. The city council had consented to the two charges which were registered against the suit property.

On suit plot **L.R.NO.209/8408** there was a tea kiosk that had been lease by the City Council to one **Agnes Mutheu Muema** before the plot was leased to **Joseph Mulu Mutisya** & others and consequently transferred to the plaintiff further in a previous suit namely **HCCC NO. 871 of 1997, Machakos Public Transporters Self Help Group –vs- Nairobi City Council as 1st Defendant, Joseph Mulu Mutisya & 3 others as 2nd Defendants and Park Towers Limited as 3rd Defendant** the Plaintiff's who had contested the transfer of the suit property to the plaintiff herein and who had been operating and managing the suit property as a matatu Bus Park recorded a settlement of the suit by consent in terms of the Decree issued on 12th October 1999 produced as P.Exhibit 10 herein. Under the terms of the consent order/decreed the plaintiffs acknowledged the 3rd Defendant, the plaintiff herein as the registered owner of the two suit properties and handed and delivered to

the plaintiff herein possession of the properties for their management and resumption of collection of parking fees from the users of the two properties. In the same case monies that were deposited in court by the plaintiff pursuant to an order of the court was on 28th June 1999 ordered released to the 3rd Defendant, the plaintiff herein. The City Council of Nairobi who were the 1st Defendant participated in the case and did not contest the order of settlement of the suit or the order for the release of the collections deposited in court by the plaintiff to the 3rd Defendant, the Plaintiff in the instant suit.

It does appear that following the settlement of the case by the Machakos Public Transporters Self Help group aforesaid the plaintiff set out to take and assume total management of the suit properties including collection of daily parking fees and charging levies to users of the open air market in respect of which they had obtained a licence/permit from the 8th Defendant to operate. This did not go down well with the 8th Defendant resulting in the intervention by the 8th Defendant through its agents in March 2000 which provoked the institution of this suit by plaintiffs.

ISSUES FOR DETERMINATION

The parties did not agree and/or file any agreed set of issues. The plaintiff and the Defendants have each in their submissions framed their respective issues which they have submitted on. On the basis of the pleadings and the documents and materials tendered the court frames the following issues for determination.

- 1. Whether the plaintiff is the registered owner of the suit properties and If so whether such registration was procured by virtue of a fraudulent and/or irregular allocation in favour of the plaintiff by agents of the 8th Defendant.**
- 2. Whether the registration of the plaintiff as owner of the suit properties was irregularly obtained and/or the same offended statute law and therefore null and void.**
- 3. Whether the plaintiff was carrying on any lawful business on the suit plots in respect of which the plaintiff was charging a daily fee and if so whether the 8th Defendant either by itself or through agents unlawfully interfered with the plaintiff's said business by taking over the collection of the daily fees which they did not account to the plaintiff.**
- 4. If there were daily collections being generated out of the business carried on the suit properties what was the quantum on a daily basis and who was entitled to it?**
- 5. Whether the plaintiff is entitled to the reliefs sought.**
- 6. Whether the Defendants are entitled to the reliefs sought.**

Evidence by the plaintiff and the Defendant

Two witnesses being Pw1 one **Francis Ngatia**, a director of the plaintiff and pw2 are **Samuel Dominic Mwathe** who described himself as a manager and director of the plaintiff testified on behalf. The Defendant called one witness Dw1 one **Isaac Njuguna Nyoike**, the Chief Valuer to testify on behalf of the Defendant.

On the part of the plaintiff pw1 gave evidence that the plaintiff a duly incorporated company in Kenya purchased the sit properties from its previous registered owners namely **Joseph Mulu Mutisya & 3 others** pursuant to an agreement of sale for the consideration of Kshs.16 million. The suit properties were duly transferred to the plaintiff after the transfers were consented to by the 8th Defendant. The Transfers in favour of the plaintiff were duly stamped and registered at the Lands office and the plaintiff as from 12th August 1996 became the registered owner of the suit properties. The witness further testified that the plaintiff wanted to develop the property and applied to the City Council for approval of the development plans and approval was granted. The witness further testified that the plaintiff charged the property to raise the development funds. The witness further testified that the plaintiff was collecting parking fees and other charges from the users of the plot until 26/3/2000 when the City Council through its agents stopped the plaintiff from using the plots and took over the collection of the revenue from the plaintiff. The witness produced the various documents as exhibits- the sale agreement the transfer of lease, charges registered against the properties, copies of leases from the previous owners and various documents from the City Council. The witness testified that other than in the present suit the City Council has never challenged the ownership of the suit plots by the plaintiff and instead the 8th Defendant had all along acknowledged the ownership of the suit plots by the plaintiff even in previous suits where the issue of ownership of the suit properties had arisen.

Pw2 gave evidence that he was managing the use of the premises for the plaintiff which were being used to provide parking facilities for motor vehicles and as an open air market. He testified that the plaintiff had licences for parking and to operate open air market which had been issued to the plaintiff by the 8th Defendant. The witness gave evidence that they used to levy charges for users of the open air market. The witness testified that they used to issue receipts for all collections and on a daily basis they used to collect an average of Kshs.25,000/-. The witness produced a bundle of receipts Exhibit 22. He further testified that on 26/3/2000 persons from the City Council invaded the suit properties and stopped the plaintiff from carrying on its business and instead the City Council started collecting the parking fees and the levy from the open market users.

Although the plaintiff came to court and obtained an injunction against the Council, the City Council refused to readmit the plaintiff into the suit premises and instead the City Council continued to collect revenue from the users of the suit premises on a daily basis. This witness testified before me on 8/5/2013 after being recalled with the consent of the Defendants. While he reiterated the evidence he gave previously before **Honourable Justice Osiemo** he further testified that the City Council of Nairobi and Park Towers Limited the Plaintiff herein were in a subsequent suit ELC NO. 314 of 2012 sued by one **Mutheu Muema** after the City Council demolished her kiosk and structures on **L.R.**

NO.209/8408 where she was a tenant. The witness testified that the Nairobi City Council filed documents responding to the applicants application for injunction denying they were the owners of the property and asserting the property was owned by the plaintiff herein and in this regard referred to the replying affidavit sworn by **Aduma Owuor** Director, Legal Affairs City Council of Nairobi on 31st August 2012.

It was the evidence of pw2 that the City Council through its agents continued to collect revenue from the said plaintiff's properties upto 19th July 2005 when the 8th Defendant vide a Notice to vacate issued to all traders Landhies Road-outside market gave notice to all traders to the effect that **".....Nobody will be allowed to trade from the peripheral area of Landhies Road Market vis-à-vis including the retailing activities that take place between the market premises and Park Towers Parking. This has been necessitated by the deterioration of the area hygienic standards as a result of this illegal trading activities...."**. This was the basis for the plaintiff to seek amendment of its plaint which was granted by consent on 14th February 2008 to the effect that **"...the 8th Defendant do show the accounts for all the revenue collected from L.R. NO.209/8408 and 209/8409 from March 2000 to 19th July 2005"**. Alternatively if the 8th Defendant failed to render accounts the plaintiff was to be allowed to furnish its own accounts which for the period it computed at Kshs.48,825,000/- based on the average daily collections of Kshs.25,000/-. The notice to vacate dated 19th July 2005 and the consent order emanating from the leave to amend the plaint given on 14th February 2008 are exhibited in the plaintiff's bundle of documents at pages 230 and 226 attached to the submissions.

Isaac Njuguna Nyoike DW1 the Chief Valuer of the 8th Defendant and his evidence was to the effect that the plaintiff did not have proper title as the proper procedure was not adhered to when the properties were transferred to the plaintiff. He contended that no ministerial approval and/or consent was sought and obtained for the alienation and transfer of the suit properties as required under the law. He denied that the 8th Defendant entered the suit plots to collect revenue and/or that it authorised its agents (1st to 7th Defendants) and/or any other person to enter the plots to collect revenue from the plots as alleged by the plaintiff. The witness stated there was no record of the consent of the Local government Minister having been obtained for the alienation of the properties to the initial allottees and neither was there any evidence of any resolution having been passed by the council. The witness however conceded having regard to the documents of transfer produced in evidence by the plaintiff the 8th Defendant consented to the transfer.

Further having regard to the replying affidavit sworn by the Tower clerk **Mr. S.K. Ngeno in HCCC NO. 871 of 1997** the City Council confirmed the suit properties were private properties and that as per the decree extracted in the suit the City Council had parted with possession of the suit properties. The witness further evidence was that the special conditions attaching to the grants in respect of the suit properties forbid the transfer subdivision or parting with possession without the consent of the Commissioner of Lands and asserted that to his knowledge no such consent was obtained which rendered the transfers null and void and thus the same ought to be cancelled.

DETERMINATION OF THE ISSUES:-

ISSUE NO. 1.

Whether the plaintiff is the registered owner of the suit properties and if so whether such registration was as a consequence of fraudulent or irregular allocation.

Pw1 gave evidence to the effect that the plaintiff purchased the two suit properties from **Joseph Mulu Mutisya** and 3 others to whom the 8th Defendant had leased the properties. The Agreement for sale dated 11th April 1995 produced in evidence shows the consideration for the purchase as Kshs.16 million which the plaintiff paid and the leases in respect of the 2 properties were transferred (assigned) to the plaintiff with the consent of the 8th Defendant. Pw1 produced in evidence the copies of the leases granted to **Joseph Mulu Mutisya & 3 others** in respect of **L.R. NOS.209/8408** and **209/8409** both dated 4th March 1996 which were duly registered at the Lands Office on 26th March 1996. The transfer of these leases to the plaintiff dated 5th August 1996 were consented to by the 8th Defendant as per the endorsement of the consent in the respective transfers made and counter signed by the Town clerk on 1st August 1996. The transfers were duly registered at the Land Office on 12th August 1996.

The Defendants witness DW1 conceded that as per the documents exhibited by the plaintiff in court, the plaintiff was the registered proprietor of the two suit properties and he further conceded that other than in the present suit the 8th Defendant has not challenged the ownership of the plaintiff's of the two suit properties. Indeed evidence tendered indicate that prior to the institution of the present suit the City Council of Nairobi had acknowledged that the two suit properties had been leased to the parties who sold and transferred the plots to the plaintiff as evidenced by the following:

(i) In **HCCC NO. 871 of 1997 Benson Kamau & 2 others** (suing for and on behalf of Machakos Public Transport Self- Help Group –vs- Nairobi City Council & **Joseph Mulu Mutisya & 3 others (2a-d) & Park Towers Limited (3rd Defendant) the Town Clerk one S.K. Ngeno** swore a replying affidavit on 5th September 1997 refuting the plaintiffs claim to the suit properties and reproduce hereunder are the salient paragraphs of the affidavit relevant to the present proceedings:

Para 5. THAT sometime in 1994 an application for a lease of the suit plots known as **L.R.209/8408** and **L.R.NO. 209/8409** was received by the 1st Defendant (City Council of Nairobi) from defendants 2A, 2B, 2C and 2D (Joseph Mulu Mutisya & 3 others).

Para 6: THAT two of the above defendants **SOLOMON KITUNDU MUNYWOKI** and **JULIUS MUTHOKA NDOLO** had been tenants of the 1st Defendant in respect of the suit premises since 1979 trading as Usalama Peugeot Services and paying a monthly rent to the 1st Defendant.

Para 7: THAT the application for lease by the above defendants was favourably considered and the two parcels of land

accordingly leased to them.

Para 8: THAT leasing of the property in issue was consented to by the 1st defendant and all relevant fees transaction were received.

Para 13: THAT contrary to the allegations of fact contained in para 11 of Mr. Kanui's affidavit all the material documents of allocation and lease were co-signed by the then Town clerk **Zipporah Wandera**, on behalf of the 1st Defendant in her capacity as the Chief Executive of the said 1st Defendant and the transfer of lease and charge signed by the then Acting Town clerk **Mr. Hezron Oluoch**.

Para 16: THAT the 1st Defendant is duly authorised to lease property such as the one in dispute. Consequently the allotment lease transfer of lease and charge of the property herein was done validly and in accordance with the laid down procedures of the 1st Defendant.

(ii) That **HCCC NO. 871 of 1997** referred to in (i) above was compromised pursuant to a consent order recorded between the plaintiffs (claimants) and the 3rd Defendant Park Towers Limited the (plaintiff in the present suit) interalia on the following terms:-

Order 3. That the plaintiffs jointly and severally do hereby deliver **L.R. 209/8408** and **L.R. NO. 209/8409** forthwith to Park Towers Limited, the registered owner.

Order 4. That the Third Defendant, registered owners, do hereby take possession forthwith of **L.R. NO. 209/8408** and **209/8409** and resume formal general management and maintenance of the properties in line with Nairobi City Council By Laws and the Laws applicable to the suit premises.

Order 5. That the Third Defendant Park Towers Limited do forthwith resume collection of parking fees from all the users of **L.R. NO. 8408** and **209/8409** as the owners.

Order 6. That the third Defendant, Park Towers Limited do hereby appoint Sammy D. Muathe as its sole agent for the smooth exercise of delivering by the plaintiffs of **L.R.NO.209/8408** and **L.R.NO.209/8409** to the Third Defendant, Park Towers Limited and collection of parking and maintenance of **L.R. NO.209/8408** and **L.R.NO.209/8409** by the Third Defendant.

The 8th Defendant as evidenced by the replying affidavit sworn by its **Town clerk S.K. Ngeno** actively participated in the proceedings in Nairobi **HCCC NO. 871 of 1997** and thus even though the 8th Defendant was not party to the consent letter between the plaintiff and the 3rd Defendant that gave rise to the consent decree issued in the said case the 8th Defendant cannot feign ignorance of the decree. The 8th Defendant has never challenged the decree given in that case and in my view the 8th Defendant acquiesced to the contents of the said decree which in no uncertain terms acknowledged the plaintiff in this present suit as the registered owner of **L.R.NO.209/8408** and **L.R.NO.209/8409**. The replying affidavit sworn by Town clerk Mr. **S.K. Ngeno** in the suit (**HCCC NO.871 of 1997**) referred to above is categorical that the 8th Defendant had leased out the suit properties to the plaintiff in the present suit. In the affidavit the City council acknowledges and admits it approved the grant of the lease in respect of the properties and subsequently consented to the transfer of the lease and the charging of the property. The transfer was to the plaintiff herein and it was the plaintiff who charged the property.

The searches conducted by the 8th Defendant on 11/4/2012 and which were exhibited in the plaintiff's supplementary bundle of documents confirmed the plaintiff was the registered owner of the suit properties. Indeed an internal memo dated 15/5/2012 from the Deputy Director Legal Affairs of the 8th Defendant to the Director, Social Services, Director, City Inspector and Director City Planning advised that the two suit properties were registered in the plaintiff's name and acknowledged there was an existing court order on both properties restraining the council from interfering with the two properties. The 8th Defendant further in a subsequent suit Nairobi **HCCC NO. 314 of 2012 (supra)** through a replying affidavit sworn by its Director, Legal affairs one, **Aduma Owuor** on 31st August 2012 confirmed that the City Council was not the registered owner of the suit properties and that it was the plaintiff herein who was the registered owner. This replying affidavit was exhibited in the plaintiff's supplementary bundle of documents.

On the basis of the evidence tendered I am satisfied that the plaintiff purchased the suit properties from **Joseph Mulu Mutisya & 3 others** who were lessees of the City Council. The transfer of the lease to the plaintiff was executed appropriately and consented to by the 8th Defendant. The transfers of the leases in respect of the suit properties were registered at the lands office on 12th August 1996 and henceforth the plaintiff became the registered owner of the lease properties for the residue of the term of the lease less the last three days. The plaintiff was not an allottee of the leases but was a purchaser for value from the initial allottee of the leases. The evidence on record indicates the allocation to the initial allottees was properly done (refer to replying affidavit by **S.K. Ngeno Town Clerk of City Council**) and hence the transfer of the suit properties which was likewise consented to by the City Council cannot be faulted.

Having regard to the evidence I have come to the finding that the plaintiff is the registered owner of the suit properties and that such registration was not as a consequence of any fraudulent or irregular allocation to the plaintiff and that disposes the first issue.

Issue NO. 2:

Whether the registration of the plaintiff as owner of the suit properties was irregularly obtained and/or the same offended statute law and therefore null and void.

The court in determining issue NO. (i) above found the plaintiff to be the registered proprietor of the suit properties following purchase and transfer for valuable consideration. The issue to be determined is whether the registration of the plaintiff as owner of the properties was irregularly obtained and/or whether the same offended statute law as contended by the 8th Defendant. The 8th Defendant submits the suit properties were public utility properties and were never available for alienation to any individual and any purported allocation and/or alienation to the lessees who transferred the properties to the plaintiff was null and void and could not pass a proper title to the plaintiff. The plaintiffs have contended that they were innocent purchasers for value of the suit properties from persons who were the registered owners and to underscore the fact that the suit plots were not public utility plots the plaintiff submit that in the replying affidavit by **S.K. Ngeno**, Town Clerk in **HCCC NO. 871** of 1997 referred to earlier in this judgment affirmed that the two parcels of land were indeed not public utility plots and were leased out and were being used privately. Before the properties were leased to **Joseph Mulu Mutisya & 3 others** who subsequently transferred and assigned the lease to the plaintiff in the present suit the same had been leased from way back in 1979 to **"Usalama Peugeot joint Services"** who had been paying rent to the City Council of Nairobi. Further in the same case (**HCCC NO.871 of 1997**) **Mr. Kuria – Gathoni**, Director of City Planning by a further Replying affidavit sworn on 17/9/1997 deponed as follows:-

Para 5. That I well and truly state that as averred in the Replying Affidavit sworn by the said S.K. Ngeno the plots known as L.R. NO.209/8408 and 209/8409 are the private property of the 1st Defendant (Nairobi city council).

Para 6: That a public utility plot is one that is designated by the Nairobi City Council as such any payment by the public for its use.

Para 7: That the plots known as L.R.NO.209/8408 and 209/8409 have never been designated by the Nairobi City Council as public utility plots and have always attracted rents and rates.

Para 8: That the plots known as L.R. NO. 209/8408 and 209/8409 are designated by the Council as and for the purpose of parking, shops and offices to be developed in accordance with plans approved by the Nairobi City Council.

The Plaintiff, as testified by Pw1 purchased the suit properties from third parties who held leases from the City Council of Nairobi. The transfer and/or assignment of the leases to the plaintiff were duly approved and consented to by the City Council of Nairobi after all Land rates and all dues due to the city Council had been paid. The sale and transfer of the lease to the plaintiff was not from the City Council of Nairobi but from the registered owners of the lease hold interest. In the premises no consent and/or approval of the Minister for local Government was required under the provisions of the Local Government Act Cap 265 of the Laws of Kenya. Thus the provisions of section 144 (5) of the Local Government Act did not have any application to the sale by **Joseph Mulu Mutisya & 3 others** to the Plaintiff and the submission by the 8th Defendant that the sale to the plaintiffs was null and void for the reason that no ministerial consent was obtained is misplaced as no such consent was required for the transaction.

The 8th Defendant submitted that the disposal of the suit properties was contrary to the statute as the consent of the Minister for Local Government which is a pre requisite for alienation of any public land held by the 8th Defendant for a term exceeding 7 years was not sought or granted. The plaintiff's transaction was not with the 8th Defendant and the same could not therefore have required the Minister's approval or consent. The 8th Defendant has further in its submissions contended that suit properties were public properties and the same could therefore not have been available for alienation to private developers. This argument appears to be self defeating as the same suit properties had from 1979 been leased out and the City council had been collecting rent from private individuals. Further in the replying affidavits by both S.K. Ngeno and Kuria Gathoni sworn in September 1997 the two council officers conceded that the suit properties had always been the private properties of the City council and the same were available to be let out to any person provided such person used the same for the reserved purposes.

Under the terms under which the suit properties were held the same were transferable with the consent of the Commissioner of Lands. The City Council as the grantor of the lease had the obligation and duty to obtain the consent of the Commissioner of Lands to the lease. The commissioner of Lands issues consent for transfers and/or leases upon being satisfied that any land rent due to the government has been paid and in case of properties within any local authority the Commissioner of Lands requires evidence of payment of rates before processing the registration of transfer. Provided the land rent has been paid and there is no breach of the lease conditions the Commissioner of Lands issues consent to transfer/charge as matter of course.

In the instant case there is no averment that any rent was outstanding and there is evidence that the rates to the City council had been paid. The Commissioner of Lands would in any event decline to register any transfer where the pre requisite conditions have not been satisfied. In the present case the commissioner of Lands registered the transfer in favour of the plaintiff and the plaintiff became entitled to the rights and privileges of being the registered proprietor. The Defendants witness **Dw1** testified that the City Council's records did not show that the consent of the Minister for Local Government had been granted to the transaction that vested ownership of the suit properties in the names of **Joseph Mulu Mutisya & 3 others**. The Defendant thus submitted no valid title could have been passed to the lessees who purported to transfer and/or assign the leases they held to the plaintiff and consequently the registration of the plaintiff as owner of the suit properties was null and void.

Dw1 was neither the Town Clerk nor the Chief Valuer of the 8th Defendant at the time the transaction was carried out. The Town clerk **Mr. S.K. Ngeno** in 1997 barely a year after the transaction had been carried out confirmed and affirmed that the lease to **Joseph Mulu Mutisya & 3 others** of the suit properties had properly and procedurally been made to them. No evidence in my view was led by the 8th Defendant to show that the Minister had not approved and/or consented to the allotment of the suit properties to the **Mulu Mustisya group**. Besides the same suit properties had been leased out to 2 of 4 new lessees under a 1979 lease and all that was happening in 1996 was indeed a renewal and extension of that lease and formalisation by way of registration of the lease. At any rate I do not suppose the transaction by the **Mulu Mutisya group** to the plaintiff, to the extent that the city council of Nairobi accorded its consent to the transaction would be affected by the non observance of any procedural requirements as between the City Council and the transferors to the plaintiff in so far as the earlier transaction was concerned.

Section 41 of the Transfer of Property Act (Revised) (2010) provides thus:-

41. Where, with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property and transfers the said for consideration, the transfer shall not be voidable on the ground that the transfer was not authorized to make it. Provided that the transfer after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

The lease to **Joseph Mulu Mutisya & 3 others** in respect of the 2 suit properties were made for consideration and they were duly executed by the duly authorized officers of the 8th Defendant. The properties were previously under lease to 2 of the lessees and the lessees could not have a basis to doubt the 8th Defendant had the power to lease the properties.

The plaintiff being the registered owner of the suit properties, its title is by virtues of section 23 (1) of the Registration of Titles Act Cap 281 Laws of Kenya (repealed) and now section 26 (1) of the Land Registration Act NO.3 of 2012 absolute and indefeasible and is not liable to challenge save on the ground of fraud or misrepresentation to which the plaintiff has to be shown to be a party, and/or the certificate of title is shown to have been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26 (1) provides:

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easements, restrictions and conditions contained in the certificate, and the title of that proprietor shall not be subject to challenge, except

a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The evidence by PW1 is clear that the plaintiff purchased the suit properties for valuable consideration from **Joseph Mulu Mustisya and 3 others** who were lessees from the 8th Defendant and that the 8th Defendant consented to the transfer of the leases which were duly registered. No fraud is alleged against the plaintiff and no fraud had been proved on their part and neither have they been shown to have party to any fraud that has been proved. It has not been proved the plaintiff acquired its title illegally, unprocedurally or through a corrupt scheme. The plaintiff paid all dues to the 8th Defendant who duly consented to the transfer of lease which were duly stamped and registered. In the circumstances I am not persuaded the registration of the plaintiff as owner of the suit properties was irregularly obtained and/or that the same offended statute law. I hold that the registration of the plaintiff as owner was lawful and valid and that the plaintiff is the absolute and indefeasible owner of the suit property by virtue of that registration. This disposes the second issue which I answer in the negative.

ISSUE NO. 3.

Whether the plaintiff was carrying on any lawful business on the suit plots in respect of which the plaintiff was charging a daily fee and if so whether the 8th Defendant either by itself or through agents unlawfully interfered with the plaintiff's said business by taking over the collection of the daily fees which they did not account to the plaintiff.

The plaintiffs witnesses pw1 and pw2 testified that they were using the suit properties for parking vehicles by members of the public and were charging fees on a daily basis and that as the City Council had licenced the plaintiff to operate an open air market they were charging the users who brought their wares for sale at the suit plots. It was the plaintiffs evidence that they were carrying on this business until the 26th March 2000 when the 8th Defendants through its agents (the 1st to 7th Defendants) descended on the suit properties and stopped the plaintiff from carrying on its business on the suit properties.

That the plaintiff was carrying on business on the suit plots cannot be in doubt. Under the terms of the consent recorded in **HCCC NO. 871 of 1997** (referred to earlier) on the 8th October 1999 the plaintiff was handed over possession of the suit properties and were mandated to forthwith resume collection of parking fees from all the users of the suit properties and specifically Pw2, Sammy Muathe, was nominated as the sole agent of the plaintiff to take over the collection of parking and maintenance fees of the suit properties on behalf of the plaintiff. Earlier on the June 28th 1999 the court in the same suit had by consent of the parties authorized the release to the plaintiff herein of monies that had been deposited in court on account of parking fees and maintenance fees collections from the suit properties.

The Plaintiff produced evidence that during the year 2000 they applied to the 8th Defendant and were issued with the following licences/permits by the City Council:-

i. permit no.0022633-To operate a parking on L.R. NO. 209/8409

ii. Permit NO. 0023451- to operate a catering kiosk on L.R. NO. 209/8408.

iii. Permit NO. 0023491- To operate an open air market on L.R.NO.209/8409.

The Plaintiff through Pw2 testified that they were making daily collections out of the activities and on average were netting an average of Kshs.25,000/- daily. The witness produced in evidence sample receipts that they were issuing to the users as Exhibit 22. The receipts were bulky but the analysed and collated receipts showed that the plaintiff were indeed carrying on business on the suit properties and were

making daily collections.

The 8th Defendant though not denying the plaintiff was licenced to operate an open air market contended that the plaintiff was not licensed to charge fees on farm produce (cess) and that in law only a local authority can do so. The 8th Defendant in the filed submission cited section 192 A of the Agriculture Act Cap 318 of the Laws of Kenya (repealed) to support the assertion that the plaintiff could not legally charge cess on farm produce. The plaintiff's position is that they were charging levies to the customers for use of the suit premises to display their wares for sale and the plaintiff was licensed to do so.

In my view the cess envisaged under the Agriculture Act and the Local Government (Agricultural Produce Cess) Adoptive By – Laws (Amendment) order, 1988 relate to the movement of Agricultural Produce from the farms to the markets and/or to the end users either for sale or any other purposes and that explains why the bulky of the cess money charged has to be applied to maintain the roads and services within the sectors in which the cess is charged and any cess charged in respect of tea and coffee is specifically required to be accounted to the Kenya Roads Board Fund. I, in the premises hold that the Agriculture Act Cap 318 Laws of Kenya (repealed) would be inapplicable in the circumstances of this matter. The plaintiff as per the evidence was not charging “cess” on the farm produce but was charging the customers for use of space in its plot. Further quite a number of products for which the plaintiff charged fees was not included in the schedule of products in respect of which cess was payable under the Act.

The parties in this case on 14th June 2000 before the Chief Magistrate's court recorded a consent order in the following terms:-

- 1. That by consent an injunction is hereby granted restraining the 1st Defendant by themselves their servants or agents or otherwise, from interfering with the plaintiffs maintenance and management of L.R. NO. 209/8408 and L.R.NO.209/8409 pending the hearing and determination of this suit.**
- 2. That an injunction is hereby issued restraining the 2nd Defendant (City Council of Nairobi) by itself, its servants or agents or otherwise howsoever from cancelling revoking or in any way interfering with the plaintiff's existing business permits NOs.0022633, 0023451 and 0023491.**
- 3. That the issue of accounts to be determined during the trial.**
- 4. That costs be in the cause.**

These orders were not varied and/or reviewed in any manner and arguably the same remain in force to date of significance is that the 8th Defendant acknowledged the existence of the business permits issued to the plaintiff and bound itself not to cancel or revoke the said permits which implied that the plaintiff was to continue with the business that they were doing without any interference. Pw2 testified that the plaintiff's personnel were forcibly removed from the suit premises on 26th March 2000 and the agents of the 8th Defendant took over the management of the suit properties including collecting revenues/levies from the plaintiff's said properties. The Deputy Director of Social Services, **Mr. Francis S. Natwati** in his replying affidavit sworn in this suit on 15th May 2000 deponed that indeed the 7 defendants were agents of the 8th Defendant and were duly authorized by the 8th Defendant to collect cess and other charges on farm produce due to it from the plaintiff's land and the Landhies Retail Market. The deponent further deponed that the defendants were collecting fees due to the 8th Defendant from the plaintiff's property as empowered by the by laws. It is thus patently clear that the 8th Defendant even though it had licenced the plaintiff to operate an open air market at its plots it had a change of heart and determined to take over the management of the use of the plaintiff's properties without due regard to the legal procedure of doing so.

On the basis of the evidence of pw2 that the 1st to 7th Defendants were involved in the takeover of the suit properties for purposes of the 8th Defendant coupled with clear admission by **Francis Natwati**, Deputy Director of the 8th Defendant in the replying affidavit that the 7 defendants were agents of the 8th Defendant, I accept the assertion by the plaintiff that the 8th Defendant did infact unlawfully enter the suit properties and stopped the plaintiff from carrying the business that they had been licenced to carry on at the suit premises. Whereas it was open to the 8th Defendant to lawfully terminate and/or revoke the licences, the 8th Defendant did not do so and instead forcibly entered the plaintiff's premises and ejected the plaintiff's workers and took over the business that the plaintiff was doing. The 8th Defendant is culpable and liable for its acts. The 8th Defendant took over the collection of the park fees and user fees in respect of the open air market and did not account the daily collections to the plaintiff. The 8th Defendant vide a Notice to vacate dated 19th July 2005 issued by the Ag Director Social Services ordered all traders-Landhies Road –outside market to cease carrying on trading activities **“from the peripheral areas of Landhies Road Market vis-à-vis including retailing activities that take place between the market premises and Park Towers Parking”** it is thus from the date of this notice that it can be said the 8th Defendant effectively outlawed trading activities that was being carried on the suit properties and it's the plaintiff's assertion that the 8th Defendant was upto this time collecting revenue from the users of the plaintiff's suit plots which the 8th Defendant needs to account to the plaintiff.

The court vide its order of 14th June 2000 had restrained the 8th Defendant and its agents from interfering with the plaintiff's management of the suit plots and further had restrained the 8th Defendant from revoking or cancelling the business permits that had been issued to the plaintiff. The court had further directed that accounts be taken at the trial but despite the court order the Defendants did not yield possession to the plaintiff and continued to collect fees from the plaintiff's plot until retail trading was outlawed by the 8th Defendant as per the Notice of 19th July 2005 ostensibly because of the deterioration of hygienic standards in the area owing to what the City council described as **“illegal trading activities”**.

Having reviewed and considered the evidence I am satisfied that the plaintiff was carrying on lawful business at the suit plots which business was duly licenced by the 8th Defendant and that the plaintiff was charging a daily fee for parking and to the users who took up space to sell their wares and/or goods at the suit plots. I accept the plaintiff's evidence that the plaintiff's business was unlawfully interfered with by the

8th Defendant through the 1st to 7th Defendants who were acting as the 8th Defendants agents. I am equally satisfied that the 8th Defendant took over the collection of the daily revenue from parking fees and fees from the open air market users and the 8th Defendant did not account these fees to the plaintiff. I would in the circumstances answer issue NO.3 in the affirmative.

ISSUE NO. 4

If there were daily collections being generated out of the business carried on the suit properties what was the quantum on a daily basis and who was entitled to it?

The plaintiff further to the consent recorded in court in **HCCC NO. 871 of 1997** on 8th October 1999 was handed vacant possession of the suit properties with mandate to take over the collection of daily revenues from the users of the suit properties. The evidence of the plaintiff's witness pw2 was clear that he was managing the plaintiffs plots and infact under the consent order in **HCCC NO. 871 of 1997** aforementioned pw2 was nominated as the plaintiff's representative to take over the suit properties and resume the collection of the daily revenue on behalf of the plaintiff. Further daily collection of revenue from the plots was confirmed by **Mr. Francis Ntwati** Deputy Director of Social Services in his replying affidavit sworn on 15/5/2000 included in the plaintiff's bundle Exhibit 12(d) where he affirms the 8th Defendant's agents were collecting "cess" from the plaintiff's plots.

The witness pw2 gave evidence that the plaintiff on a daily basis was collecting on average Kshs.20,000 to 25,000/- and produced in evidence receipts that the plaintiff used to issue before the interference by the Defendants and these were produced in bulk as Exhibit 22 and the analysis showed that on a daily basis the plaintiff was collecting on average about Kshs.25,000/-. They further gave evidence that one **Agnes Muema** had rented the tea kiosk on the plaintiff's **L.R. NO.209/8408** and was paying a monthly rent of Kshs.20,000/- to the City Council which payment should have been paid to the plaintiff. Rent payment receipts by the said **Agnes Muema** were tendered in evidence. The 8th Defendant did not render an account of the collections and the plaintiff on 14th February 2008 before **Hon. Justice Osiemo** sought leave and was granted leave to amend the plaint to require that the 8th Defendant do show the accounts for all revenue collected from **L.R.NO.209/8408** and **209/8409** from March 2000 to 19th July 2005 and in the alternative if it cannot provide the accounts the plaintiff be at liberty to furnish its own accounts. In lieu of any accounts by the 8th Defendant the plaintiff was to seek refund of revenue arising out of daily collections from March 2000 to 19th July 2005 amounting to Kshs.48,825,000/-.

The 8th Defendant has contested the quantum of the daily collections and points to the inconsistencies in the plaintiff's evidence and the pleadings. In the plaint the plaintiff pleads that the daily collections were between Kshs.20,000/- and Kshs.25,000/- while other evidence suggests that the plaintiff was in possession during some periods and was making revenue collections. The 8th Defendant submits that as the plaintiff is making a claim for special damages the same ought to have been specifically pleaded and proved while the plaintiff for its part submits that they have established by evidence that on average they were collecting Kshs.25,000/- per day as borne out by the analysed and collated receipts Exhibit 22.

The plaintiff contends that the evidence on collections was largely uncontraverted. The court has scrutinized the plaintiff's exhibit 22 comprising of the receipts that it was issuing to its customers and notes there are receipts from the month of August 2000, during the year 2001 and the year 2002 insinuating that the plaintiff during these periods was still collecting revenue from the suit plots contrary to PW2 evidence that the plaintiff was not allowed back to the suit premises after they were evicted on 26/3/2000.

The plaintiffs letter of 18/4/2002 to the Town Clerk Exhibit 14 was a complaint that the 8th Defendants officers had on the night of 6th April 2002 re-entered the plaintiffs property contrary to the existing court restraining orders and was warning that the Defendant's risked being cited for contempt if they did not stop interfering with the plaintiffs daily operations on their properties. No contempt proceedings were brought against the Defendants which would pre-suppose the Defendants ceased interfering. The evidence by Pw1 was that after the injunction was granted the Defendants occasionally interrupted the plaintiffs business but no particulars are given on the specific times that the business was interrupted.

On the basis of the evidence given and produced I accept and hold that there were daily revenue collections generated out of the business carried out at the suit premises and that the plaintiff was entitled to receive those collections.

Having regard to the plaintiff's Exhibit 22 I accept that the daily collections were averaging Kshs.25,000/- as per the computations supplied by the plaintiff as hereunder.

- i. 15th March 2000.....Kshs.26,580/-
- ii. 16th March 2000.....Kshs.26,140/-
- iii. 17th March 2000.....Kshs.25,160/-
- iv. 18th March 2000.....Kshs.24,260/-
- v. 19th March 2000.....Kshs.23,080/-
- vi. 20th March 2000.....Kshs.24,520/-
- vii. 21st March 2000.....Kshs.24,980/-

viii. 22 nd March 2000.....	Kshs.25,400
ix. 23 rd March 2000.....	Kshs.25,580/-
x. 24 th March 2000.....	Kshs.24,420/-
xi. 16 th August 2000.....	Kshs.25,280/-
xii. 17 th August 2000.....	Kshs.25,300/-
xiii. 20 th February 2001.....	Kshs.24,540/-
xiv. 21 st February 2001.....	Kshs.24,440/-
xv. 6 th January 2002.....	Kshs.24,600/-
xvi. 7 th January 2002.....	Kshs.25,300/-
xvii. 15 th March 2002.....	Kshs.25,500/-
xviii. 16 th March 2002.....	Kshs.25,040/-

The plaintiff has made a claim for an account for the period March 2000 to 19th July 2005. I cannot find any basis or rationale for such claim since the plaintiff was handed back the suit premises following the consent order made in court on 14th June 2000. I however hold and find that the plaintiff would be entitled to an account for the daily revenue collections from 26th March 2000 to 13th July 2000 when the consent order recorded in court was issued. There is evidence that during the period after the consent order the plaintiff was in possession and was carrying on business and making the daily collections as some of the receipts in the plaintiffs Exhibit 22 illustrate. The Exhibit shows the plaintiff issuing receipts in August 2000 after the court order was issued. As the order was extracted and issued on 13th July 2000 the order then was available for service on the Defendants and for the plaintiffs to retake possession of the suit premises. After issuance of the order and service of the order on the Defendants the plaintiff was always at liberty to take out contempt proceedings against the Defendants in case of disobedience of the court order which they never did.

The reference in the order of 14th June 2000 providing for the accounts to be taken at the trial in my view must have related to the period the Defendants had been in possession from the 26th March 2000 to the time the order of injunction was issued on 13th July 2000 and could not have related to the period the plaintiff was in possession of the suit premises and running its business. Thus the account will be taken as from 26th March 2000 upto and including 13th July 2000 being a total of 110 days at the daily rate of Kshs.25,000/- which in aggregate translates to **Kshs.2,750,000/-** which I find and hold the 8th Defendant would be liable to pay to the plaintiff being collections that were made by the 8th Defendant during the **110 days** period and which ought to be accounted to the plaintiff.

LAW APPLICABLE

Before advert to which party would be entitled to what reliefs I will consider the applicable law as submitted by the parties. The plaintiff referred the court to the case of **FLORA WASIKE –VS- DESTIMO WAMBOKO CIVIL APPEAL NO. 81 OF 1984 KAR (1982-1988) 625** where the court of appeal held **“it is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation”** to support the proposition that the 8th Defendant stood bound by the consent order recorded in **HCCC NO. 871 of 1997**. Although the 8th Defendant was not a party to the signed consent, the 8th Defendant acquiesced to the orders that the court made to the extent that it did not seek to vary or set aside the orders even as they affected its interests and/or rights.

The plaintiff further referred the court to the case of **KURIA GREENS LTD –VS- REGISTRAR OF TITLES & ANOTHER (HC Petition NO. 107 OF 2010) 2011 Eklr** to support its proposition that the plaintiff being the registered proprietor of the suit property its title was absolute and indefeasible. The court has found that the plaintiff is the registered owner of the suit properties and has determined issue NO.(1) in favour of the plaintiff. Section 25(1) and 26(1) of Land Registration Act NO.3 of 2012 confers rights to the proprietor and protect the title of a proprietor.

Section 25(1) provides:-

The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever, but subject-

a. to leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to required noting on the register unless the contrary is expressed in the register.

Under section 26(1) a duly issued and registered certificate of title constitutes conclusive evidence of ownership and cannot be challenged except as provided under the Act.

26.(1) provides-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except-

a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or

b. Where the certificate of the title has been acquired illegally, unprocedurally or through a corrupt scheme.

I have reviewed and evaluated the evidence and I have in my determination of issue NO. (1) and issued NO.(2) come to the finding that the registration of the plaintiff as the proprietor of the suit properties was not procured illegally and/or irregularly as pleaded by the Defendants as the plaintiff was an innocent purchaser for value from the proprietor without any notice of any defect in the title. The plaintiff's title in the premises deserves protection under the law. The Defendants have not proved or established there was any fraud or misrepresentation to which the plaintiff was a party. The Defendants have equally not proved any irregularity or illegality or any corrupt scheme which could vitiate the title of the plaintiff.

I have considered the authorities referred to the court by counsel for the 8th Defendant namely **KENYA ANTI CORRUPTION COMMISSION –VS- PAMELA ORESIA EBOYI & ANOTHER (2013) eKLR KENYA ANTI CORRUPTION COMMISSION –VS- PAUL MOSES NGETHA & 102 OTHERS (2006) eKLR and MWANGANGI & 64 OTHERS –VS- WOTE TOWN COUNCIL (2004) IKLR** and I am of the view that the cases are distinguishable and cannot have any application to the instant case. In the instant case the Defendants have not proved the suit lands had been alienated for any specific public purpose and/or was trust land as in the cases referred to. The evidence in the present case is that the City Council of Nairobi had since 1979 leased out the suit land to private persons who were paying rent to the City Council. The 8th Defendant through its own chief officers (**Mr. S.K. Ngeno Town Clerk and Kuria Wa Gathoni** Director of Planning & Architecture confirmed the land had regularly and properly been leased to the parties who transferred the lease to the plaintiff. It was the evidence of the said Chief Officers that the suit properties were properties of the City Council that were available to be leased to private persons provided they complied with the development conditions and there is clear and uncontraverted evidence that the suit premises had indeed been all along since 1979 been leased out.

The Defendant produced a search issued by the Ministry of Lands on 8th August 2007 on the suit plots in an attempt to show that the suit lands had not as at 8/8/2007 been transferred to the plaintiff. The search was done on Title **NO.66529 of L.R. NO. 209/8409** and the same correctly showed that **Joseph Mulu Mutisya & 3 others** were registered as lessees of the property for a term of 99 years from 1/5/1965 (less the last 3 days). The City Council of Nairobi still held the reversion. The search of this title would not have revealed the transaction to the plaintiff since after the lease in favour of **Joseph Mulu Mutisya & 3 others** was registered it was given a new title number being **I.R.NO.68751** in regard to **L.R.209/8408** and **I.R. NO.68752** in respect of **L.R. NO. 209/8409**. A search on these titles would have revealed that the two leases had been transferred and/or assigned to the plaintiff on 12th August 1996. The official search by the Ministry of Lands issued on 7th August 2007 in the circumstances does not prove that the suit premises had not as at that date been transferred to the plaintiff as the search was carried out on the reversionary leasehold title and not on the title which the Council still holds created following the grant of the leases in favour of the **Joseph Mulu Mutisya and group**.

The court has held that the plaintiff was properly and regularly registered as the owner of the suit properties on 12th August 1996 and as at 26th March 2000 the plaintiff was carrying on lawful business on the suit premises such that the invasion of the suit premises by the Defendants constituted an act of trespass. The plaintiff as at the time of the trespass had obtained approval for development of the suit premises and there is evidence that the plaintiff had negotiated development finances notably from the East African Development Bank but which loan could not be processed owing to the ownership dispute that had erupted following the invasion of the suit properties by the Defendants.

The plaintiff vide its re amended plaint claims damages and loss of revenue. The court has held that the plaintiff was entitled to an account of the daily collections during the period that the 8th Defendant was in control of the suit premises and was collecting the daily revenues being from 26th March 2000 to 13th July 2000 when the injunctive order was lifted. Although there is indication that the 8th Defendant even after 13th July 2000 continued to occasionally interfere with the plaintiff's management of the suit premises there is no clear evidence whether or not the interferences were over lengthy periods and/or they were only sporadic. Thus the court is not satisfied there would be any basis to award the plaintiff loss of daily revenues from 14th July 2000 upto the 19th July 2005 and/or to the date of determination of this suit as claimed by the plaintiff.

The claim by the plaintiff of Kshs.20,000/- per month for the rent of the tea kiosk on **L.R. NO. 209/8408** allegedly leased to one **Agnes Muema** was not specifically pleaded and neither was the evidence adduced sufficient to establish that the rental of Kshs.20,000/- was being paid per month for the kiosk. The receipts relied on by the plaintiff to prove this claim attached to the plaintiff's supplementary bundle of documents shows a different plot **NO.207/847** and indicates the payment to relate to the period January-April 2010. I therefore accept the 8th Defendants submission that the claim for the monthly rent of Kshs.20,000/- for **L.R.NO.209/8408** was neither pleaded and nor was it proved. The claim being in the nature of special damage ought to have been specifically pleaded and proved. I therefore disallow the claim on that account.

The plaintiff claims damages and loss of revenue arising out of daily collections of Kshs.25,000/- per day from July 2005 until the determination of the suit. As per the evidence the City Council cancelled all trading activities that were being carried out at the suit premises

and the peripheral areas citing deterioration of hygienic standards and insecurity vide its notice of 19th July 2005. It was within the City Council right and authority to ban trading activities within the precincts of the suit premises. However since the City Councils invasion of the suit premises owned by the plaintiff and their laying claim to the property prevented the plaintiff from developing the properties in accordance with the approved plans, it is my view that the plaintiff would be entitled to general damages for trespass and damages for loss of user. The issue for me to determine is the quantum of damages the plaintiff would be entitled to having regard to the facts and circumstances of this case.

The plaintiff referred the court to the decision judgement in **HCCC NO. 367 OF 2000 WILKSDEN INVESTMENTS LIMITED –VS- KENYA HOTEL PROPERTIES LIMITED** where **Hon. Justice O.K. Mutungi** as he then was considered the guidelines that a court would consider in assessing damages. The Honourable Judge in his judgement referred to **Hon. Justice Bosire's** judgement in the case of **KAMAU MACHARIA – VS- MWANGI KIGONDU & 2 OTHERS (HCCC NO.4067 OF 1986)** where **Bosire Judge** while addressing himself to the issue of general damages stated as follows:-

“Even without evidence of loss the court is obliged to assess damages-- The plaintiff has for a long time been deprived of the use of the land in dispute. He is entitled to damages. The measure of damages is such sum as the court will consider reasonable, considering the size of the land involved and the length of time”.

In that case **Bosire** awarded Kshs.50,000/- owing to the small size of the land and the place where the land was situated. **Hon Justice O.K. Mutungi** while approving the holding by **Bosire Judge** stated thus:-

“To Hon. Bosire’s holding, I need only add that general damages for trespass to land are awarded, as an expression and protection of the land owner’s right or possessor’s rights against unauthorised persons. Without such general damages, trespassers would establish a right by usage, to intrude into other persons land and with impunity.

On the quantum of the general damages, no two sets of facts are exactly identical, and there is no mathematical formula. Each case has its own unique facts and circumstances”.

In the case before **Hon. Justice O.K. Mutungi** the property was located in the City Centre and adjacent to the Hotel Intercontinental. The judge was referred to the case of **Njeri Kimani & another – vs- Joseph Njoroge Murigi & 2 others (HCCC NO. 819 of 2000)** where the property was located in section 1 in Eastleigh and general damages of Kshs.500,000/- was awarded **O.K. Mutungi Judge** while commenting on the award in **Njeri Kimani & another** case (**Supra**) stated as follows:-

“There the property was located in section I in Eastleigh a much less prestigious location Vis –a-vis the property and location of the property in the case before me”.

The judge proceeded to award general damages in the sum of Kshs.10 million for trespass to property and awarded a further sum of Kshs.6,000,000/- on account of lost business opportunity. In regard to loss of business opportunity the judge held such damages cannot be quantified as in the case of special damages but such damages have to be comparable to general damages assessed by the court taking into account the unique circumstances in each case. In the case **O.K. Mutungi Judge** considered the fact that the plaintiff had successfully negotiated a loan with I.F.C a subsidiary of the World Bank for the construction of a Hotel on the suit property.

I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.

In the **Willesden Investment Ltd case (supra)** **O.K. Mutungi Judge** awarded general damages of **Kshs.10,000,000/-** for trespass onto a property within the CBD. Considering the circumstances of this case and having regard to the fact that the award in the above case was made nearly 10 years ago I assess general damages of **Kshs.15,000,000/-** as fair and reasonable having regard to the lapse of time and inflation.

In regard to the issue of damages in respect of loss of business opportunity I take account of the fact that the City Council the 8th Defendant herein cancelled all retail trading activities in the plaintiff’s suit properties and within the area adjacent thereto vide the notice of 19th July 2005 which meant that the plaintiff could not carry on with the open air market business that they were doing henceforth. The plaintiff could also not carry through the development that had been approved on the suit property owing to the contested ownership of the property. Indeed the negotiated financing of the development by East African Development Bank was aborted in February 2003 owing to the ownership dispute that had arisen over the suit property. Thus the plaintiff lost a business opportunity. Considering all factors and the circumstances I award the plaintiff a sum of **Kshs.10,000,000/-** for loss of business opportunity.

In the result I find and hold that the Defendants have not proved their Counterclaim on a balance of probabilities and I dismiss the Defendants counter claim with costs to the plaintiff. I find and hold that the plaintiff has proved its claim on a balance of probabilities and I accordingly enter judgment in favour of the plaintiff and against the Defendants jointly and severally in the following terms:-

a. That the plaintiff is the duly registered owner of L.R. NO. 209/8408 and L.R.NO.209/8409 Nairobi and is entitled to quiet possession of the same without any hindrance.

b. Kshs.2,750,000/- being special damages on account of unaccounted daily revenues from 26th March 2000 to 13th July 2000

together with interest thereon at court rates from 14th July 2000 till payment in full.

c. General damages for trespass assessed at Kshs.15,000,000/- with interest at court rates from the date of this judgement.

d. Damages assessed at Kshs.10,000,000/- for loss of business opportunity with interest at court rates from the date of this judgement till payment in full.

e. Costs of the suit and costs of the counterclaim to be taxed and certified by the taxing master of the court.

JUDGEMENT DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27TH DAY OF FEBRUARY 2014.

J.M.MUTUNGI

JUDGE

In the presence of:-

Mr. Njoroge for Oyatta.....for the Plaintiff

MS Boyani.....for the Defendants