REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 44 of 2005

NAKURU AUTOMOBILE HOUSE LIMITED……...…….PLAINTIFF

VERSUS

TOWN CLERK……...1ST DEFENDANT

MUNICIPAL COUNCIL OF NAKURU……...……2ND DEFENDANT

JUDGMENT

The plaintiff brought this action against the defendants claiming a permanent injunction to restrain the former from entering, remaining in or interfering with the plaintiff's quiet use and enjoyment of L.R. NO.NAKURU MUNICIPALITY BLOCK 9/110, general damages for loss of user from the year 2001 till vacant possession, vacant possession or eviction and costs of the suit.

The plaintiff contends that it is the registered proprietor of the suit property having obtained registration in 1998. Upon such registration, the plaintiff presented to the defendants architectural and structural drawings for the development of a petrol station which drawings were approved. Pursuant to the approval, the plaintiff commenced construction on the suit property but was stopped by the defendants who insisted that the property belonged to the 2nd defendant and that it was irregularly allocated to the plaintiff. To assert their claim, the defendants fenced the property, cleared the vegetation and allocated it to hawkers.

The plaintiff brought this suit and obtained restraining orders in 2005 and todate the property is vacant.

For their part, the defendants have in their defence and counter-claim maintained that as early as 1990, the suit property had been earmarked for the expansion of the existing council mortuary, development of a private mortuary and construction of a public car park; that upon the Commissioner of Lands directing the plaintiff to surrender the title deed in 2001, the suit property was converted to a public utility land. The defendant therefore seeks in the counter-claim that the court declares that the suit property was irregularly allocated to the plaintiff in the main suit and for the cancellation of the title issued to the public.

At the trial Vijay Morjaria, the Managing Director of the plaintiff testified that the plaintiff purchased the

property from the original owners, Kiptui G. Chesang, J. Kigen, Onesmus Muiya and Joseph Muthomi,. The latter, according to evidence presented, is an Assistant Commissioner of Lands. The witness went on to explain how the plaintiff obtained the necessary approvals from the defendants and paid rates before commencing construction of a shopping mall and a petrol station.

In 2001, the defendants acting through the Mayor, Councillors and their employees invaded the property and stopped the construction claiming the property has been set apart for public utility. As a result of the interference, the plaintiff had to shelve the project which was being undertaken at a cost of Kshs.22 million. The plaintiff had deposited building material at the site. The plaintiff expected at the completion of the project to earn a monthly income of between Kshsh.1.5 and 2 million from rent. As a result of the defendants' interference, the plaintiff claims in loss of user Kshs.3.7 million,

On behalf of the defendants, the Town Clerk, Mr. Kaio Kathun Mbulusi and the Acting Director, Town Planning, Mr. Keter Kipkemoi Willy, stated that the 2nd defendant in a meeting of its Town Planning and Works Committee held on 19th October, 1990 resolved to reserve the property for the expansion of the Municipal Mortuary, the development of a private mortuary, a chapel and a public parking. The witnesses insisted that the approvals for development were irregularly obtained as such approvals can only be issued by the Town Planning Committee and also for the reason that no approval can be given for a commercial activity in the vicinity of an existing mortuary.

According to them, the plaintiff ignored the directive by the Commissioner of Lands to surrender the title deed and proceeded with the project. The defendants also called Mr. Cyrus Kiogora Mburugu, the Chief Land Administration Officer, Ministry of Lands, Nairobi whose evidence was to the effect that the suit property was allotted to three individuals by the Government as explained earlier. In 1996, the allottees were granted authority to sell the property and did so to the plaintiff, to whom a title deed was issued in 1998.

I have considered the evidence presented in this dispute as well as the submissions. While the plaintiff seeks to restrain the defendants from interfering with its use of the suit property, the latter insists that the former's title was irregularly obtained and seek a declaration to that effect. The sole question therefore revolves around the propriety of the title held by the plaintiff.

It is common ground that the plaintiff obtained ownership from three original joint owners, one of whom is a senior officer in the Ministry of Lands. The plaintiff was initially issued with a title deed under the **Registered Land Act** on 30th March, 1998. The plaintiff's witness explained that as a result of robbery in 2000 the original title deed was lost and a replacement issued on 2nd May, 2001.

It follows from the foregoing that upto this point, the plaintiff holds a Certificate of Lease in respect of the suit property for a term of 99 years from 1st May, 1996. By dint of **Section 27** of the **Registered Land Act**, that registration vests in the plaintiff the leasehold interest of the suit property, subject only to the provisions of the Act and all implied and expressed agreements, liabilities and incidents of the lease and further subject to overriding interests enumerated in **Section 30** of the **Registered Land Act.**

In addition to this, the certificate of lease held by the plaintiff is, according to **Section 32(2)** of the **Act**, *prima facie* evidence that the plaintiff is the registered owner. The defendants' claim is not based on the provisions of **Section 30** aforesaid but on the following grounds:

i) that the title was obtained irregularly as the Commissioner of Lands had directed the plaintiff to surrender it;

ii) that by its minutes No.27 of a meeting held on 19th October, 1990 the 3rd defendant resolved to set apart the suit property for its purpose, namely the expansion of its mortuary and construction of a private mortuary and a public parking;

iii) that the property was identified by the Ndungu Report to have been illegally acquired.

Although the defendants have based their claim on the ground that the plaintiff's title was irregularly obtained, the Commissioner of Land is categorical through the defendants' third witnesses, Cyrus Kiogora Mburugu, that from their record, the plaintiff is the lawful owner of the suit property. The letter purportedly written to the plaintiff by the Commissioner of Lands to surrender the property was not part of the record held by the Ministry of Lands. Furthermore, the title to be surrendered was in relation to parcel No.Block 9/10 Nakuru Municipality and not the suit property. The letter was not produced in these proceedings.

Regarding the meeting of 19th October, 1990, it was incumbent on the defendants to show that as they deliberated on what to do with the suit property, it belonged to them. Either at the time of the meeting or at the hearing of this case, the defendants did not have any proof of ownership of the property. Further, the said minutes do not identify the property earmarked for expansion of the mortuary. Again, on 23rd May, 2001, the defendants wrote to the plaintiff confirming that they have no claim over the property. The letter reads:

"We have examined your documents and wish to inform you that we have no claim forsoever (sic) on ownership of the above parcel of land. You may implement your development in accordance with the council plans and development regulations."

The extract of the Ndungu Report was not and could not be admitted in evidence due to lack of authenticity. Regarding whether or not the proposed development by the plaintiff was in consonance with the rule and regulations of town planning, the discretion rests with the defendants and the Minister in terms of the Land Planning Act and the Physical Planning Act.

For the reasons stated, I am persuaded that the defendants have no legal or any other basis to interfere with a private property and are hereby restrained by an order of permanent injunction in terms of paragraph (a) of the plaint. For the same reasons, the counter-claim fails and is dismissed with costs.

Regarding the claim for loss of user, it is not in doubt that the plaintiff has not proceeded with the planned development of the suit property due to the defendants' interference in 2001. According to the plaintiff, the actions of the defendants have caused it a loss of Kshs.3.7m

In the words of the plaintiff's witness, that amount is based on his experience as a property businessman. It has been stated time without number that special damages in addition to being pleaded must be strictly proved. See **Miriam Maghema Ali** V. **Jackson M. Nyambu t/a Sisera Stores**, Civil Appeal No.5 of 1990.

A claim for loss of user is, no doubt- a claim in special damages. The court in **David Bagine** V. **Martin Bundi**, Civil Appeal No.283 of 1996 cited by learned counsel for the defendants, stated that:

"We must and ought to make it clear that damages claimed under the title *"loss of user"* can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages…….

these damages as pointed out earlier by us must be strictly proved."

There was no proof of loss suffered due to loss of user. That claim fails.

In the result, there will be judgment as explained in favour of the plaintiff. I award costs of this suit to the plaintiff.

Dated, Signed and Delivered at Nakuru this 14th day of June, 2012.

W. OUKO
JUDGE