REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 316 OF 1998

MARGARET WANJIKU KAMAU.....PLAINTIFF

VERSUS

JOHN NJOROGE GATHURU.....1ST DEFENDANT

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

JUDGMENT

The plaintiff averred that she was the lawful allottee of **Nakuru Municipality Block 1/1275** (formerly Plot No. 243) situate at Race Track Estate within Nakuru Municipality. Adjacent to the said premises is a public car park which also provides the only access to the frontage of her residential house developed on the said plot. The plaintiff claimed that on or about 30th July, 1998 the first defendant threatened to close the frontage of her house saying that the public parking area had been allocated to him by the Municipal council of Nakuru for the purpose of constructing a residential house thereon. The plaintiff was aggrieved by the said allotment as she claimed that it denied her access to her house and further stated that the allocation of the open space to the first defendant was in breach of planning regulations. She therefore prayed for a perpetual injunction to restrain the first defendant from taking possession or constructing any structure on the disputed property and for a declaration that the denial of access road to her by the defendants was unlawful and oppressive.

The first defendant filed an amended statement of defence on 25/5/2001 and denied that the open space adjacent to the plaintiff's property was a public car park. He stated that he was a bona fide purchaser for value without notice of the leasehold interest of a property known as **Nakuru Municipality Block Race Track R.78** which is adjacent to the plaintiff's aforesaid property and had been paying rates to the Municipal Council of Nakuru for the said property.

He further denied having threatened to close the plaintiff's frontage and also stated that both plots were served by an access road and that adjacent to their respective plots was a large wide and open space.

The first defendant alternatively blamed the second defendant as the author of the problem between him and the plaintiff and served the second defendant with a notice of indemnity under **Order 1 Rule 21** of the Civil Procedure Rules. The indemnity was sought on the ground that the first defendant purchased the said parcel of land at Kshs.120,000/- on the second defendant's assurance that the title was clean and without defect. The first defendant claimed indemnity for the said purchase price with interest at bank rates from the date of payment or alternatively and without prejudice, the value obtaining at the time of judgment for a similar plot in the same locality. He also claimed a refund of all payments of rates, fees

and charges paid in connection with the said parcel of land together with interest thereon at bank rates from the time of payment until payment in full.

The second defendant in its written statement of defence admitted that there had been planning anomalies in the disputed area and stated that it had taken steps to replan the suit premises after it discovered the planning anomalies.

During the hearing, the plaintiff testified that she acquired her property in 1986 through allocation by the Municipal Council of Nakuru, the second defendant and she produced the allotment letter and a bundle of receipts for all the payments which she had made to the second defendant in respect of her property. There was no dispute by either of the defendants that she was the lawful owner of **Nakuru Municipality Block 1/1275**. The plaintiff had constructed a house on the said plot and had been living there since 1994. The plaintiff testified that the open space outside her house which the first defendant had purported to have acquired was the only access to her house and when she saw the first defendant intending to develop the same, she complained to him but he did not consider her protest forcing her to write a letter of complaint to the Town Clerk of the second defendant. The Town Clerk in turn sent the Town Engineer to visit the premises and assess the situation. The Town Engineer visited the premises, carried out investigations and confirmed the plaintiff's complaint to be well founded.

According to the area survey plan that was produced as P. Exhibit 5, the open space that is the subject of the dispute is actually a "***cul de sac".*** The plaintiff also told the court that she obtained some minutes of the second defendant's meeting which showed that the second defendant had revoked its earlier decision to allocate that parcel of land which was the subject of the dispute. Minute No. 98 was produced as P. Exhibit 7. The Provincial Physical Planning Officer, Rift Valley Province, had also written a letter dated 8/6/99 to the Town Clerk, Municipal council of Nakuru, informing him that it was not possible to prepare another Part Development Plan (P.D.P.) for the disputed property as it was falling on a ***cul de sac*** and was part of 9 metre road providing access to the neighbouring plots, as per approved plan No. 229 of 23/3/1983. The said letter, P. Exhibit 8, was copied to the advocates for the defendants as well as to the first defendant, the Town Engineer and the State Counsel, Nakuru. **PW2, Robert Kiprono,** a Physical Planner in the Department of Physical Planning, Nakuru, confirmed the contents of P Exhibit 8 and said that although he was not working in Nakuru at the time when the said letter was done, he had visited the area and ascertained that it was a ***cul de sac*** and the approved plan for the area had never been amended. He further stated in cross-examination that any amendments to an approved physical plan had to be Gazetted.

In his defence, the first defendant told the court that he purchased the plot in question from one Peter Birir vide an Agreement dated 28th February 1997 at an agreed purchase price of Kshs.120,000/-. He paid Kshs.3,000/- for the agreement to M/S Mungai Mbugua & Co. Advocates who were acting for the vendor and himself. He further stated that on 4/3/97 his advocates applied to the second defendant for consent to transfer the said plot and he paid Kshs.4,000/- for the consent which the second defendant gave vide its letter dated 5/3/97. The first defendant also incurred other expenses on account of the said plot. He paid Kshs.1,500/- for clearance certificate, Kshs.5,854/- for stamp duty, survey fees, stand premium and annual ground rent. These payment were made on 4/3/97. On 27/8/98 he paid another Kshs.624/- for ground rent and on 23/3/2001 he also paid Kshs.1248/- on account of ground rent. All the above payments were made to the second defendant. The first defendant further stated that after he got all the necessary documents and approvals from the second defendant, he engaged an Architect who prepared a building plan but before he could start construction work he was served with a court order restraining him from carrying out any developments thereon. He said that officials from the second defendant had shown him all the plot boundaries. He further stated that the second defendant had never told him that the plot in question was for public utility and was also not aware that the allocation of the plot had been revoked. He blamed the second defendant for his problems regarding the property, saying that he had purchased the same in good faith, having relied on representations of the second defendant that the plot in question was actually available. He told the court that the second defendant had not given him any alternative plot nor compensated him for the financial loss that he had suffered. He claimed that the value of a similar plot in the area was Kshs.400,000/- but no evidence of that allegation was tendered.

The second defendant did not adduce any evidence but PW3 and PW4 were officers working for the second defendant who had testified after having been summoned by the court at the request of the plaintiff. PW3 was an Assistant Surveyor who produced P.Exhibit 5 on behalf of the second defendant's Chief Surveyor who was the one who had been summoned by the court to produce the said exhibit. He told the court that **Plot R. 78** did not exist in the Registry Index Map (P. Exhibit 5) which he had produced. PW4 was a legal clerk also working for the second defendant and had 20 years experience in his work. He was in Land conveyancing Department of the second defendant and could recall having seen documents relating to **Plot R. 78** and he confirmed that it had been curved out of a public utility plot. In cross-examination, he stated that the second defendant had actually granted consent for the transfer of the plot from the original allottee, Mr. Peter Birir to the first defendant. PW4 did not tell the court how Mr. Peter Birir had acquired the plot in the first place although he said that he had seen a Part Development Plan in respect of the plot in their office but he said he could not remember having given it to the first defendant. This is the Part Development Plan allegedly prepared by the Ministry of Lands and Settlement, Physical Planning Department at Nakuru which had created **Plot R. 78** out of the ***cul de sac*** and which was used to allocate the same to Mr. Peter Birir.

However, PW2, the Physical Planner was not aware of that Part Development Plan allegedly done in 1996. That Part Development Plan was marked for identification but the first defendant never called any witness to produce the same.

It is not in dispute that there was a public utility plot on the frontage of the plaintiff's parcel of land known as **Nakuru Municipality Block 1/1275**, Race Track Estate. According to the evidence of PW2 and to the Registry Index Map, (P. Exhibit 5) that was a ***cul de sac*** and PW2 told the court that such spaces are left ***inter alia,*** for vehicle turning and was also providing access to the neighbouring plots. According to the evidence of PW2 and as per P. Exhibit 8, the approved plan for the area, Plan No. 229 of 23/3/1983 had never been amended. In the absence of any evidence to contradict the above position, I hold that the Part Development Plan that purported to create **Plot R. 78** was an unlawful document. It is instructive to note that Mr. Peter Birir who sold the unsurveyed plot to the first defendant was never called to testify as to how he had acquired the plot. It can be assumed that he was instrumental in the preparation of the Part Development Plan that purported to have created the plot. The first defendant should have either called Mr. Birir to testify and produce all the original documents through which he had acquired the said plot or adduced such other evidence to show that the plot was lawfully created and allocated to Peter Birir before he sold the same to him. If Mr. Birir did not have a good title to the plot in dispute he could not pass a good title to the first defendant. The plaintiff has on a balance of probabilities established her case and I hereby declare that the first defendant has no right to block the frontage of the plaintiff's property which opens up to the ***cul de sac.*** I also issue a perpetual injunction to restrain the first defendant from taking possession or putting up any structure on the alleged **Plot No. R. 78** adjacent to the plaintiff's property aforesaid.

With regard to the first defendant's claim as against the second defendant, he argued that he relied on the second defendant for guarantee that the title was clean and without defect. However, I do not think that was the case. The second defendant was not a party to the sale agreement between the first defendant and Mr. Birir. It was not shown that the second defendant played any role in the preparation of the Part Development Plan that created **Plot R. 78** out of a ***cul de sac.*** No evidence was tendered as to how the plot was allocated to Mr. Birir before the first defendant purchased the same from him. The first defendant, in paragraph 10 of his affidavit sworn on 29th August, 1998 stated as follows:-

"10. THAT when I went to view the plot before buying the same I was made to believe by the seller that the same was surveyed in such a way as to allowed (sic) enough room for everyone".

The second defendant, through an affidavit sworn by its Town Clerk on 2nd September, 1998 stated that as at November, 1996 it was not aware that the ***cul de sac*** had been allocated to anybody and it was only when the Town Clerk sent the Town Engineer to the premises to carry out investigations that the planning anomaly was discovered. However, the second defendant, through an affidavit sworn by PW4, Sammy Njuguna Kanyoi on 28th September, 1999 stated in paragraph 5 thereof that:-

"5. THAT it is the Provincial Physical Planner who had given approval to the allocation of Plot R. 78 the disputed premises herein. Annexed herewith it the said approval MCN2".

I believe thereafter the plot was allocated to Mr. Birir with approval of the Commissioner of Lands. But in light of the evidence that was tendered by PW2, it is evident that the approval of the Provincial Planner was wrongfully obtained. I would agree with the submissions by Mr. Mbeche, the second defendant's advocate that it was the Commissioner of Lands who should have been held liable for allowing the creation of the plot in question and not the Municipal Council of Nakuru. When it came to the knowledge of the second defendant that the survey of **Plot No. R. 78** was unlawful, it revoked the allocation of the plot on 17th July, 1997.

The old maxim "***caveat emptor"*** cautions a buyer to beware and the first defendant should have exercised great caution before entering into the process of buying an unsurveyed plot from Mr. Birir. The first defendant should have applied for leave to issue a third party notice to Mr. Birir who sold the said parcel of land to him and received the purchase price of Kshs.120,000/-. The second defendant is not liable to refund that money to the first defendant because it did not receive the money and neither is there any evidence that it gave any guarantee or assurance to the first defendant regarding the said plot. I would further state that the other sums of money which the second defendant received from the first defendant towards purchase of the said plot are not refundable by the second defendant because as at that time Municipal Council was justified in receiving the same. But after the second defendant nullified the allocation of **Plot R. 78,** it should not have demanded or collected any money from the first defendant on account of the plot in respect of either ground rent or rates. I order that the second defendant refunds to the first defendant all the money that he may have paid on account of the plot after 17th July, 1997.

With regard to the costs of this suit, the plaintiff, having established her claim as against the defendants, I order that her costs be met equally by the defendants.

DATED, SIGNED & DELIVERED at Nakuru this 28th day of June, 2005.

D. MUSINGA

JUDGE