



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LANDS AND ENVIRONMENT DIVISION
CIVIL CASE NO. 662 OF 2009

BOOKER MBUGUA GACHERU

T/A VAS DISTRIBUTORS.....PLAINTIFF

- VERSUS -

RUNDA WATER LIMITED.....1ST DEFENDANT

PETER GACHUHI.....2ND DEFENDANT

KITHAKA MBERIA.....3RD DEFENDANT

WACHIRA KARITE.....4TH DEFENDANT

JUDGEMENT

This suit was commenced by the Plaintiff vide a Plaint dated 23rd December 2009 and filed on 24th December 2009 wherein the Plaintiff prayed for judgment to be entered against the Defendants jointly and severally as follows:

- a. A declaration that the change of user to residential purposes in respect of the property L.R. No. 7785/1303, Runda Estate, Nairobi (hereinafter referred to as the “suit property”) was obtained regularly and that all legal requirements thereof were satisfied;**
- b. A declaration that the suit property is not and has never been a public utility plot;**
- c. A declaration that the Defendants have no legal basis to object and/or interfere with the developments on the suit property;**
- d. A declaration that the refusal by the 1st Defendant, Runda Water Limited, to connect water to the suit property is illegal, null and void.**
- e. A mandatory injunction directing the 1st Defendant to connect water to the suit property;**
- f. A mandatory injunction directing the 1st Defendant to give all authorizations in respect of security, connection of water and access to the suit property;**

g. A permanent injunction restraining the Defendants, their servants and/or agents from interfering with the Plaintiff's ownership, use and enjoyment of the suit property;

h. General damages for trespass to and interference with enjoyment of the suit property;

i. Special damages for lost rental income of Kshs. 28,800,000/-;

j. The costs of this suit and interest on (h) and (i) above at court rates; and,

k. Such other or further relief that this honorable court may deem fit and just to grant.

Pleadings

In his Complaint, the Plaintiff stated that he is the registered proprietor of the suit property, having purchased it from Runda Academy Limited vide a transfer registered on 13th September 2002. He disclosed that at the time of purchase, the permitted user for the suit property was “*education purposes and the accommodation for the headmaster*”. He stated further that he applied for and obtained change of user of the suit property from the City Council of Nairobi (*as it then was*) to “*residential purposes*” and a new Grant Number **I.R. 103345** dated 1st November 2006 was issued by the Commissioner of Lands with the change of user duly endorsed thereon. He added that he complied with all the provisions of the Physical Planning Act in the process of applying for and obtaining the change of user and all interested parties were granted an opportunity to raise any objections to the application for change of user. He stated that the Defendants never filed any objections at the City Council of Nairobi and no appeal has been filed against the approval for change of user of the suit property to residential purposes. He also stated that after obtaining the change of user, he commissioned his architects to prepare plans and drawings for a residential housing project on the suit property including a perimeter wall. He also confirmed having received approval from the National Environmental Management Authority for the housing project on 4th July 2008.

He further stated that the Runda Association required that all plans for new developments within Runda Estate be submitted to its officials for vetting. He stated that on or about November 2007, he duly submitted all the building plans for the perimeter wall and the residential housing estate to the Runda Association for vetting but in breach of their duty, the Runda Association objected to the project on the fallacious ground that the suit property is a public utility plot. He added that the Runda Association proceeded to deny the Plaintiff's motor vehicles access to the suit property for purposes of developing it and /or to deliver construction materials.

He also said that at all material times, the 1st Defendant had a legal obligation to supply all land owners and residents of Runda Estate with water and other services having been granted the relevant license by the City Council of Nairobi (*as it then was*). He stated further that on or about 22nd August 2008 and again on 28th August 2009, the Plaintiff made an application to the 1st Defendant to have water installed into the suit property, the relevant agreement was signed, the requisite payments made but in breach of its duty to supply the Plaintiff with water to the suit property, the 1st Defendant unreasonably and without any justifiable cause refused to connect water to the suit property.

The Plaintiff stated that the Defendants' actions have caused him considerable loss and damage in terms of lost income from the housing project, trespass and loss of enjoyment of the suit property and unless they are restrained by an order of this court, they will continue in their illegal actions and obstinacy. He proceeded to particularize his loss and damage as amounting to a total rental income of Kshs. 28,800,000/- which he would have earned from 16 up-market residential units each bringing in a monthly rental income of Kshs. 150,000/- from October 2008 to the date he filed suit.

The Defendants filed their Statement of Defence and Counterclaim on 15th July 2013. The Defendants stated that the Plaintiff's ownership of the suit property is unlawful as the same was obtained unlawfully since that property was originally a public utility land. They admitted that the user of the suit property

was “*education purposes and the accommodation of the headmaster*”. They stated that the alleged change of user was unlawful as it did not comply with the requisite procedures and factors of consideration to be met before a change of user is granted. They stated that the change of user from educational to residential and from single dwelling use to multi-dwelling units was inimical to the objectives and aspirations of the Runda Association which cannot be compelled to co-operate in a venture that does not coincide with its objectives and the interests of its membership. The Defendants asserted that they took objection to the change of user. They added that the change of user was subject to inter alia the suit property not constituting part of the disputed public utility land. They also said that the Plaintiff sought to commence the project before obtaining the requisite change of user and approval for the project from the Runda Association, the City Council of Nairobi (*as it then was*) and the National Environmental Management Authority. The 1st Defendant stated that it was under no duty to supply the Plaintiff with water for carrying out unapproved projects but only supplied water for domestic use. They also stated that the Plaintiff is not a member of the Runda Association which is a condition precedent to procuring the supply of water from the 1st Defendant. The Defendants denied that the Plaintiff has suffered any loss or damage as alleged and particularized in the Plaint and also denied any allegations of trespass or loss of enjoyment as alleged in the Plaint.

The Plaintiffs in the counterclaim stated that the counterclaim is brought under the auspices of the Runda Association which is a society mandated by the residents of Runda Estate to inter alia protect and develop the common and natural resources within Runda Estate. They included the Chief Land Registrar as the 2nd Defendant who is an officer appointed by the President of the Republic of Kenya to be in control of land, land surveys, land registration and recorder of titles Department. They also sued the City Council of Nairobi (*as it then was*) as the 3rd Defendant which was at all material times responsible for the approval of development plan proposals and change of user for land within the Runda Estate and other areas in Nairobi. The Plaintiffs in the Counterclaim averred that at all material times the suit property was a public utility land donated by the developer of Runda Estate and set aside for construction of schools, a police station and a church. They stated that in accordance with the provisions of the Government Lands Act Cap. 280 (*now repealed*) and the Land Planning Act Cap. 303 (*now repealed*), the said developer, Mae Properties Limited, surrendered to the Government of Kenya through the 2nd Defendant inter alia the suit property for public use which surrender was made vide an instrument of surrender registered in the Land Titles Registry at Nairobi as **I.R. No. 8160/54**. They further averred that in or about the year 1996, the Commissioner of Lands in the Counterclaim unlawfully subdivided and allocated the surrendered land to third parties when he knew or ought to have known that the same was reserved as public utility land for public purpose and amenities and was not available for subdivision or allocation. They further averred that the suit property was hived off and subdivided from the surrendered land and was allocated to an entity called Runda Academy Limited from which the 1st Defendant in the Counterclaim subsequently acquired the suit property. They further stated that subsequent to that acquisition, the 1st Defendant in the Counterclaim applied to the 3rd Defendant in the Counterclaim for change of user of the suit property from “*education*” to “*residential*” which approval was granted subject inter alia to “the plot not constituting part of the disputed public utility land/allocations”. The Plaintiffs in the Counterclaim averred that the 3rd Defendant in the Counterclaim approved the change of user without regard to the illegality of the title held by the 1st Defendant in the Counterclaim. They added that the approval by the 3rd Defendant disregarded the provisions of the Physical Planning Act, the Environmental Management and Coordination Act, the area zoning policy and the objections of the residents of Runda Estate and it should follow that the decision of the 3rd Defendant in the Counterclaim allowing the change of user on the suit property should be declared a nullity. The Plaintiffs in the Counterclaim stated that as a result of the unlawful subdivision and allocation of the suit property and the unlawful change of user of the suit property from educational to residential, the residents of Runda Estate had suffered loss by being deprived of the enjoyment of the suit property in the user it originally bore. They also added that the 1st Defendant in the Counterclaim refused to surrender the suit property and persists with his unlawful project and the Commissioner of Lands has refused and/or neglected to revoke the illegal title that the 1st Defendant in the Counterclaim holds and the 3rd Defendant in the Counterclaim has refused and or neglected to revoke the approval of the project and change of user of the suit property. For those reasons, the Plaintiffs in the Counterclaim prayed for judgment to be entered against the Defendants in the

Counterclaim jointly and severally for:

- i. A declaration that the purported subdivision and allocation of the parcel L.R. No. 7785/1023 (now L.R. No. 7785/1303) and issuance of the Grant No. I.R. 103345 by the 2nd Defendant in the Counterclaim was illegal, null and void;**
- ii. A declaration that the Certificate of Title No. L.R. No. 7785/1303 (Grant No. I.R. 103345) now held by the 1st Defendant in the Counterclaim is illegal, null and void and vests no property in the suit property in the 1st Defendant in the Counterclaim;**
- iii. A mandatory injunction against the 2nd Defendant in the Counterclaim to cancel the Grant issued to the 1st Defendant in the Counterclaim in respect of L.R. No. 7785/1303 and to correct the entries in the relevant registers to reflect the original user and ownership of the said parcel;**
- iv. A declaration that the approval of change of user of L.R. No. 7785/1303 from education purpose to residential and subsequently from single dwelling to multi dwelling is unprocedural, illegal and a nullity;**
- v. A mandatory injunction against the 3rd Defendant in the Counterclaim to revoke the change of user granted in respect of L.R. No. 7785/1303 and to restore its original user status of educational purposes;**
- vi. A permanent injunction restraining the 1st Defendant in the Counterclaim either by himself, his servants, agents, employees and assigns from further carrying out any development and/or trespassing on L.R. No. 7785/1303;**
- vii. A mandatory injunction against the 1st Defendant in the Counterclaim to restore at his own costs the parcel L.R. No. 7785/1303 to its former state prior to the commencement of his project;**
- viii. Any other and further reliefs as the court may deem fit and just to grant in the circumstances;**
- ix. Costs of this suit and interest thereon**

In response thereto, the Plaintiff filed his Reply to Defence and Defence to Counterclaim dated and filed on 25th February 2010 stating that he was not aware that the suit property was at any time public utility land. He asserted that he is an innocent purchaser for value without notice of the alleged illegality of title, which claim he said was unfounded and baseless. He put the Defendants to strict proof of this assertion. He added that the change of user of the suit property was obtained legally with all the requirements under the law having been strictly met. He further denied that the Defendants took objection to the change of user at the time the opportunity was availed to them and put them to strict proof thereof. He stated further that the change of user was not made subject to a condition that it does not constitute part of the disputed public utility land asserted that this is a generic condition in all change of user approvals granted by the City Council of Nairobi (*as it then was*). He further stated that an agreement was entered into between the Plaintiff and the 1st Defendant and the requisite payments were made to the 1st Defendant for the installation of water to the suit property but the 1st Defendant unreasonably and without any justifiable cause refused to connect the water. He added that construction of residential houses and a perimeter wall is a domestic use. He reiterated that he obtained approvals from the City Council of Nairobi (*as it then was*) and from NEMA for the housing project and that the Defendants' failure to approve the project on the grounds that it was a public utility plot is ungrounded, fallacious and time barred since the Plaintiff already obtained change of user. He further stated that the Defendants have denied the Plaintiff's agents to access the suit property to deliver building materials which constitutes trespass to property. The

Plaintiff further denied every allegation contained in the Counterclaim. He further stated that the Counterclaim is defective as drawn because the Plaintiff in the Counterclaim lacks *locus standi* to institute the claim, the claim on change of user is time barred, the counterclaim is fatally defective for misjoinder and non-joinder of relevant parties and that the Counterclaim is not accompanied by a verifying affidavit. He stated that Runda Association has no *locus standi* to bring the Counterclaim or to protect and develop the common and natural resources within Runda Estate stating that the suit property is neither a common nor a natural resource within Runda Estate and is not available to Runda Association, it being private property. He denied the assertion that the suit property has ever been public utility land or that it was donated by the developer of Runda Estate or set aside for the construction of schools, a police station and a church and put the Plaintiffs in the Counterclaim to strict proof. He further added that he purchased the suit property from Runda Academy Limited, a private limited liability company, vide a transfer registered on 13th September 2002 as an innocent purchaser for value without any notice of the alleged claims by the Plaintiffs which claims he considered to be baseless and unfounded. He denied knowledge of the alleged developer, Mae Properties Limited, who he stated is in any event a stranger to this suit. He further denied the alleged surrender or that it relate to the suit property and put the Plaintiffs in the Counterclaim to strict proof. He further stated that he is not the original allottee of the suit property from the Government of Kenya but was a bona fide purchaser for value without notice from a registered proprietor Runda Academy Limited. He denied the allegations of unlawful subdivision and allocations to third parties and breach of trust and put the Plaintiffs in the Counterclaim to strict proof. He further added that the Plaintiffs in the Counterclaim have never taken any step in respect of their allegation of illegal alienation of public land and that the Counterclaim is an afterthought and an affront to his rights to private ownership of the suit property. He denied that the suit property was hived off the alleged surrendered land and put the Plaintiffs in the Counterclaim to strict proof thereof. He further denied that there was any illegality in the title deed held by him over the suit property or that the change of user was approved without regard to the law and put the Plaintiffs in the Counterclaim to strict proof thereof. He asserted that the approval for change of user followed all the established legal procedures and flaws and further that the issue is spent and cannot be reopened in this suit since the Plaintiffs failed to object at the appropriate time and no appeal against the approval has ever been filed. He also stated that no loss has been suffered by the unnamed residents of Runda Estate and in any event they are guilty of laches having failed to take action in respect of their purported claims for over 14 years. On those grounds, he sought for the Counterclaim to be dismissed with costs.

The Plaintiff's Evidence

Hearing commenced on 19th June 2013. The Plaintiff called a total of 4 witnesses. The first witness, PW1, Lilly L.K. Kithinji testified that she was working as a Technical Director at Cephas Valuers Limited. She stated that she was a registered and Practicing Valuer since 1992 and was approached by the Plaintiff to go and evaluate the suit property. She stated that she carried out the evaluation of the suit property on 22nd February 2012 after carrying out a site visit with her team. She confirmed that she prepared a Report and Valuation dated 24th February 2012 which she produced in court as Plaintiff's Exhibit No. 1. In that report, she estimated the loss in rental income at a sum of Kshs. 148,320,000/- for the period October 2008 to March 2012. She stated that she took into account the rent which would have accrued from properties if they had been constructed. In cross-examination, PW1 disclosed that in arriving at her valuation of the proposed development, she assumed that the suit property had been developed as proposed. However, she admitted that no architectural plans or building plans were available to her to assist her in doing her valuation. She stated that in arriving at her estimated rental loss income, she had regard to the other residences within Runda Estate, consulted other valuers and a database of the real estate market. She also said that she consulted landlords and tenants in the area on the going rents but could not however give better and further particulars of the specific individuals she spoke to. She admitted that her valuation was a general estimate which can vary. She further admitted that she assumed that the suit property was properly allocated to the Plaintiff.

The second witness (**PW2**) was Gilbert Jarlet Njau. He stated that he is a Registered Physical Planner having practiced as such since the year 1968. He testified that sometimes in the year 2003, the Plaintiff being one of his clients instructed him to facilitate the change of user of the suit property from "*education purposes and the accommodation for the Headmaster/Principal*" to "*residential*". He

confirmed having made the necessary application to the Nairobi City Council (*as it then was*) and also put up a billboard at the suit property on 7th August 2003 as required under the Physical Planning Act. He further stated that a public notice was thereafter placed on the national newspaper of East African Standard newspaper of 13th August 2003 encouraging any party or individual with any complaint to present the same to the Town Clerk, Nairobi City Council (*as it then was*). He stated that the application was approved by the then Nairobi City Council on 25th March 2004 and the necessary Notice of Approval of Development Permission (**PPA2**) dated 29th March 2004 was issued. He further testified that this approval was submitted to the then Commissioner of Lands offices on 27th April 2004 and the approval of the then Commissioner of Lands was accorded vide his letter under reference number **21356/20** dated 12th May 2005, copies of which he exhibited. He further testified that further advertisements were placed in the Daily Nation and Standard Newspapers of 7th April 2008 following the change of residential user density. He further stated that to the best of his knowledge and information, none of the Defendants ever raised any objection to the then Nairobi City Council nor was any appeal lodged with the relevant authority being the Nairobi Physical Planning Liaison Committee against the approval of change of user. He emphasized that all due process were observed in this process. On cross-examination, this witness stated that he is the one who personally applied for the change of user of the suit property from educational to residential. He stated that though he placed a billboard on the suit property announcing the change of user, he did not have photographic evidence of the same. He further stated that before applying for the change of user, he familiarized himself with the conditions on the title of the suit property. He stated that he never engaged with the Runda Association at all during this process. In re-examination, he stated that it was not his duty to contact the Runda Association while pursuing the change of user as the approving authority being the then Nairobi City Council was the one which contacts interested parties on the planning issue.

The third witness (**PW3**) was James Gathecha Waweru. He stated that he was an architect for 44 years. He stated that the Plaintiff was one of his clients. He stated that on 13th August 2007, the Plaintiff appointed his firm to design high costs houses on the suit property. He added that the Plaintiff showed him the title deed to the suit property being Grant No. I.R. **103345** which stated as one of the special conditions that “*the land and building shall only be used for residential purposes*”. He further testified that in order to build the houses on own plots as required by the Plaintiff, he applied to the Director of City Planning at the then Nairobi City Council for multi-purpose use via his letter dated 22nd January 2008. He also testified that he submitted to the then City Council the layout of the houses as well as the design of the house types. He stated that he also submitted the project to the Defendants for approval on the Plaintiff’s instructions. He further testified that the Plaintiff instructed him to submit the approval of the then Nairobi City Council to the Runda Association for its vetting and approval which he did vide his letters dated 22nd January 2008 and 9th June 2008. He also stated that the Plaintiff further instructed him to design a perimeter wall around the entire site which he did and obtained approval from the Director of Planning of the then Nairobi City Council vide its letter dated 5th February 2008. He further testified that like with the housing layout, he submitted drawings of the perimeter wall to the Runda Association vide his letter dated 5th February 2008. He noted that the Runda Association declined to grant the necessary approvals for the housing layout and the perimeter wall stating that there were issues concerning the suit property some of which were already in court cases. He further noted that to date, no details on the stated court cases have ever been supplied to him and the denied approval resulted in the project stalling to date. Upon cross-examination, the witness stated that he responded to the objections of the Runda Association vide his letter. He further confirmed that special permission for multi-use of the suit property was granted by the then Nairobi City Council.

The Plaintiff also called a fourth witness whose evidence was taken by this court. However, upon retiring to write this judgment, the court discovered that the page bearing the evidence-in-chief of this witness had been torn out of the court file. Accordingly, the evidence of this witness cannot be recorded here.

The Defendants’ Evidence

The first witness on the defence side (**DW1**) was Peter Gachuhi. He stated that he is an Advocate of the

High Court and the Chairman of the Runda Association during the period March 2008 to April 2010. He also stated that he was a Director of the 1st Defendant, Runda Water Limited during that period. He stated that Runda Association is registered as a society under the Societies Act and its members comprise of residents living within Runda and falling under Land Reference Number **7785** and Nairobi **Block 112**. He then stated that by a letter dated 9th November 1984, a copy of which he produced, the Commissioner of Lands was calling for comments from the Director of Physical Planning and Director of Surveys with regard to a proposed subdivision of Land Reference **No. 7785/10**. He pointed out that at point 9 of the said letter, the then Commissioner of Lands stated that an area of land for public purpose was to be surrendered to the Government free of cost. He stated that the surrender was done by the developer, Mae Properties Limited, by the instrument of surrender I.R. No. 8160/54. He testified further that subsequently, instead of the suit property being reserved for purposes of public use, it was allocated to an entity known as Runda Academy Limited which is a private entity. He referred to a title deed for the suit property in the name of Runda Academy Limited. He stated that the suit property forms part of the land surrendered to the Government by Mae Properties Limited. He added that the Runda Association was unaware of this development and only came to learn of it when the Plaintiff approached the Runda Association seeking certain approvals of a proposed development thereon. He stated that they came to see a copy of the title deed for the suit property held by the Plaintiff. He stated that the change of user relied upon by the Plaintiff clearly indicated that the approval was subject to the property not being one of the disputed public utility plots. He mentioned that the zoning policy of that area is for a minimum of ½ acre plots with each plot occupying a single dwelling. He noted that the Plaintiff was proposing a multi-dwelling development which does not concur with the zoning policy in Runda Estate. He added that the Plaintiff made another application in a notice in the Daily Nation and Standard Newspapers on 7th April 2008 requesting for authority for multi-dwelling on the suit property. He stated that they expressed their objections to the Town Clerk of the then Nairobi City Council on 9th April 2008 but that the same were not responded to. He added that changing the user of the suit property from single dwelling to multi-dwelling as proposed by the Plaintiff was inconsistent with the character of the area and would increase pressure on the infrastructure around the estate. He stated that Runda Estate is not within the Council's sewerage system and in their view the development could not comply with the Council's by-laws for multi-dwelling where there is a sewerage system. He emphasized that Runda Association has always objected to this development.

He further testified that Runda Water Limited is a subsidiary of Panafrica Insurance Limited as was also the case for Mae Properties Limited. He stated that Runda Water Limited was set up for the treatment of water and supplying residents of Runda Estate. He disclosed that the water is extracted from Ruakariver and there is a treatment plant within Runda Estate. He added that in the year 2000-2001, Runda Association acquired 74.5% of the shares in Runda Water Limited. He added that the balance of the shares are held by Panafrica Insurance which still owns substantial parts of the estate. He testified further that upon receipt of the Plaintiff's title deed to the suit property, Runda Association took the view that to supply water for the proposed development on the suit property which it had objected to would be to countenance an illegality and a breach of trust by the Association to its residents.

He further stated that on the Counterclaim, the Defendant seeks to correct the unlawful steps taken by the then Commissioner of Lands in 1996 and the consequential orders that the title deed to the Plaintiff be revoked. He added that this is in the spirit that as an association of residents, where property such as this which was surrendered at no cost should be held for the good of the public as was intended. He further added that the Runda Association was concerned that if they do not preserve public utility plots for purposes of public schools, open spaces or any other public use such as a clinic or fire station, it is they as residents and Kenyans who would become victims. He further added that their generation would also be held liable in that they had an opportunity to correct the preservation of public utility property. He further said that the Plaintiff has claimed a colossal amount in lost rental income but stated that the damage to the public is unquantifiable for the reason that land is limited. He added that the Plaintiff has his recourse from the sellers Runda Academy Limited while the residents have no recourse.

In cross-examination, Mr. Gachuhi confirmed having seen a copy of the Plaintiff's title deed to the suit property but added that Runda Association queried the validity of the same on the basis that they objected to the allocation of the suit property, a public utility plot, by the Commissioner of Lands to a private

entity. He confirmed having informed the Plaintiff as much verbally in various meetings with the Plaintiff. He added that as Runda Association, they wrote letters to the Commissioner of Lands objecting to that allocation but could not produce copies of those letters before the court. He emphasized that it was wrong for the Commissioner of Lands and the then City Council of Nairobi to change the user of the suit property because it would be inconsistent with the purpose of the land as it was intended to be a public utility plot. He further stated that he was not aware whether their objection to the change of user was made before or after the approval. He further stated that he cannot remember seeing a notice in the newspaper or a bill board on the change of user.

The second defence witness (**DW2**) was John Koyier Bare, a Registered Planner working as the Acting Director of Urban Planning with the County Government of Nairobi. He testified that the Plaintiff as the owner of the suit property applied under the Planning Act for change of user of the suit property from educational to residential. He confirmed that the Plaintiff was granted conditional planning approval and that the intended development thereon was consistent with the zoning of Runda Area which fell in the development zone no. 13. He further testified that upon perusal of the property file at the County Government, he did not find any material objections filed as required in the Planning Act or any other related legislation in respect to the development. He confirmed that the Planning Committee granted the sought after permissions to the Plaintiff. He further stated that the Planning Law gives the public and stakeholders a window of making objections under section 26 of the Physical Planning Act and further windows for making objections are also given in sections 8 and 13 of the Physical Planning Act. He added that objectors can lodge their objections with the Liaison Committee while an appeal can be lodged with the National Liaison Committee and further to the High Court. He stated that he did not find any material objection in this case and the approval was given. On condition no. (iv) of the Notification of Approval, he stated that they never received any complaint that the suit property was a public utility plot. He confirmed that when the application was received by them, it was accompanied by a copy of the title to the suit property by the Plaintiff as the proprietor thereof. He stated that the then City Council of Nairobi followed the law that guides development permission. On cross-examination, he confirmed that he was not aware that the Runda Association was informed of the approval of change of user to the Plaintiff in respect of the suit property. He further testified that the public was informed of the proposed change of user in this case. He further added that he saw some objections on the file one of which was by the Runda Association, stating that the suit property was a public utility plot.

Issues for Determination

- i. Whether the allocation of the suit property and issuance of the Grant No. I.R. 103345 to the Plaintiff by the 2nd Defendant in the Counterclaim was illegal, null and void, whether the said Grant now held by the Plaintiff is illegal, null and void and vests no property in the suit property in the Plaintiff, and whether a mandatory injunction should be issued against the 2nd Defendant in the Counterclaim to cancel the said Grant and to correct the entries in the relevant registers to reflect the original user and ownership of the said parcel;***
- ii. Whether the approval of change of user of L.R. No. 7785/1303 from education purpose to residential and subsequently from single dwelling to multi dwelling is unprocedural, illegal and a nullity and whether a mandatory injunction against the 3rd Defendant in the Counterclaim should be issued to revoke the change of user granted in respect of the suit property and to restore its original user status of educational purposes;***
- iii. Whether a permanent injunction should issue restraining the Plaintiff either by himself, his servants, agents, employees and assigns from further carrying out any development and/or trespassing on the suit property;***
- iv. Whether the court should issue a declaration that the refusal by the 1st Defendant, Runda Water Limited, to connect water to the suit property is illegal, null and void and whether a mandatory injunction should issue directing the 1st Defendant to connect water to the suit property;***

v. *Whether to issue a mandatory injunction directing the 1st Defendant to give to the Plaintiff all authorizations in respect of security and access to the suit property;*

vi. *Whether to order that the Defendants pay the Plaintiff general damages for trespass to and interference with enjoyment of the suit property;*

vii. *Whether to order that the Defendants pay to the Plaintiff special damages amounting to Kshs. 28,800,000/- for lost rental income that he would have earned from the suit property;*

viii. *Who is to bear the costs of this suit.*

Determination

i. Whether the allocation of the suit property and issuance of the Grant No. I.R. 103345 to the Plaintiff by the 2nd Defendant in the Counterclaim was illegal, null and void, whether the said Grant now held by the Plaintiff is illegal, null and void and vests no property in the suit property in the Plaintiff, and whether a mandatory injunction should be issued against the 2nd Defendant in the Counterclaim to cancel the said Grant and to correct the entries in the relevant registers to reflect the original user and ownership of the said parcel;

It is common ground on the part of the Plaintiff and the Defendants that the Plaintiff is the current registered proprietor of the suit property, having purchased it from Runda Academy Limited. Copies of the title deed held by Runda Academy Limited and the title deed held by the Plaintiff were availed to the court and the Defendants and they confirm having seen them. The Defendants, however, contend that the title deed held by the Plaintiff is defective, illegal, null and void on the grounds that the suit property was a public utility plot, the same having been surrendered by Mae Properties Limited to the Government of Kenya for public use by the instrument of surrender **I.R. No. 8160/54**. It is the Defendant's case in the Counterclaim that the Chief Lands Registrar was wrong in allocating the suit property to Runda Academy Limited, a private entity, what was surrendered by Mae Properties Limited for the use of the public. To that extent therefore, the Defendants assert that the title acquired by the Plaintiff over the suit property was manifestly defective as a consequence and should be cancelled and the suit property revert back to public use.

Other than asserting that the suit property was surrendered to the Government by the developer, Mae Properties Limited, by the instrument of surrender **I.R. No. 8160/54**, the Defendants did not produce a copy of that surrender before this court. **Section 107** of the **Evidence Act Cap 80** provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Mae Properties Limited is not a party in this suit and so they are not able to shed light on this assertion by the Defendants. All the evidence that the court is left to rely on to prove the Defendant's assertion is the testimony of **DW1**. If at all there was in existencethe instrument of surrender **I.R. No. 8160/54**, the same should have been availed to this court. This was not done. That being the case, I am left with no option but to arrive at the finding that the Defendants have failed to prove that the suit property was indeed surrendered by Mae Properties Limited to the Government for public use.

On his part, the Plaintiff produced to this court a copy of his title deed to the suit property. The law is very clear as regards the position of a title holder of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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 Defendants challenged the Plaintiff’s title deed on the ground that the same was acquired illegally. However, as already established above, the Defendants have not produced any credible evidence to prove that assertion. The court is duty bound to find that the Plaintiff’s title deed is prima facie evidence that the Plaintiff is indeed the absolute and indefeasible owner of the suit property and I do so find.

That being my finding, I further find that no impropriety has been proved in the allocation of the suit property to Runda Academy Limited which subsequently sold the suit property to the Plaintiff, the Plaintiff’s title is valid and the court shall not issue an order to cancel the same or rectify entries in the register.

ii. Whether the approval of change of user of the suit property from education purpose to residential and subsequently from single dwelling to multi dwelling is unprocedural, illegal and a nullity and whether a mandatory injunction against the 3rd Defendant in the Counterclaim should be issued to revoke the change of user granted in respect of the suit property and to restore its original user status of educational purposes;

It is conceded by the Defendants that the Plaintiff applied for and obtained change of user of the suit property from education purpose to residential and subsequently from single dwelling to multi dwelling. The Defendants asserted that they lodged their objection to the granting of the change of user with the then City Council of Nairobi. This fact is not disputed by the Plaintiffs. However, notwithstanding those objections, the then City Council of Nairobi did grant the change of user of the suit property from education purpose to residential and subsequently from single dwelling to multi dwelling. The Defendants assert that this was unprocedural and the approval of change of user should be found to be illegal and a nullity and the court do order for the user of the suit property to revert back to educational purposes.

Section 13(1) of the Physical Planning Act (Cap 286) provides as follows:

“Any person aggrieved by a decision of the Director concerning any physical development or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.”

Section 15(1) of the same statute provides as follows:

“Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.”

Section 15(4) of the same statute provides as follows:

“Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court.”

These legal provisions lay out a very elaborate procedure through which a person aggrieved by the decision of the Director of Planning can challenge development permission or a decision for change of user. One has to commence first with lodging an appeal with the Nairobi Liaison Committee. If one is further aggrieved, one lodges another appeal to the National Liaison Committee. It is only if one is aggrieved with the decision of the National Liaison Committee that one can lodge a final appeal at the High Court or its equivalent in this case being the Environment and Land Court. This is to say that the

Defendants are wrong to challenge the decision of the Director of change of user of the suit property from education purpose to residential and subsequently from single dwelling to multi dwelling before this court without following the enumerated procedure. That being the position, the Defendants have no right of audience before this court to challenge the change of user of the suit property. It follows that I find that the decision of the Director to change the user of the suit property stands.

iii. Whether a permanent injunction should issue restraining the Plaintiff either by himself, his servants, agents, employees and assigns from further carrying out any development and/or trespassing on the suit property;

I have already found that the Plaintiff is the duly registered proprietor of the suit property. I have also found that the Plaintiff received approval from the Director of Planning at the then City Council of Nairobi to change the user of the suit property from education purpose to residential and subsequently from single dwelling to multi dwelling. That being the position, the Plaintiff is entitled to enjoy all the rights and privileges appurtenant to the suit property and is at liberty to develop the suit property in the manner that he deems fit.

iv. Whether the court should issue a declaration that the refusal by the 1st Defendant, Runda Water Limited, to connect water to the suit property is illegal, null and void and whether a mandatory injunction should issue directing the 1st Defendant to connect water to the suit property;

On the issue of supply of water to the suit property by Runda Water Limited, I find that this is a contractual arrangement that may be entered into between the Plaintiff and Runda Water Limited. Therefore, this court cannot issue an order directed at it compelling it to supply water to the Plaintiff.

v. Whether to issue a mandatory injunction directing the 1st Defendant to give to the Plaintiff all authorizations in respect of security and access to the suit property;

As the owner of the suit property, the Plaintiff is entitled to be allowed access to the suit property and the Defendants are hereby directed to grant the same to the Plaintiff. However, the Plaintiff has not legal right to be granted security by the Defendants.

vi. Whether to order that the Defendants pay the Plaintiff general damages for trespass to and interference with enjoyment of the suit property;

No evidence was produced to demonstrate that the Defendants in any way trespassed upon the suit property and therefore no award of general damages for trespass shall be granted.

vii. Whether to order that the Defendants pay to the Plaintiff special damages amounting to Kshs. 28,800,000/- for lost rental income that he would have earned from the suit property;

The Plaintiff claims special damages amounting to Kshs. 28,800,000/- being what he terms as lost rental income that he would have earned from the suit property had the Defendants allowed him to develop the suit property as he had planned. I will not award this sum as the same was not specifically pleaded or proved.

viii. Who is to bear the costs of this suit.

Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2016

MARY M. GITUMBI

JUDGE

Judgement read in open court in the presence of

Mr. Mogere for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant

.....for the 4th Defendant.