IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & OUKO, JJ.A)

CIVIL APPEAL NO. 8 OF 2004

BETWEEN

KEPHA MAOBE & 365 OTHERS ……..…… APPELLANTS

AND

BENSON I. MWANGI ……..……. 1ST RESPONDENT

CITY COUNCIL OF NAIROBI ……..…….. 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Rimita, J.) dated 20th June, 2003

in

H.C.C.C. NO. 516 of 1997)

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JUDGMENT OF THE COURT

Introduction

1. It is common knowledge, and we may take judicial notice of it, that the affinity for land acquisition and ownership in this country is insatiable. Land is indeed so central to the lives of Kenyans that it was at the centre of the bitterly fought war for the country's independence. The exemplification of the thirst for land is our capital city whose central business district and its environs have since independence been covered with stone, concrete, mortar, brick, mud and iron sheets (mabati) leaving little, if any, environmentally sustainable open spaces for public use. Along with the hunger for land acquisition and development came what was derisively christened "land grabbing" which was essentially alienation of land reserved for public purposes for private use and development through dubious means. Our Courts became inundated with land disputes which still continue to haunt the country as alternative means of resolving them continue to be explored. It was no wonder therefore that the residents of Kimathi Estate in Nairobi, who had commonly used an open space in that Estate as a playground for their children and for other general public purposes for almost 30 years, suddenly woke up one day in 1997 to find a private developer fencing it off and heaping building stones on it. They rushed to Court.

Background

2. Kimathi Estate was the first of several residential Estates developed by the former **Nairobi City Council** (the Council), for sale on reasonable terms to the residents of the city. For that purpose, the Council received from the Government of Kenya, which held the unalienated land in fee simple under the **Government Lands Act**, Cap 280, a grant of lease for L.R No. 209/7383 **(plot 7383)** measuring 18.45 Hectares or approximately 45.7Acres for 99 years from 1st April 1954. With the consent of the Commissioner of Lands, the Council subsequently surveyed the land and created 365 residential units of approximately 0.0223 Hectares, which it offered to qualified applicants for purchase. The development was carried out through M/s Housing Finance Company of Kenya Ltd (HFCK) which offered mortgage facilities for the tenant purchase scheme. The offshore financier of the Council was USAID in Kenya. All the units were purchased in the 1970s to 90s and sub-leases of 83 years less 3 months were issued by the Council to the purchasers.

3. Other than the residential units, and as part of the planned development, the Council left unused open spaces interspersed on the whole parcel of land, some of which were designated as public utilities for shops, car park and community center but was later ceded to the adjacent Kimathi Primary school. There were two other open spaces designated for **"Special Purposes".** One of them was supposed to be a library or a replacement of the shops/car park/community plot ceded to the primary school, but on the evidence, those amenities are not on the ground. However, the Council became interested in the other 'special purpose' plot in 1992 when a new Part Development Plan (PDP) was prepared and the user was changed to "residential". In 1996, the plot was divided into five sub plots which were allocated to private developers. One of the subdivisions was sold by the original allotee to **Benson I. Mwangi** (Mwangi) and he moved in to fence and develop it in 1997 but was stopped by a Court injunction obtained by the residents. It is the second "Special purpose" plot that is in dispute here (disputed plot).

The dispute

4. All 365 original purchasers and their successors in title (hereinafter **'the appellants'**) went before the High Court on 14th March 1997 and sued Mwangi, the Council, and the Commissioner of Lands. Subsequently the suit against the Commissioner of Lands was withdrawn since the Government divested itself of all interest in the land after issuance of the grant of lease to the Council, subject only to its reversionary interest and the terms stated in the grant. Mwangi and the Council are the 1st and 2nd respondents before us, respectively. The suit was thus based on an amended plaint which sought the following prayers;-

> ***"(a) An injunction restraining the defendants (respondents) by themselves, agents, officers or in any other way whatsoever from selling, alienating, fencing off or interfering whatsoever with the plaintiffs (appellants) quiet enjoyment of L.R No. 209/7383/354 original L.R No. 209/7383.***
>
> ***(b) A declaration that the allotment of the said parcel of land is contrary to the law governing land in Kenya is therefore null and void.***
>
> ***(c) An order that the lands register be rectified by the deletion of the 1st defendant and substitution thereof with that of the Government of Kenya."***

5. The gravamen of the dispute is the assertion by the appellants that the entire parcel of land (plot 7383) was granted by the Government to the Council for the purpose of a housing development scheme and the subdivisions they bought included all spaces reserved and left undeveloped for the service and enjoyment of the residential units. The disputed plot was thus part of the land alienated by the Government and accepted by the Council for their benefit. It was not available for alienation to any other party without their knowledge or consent.

6. On the other hand, the Council in its defence, averred that it had sold specific plots curved out of the original title to the appellants; the plots were of a specified size and boundaries; the Council never surrendered the head title; the undeveloped open spaces remained vested in the Council and consequently, it was at liberty to assign any use over such plots provided the correct procedure was followed. Mwangi, on his part, maintained that he had purchased the suit property from one Peter Gathondu Miti after

conducting due diligence to verify the authenticity of the title therein and was therefore an innocent purchaser for value without notice.

7. The appellants called as their expert witness, **Johnson Ngari** (PW1), a physical planner and valuer who had worked with the Council previously. He prepared a 'Survey Report' on physical planning issues on plot 7383 (Kimathi Estate). He referred to various amenities reserved for specific purposes and then focused on the two spaces reserved for 'Special purposes'. According to him, 'special purpose' meant a reservation for a purpose that was not necessarily 'public'. A public utility plot could serve the residents as well as outsiders while 'special purpose' plot is meant to assist the residents and owners of the houses. One of the special purpose plot was earmarked for a Library, and it was odd that the disputed plot, also a special purpose one, was going to be used for residential purposes. In his view, if the Council intended to change the user of the plot, it could only do so after proper consultations with the residents and then go through a long process of validation under different laws and regulations. He testified that the Council changed the user of the disputed plot without following any lawful procedure which by-passed the Town Planning Committee and the Director of Planning and hoodwinked the Commissioner of Lands that it was an "unused open space" and not a "special purpose" plot.

8. That evidence was buttressed by **Paul Njogu Njeru** (PW2) who had worked with the Council as an Engineer & Planner under the Director of City Planning between 1977 and 1980, and was a planning expert in his own right. He had also purchased one of the residential units in Kimathi Estate behind the disputed plot. The plot was serving the residents of the Estate and when he saw fencing activity, he checked with the Council records and found that a change of user which was not lawful or procedural was processed by someone between 1992 and 1996 by changing the original planning maps to show that the disputed plot was 'unused open space' while indeed it was a 'special purpose' reservation of the original parcel of land. The entire Kimathi Estate and the disputed plot belong to the tenant-purchasers.

9. According to PW2, the suit property was not suitable for residential purposes and the alienation of it was prejudicial to the appellants because firstly, the appellants had no place to construct social amenities like a social hall, library, meeting places for social functions, recreational gardens or playing field for children. Furthermore, the development of residential premises on the disputed plot would in turn lower the value of the houses in the Estate. He testified that there was no consultation with the appellants when the Council purported to change the user and subsequently alienate the disputed plot.

10. The last witness for the appellants was **Kepha Ombati Maobe** (PW3), who produced a copy of the sub lease given out by the Council to confirm the terms. He maintained that the Council did not follow the proper procedure when it changed the user and allocated the suit property to Mwangi.

11. The Council called its own expert, **Patrick Tom Odongo** (DW2), the then Deputy Director of City Planning, also a physical planner. Unfortunately he did not complete his testimony because he was hospitalized midstream his cross examination. He confirmed that the Government gave out the land to the Council to develop a housing Estate and approved the sub-division plan for the development. Apparently the original Grant, original approved plan and maps were not produced in evidence by the Council but DW2 raised no objections to the plan exhibited by PW1. With regard to the plots reserved for 'special purpose', he testified that they were banked for any purpose or future development at the discretion of the Council. It was not necessarily for public use, but it could be beyond the interests of the residents of the Estate. The Council in the exercise of its duty of supplying land to the public for housing could choose whatever it needed to do with the disputed plot, and eventually did by changing the user, subdividing it and allocating to five people. According to him, the sub-leases issued to the residents were specific to the individual units and did not stretch beyond the bounds of their deed plans. As for the definition of 'special purpose', it meant, in his view, that the land is not committed to a certain purpose and its ultimate use would be determined by the Council, without recourse to the residents of the Estate. The Council did not owe any trust to the residents in respect of the open spaces. The alienation of the disputed plot without consulting the appellants was therefore proper. In any event, he added, there were Councillors who participate in Town planning and full Council approvals and are taken to represent everybody. There were also other approvals by the Director of Surveys and the Commissioner of Lands which were obtained. He maintained that the sub-lease issued to Mwangi was proper.

12. For his part, Mwangi insisted that he had purchased a portion of the disputed plot measuring 0.034 Hectares on 16th November, 1996 through a lawful sale agreement signed with the seller who had a letter of allotment from the Council. He paid the dues which the allotee would have paid and the Council gave him permission to commence development. He intended to build a house similar to the ones in Kimathi Estate but was stopped in his tracks by a Court order. The building stones he had brought on site were subsequently stolen and he has suffered loss. He confirmed the plot was being used as a children's playground before he fenced it

13. Extensive written submissions accompanied by authorities were made by respective counsel representing the parties.

Decision of the High Court.

14. In a seven-page judgment dated 20th June, 2003 the High Court **(Rimita J.)** dismissed the appellants' suit expressing itself as follows:-

> ***"One issue that needs special consideration is whether the open space or spaces were part of the units sold to the plaintiffs by the City Council of Nairobi. I have perused and considered the sample of the sale agreement made available to me. Obviously the open spaces are not part of the transaction.....But the plot in dispute was reserved for "special purpose".The parties called witnesses to give the meaning and definition of what the "special purpose' meant. The opinions were varied but what this means is that the Council had reserved the open space for some unspecified purpose…The land which was not sold to the tenants was obviously left in the hands of the City Council. Like other land in the hands and at the disposal of the Council, the open spaces were held in trust for the residents of the City and the Council cannot deal with the same except for the good of the residents.***
>
> ***But the Council has a wide discretion and can make any decisions on disposal or dealings with land as far as the decisions are done in good faith and for the good of the Council.…….....It would appear that the Council decided to change user of the open space whatever the original idea was and created residential plots. According to the minutes, the plots were organized as a continuation to the existing Kimathi Estate. I find the necessary consents and authority were obtained from the Commissioner of Lands. …..***
>
> ***I accept the 1st defendant's defence that he was an innocent and bona fide purchaser without notice. No fraud has been proved against any of the defendants. No particulars of fraud were pleaded in the Plaint. The 1st defendant's title cannot be challenged under the circumstances..."***

That is the decision which provoked the appeal before us.

The appeal and submissions of counsel

15. At the hearing of the appeal, only learned counsel for the appellants **Mr. Andrew Ombwayo** showed up. Hearing notices were duly served on the respective advocates representing Mwangi and the Council, but they did not show up and the hearing proceeded as scheduled. Five grounds of appeal were listed in the memorandum, but Mr. Ombwayo argued the appeal by combining grounds 2, 3 and 5 and arguing ground 4 on its own. Ground 1 was abandoned since the issue of representation was no longer alive. The grounds were as follows:-

> ***"2. The learned trial Judge erred in law and in fact by mis-apprehending the import and effects of the tripartite transactions involving the suit land, L.R. No.***

209/7383 (now Nairobi/Block 51/1-359) between the Government of Kenya, between the 2nd respondent and 365 appellants of Kimathi Estate and the sale transaction of plot No. 354 i.e. L.R No. 209/7383/354 (now Nairobi/Block 51/268) on 'special purpose' space of the said Kimathi Estate to the 1st respondent.

3. The learned trial Judge erred in law and in fact and misdirected himself on law and facts by holding that the 'open spaces' and 'special purposes zones' within Kimathi Estate were separate areas and remained reserved in the 2nd respondent free for its use while the said 'open spaces', special purposes zones, easements and rights thereon were servient tenements appurtenant to and inseparable from Kimathi Estate's dominant tenement of 365 Kimathi Estate residents of the said special purpose land on L.R. No. 209/7383 (now Nairobi/Block 51/1-359). sic

4. The learned trial Judge erred in law and in fact by accepting the sale and allotment of purported sub-sub (sic) plot No. 354 of L.R No. 209/7383/354 (now Nairobi/Block 51/268)Kimathi Estate as valid while allotment of the said plot by the 2nd respondent to the 1st respondent was contrary to laws governing land in Kenya and Nairobi in particular and thereby deprived the appellants quiet enjoyment of the rights and benefits under the appellants' sub-leaseholds between the appellants and the 2nd respondent.

5. The learned trial Judge erred in law and in fact by deciding the appellants suit outside the issues and evidence adduced at the trial and contrary to the norms of the law of real property in Kenya and Nairobi in particular as to who was head title to the said L.R No. 209/7383 (now Nairobi/Block 51/1-359)"

16. Mr. Ombwayo submitted that lease granted to the Council by the Government was held by the Council on terms. The sub-leases were similarly granted to the appellants subject to those terms and to other terms listed in two schedules in the lease document held by the appellants. In his view, the residential units sold to the appellants were dominant tenements which continued to enjoy the benefits of easements and other benefits accruing from the servient tenements which were the reserved public utilities and special purpose plots. He emphasized that the Council demised the entire plot 7383 of 18.45 Hectares and left nothing for allocation to anyone else. Indeed, he pointed out, one of the clauses provided for payment of a proportion of expenses which the Council would expend on the areas used in common by the appellants. The Council, therefore, could only wait until the expiry of the sub leases to change whatever terms of the leases they may wish to, instead of blatantly breaching its part of the bargain midstream.

17. He cited several authorities on the definition of easements and to support the view that there were rights attached to the land which were appurtenant to the appellants' sub-plots and the Council leased them out. The authorities included two articles issued in April 2014 on ***"Overview of Easements (servitudes), Licences, Restrictive Covenants Relating to Land"*** by Stephen Price and ***"Easements, Covenants and Similar Rights in British Columbia- An Overview"*** by David Little & Others.

18. With regard to the allotment made to Mwangi, Mr. Ombwayo submitted that on the facts the allocation was irregular as it was made unilaterally by the Council without any consultations or information to the appellants. He referred to the Provisions of **Sections 23** and **24** of the **Registration of Titles Act (RTA)** to support the submission that after the grant made to the appellants, there was nothing else to grant to Mwangi, and therefore no protection was available under the law.

Analysis and determination.

19.As this is a first appeal, we have carried out our duty to analyze and re-evaluate the evidence adduced

before the High Court in the manner of a retrial with a view to arriving at our own conclusions, but always giving allowance for the fact the we did not see or hear the witnesses. See ***Selle & Another-vs-Associated Motor Boat Co. Ltd. [1968] 123*** *at p 126* T*he Court in that case added:*

> ***"In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan [1955] 22 EACA 270)."***

20. The solution to the dispute before us, as we see it, lies in the answer to one overarching issue: the purpose for which the original grant was made to the Council. The answer will then dovetail to the terms of both the original grant and the sub-leases issued to the appellants to answer the sub issues: whether the Council had the right to reallocate the disputed plot without recourse to the appellants and whether Mwangi's title was protected under the law.

21. It is common ground that the entire parcel of land, plot 7383, measuring 18.45 Hectares, was originally unalienated land held by the Government of Kenya (GoK) under the ***Government Lands Act***. It is also common ground that the entire parcel of land was given out as a Grant to the Council. But the grant was not given absolutely to the Council as it was limited to a term of 99 years and was also subject to other written terms. GoK would then have the reversionary rights. More importantly, the grant was specifically directed as to the use thereof, that is to say, the development of a housing project in Eastlands area of Nairobi known as Kimathi Estate. It was also specific as to the nature of the development whose plan was drawn up and submitted to the Commissioner of Lands for approval. The plan consisted of 365 residential units; public amenities such as a community center, car park and shopping center; and two ***"special purpose"*** plots. The two plots could have been labelled 'open spaces' when the original development was approved by GoK, but they were not. More on this later.

22.*The* ***habendum*** in the original Grant as extracted from the sub-leases was as follows:-

> ***"(a) The Council is registered as the proprietor as Lessee from the President of the Republic of Kenya for the term of Ninety Nine years from the First day of April One Thousand Nine Hundred Fifty Four (subject to such charges leases encumbrances and other matters as are notified in the Memorandum endorsed hereon to the annual rent of peppercorn (if demanded) and to the provisions and special conditions contained or referred to in a Grant registered in the Registry of Titles at Nairobi as Number I. R 27721/1) of ALL THAT piece of land situate in the City of Nairobi in the Nairobi area of the said Republic of Kenya containing by measurement eighteen decimal four five (18.45) hectares or thereabouts known as Land Reference Number 209/7383 being the premises comprised in the said Grant and more particularly delineated and described on Land Survey Plan Number 89307 annexed thereto and thereon bordered red.***

b. ***The Council has caused the said piece of land to be sub-divided into separate plots and has erected housing units thereon, and named the same <u>KIMATHI</u> <u>ESTATE</u>***

c. ***The Council has agreed <u>to grant a Lease to the</u> <u>Lessee of one of such plots together with the buildings and improvements erected and being thereon on the terms hereinafter mentioned..."</u>*** (emphasis added)

23.As stated earlier, the Council failed or was otherwise reluctant to produce the original grant from GoK and the approved survey plans which were in its possession. The presumption is thus irresistible that if they were produced they would have been adverse to its case. Were there, for example, irregular alterations to the original plans? What were the particulars stated in paragraph (a) above, with respect to:

"the provisions and special conditions contained or referred to in the Grant registered in the Registry of Titles as Number I.R 27721/1"?

24. It seems to us thus far, that the fallacy in the defence put forward by the Council was that it acquired absolute interest in the plot from GoK and it had the right to do whatever it wished with the plot without recourse to anyone, especially the beneficiaries of the housing Estate. That defence, in our view, is incorrect and we reject it.

25.Public land is not a birthday cake for mere chopping up and distribution to favoured allotees. It is a rare commodity which is ring-fenced by Constitutional and statutory provisions and regulations to ensure environmental sustainability and inter-generational equity. We may cite a relevant portion of the decision of Waki J. (as he then was) relating to compulsory acquisition of land under the old Constitution, in the case of

Niaz Mohammed –vs- Commissioner of Lands & 4 others KLR (E&L) 1 at page 217:-

"There is no right of compulsory acquisition of land by the government for purposes other than those provided for in the Constitution of Kenya under

Section 75. …….

If it were not so, and taken to its logical conclusion, a loophole would be created for any government which does not mean well for its citizens, to compulsorily acquire whole sections of a city or town or other developed property on the pretext of public good, compensate the owners of the property acquired with taxpayers' money and then turn round and dish out those properties to favored citizens of its choice or the enemies of the state! Parliament could not have intended such preposterous consequences. I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the government, then the land falls to be used by the government in any manner it desires. There is plainly no such carte blanche intended in the provisions of the law cited above. The land must be used subsequent to the acquisition, for a lawful purpose, and as I see it, the only lawful purpose is the one which it was intended.

I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters not that the entire portion acquired was not used for that purpose. Unutilized portions, in my view, would remain road reserves. And if it was the case that it was found unnecessary after all to have acquired the portion for the expressed purpose, does equity not require that the portions be surrendered back to the person from whom the land was compulsorily acquired? The law itself in section 23 of the Land Acquisition Act appears to imply such equity although it relates to withdrawal of acquisition before possession is taken.."

26. By parity of reasoning, the acquisition of the land in issue here for the specific purpose of developing a housing estate did not give the Council the *carte blanche* to use it as it wished. It would certainly not alienate the special purpose plot for construction of a nuclear plant or a brewery, or other environmentally untenable developments without recourse to the appellants.

27. This view is supported by express provisions in documents on record which we must now construe. In doing so, we have to recall that the object of construction of terms of a written agreement is to establish the intention of the parties which is an objective exercise. The question in this matter is not what the appellants or the Council meant or understood by the words used in the documents that bind them, but the meaning which a particular clause or the entire lease would convey to a reasonable person having all

the background information that was available to the parties at the time of the contract. *(*See ***Investors Compensation Scheme Ltd. –vs- West Bromwich Building Society (1998) 1 W.L.R 912***).

28.The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. In ***Ford –vs-Beech (1848) 11 QB 852 at 866****:*

> ***"The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent."***

29. The sub-lease produced in evidence by the appellants shows that the conveyance was not simply of the various residential sub-divisions and the buildings thereon. They went with various rights and benefits which were also specified. We may reproduce the covenant and obligation entered into by the parties:-

> ***"NOW THIS LEASE WITNESSETH that in pursuance of the said agreement and in consideration of the purchase price rent and covenants on the part of the Lessee hereinafter reserved and contained the Council HEREBY LEASES unto the Lessee ALL THAT piece of land … being a portion of the premises comprised in the Grant….TOGETHER with the detached/semi-detached/terraced dwelling house and other improvements erected and being thereon (hereinafter called 'The demised premises') AND TOGETHER with the rights and benefits specified in the First Schedule hereto…"(***emphasis added)

30.The ***First schedule*** provided as follows:-

1. ***"So far as the Council can grant the same the right of free passage and running of electricity water and soil (in common with the Council and all other persons entitled thereto) by and through the wires (including telephone and telegraph wires) conduits drains, pipes and sewers in or under the neighbouring building and land of the Council.***

2. ***The right of support enjoyed by the demised premises at the date hereof but subject to the rights of other parts of the same block (if any) to be supported by the demised premises as the same now are.***

3. ***The benefit of the stipulations and restrictions impose by the leases of other dwelling houses in the same block (if any).***

4. ***Any other rights licenses, easements, quasi easements (so far as the Council can grant the same) as are at present appurtenant to or enjoyed with the demised premises." (****emphasis added****)***

31.The council expressly reserved only minimal rights for itself under the second schedule, thus:-

"1. The right of free passage and running of electricity, water and soil by and through the wires (including telephone and telegraph wires) conduits, drains and sewers in or under the demised premises.

2. ***The right for the Council and its agents or contractors at all reasonable times to enter upon the demised premises with or without workmen for the purpose of inspecting, repairing, cleansing or renewing the said drains, pipes and sewers."***

32. It is obvious therefore that the subleases conveyed a leasehold interest in the plots but also express

easements and quasi easements which were appurtenant to the sub leases. These are regular clauses where properties are held in common as there is need to share *"rights of support, shelter and protection, passage and provision of water, sewerage, drainage, gas, electricity, garbage, air, and all other services of whatever nature over the parcel and every structure thereon, as may be necessary for the reasonable use and enjoyment of the property or unit."*- see Dr. Tom Ojienda, ***"Conveyancing- Principles and Practice"***. The appellants here paid some consideration for *"the expenses of repairing cleansing and renewing all drains pipes roads pavements sewers and any other things the use of which is common to the demised premises and other premises."*(emphasis added). An objective construction of the leases would support the existence of those easements.

33.In the case of ***Ruth Wamuchi Kamau-vs- Monica Mirae Kamau- Civil Appeal No. 45 of 1983*** an easement was defined as follows: -

> ***"An easement is a convenience to be exercised by one landowner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement…Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come."***

34. It is evident that an easement relates only to the user of the servient tenement and does not extend to ownership of the servient tenement. We did not understand the appellants to argue that their leasehold titles gave them proprietory rights to the public amenities and the special purpose plots, as they clearly did not. But they argue that the easements gave them a right and benefit which the Council could not take away willy nilly. There was no opposition to their evidence, and it was in fact confirmed by Mwangi, that the disputed plot was being used as a playground by the children in the Estate. There was also evidence that the appellants held social and recreational gatherings there and had done so for over 25 years. A residential estate that chokes itself with buildings and does not have such facilities opens the residents to an unhealthy environment. The appellants were not aware of the alienation of the disputed plot and DW1 contended that it was not necessary to involve them since the Council had a right to make decisions on its property without recourse to the appellants

35. We think for ourselves that the appellants had rights over the special purpose plot and other open undeveloped spaces by way of easements, both positive and negative. As the Court of Appeal in England stated in

> ***Re Ellenborough Park Re Davies & Others –vs- Maddison and Another (1955) 3ALL ER 667,*** the right claimed as an easement ought to be reasonably necessary for the better enjoyment of the dominant tenement. In ***Wheeldon –vs- Burrows (1879) 12 Ch. D. 31*** Thesiger, L.J. stated:-
>
> > ***"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.."***

36. There was, of course, the raging debate between the expert witnesses on what **"Special purpose"** entailed: PW1 contending that it was not necessarily public, but was meant to assist the appellants who ought to have been consulted, before alteration of the user to residential purposes which, to him, was odd. DW1, asserting that it was banked by the Council for any purpose or necessary use which need not be for

public and the approval of the appellants was unnecessary. The High Court chipped in with its own definition finding that it was an open space reserved for unspecified purpose.

37. We need not adopt any of the expert definitions as we are not bound to do so. Nor do we think the High Court was right to equate "special purpose" with "open space". The development plan approved by GoK had "public spaces" for public purposes, defined under the **Land Planning Act** (Cap 303) **Regulation 11(2)(c)** as *"non-profit making purpose"* (educational, medical, religious, car parks, public open spaces and other social amenities) for enjoyment of the appellants. The other provision in the plan was for "special purpose" spaces. There was no "open space" as referred to by the High Court, which had no particular purpose.

38. By definition "Special" means:

> ***"i) Of, relating to, or designating a species, kind, or individual thing.***
>
> ***ii) (Of statute, rule, etc.) designed for a particular purpose.***
>
> ***iii) (Of powers etc.) unusual, extraordinary."*** See ***Black's Law Dictionary, 8th Edn.***
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> > At page 1337, "special purpose property" is defined as one *'that has unique design or layout, incorporates special construction materials, or has other features that limit the properties utility for purposes other than for which it was built'.*
> >
> > The ***Concise Oxford English Dictionary, 11th Ed*** defines 'special' as,
> >
> > ***"1. Better, greater, or otherwise different from what is usual…"***

39. "Special purpose" may therefore not be a term of art but, in our view, it meant that the plots marked for 'special purpose' had a user that was out of the ordinary use of the entire original parcel, which was for the benefit of Kimathi Estate residents as a whole. Certainly, more residential buildings were not part of the definition of the disputed plot.

40. We have considered the evidence on record relating to the change of user of the disputed plot and the process of approvals and find them shrouded in mischief. Apart from the council's admitted non-involvement of the appellants, the disputed plot was changed from the approved original user into "open space" for easier acceptance by approving authorities. If approvals required under the law could be obtained under the original plan, surely there would have been no need to change the user.

41. There were statutory tools for dealing with the disputed plot including the **Government Lands Act, The Local Government Act, The Survey Act, The Land Planning Act** and **The Physical Planning Act**, to name but a few. On the evidence from the appellants witnesses, which was not seriously challenged, these were not followed in relevant parts. The evidence, for example, that approval was obtained from the Commissioner of Lands in 1994 before the matter was even placed before the Town Planning Committee for debate and recommendation in 1996. The cart was put before the horse! The process was, in our view, irreversibly tainted, and we so find.

42. Where does that leave Mwangi? It would appear that all he had was the letter of allotment from the original allotee with whom they had executed agreements and he paid the consideration demanded by the council. The Council thereafter allowed him to enter into the property and commence development. We have checked the record of appeal and do not find the copy of the sub lease, if any, issued to Mwangi by the Council, similar to those issued to the appellants. On that premise, Mwangi would not have the protection of the relevant sections of the **Registration of Titles Act** (now repealed) as it applies to a registered proprietor of land or lease. See ***Insurance Company of East Africa Vs The Attorney General, The Municipal Council Of Msa, Zaherali Bahadurali Bhanji & Faiza Zaherali Bahadurali [2001] eKLR.*** Mwangi's main argument was that he was an innocent purchaser for value without notice. We have no reason to doubt his evidence on how he came to buy the property. But it was tainted property for

the reasons we have attempted to show above. The Council had no valid title to pass even assuming that one was issued under the **Registration of Titles Act,** which we cannot find. But he is not without a remedy. In ***Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri, - Civil Appeal No. 6, 26& 27 of 2011***, this Court held:-

> ***"This Court is a Court of law and a Court of equity; equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property".***

We think he is entitled to damages from the Council on account of its actions, and he is at liberty to pursue them.

43. The upshot is that the appeal herein has merit and ought to be allowed. The orders issued by the High Court are hereby set aside and substituted with an order granting prayers (a) and (b) in the amended plaint dated 13th March 1997. The appellants shall have the costs of the appeal and of the suit before the High Court, payable by the 2nd Respondent, the Nairobi City Council or its successor in Title. Orders accordingly.

Dated and delivered at Nairobi this 6th day of November, 2015.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR