General v Ouma (Suing on behalf of Jesus cares Centre Ministry Intl of the Redeemed Gospel Church Inc) (Environment and Land Appeal E017 of 2023) [2025] KEELC 3231 (KLR) (7 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3231 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E017 OF 2023

FO NYAGAKA, J

APRIL 7, 2025

BETWEEN

THE HON. ATTORNEY GENERAL ..... APPELLANT

AND

CHARLES DICKENS OUMA (SUING ON BEHALF OF JESUS CARES CENTRE MINISTRY INTL OF THE REDEEMED GOSPEL CHURCH INC) ..... RESPONDENT

(Being an appeal from the judgement of the Hon. Julius Nangea (Chief Magistrate) delivered on the 15.03.2023 at Homabay Chief Magistrate's Court in ELC Case No. 35 of 2021)

JUDGMENT

1. The appellant, the Hon. Attorney General, brought this appeal as a result of being aggrieved by the decision of the Hon. Julius Nangea (Chief Magistrate) delivered on the 15.03.2023 at the Chief Magistrate's Court at Homabay in ELC Case No. 35 of 2021.

2. The appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 29th March 2023:

    a. Trial Magistrate erred in law and fact by ignoring the defendants submissions that the plaintiff was not an entity capable of suing and being sued as no proof had been brought forth to prove that the entities i.e. Jesus Care Centre Ministry INTL, Redeemed Gospel Church INC mentioned at the heading of the plaint and Redeemed Church Homabay branch mention in the prayer b of the plaint were existing registered entities/societies capable of identify as a church.

    b. The trial magistrate erred in fact and law by arriving at a finding based on no evidence that the plaintiff was an official of the entities and had capacity to bring suit on behalf of the entities

mentioned in the plaint that is Jesus Care Centre Ministry Int and Redeemed Gospel Church INC and Redeemed Church Homabay.

c. The trial magistrate erred in law by shifting the burden of proof of ownership to the defendant and arriving to an erroneous finding that ownership was not contested yet in paragraph 8 of the statement of defence the plaintiff is put to strict proof of ownership.

d. The trial magistrate therefore erred in allowing prayer b of the plaint issuing a declaration based on no evidence that Homabay Municipal Block 162/02/6 number 16 belonged to Redeemed Church Homabay branch an entity that was not a party to the suit and provided no documentation of ownership.

e. Trial magistrate erred in delivering judgement in favour of entities not capable of suing and being sued. Whose representation was done by a person who did not have authority to act on their behalf and had not proved ownership.

3. In response to the appeal, the Respondent has filed a cross-appeal dated 24th April 2023. It raises the following two grounds: -

a. The learned trial magistrate erred in law in failing to note that since the defendant filed a statement of defence but failed to adduce any evidence at the hearing, the plaintiff's suit stood uncontroverted and since the plaintiff proved his claim against the defendant for trespass, he was entitled to the proved rent per month of Kshs. 20,000 and general damages for trespass which is actionable per se.

b. The learned trial magistrate erred in law in awarding the arbitrary sum of Kshs. 240,000 whereas the defendant occupied the land for over 17 months by 30th February 2022 amounting to Kshs. 10,200,000 and for toilet use Kshs. 765,000.

4. This being a first appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See the case of Sielle v Associated Motor Boat Co. Ltd 1969] E.A. 123). Therefore, it ought to give due consideration to any small, but indeed, minor issues that may pass into the weight of the evidence, for instance, the demeanor of the witnesses who testified, unless it is expressly recorded.

5. Of the pleadings, the Appellant was sued by the respondent vide a plaint dated 4th May 2021 for general and special damages of Kshs. 1,511,000 as well as aggravated, punitive or exemplary damages. The respondent also sought a declaration that the suit land, LR NO. Homabay Municipality Block 16202/6 Commercial 16 belongs to Redeemed Church Homabay Branch as well as a recission of the verbal contract of the tenancy made on 10th June 2019. Finally, the respondent also sought an eviction order against the National Youth Service (NYS) from the suit land.

6. The Respondent averred that on or about the 10th June 2019 he entered into an oral agreement with the officer in charge of the NYS at Nyadenda for the rental of the church premises on the suit property as well as the use of the church building and chairs to host 168 servicemen for a period of 2 months; that it was a condition of the said agreement for the servicemen to pay for the electricity consumed during the said term and to pay some money in consideration for the use of the respondent's chairs.

7. It was the respondent's case that on or about the 20th June 2020 the NYS without any reasonable excuse declared that the suit land was their satellite camp as it belonged to the Kenya Ports Authority and thus rescinded the verbal contract between itself and the respondent thus committing an act of trespass.

8. In response, the Appellant filed an Amended Statement of Defence and Counterclaim dated the 12th October 2022 introducing the Kenya Ports Authority as a party in the suit and denying the particulars of trespass enumerated in the respondent's plaint and putting him to strict proof however the counterclaim was withdrawn on 17th November 2022 by consent of the parties.

9. The Appellant averred that the NYS were not claiming ownership of the suit property as alleged by the respondent but that it was directed to settle on the property by the County Commissioner following disagreements between the parties herein; that the NYS did not in any way defile the sanctity of the church compound or break any chairs but rather that the NYS was acting on behalf of the Kenya Ports Authority under the supervision of the Ministry of Interior and co-ordination of National Government following an executive order by the President directed to them to renovate and clean the ports of Kisumu and its feeder ports.

10. The Respondent called PW1 in support of its case. He adopted his written witness statement dated 4th May 2021 as his evidence in-chief, basically reiterating the averments in the Plaint.

11. In cross-examination the witness testified that the church did not have a certificate of title but rather a letter of allotment; that the NYS was not to pay rent for use of the suit land for the first two months that rent was not agreed at Kshs. 20,000 per month but that it was increased vide an increment letter. The respondent further admitted that he did not have nor produce documents from KPLC that included the electric bills.

12. In re-examination the witness testified that there was no written agreement between the parties herein.

13. PW2, Boston Otieno Obonyo, a personal assistant to the Respondent adopted his statement dated 29th November 2021 as his evidence in chief corroborating the testimony of PW1 and reiterating the averments in the respondent's plaint dated 4th May 2021.

14. In cross-examination PW2 testified that the agreed monthly rent was Kshs. 20,000. The Respondent then closed their case.

15. On its part, the Appellant closed its case without calling any witnesses.

16. The Honourable Chief Magistrate in his judgement found that there was no valid or enforceable tenancy agreement between the parties; that the plaintiff had brought the suit in his capacity as an official of the church thus had locus standi and as NYS did not have consent of the respondent to stay on the suit land, it had trespassed on the same and was thus obligated to pay damages for the same calculate at Kshs. 240,000 being the agreed monthly rent agreed between the parties for 12 months up to the time the respondent filed suit against the appellant. The trial court further held that having granted the respondent the award above, it would be duplicitous to award damages for trespass and proceeded to grant eviction orders against the NYS from the suit land.

17. Having re-analyzed the trial court record and upon considering the grounds of appeal set out by the appellant as well as by the respondent in his cross-appeal above and the submissions filed by both parties, I deduce that the only issue for determination is whether the trial magistrate erred in finding in favour of the Respondent.

18. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya 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."

19. The burden of proof in the trial court was on the plaintiff who sought the relief of the court, he tendered his evidence and claimed the appellant was liable for trespass and thus liable to settle the damages incurred. The burden of proof shifted to the Appellant to rebut.

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J (as he was then) in William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

21. Similarly, Lord Nicholls of Birkenhead in Re H and others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

22. The Appellant did not call any witnesses to rebut the evidence tendered by the Respondent.

23. In the case of Janet Kaphiphe Ouma & another v Maries Stopes International (Kenya), Kisumu HCCC No 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through Stanely *Muriga v Nathaniel D. Schulter, Civil Appeal No 23 of 1997* the court held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

24. The only evidence on record in the instant case was from the Respondent. According to him, after agreeing on a verbal agreement with the NYS over rental of the suit premises for Kshs. 20,000 monthly excluding the first two months, the NYS subsequently never paid the agreed amount and ended up occupying the suit land.

25. In Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows: -

> " In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."

26. In the case of Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J citing the case of Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998 appreciated that:

> " Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence

rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

27. In the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

28. If still in doubt as to the legal position reference could be made to the case Drappery Empire v The Attorney General Nairobi HCCC No 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.

29. I am persuaded that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding that the Respondent had proved his case on a balance of probabilities.

30. The appellant's Amended Statement of Defence dated 12th October 2022 remains mere averments with no evidential value.

31. Further to the above, the Appellant pleaded in its Memorandum of Appeal that the trial magistrate ignored its submissions that the Respondent was not an entity capable of suing and being sued an issue that the appellant has raised in its submissions before this court.

32. Submissions are merely a tool or language for parties to market their views. They can as well be ignored and still the court arrives at the right (or wrong) finding. There are many cases determined on merits without submissions being filed or even considered if filed. That ground of appeal must fail.

33. Be that as it may, it must be noted that the issue of the Respondent's locus standi was not raised in the appellant's pleading, specifically its amended statement of defence and counterclaim dated 12th October 2022.

34. It is now well settled law that a Court will not permit a party to lead evidence on unpleaded issues and if such evidence is presented, the Court ought to disregard the same. This much was pointed out by the Court of appeal in Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR, where it noted as follows:

> " The appellants' contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1st respondent's election thereby essentially assisting the petitioner in an impermissible manner. The 1st respondent in submissions filed in this Court supported this argument by the appellant and cited to us two decisions of the Nigerian Supreme Court. In the first, ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;
>
> "....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings,

or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

To the above submissions by the appellant and the 1st respondent through its learned counsel Mr. Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2nd to 4th respondents both in their written submissions and in the address before us by Mr. Laichena, their learned counsel.

As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score. (Emphasis supplied)"

35. This point was restated by the same Court in the case of Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR, where the Appellant had filed a case against the Respondents alleging, inter alia, the tort of fraudulent misrepresentation. The second Respondent, the Municipal Council of Kisumu, which was second Defendant in the High Court, raised a preliminary objection that the suit against it was time barred since the alleged tort was said to have been committed in 1994 and the original plaint was only filed in 1997. A Defence that had been previously filed by the 2nd respondent had neither pleaded the Defence of Limitation nor specifically pleaded that the claim was time-barred under the *Public Authorities Limitation Act*. The High Court nevertheless allowed the issue of Limitation, upheld the preliminary objection and thus terminated the Appellants' claim. The Appellants appealed and it was held, interalia, that the second Respondent having failed to plead Limitation in its Defence was not entitled to rely on that issue and base a preliminary objection on it. The High Court was faulted for allowing the issue of Limitation to be raised and upholding the preliminary objection of the second respondent based on the issue of Limitation.

36. Simply put, a Defence should first plead an issue before a party can lead evidence on the same and ultimately the court base its decision on the same. If a point is not pleaded, the same cannot be entertained. This position was resolutely followed in Emily N. Mulanya vs. Kenya Power and Lighting Company [2018] eKLR.

37. Further to the above, parties cannot rely on submissions to do that which should have been done by pleadings and evidence, in the case of Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Justice G V Odunga (as then he was then) stated: -

> "It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of

submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> "Submissions simply concretize and focus on each side's case to win the court's decision that way. Submissions are not evidence on which a case is decided."

38. The Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR stated: -

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

39. Guided by the above decisions I find no merit in the appellant's appeal.

40. Turning to the Respondent's cross-appeal, despite filing his Defence, the Defendant neither filed any documents to support its defence nor participated in the hearing by adducing evidence. What does such a state of things imply or import?

41. It is trite that pleadings are not evidence and the legal position has always been that in the absence of evidence, the pleadings of a party remain mere allegations. This position was reaffirmed by the Court of Appeal in the case of Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR where the learned judges held as follows:

> " First and foremost, there can be no quarrel with the statements...that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 when he stated:
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> > "The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence...As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

42. The above notwithstanding, the burden on the Plaintiff to prove his case remains the same throughout the proceedings. That burden of proof was in no way lessened because the Defendant did not adduce any evidence. In this respect, the Court of Appeal in the above cited Charterhouse Bank Limited case (supra) stated as follows:

> " The suggestion, however, implicit..... that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is

proved on a balance of probabilities cannot possibly be correct... While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109]."

43. From the evidence on record, it was undisputed that the Respondent was the occupant of L.R. No. Block 16202/6 COMM16 had been registered in the name of JESUS CARES CENTRE MINISTRY INTERNATIONAL that was represented by the respondent in this suit as evident from the Rates Clearance Certificate adduced in support of the respondent's case.

44. Further, the verbal agreement on rent of the suit land was made on or about the 10th June 2019. By it, it was agreed that the NYS would pay Kshs. 20,000 per month as was evident from the uncontroverted testimony of both PW1 and PW2 with the first two months being excluded. Given that the suit was filed on the 22nd June 2021 it meant that the NYS was thus liable for payment for the 22 months and thus liable to a total of Kshs. 440,000 arrived at as follows: -

22 months' x Kshs. 20,000 per month = Kshs. 440,000

45. The Respondent pleaded that it is entitled to damages for trespass. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

> " An unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

46. In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, the authors have discussed the issue of damages in respect of trespass as follows:

> " (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
>
> (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
>
> (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use."

47. The legal position with respect to trespass to land is that the same is actionable per se. This means that once it has been established that Trespass occurred, the person against whom the trespass was committed is entitled to damages. This position was affirmed by the Court of Appeal in Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited [2017] eKLR where it was held;

> " Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case."

48. In determining the amount of general damages for trespass, the trial court in the case of Aster Holdings Limited v City Council of Nairobi & 4 others [2017] eKLR considered among others the size, value and location of the property as well as the duration that the rightful proprietor had been kept off the

land. These considerations were upheld by the Court of Appeal in the Caroget Investment Limited v Aster Holdings Limited & 4 others (2019) eKLR case.

49. Taking all the above into consideration as well as the fact that the Respondent represented a church which is not a profit earning body meaning that it has suffered nominal loss, I am convinced that an award of Kshs. 440,000 being the expected rental income up to the time of filing suit is reasonable.

50. The awards for toilet use of Kshs. 765,000 as pleaded in the Respondent's cross-appeal were never supported by any evidence adduced by the respondent or his witnesses. In any event the premises could not have been in use without a toilet. Where did the Respondent, upon permitting the NYS to use its premises, expect the people residing thereon to go for calls of nature? The Respondent seems to be one actuated by selfishness yet it is supposed to be Godly. Even in the Holy Bible, the children of Israel were advised to dig toilets to dispose of their excreta (see Deuteronomy 23: 13 where the Bible says, "As part of your equipment have something to dig with, and when you relieve yourself, dig a hole and cover up your excrement"). The Respondent went too far in trying to flog an already dead horse. The same is denied.

51. The upshot of the above is that the Respondent's cross-appeal dated 24th April 2023 is partially successful and I hereby set aside the trial magistrate's judgement of 15.03.2023 at Homabay Chief Magistrate's Court in ELC Case No. 35 of 2021 in regard to the damages awarded as contained herein.

52. The Church is supposed to be a conciliatory instrument on earth. In any event it receives offerings, besides tithe, from the faithful. To award costs to it in this appeal and cross-appeal would, most probably paint its act of receiving extra monies from the secular world – the government – badly and defeat the spirit of reconciliation. I do not award costs of both the appeal and cross-appeal.

53. Consequently, the orders materializing from the instant judgement are as follows;

    a. The appellant's appeal vide the Memorandum of Appeal dated 29th March 2023 is hereby found to be without merit and dismissed wholly.

    b. The respondent is awarded nominal damages for trespass to the tune of Kshs. 440,000 with interest from the date of filing suit before the trial court to the date judgement on the 15th March 2023 and to when it shall be paid.

    c. Each of the parties to bear their own costs for this appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 07TH DAY OF APRIL 2025.

HON. DR. IUR F. NYAGAKA,

JUDGE

In the presence of,

1. Ms. Kokeyo Advocate holding brief for Mwamu for Appellant.

2. Ms. Sarah Juma State Counsel for the Respondent.