IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, TUNOI & LAKHA, JJ.A.)

CIVIL APPEAL NO. 264 OF 1996

BETWEEN

NAIROBI CITY COUNCIL ..... APPELLANT

AND

THABITI ENTERPRISES LIMITED ..... RESPONDENT

(Being an Appeal from the Order of the High Court of Kenya at Nairobi (Justice Hayanga) given on the 26th November, 1996

In

H.C.C.C. NO. 4626 OF 1992)

JUDGMENT OF AKIWUMI J.A.

Thabiti Enterprises Ltd which I shall call "Thabiti" and which is the respondent in this appeal, filed a suit against the Nairobi City Council, the appellant in this appeal. In this suit which was clearly one of alleged trespass by the City Council on the suit land namely, L.R. 209/10466 belonging to Thabiti, Thabiti sought the following relevant and significant prayers:

> "(a) A permanent injunction restraining the Defendant its servants and or agents from putting up any and/or further structures on L.R. No. 209/10466.
>
> (b)The Defendant be ordered to remove all erections put on L.R. No.209/10466.
>
> (c)General damages for trespass",

and costs and interest on the costs and general damages.

The City Council filed a lame defence which, upon application "made on behalf of Thabiti, was on 14th June, 1993, struck out by Bosire, J. as he then was, on the ground that:

> “... the defence can only be described as an abuse of the process of the Court ...".

He then went on in his ruling to enter judgment for Thabiti thus:

> "The result is that there shall be judgment for the Plaintiff as prayed in paragraphs (a), (b) and (d).

> As for general damages, the plaintiff shall be at liberty to pursue that part of the claim by setting down the suit for assessment of the damages.".

As regards Thabiti's action for general damages for trespass, it is undoubted that after the striking out of the City Council's defence, the City Council was adjudged to have trespassed as claimed in the suit filed against it by Thabiti and that all that remained was the assessment of general damages by way of formal proof, and indeed, on 23rd June and 18th October, 1993, dates for formal proof hearings which did not take off, were taken. Finally, on 24th July, 1995, the date for the formal proof hearing was fixed to be 31st July, 1995. On this date when the matter came before Hayanga, J. for hearing, Mr. Wambaa who appeared for Thabiti opened his case by making the following novel statement:

> "This claim is for compensation of the plot into which the defendant had encroached. it is Exparte Hearing because the defence had been struck out, because the defendant had offered Shs.68 million. We want more so we have brought a valuer here.".

In order to understand the purport of Mr. Wambaa's opening remarks, attention must be drawn to negotiations that had taken place between Thabiti and the City Council from 14th June, 1993, when judgment was entered for Thabiti, until 31st July, 1995, when the formal proof hearing came before Hayanga, J. These negotiations which are evidenced by an exchange of correspondence between the parties and contained in the record of appeal, show that whilst the parties had agreed that their dispute could be settled by the transfer by Thabiti of the suit land to the City Council, the parties had been unable to agree on the purchase price to be paid by the City Council. But without making any amendments to Thabiti's plaint or any application by the City Council to make this completely new and unsettled issue a bone of contention, and which was clearly incompatible with the ruling of Bosire, J., Mr. Wambaa sought in the hearing before Hayanga, J. which was for formal proof of general damages for trespass and as ordered by Bosire J., the determination of a quite different and one can also say, an empty issue namely, the purchase price of the suit land without seeking its transfer to the City Council.

It is true that Bosire, J. in his ruling of 14th June, 1993, did not specifically give judgment for Thabiti to the effect that the City Council had trespassed on the suit land. But this is unnecessary having regard to the fact that the City Council's defence against Thabiti's plaint had been struck out. The relevant averments of Thabiti's plaint which show that Thabiti's claim was based only on trespass and not on the acquisition of the suit land by the City Council, are as follows:

> "Sometime in the year 1990/1991 or thereabouts, the Defendant trespassed on to the Plaintiff's property mentioned in paragraph 3 hereinabove, and without any colour or right erected thereon a fence and put some sign posts that tend to indicate that the property belongs to the Defendant.
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> That the Defendant erected the said fence and sign posts on the Plaintiff's property L.R. No.209/10466 knowing the same to be false, unlawful, illegal, wrongful and/or without any justification. The Defendant has since carried out physical developments on the said property with full knowledge that the same belongs to the Plaintiff.
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> By reason of the Defendant's unlawful acts aforementioned, the Plaintiff's rights to their property L.R. No. 209/10466 have been greatly prejudiced occasioning them great financial loss, damage and embarrassment.
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> Despite demand and notice of intention to sue having been given, the Defendants (sic) have adamantly refused and/or ignored to remove the erection referred to in paragraph 5 hereinabove or any part thereof.".

The consequential order made by Bosire, J. after striking out the City Council's defence, with respect to general damages namely, that Thabiti "shall be at liberty to pursue that part of the claim by setting down the suit for assessment of damages", puts beyond any doubt that the City Council had been held liable for trespass on Thabiti's land as claimed in its plaint. Certainly not that the City Council had purchased or acquired that land and that therefore, its purchase price should be determined by the superior court.

As already adverted to, when the matter came before Hayanga, J. Mr. Wambaa on behalf of Thabiti sought what can be summed up as the ascertainment of the value of the suit land allegedly expropriated by the City Council. But as Thabiti's plaint show, no

where in it was it ever asserted that its, land had been expropriated by the City Council. No amendment to the plaint to reflect this new assertion was also ever made. The City Council, however, did not seem to have minded the obvious and fundamental departure from the original cause of action which had not changed, and in respect of which, substantive judgment had already been given by Bosire, J. and also from the originally related reliefs for an injunction and general damages which had also not changed., However, if the City Council did not mind, the superior court itself, was under a clear duty to refuse to deal with the matter as presented before it and also in respect of which, it had no jurisdiction. But more of this later. Instead, Mr. Wambaa was allowed to call a Mr. Aritho a graduate in Land Economics of the University of Nairobi and a licensed land valuer to give expert evidence as to the value of the suit land which he put at Kshs. 100,230,000/- and which as he stated in his valuation report was, "to be used to claim FULL AND ADEQUATE COMPENSATION".

Hayanga, J. himself, seems to have realised that the order that was being sought from him was contrary to that which arose from the ruling of Bosire, J., and completely different from what had been sought in Thabiti's plaint. Indeed, at the inception of his judgment dated 27th September, 1995, Hayanga, J. stated the situation correctly when he said that:

> "The matter came before me for assessment of damage following that order and ruling by Hon. Bosire J. It came on 31.7.1995 and the Plaintiff called Mr. Gitonga Ritho a licensed Land Valuer who said in his evidence that in 1992 he prepared a valuation Report on Plot L.R./209/10466 ...".

After considering the evidence of Gitonga Ritho, Hayanga, J. then went on to state again correctly, that:

> "I do not think this is a question of acquisition of land as the matter arises from a claim based on trespass. Land was not taken from the claimant infact it is still registered as Owner and they are using it as they have charged it to Standard Chartered Bank what is obvious is that the Defendant made wrongful entry into plaintiffs (sic) land."

After this and without considering whether he had jurisdiction to consider an issue which was quite different from what he had already found to be the true issue before him for determination, the learned judge then went on, I fear, without giving the matter the proper consideration that it deserved, to say, which is contrary to his unassailable earlier findings, that:

> "Although the defence was struck out, it appears from the submission of Counsel that the amount demanded is final settlement of the case inclusive of surrendering the Title to the Defendant. Special and General damages.
>
> On this it would appear that damages asked for do now take the nature of compensation for compulsory acquisition. Indeed, it would appear that the property is taken by the Council for the extension of the Martin Luther School.".

The learned judge then, and without giving any other reasons why he should not comply with the order for the assessment of general damages for trespass, went onto determine the market value of the suit land as compensation for its compulsory acquision by the City Council and in respect of which there was no evidence before the learned judge, and not general damages for trespass, at Kshs. 80,000,000/-. The error on the face of the learned judge's judgment is quite obvious to me. This is even more so, when one considers the fatal inconsistency in the decree that was drawn up as a result of his judgment This decree which is as follows, deserves to be set out in full:

"DECREE

CLAIM FOR

(a) A permanent injunction restraining the defendant its servants and/or agents from putting up any and/or further structures on L.R. No.209/10466.

(b) The defendant be ordered to remove all erections put upon L.R. No. 209/10466.

(c) General damages for trespass.

(d) Costs of this suit.

(e) Interest on (c) and (d) hereinabove.

(f) Any other or further relief this honourable court deems fit and just to grant.

This suit coming up for formal proof on 31st July, 1995 and for judgment on 27th September, 1995 before Honourable Justice Hayanga in presence of Counsel for the plaintiff and Counsel for the defendant.

IT IS ORDERED

1.That the defendant do pay to the plaintiff the sum of shs. 80,000,000/- being the value of plot No. L.R. No. 209/10466 Nairobi.

2.That the defendant do pay to the plaintiff costs of this suit to be taxed and certified by the taxing officer of this courts.

Given under my hand and the seal of the court this 27th day of September, 1995.

Issued at Nairobi this 28th day of September, 1995.

Deputy Registrar

High Court of Kenya NAIROBI".

The glaring inconsistency apparent in the decree in ordering the City Council to pay Thabiti 80,000,000/- being the value of the suit land when not only was this not claimed in the very same decree but which very same decree had also at the same time, testified to the facts that Thabiti's claim was for a permanent injunction restraining the City Council from putting up any structures on the suit land and further that the City Council should be ordered to remove from it all the things that it had erected thereon and general damages for trespass, is there plain for all to see. The omission in the decree of any reference to the fact that Thabiti's claim for the injunction and the removal of the erections with respect to the suit land, had been granted, makes the decree suspect, to say the least. By the same token, it would be inappropriate to dispense with the amendment' of Thabiti's pleadings or to amend it to include the determination of the purchase value of the suit land when judgment had already been given to Thabiti granting the injunction and removal orders already referred to, on the grounds as claimed in its plaint, that Thabiti was the owner of the suit land which it was not selling, and had rather sued the City Council for the infringement of its ownership of the suit land through the acts of trespass by the City Council thereon. There was no evidence to support a counter claim by the City Council nor indeed, was any pleaded, that the City Council had purchased the suit land from Thabiti.

It is therefore not at all, surprising to me that the City Council though it had acquiesced in the request that the learned judge ascertain the purchase value of the suit land and had indeed, even made a part payment of Kshs. 1,000,000/-, would, being of the view that the learned judge's assessment of the purchase value gave rise to incompatible orders in the suit, seek redress by way of a review of the learned judge's judgment on the obvious ground that there was an error apparent on the face of the record. As I have already observed, there was an error apparent on the face of the record which to borrow the words of Mulla on Code of Civil Procedure vol.2 14th Ed p.2335 which the learned judge had found favour with,

was in my view, clearly one which "can be seen by one who runs and reads". It was, to quote Mulla again, "an obvious and patent mistake". This error on the face of the record is not what can be described as an incorrect exposition of the law, a failure to apply the appropriate law, an omission to raise and discuss appropriate legal issues or the taking of an erroneous view of the law on a debatable point, all of which, would make me take a different view of the matter. With reference to what is an error simpliciter and what is an error on the face of the record, Mulla, having admitted that the difference was a slim one, went on to opine that:

> "It can be' said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established"

In my view, this is the case here and the fact that the City Council acquiesced in the procedure adopted by the learned judge makes no difference. The learned judge had indeed, seen the error but proceeded to perpetuate it well knowing that whether the pleadings of Thabiti were amended or not, his judgment would conflict with the existing orders made by Bosire, J. One is also reminded of the following perceptive and in the circumstances most apt, dictum of Hancox, Ag. J.A. as he then was, in the case of Kenya Commercial Bank Ltd. v James Osebe (1982-88)1 KAR 48 at:51 when he observed:

> "Moreover strange results would follow if a judge were free to determine issues not properly before him."

I might have taken a different view, if the learned judge himself, had not been aware of the obvious incongruity of his actions.

An application for review is required by Order 44(1) of the Civil Procedure Rules to be filed without unreasonable delay and this was a matter the learned judge dealt, with albeit, in a somewhat confusing manner in his ruling on the City Council's application for review. When considering the conduct of the City Council, the learned judge said as follows:

> "I have looked at the conduct of the Defendant, against the History of this case, filing a useless defence to the claim.
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> Concurring in the presentation to the Court of an issue of total settlement inclusive of General and Special damages if any and compensation for the entire land.
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> Presenting the fact that the land would now revert to it from the plaintiff, accepting the judgment and paying a deposit of Kshs1 million in part settlement of the Decree. Failing to show any disaffection with the judgment and appealing against it or applying on 17.4.1996 to set aside the decree of 27.9.95, six months later applying for Review six months later (sic) which indeed seems an inordinate delay.
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> I feel this is an abuse of the Court's Process. That term connotes that the process of the court has not been carried out properly, honestly and in good Faith, it means that the court will not allow its function as a Court of Law to be misused "see Bullen and Leake 12th Ed. p.148. I do not make my decision on that.". (emphasis is mine).

Having refused to make any decision on whether the City Council's application for review had been properly brought or not, the learned judge must be said to have declined to dismiss or strike it out on that ground. He, however, by his ruling of 26th November, 1996, refused to grant the review sought on the following main ground: that since both parties had acquiesced in his determination of the compensation to be paid to Thabiti on the basis that the suit land would be acquired by the City Council though not pleaded, he saw nothing wrong in the determination of the compensation involved, and even if he had followed the wrong procedure, this did not constitute an error which was apparent on the face of the record so as to constitute a sufficient ground for reviewing his earlier judgment.

The City Council being dissatisfied with the ruling of the learned judge appealed to this court on ten

ground which can be summarized as follows: that the learned judge erred in holding that his determination of the compensation payable to Thabiti for the alleged expropriation of the suit land by the City Council when this had not been pleaded, though acquiesced in by the parties, amounted to an error apparent on the face of the record; and that under these circumstances, the learned judge also lacked jurisdiction to determine the compensation payable.

I must now revert to the issue that I have discussed earlier, namely, whether there was an error apparent on the face of the record and if so, whether the learned judge should have granted the order for review that was sought. It will be recalled that I had stated that it was my view, that no matter whether the parties had agreed to the learned judge determining the purchase price of, or compensation payable for, the suit land which had not been sold,

and no matter whether the City Council had made part payment of the assessed compensation, the particular circumstances surrounding that determination and the obvious incongruous indeed, contradictory, nature of the judgment of the learned judge, having regard to the previous ruling of Bosire, J. in the same suit, was in that the learned judge should have granted the review sought.

For this reason alone, I would allow the appeal.

I must now turn to another issue raised in this appeal, which, having regard to my foregoing determination, I really need not consider except that counsel made submissions on it at some length. This is whether the learned judge had any jurisdiction to determine the compensation value of the suit land without the pleadings in the suit having been amended to make this an issue in the suit, notwithstanding the apparent acquiescence of the parties to this procedure. In this regard, Mr. Ngatia for the appellant, cited a number of cases in support of his proposition that a judge does not have- jurisdiction to determine a matter which has not been pleaded unless the pleadings are suitably amended. In the case of Abdul Shakoor Sheikh v. Abdul Majid Sheikh, Mansor Ltd and City Development Co. Ltd Civil Appeal No. 161 of 1991 (unreported), this court consisting of Gicheru, Kwach, JJ.A. and Cockar, J.A. as he then was, held, when for the first time, in an affidavit filed in the suit, reference was made to a related meeting but one which had not been averred in the plaint, that the judge of the superior court had "committed a serious breach of a fundamental rule of pleading" when he granted a relief which had not been sought. This court in its judgment in that case, delivered on 19th February, 1993, had this to say:

> “The application was supported by the affidavit of the first respondent in which he referred, for the first time, to a meeting of the third respondent's board meeting held on 27th May, 1991, at which resolutions prejudicial to him were allegedly passed. It is to be noted that the plaint was not appropriately amended to reflect this particular meeting. At that meeting the appellant's son was appointed a director of the third respondent ... In relation to this, Mr. Nagpal's submission before us was that the Judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint filed by the first respondent ... Mr. Nagpal is clearly right. Order 7 rule 6 of the Civil Procedure Rules states that every plaint shall state specifically the relief which the plaintiff claims, either simply or in the alternative and it shall not be necessary to ask for costs, interest or general relief which may always be given as the court thinks just. As a general rule, therefore, a plaintiff is not entitled to reliefs which he has not specified in his statement of claim. Pleadings play a very pivotal role in litigation. As is stated in Bullen and Leake (12th edition) at page 3 under the rubric Nature of Pleadings:
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> > ‘The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which' will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial’”.

In the case of Charles C. Sande v. Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992,

(unreported) this court consisting of Cockar, JA as he then was, and Omolo and Tunoi JJ.A. held as recently as on 24th January, 1994, that a Judge had no power or jurisdiction to decide an issue not raised before him and went on to emphasise that:

> "In our view, the only way to raise issues before a Judge is through the pleadings 'and as far as we are aware, that has always been the legal position.".

But it will be useful to set down the background to that appeal in which it was conceded that special damages had not been specifically pleaded, as found by this Court:

> "During the trial in the High Court the Appellant was allowed, and without any sort of objection whatsoever from the Respondent, to lead evidence to the effect that as a consequence of the alleged breach of the contract by the Respondent, he had suffered a loss of Shs. 14,151,650/70 and that he was claiming that sum from the Respondent though he had not pleaded it in his plaint ... Though the learned trial judge ... allowed the Appellant to lead detailed evidence on this aspect of the matter and without any objection from the Respondent; and though written submissions were made to the judge, without the Respondent raising the issue of failure to specifically plead the Shs.14,151,560/70, yet when it came to giving his judgment, the judge refused to award to the Appellant that sum, he then being of the view that the said sum, being in the nature of special damage, should have been specifically pleaded and that he (the Judge) had been in error in allowing the Appellant to lead evidence on the issue. That finding by the learned Judge forms the basis of the Appellant's appeal before this court.".

Interestingly, the second ground of appeal in Sande which sets out matters which are not dissimilar 'from the issues in this appeal, are as follows:

> "The learned judge erred in law in refusing to allow the Appellant's claim for loss of profits in view of the fact that: -
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> (a)evidence of such loss was given by the Appellant in his evidence in chief;
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> (b)no objection had been taken on behalf of the Respondent to the tender and admission of such evidence;
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> (c)the Respondent through its advocate had cross-examined the Appellant or had an opportunity of cross-examining the Appellant on this issue;
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> (d)the Respondent's advocate referred to this issue in her submissions to the court; and
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> (e) the issue had been left to the court for determination.".

With respect to this ground, this Court in Sande had this to say:

> "There is no doubt from the record that all the matters listed in this ground of appeal did take place before the Judge and the question that we must answer is whether in the circumstances of the case they can be taken to excuse the appellant's failure to comply, with the well settled and mandatory requirement of the law that special damages must be pleaded and must be specifically proved.".

After considering the case of Odd Jobs V. Mubia [1970] EA 476, this Court then went on to say in Sande, that:

> "In the MUBIA case, the unpleaded issue upon which the judge had based his decision was whether one of the parties to the agreement had failed to comply with a condition in the contract between them. The unpleaded issue was not a claim for special damages which, as we have repeatedly stated, the law requires to be specifically pleaded before it can be proved...We would

> endorse the well-established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallise the issues which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are ... Nor can we find any relaxation of the attitude of this court to the rule that special damages must be specifically pleaded and proved ... We do not think that the courts in Kenya have adopted any lenient approach as alleged; nor do we think it would be right for them to do so.".

If as it is true, that in its foregoing observations, this Court was also concerned with the lack of pleading of special

damages which invariably, can be said to flow naturally from the same facts that support the claim for general damages, then a fortiori, the foregoing observations will apply with greater force to the averments involved in this appeal where, unlike the issue of special damages, the determination of the compensation value of the suit land does not flow naturally, and is a completely different issue from any of the averments contained in the plaint of Thabiti that related only to trespass. Mr. Mutiso for Thabiti cited, inter alia, Odd Jobs which was determined some 26 years ago, on 28th August, 1970. In that case, it was held by the East African Court of Appeal, that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial, that the issue had been left to the court for decision. In his judgment in Odd Jobs, Duffus, P.I think, correctly stated that:

> "In this case the real issue for determination and the issue on which the judgment is based was whether the contract was dependent on a condition precedent being carried out by the defendant/appellant.",

an issue which is clearly distinguishable from the contradictory and incompatible reliefs involved in this appeal. It was within this context that Law, J.A. observed in Odd Jobs that:

> "On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.".

He nevertheless, then went on to disclose his doubts even as in Odd Jobs, where the unpleaded course of action and reliefs sought were of the same general nature, and not as disparate or essentially different as those involved in this appeal, when he concluded that:

> "In these circumstances, although with some hesitation, I consider that the unpleaded issue was left to the judge for decision.".

Duffus, P. in his judgment in Odd Jobs, also made the following pertinent observation:

> "There has been an irregularity in the pleading but this court will not usually interfere with a judgment if it is satisfied that there has been no failure of justice or lack of jurisdiction.".

One thing is clear to my mind, that where as in this appeal, a judgment has been given which makes nonsense of a previous judgment in the same suit, then there has been a failure of justice.

As clearly shown in Sande, this Court considered Odd Jobs and decided not to follow it, even if it can be said but which is not so, on the limited ground that the unpleaded issue was a claim for special damages. What this Court has also reiterated in both Sande and Sheikh is its non-acceptance as being applicable in Kenya, of the dictum of Law, J.A. in Odd Jobs which was an appeal determined not by this Court.

In the case of Wangechi Kimita & Another v. Mutahi Wakabiru (1982-88) 1KAR 977 this court held that "any other sufficient reason" need not be analogous with the other grounds set out in order 44(1) of the Civil Procedure Rules as such a restriction would clog the unfettered right given to a court to review its decision under section 80 of the Civil Procedure Act from which Order 44(1) aforesaid derives its being. In my view, the wrongful assumption of jurisdiction by the learned judge to determine the value of the suit land amounts to "any other sufficient reason" that justifies the grant of an application for review. However, having regard to the peculiar circumstances of this appeal, particularly since it was not the basis of the City Council's application for review as shown in its supporting affidavit, I am quite content as I have already stated, to allow this appeal, set aside the ruling of Hayanga, J. refusing to review his earlier judgment, on the ground that there was a glaring mistake or error on the face of the record which should have compelled the learned Judge to review his judgment, allow the City Council's application for review and set aside the judgment of Hayanga,, J. delivered on 27th September, 1995. Because of the acquiescence of the City Council in the trial which took place before Hayanga, J., each party will bear its own costs of this appeal.

As Tunoi, J.A. agrees, the order of the Court is that the appeal is allowed, the ruling of Hayanga, J., which is appealed against is hereby set aside, the City Council's application for review is hereby allowed and the judgment of Hayanga, J. of 27th September, 1995, is set aside together with such consequential acts derived therefrom. Each party will bear its own costs of this appeal.

Dated and delivered at Nairobi this 7th day of March, 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

JUDGMENT OF TUNOI, J.A.

The history of the events leading to the litigation, the subject of this appeal, is that the City Council, which I shall refer to henceforth as the appellant, in or about 1977 allocated about 20 acres of land to Martin Luther Primary in Hamza Estate in the Eastlands of Nairobi. Part of this land, a natural extension of the school playground, abuts on Rabai Road. The appellant then erected a fence all round the land and securely enclosed the entire school compound which had always remained so fenced before the institution of the suit against it in the superior court. The appellant, together with the Parents and Teachers Association (PTA) of the school, presumably in answer to the increased pupil population in the school, had over a course of time, put up several buildings including classrooms and workshop blocks, one of which will have to be demolished pursuant to the ruling of Bosire, J. (as he then was) delivered on June 14, 1993. I shall later in this judgment reproduce in full the said ruling.

Without the knowledge of the appellant and the PTA of Martin Luther Primary School, some unknown surveyors surreptitiously carried out a survey of the school compound with a view to demarcating it into plots. The cadastrial survey was completed on February 27, 1986. It was submitted to the Director of Surveys on March 3, 1986. He accorded his approval on April 15, 1986. Consequently a piece of land measuring 2.15 hectares or 5.3 acres being Land Reference No. 209/10466, hereinafter referred to as the suit land, was demarcated out of the school compound. As a result of this, the school is effectively isolated from Rabai Road and hemmed in on a smaller inner reduced compound. The school lost its playground and the land for future extension. Together with the excision went a newly constructed workshop block and other erections and structures. It is beyond comprehension that the Commissioner of Lands in blatant abuse of duty unreasonably deprived the school of its buildings and land for future use and extension without alternative replacement. It is on record that the suit land is located in the heavily populated part of Nairobi generally known as Eastlands. In particular, the suit land is bordered on the West by Makadara, Hamza and Jericho Estates and Across Rabai Road by Buru Phases III, V and

Harambee Estates. It is obvious from the conduct of the appellant that the school deserved to retain its compound.

In or about 1986 Thabiti Enterprises Company Limited, hereinafter referred to as the respondent, obtained a grant of the suit land for a term of 99 years from April 1, 1982, at a stand premium of Kshs.35,000/= and on December 15, 1986 mortgaged it to Standard Chartered Bank Africa PLC.

It is against this background that the respondent sued the appellant for:-

> (a) A permanent injunction restraining the appellant its servants And/or agents from putting up any and/or further structures on L.R. No. 209/10466.
>
> (b) The removal of all erections put up on L.R. No. 209/10466.
>
> (c) General damages for trespass.
>
> (d) Costs of the suit.

By its defence the appellant denied that it had trespassed on the suit land and averred that the suit land was irregularly acquired by the respondent since the property had been reserved for future extension of the Martin Luther Primary School. Soon thereafter the respondent filed an application to strike out the defence under Order VI Rules 13(1) and 16 of the Civil Procedure Rules. Bosire, J. (as he then was) granted the application, struck out the defence and entered judgment for the respondent as follows:-

> **"RULING**
>
> The evidence before me overwhelmingly shows that there is no dispute that the applicant is the owner of the suit property. The defendant's contention is that the applicant was irregularly allocated the land but has not gone further to seek orders nullifying the allocation for whatever reason.
>
> Consequently, the defence can only be described as an abuse of the process of the court and must be struck out as prayed in the chamber summons dated 22nd January, 1993. The result is that there shall be judgment or the plaintiff as prayed in paragraph (a), (b) and (d). As for general damages, the plaintiff shall be at liberty to pursue that part of the claim by setting down the suit for assessment of the damages. Costs of the application to the plaintiff/applicant assessed at Kshs.2,000/= inclusive of all attendance. Orders accordingly."

It is clear that the learned judge decreed in the respondent's favour for the reliefs sought by it in the plaint. These prayers are a permanent injunction to restrain the appellant, its servants and/or agents from putting up any and/or further structures on the suit land; the removal of structures already on the suit land general damages for trespass, and; finally, costs of the suit.

It is indeed a matter of concern that, in a suit such as this, the appellant did not seriously consider the effect of not filing a proper defence to the suit and I agree with the learned judge on that score that the so-called defence could be described as an abuse of the process of the court.

The suit was fixed for formal proof on July 31, 1995, before Hayanga, J. It is imperative to reproduce what transpired in court before the learned judge: -

> "31.7.95. Coram: A.I. Hayanga, J.
>
> Kenyatta: Court Clerk.
>
> Mr. Wambaa holding brief for
>
> Wetangula & Co. for the plaintiff.

Miss Ngethe for Defendant.

Mr. Wambaa

This claim is for compensation of the plot into which the defendant had encroached. It is Exparte Hearing because the defence had been struck out, because the defendant had offered shs.68 million. We want more so we have brought a valuer here."

The valuer then gave his evidence and was briefly cross-examined. Written submissions were ordered to be filed by August 2, 1995.

It is interesting to note that inspite of the glaring and substantial inconsistency between the interlocutory ruling made by Bosire, J. (as he then was) and the proceedings conducted before Hayanga, J. without the plaint having been amended, the relief seeking damages for trespass was converted into a suit seeking compensation for the acquisition of suit land. Not only had compensation not been pleaded, but the cause of action based on it was in direct contradiction to the pleaded cause of action for trespass. Moreover, the valuer did not allude to any issue of damage at all, in his evidence.

It was an error on the part of the learned judge to allow the respondent to lead evidence on the aspect of compensation even though without any objection from the appellant.

In the judgment which he delivered on September 27, 1995, Hayanga, J., totally ignored the ruling of Bosire, J. (as he then was). He not only failed to assess damages for trespass but drastically departed from and went off course the pleadings and embarked on a new, separate and distinct case altogether. He held that the damages asked for took the nature of compensation for compulsory for compulsory acquisition. He determined the market value of the suit property at Shs.80,000,000/=. He decreed that sum in the respondent's favour.

No appeal was preferred against that judgment but on May 18, 1996, the appellant filed an application for review of the said judgment under Sections 3A and 80 of the Civil Procedure Act and under Order 44 Rule (1) of the Civil Procedure Rules. The learned judge in a considered ruling declined the application and dismissed it with costs. Against that decision the respondent has now appealed to this Court.

Several grounds of appeal are set out in the appellant's memorandum of appeal, but, in my view, the substantial ground is whether the learned judge erred in not holding that due to the several vitiating factors in the trial of the suit, the appellant has made out sufficient reason to warrant a review.

The power to review is given to the court by Section 80 of the Civil Procedure Act, Order 44 of the Civil Procedure Rules and the relevant case law. In Sadar Mohamed vs. Charan Singh, [1959] E.A. 793, Farrel J. held that there was unfettered discretion in a court to make such orders as it thinks fit on an application for review and that the omission of any qualifying words was deliberate. However, in a later decision, Yusuf vs. Nokrach, [1971] E.A. 104, the late Mr. Justice Chanan Singh held that "any other sufficient reason" as set out in Order 44 Rule 1 means sufficient reason analogous to those in the rule. It would be quite apparent that in perceiving the rule that way, the court tended to restrict the grounds on which a review can be had.

But the recent judgment of this Court, Wangechi Kimita & Another vs. Mutahi Wakabiru, C.A. No. 80 of 1985 (unreported) it was held that 'any other sufficient reason' need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees of orders for any sufficient reason.

Under Order 44 Rule 1, the court may review a judgment, decree or order on account of mistake or error apparent on the record. In my view there were a number of legal errors which required that the judgment made by the learned judge should be reviewed by the court.

The learned judge did not realise that a final and conclusive judgment had actually been entered by Bosire, J. (as he then was) and that the only thing left for him was to assess damages for trespass. There was no room for the proceedings before him to accommodate the issue of compensation. The learned judge was, of course, not sitting on appeal on a matter involving Land Acquisition Act. I agree with Mr. Ngatia, counsel for the appellant that the learned judge misapprehended the matter before him in not realising that the appellant had never acquired the suit property which, in fact and in law, was vested upon the respondent.

The orders made by Bosire , J. (as he then was) obligated the appellant not to put up any further structures upon the suit land. The said orders further directed the appellant to remove all structures from the suit land. It follows, therefore, that the subsequent judgment delivered by Hayanga, J. can only be seen as awarding Shs.80,000,000/= for simple trespass, if any, since the suit land was never compulsorily acquired by the appellant.

It would appear that these glaring errors arose singularly due to the manner in which the prayer was prosecuted and in the process, the learned judge was unfortunately misled to award a prayer which was not contained in the plaint. These errors which were apparent on record and the fact that no nexus existed between the ruling and subsequent judgment were sufficient reasons to warrant the learned judge to review his judgment. Errors apparent on the face of the record need not, as the learned judge held, be those that can physically be pointed out without "any argument". In this regard grounds 2,3 and 4 of the grounds of appeal succeed and are allowed.

Ground 5 of the grounds of appeal states that the learned judge in awarding compensation lacked jurisdiction and his judgment under review was therefore a nullity. It is difficult to resist this submission by Mr. Ngatia. Prosecution of general damages for trespass as if it was a compulsory acquisition obscured the issue which was for determination before the learned judge. Jurisdiction to award compensation was a condition precedent to the proceedings by the learned judge. In the circumstances, the learned judge acted wrongly and in excess of jurisdiction in proceeding with the determination of compensation without ascertaining that he had jurisdiction so to do.

I would think also that the justice of the matter required that the judgment be reviewed for the record to be put right. The significance of this ground is more apparent when it is considered that the suit land is charged to Standard Chartered Bank PLC to secure a loan advanced to the respondent. Further, although the respondent was fully aware of the trespass to the suit land it acquiesced and id not object for over 6 years. Moreover, the Commissioner of Lands in breach of trust and in blatant abuse of power deprived the true beneficiary and real owner of the suit land and unjustly enriched the respondent at the expense of the people of Nairobi. In the circumstances the general damages for trespass, if any, could only have been token. I need say here that if the appellant had been diligent enough in its pleadings, the court if petitioned, might have nullified the allocation.

It is now settled law that the only way to raise issues for determination by the court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them. See the case of CHARLES C. SANDE V KENYA CO-OPERATIVES CREAMERIES LTD. Civil Appeal No. 154 of 1992 (unreported). In this instance compensation was never pleaded and should not have been tried. The court was obligated to dismiss that relief.

I would allow this appeal and would make orders as proposed by Akiwumi, J.A.

Dated and delivered at Nairobi this 7th day of March, 1997.

P.K. TUNOI

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JUDGE OF APPEAL

JUDGMENT OF LAKHA, J.A.

The facts concerning this appeal are set out by Akiwumi, J.A. in his judgment (which I have had the advantage of reading in draft) and need not be repeated. There are three matters on which I would comment.

First, the main argument on this appeal made by the appellant's advocate was that at the hearing before the superior court (Hayanga, J.) the respondent made an obvious and fundamental departure from the original cause of action with related relief for general damages without any amendments of the pleadings and considering the unpleaded issue of the ascertainment of the value of the suit land encroached upon by the appellant. This is true. But was the learned judge in error in so doing? The appellant acquiesced into the unpleaded issue being argued and it was left for a decision of the superior court. This is clear from the fact that at the hearing the respondent's advocate opened its case by stating as follows:

> "This claim is for compensation of the plot into which the defendant had encroached. It is Exparte Hearing because the defence had been struck out, because the defendant had offered shs.68 million. We want more so we have brought a valuer here."

Furthermore, the respondent called a witness to give evidence as to the market value of the suit land without any objection on the part of the appellant whose advocate was in attendance and indeed cross-examined the witness thus fully participating therein. Written submissions followed in which the appellant's advocate dealt with the valuation report and the evidence led by the respondent as to the market value of the property.

In these circumstances, I am of the opinion that the ascertainment of the value of the suit land had become an issue at the trial with no objection on the part of the appellant who fully participated in it by cross-examination and making submissions therein. In my view, therefore, this ground of appeal must fail as there was evidence to support the learned judge's finding in this respect.

It is said that if the appellant did not object or acquiesced in a grave departure from the pleadings which were not amended, then the court itself was under a clear duty to refuse to deal with it. With respect, I do not agree. This was a dispute of a civil nature between parties; it is not litigation belonging to the court or a judge personally. This is so firmly established in our law that a judge is not allowed in a Civil dispute even to call a witness whom he thinks may throw some truth on the facts. He must rest content with the witnesses called by the parties: See Re Enoch & Zaretsky, Bock & Co. [1910] 1K.B. 327. So also it is for pleadings; it is not for the judge to take it on himself lest by so doing, he appears to favour one side or the other.

Having acquiesced in the departure and participated as set out above the appellant cannot now be allowed to complain that the trial judge was in error in view of the state of the pleadings. In my view, the learned trial judge considered this aspect of the matter and dealt with it, rightly in my opinion, when he stated as follows:

> "Mr. Ngatia has said that by so doing the parties assumed that the plaint had such prayer or that the plaint had been amended, but in so far as this had not happened the proceedings were vitiated and rendered null and void. However, I agree with Mr. Mutiso when he says that the defendants had themselves argued the matter on the issue on which the judgment was based. They acquiesced or agreed on the "issue" that the judgment be compensatory as they the Defendants were taking the land to make it part of Luther Primary School and after judgment they even paid K.shs.1,000,000/= to the plaintiff in fulfilment of the decree. They should be estopped now from denying that they presented the court a claim for compensation and willingfully agreed to the issue as to full settlement and what the court decided was fully understood by the parties who in effect presented

the case that way."

Secondly, such a course by the trial judge is well recognised in our law. In Odd Jobs vs. Mubia [1970] E.A. 476 the judge decreed in the plaintiff's favour on a ground which had never been pleaded, that is to say that there had been a contract of sale, but conditional on the doing of repairs; that this condition had not been performed; that this failure to do the repairs amounted to a breach of an essential condition going to the root of the contract and entitling the plaintiff to repudiate the contract. Not only had none of these matters been pleaded, but the cause of action based on a conditional sale was in direct contradiction to the pleaded cause of action, which was that there had never been a contract at all. Furthermore, the judge's favourable finding of credibility on the part of the plaintiff ignored the fact that the plaintiff must have been given a very different story in his instructions to his advocate from the story he told in court. Yet it was held:

> "A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;
>
> On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."

With respect, I do not find the case of Charles C. Sande vs. Kenya Co-operative Creameries Ltd Civil Appeal No. 154 of 1992 (unreported) helpful in this appeal. The case dealt with the only issue whether special damages can be decreed when not specifically pleaded. Matters of acquiescence or whether a course of trial allowed an unpleaded issue to be left to Court were not decided by the Court. The observations made by the court relating pleadings and amendments were obiter as being unnecessary for the decision of that appeal. I feel sure that the Court did not intend to express any view either way as to what will be the position in those situations. I believe that they are better decided when, and if, a particular case comes before the court.

Indeed, Odd Jobs (supra) was subsequently followed by the Court of Appeal for Eastern Africa in the case of Nkalubo vs. Kibirige [1973] E.A. 102. An allegation of witchcraft which was a very grave charge was made against the party in that case, an ordained clergyman. Law, J.A. with whom Sir William Duffus, P. agreed, at p.106 stated as follows:

> "But this matter was never pleaded. The word witchcraft does not appear anywhere in the plaint. As the Vice-President has pointed out, the actual defamatory words allegedly spoken must be specifically pleaded, so that a defendant knows exactly what case he has to meet. However the respondent and four witnesses called by him were allowed to testify about the allegations of witchcraft, without objection from appellant's counsel, and without comment from the court. It may be that all concerned took the view that the allegations of witchcraft were covered by the allegation pleaded in paragraph 4 (c) of the plaint, that the following words had been spoken by the appellant of the respondent:
>
> "..... that the plaintiff is not fit to become their Minister."
>
> Be that as it may, the allegations of witchcraft were introduced without objection and formed the principal ground of complaint against the appellant. Whether these allegations were made or not became the main issue, or one of the main issues, at the trial, and could not have been more of an issue if it had been pleaded. The conduct of the trial shows that the parties allowed, and intended, these allegations to become an issue, although unpleaded. This is, I think, one of those cases where an unpleaded issue was, from the course followed at the trial, left to the judge for decision."

Even Spry, V.P. who dissented admitted the existence of the rule when he stated at p.105:-

> "It is true that this Court has said, more often than once, that while the general rule is that "relief not founded on the pleadings will not be given" (per SINCLAIR, V.P., in Gandy vs. Caspair, (1956) 23 E.A. C.A. 139 at p. 140), a court "may allow evidence to be called, and may base its

decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision" (per LAW, J.A., in Odd Jobs vs. Mubia, [1970] E.A. 476 at p.478). I accept that as a general statement but I do not think it can be invoked to allow the introduction of what amounts to a new cause of action."

Yet again it was followed and applied in the case of Railways Corporation vs. East African Road Services Ltd. (1975) E.A. 128 when it was held:

"Poor visibility had become an issue without objection by the appellant and the judge could rely on it."

Spry, Ag. P. p.132 stated as follows:-

"First, one of the two reasons for which the judge found the Corporation negligent was that it had failed to secure adequate visibility by cutting back trees and vegetation. This had never been pleaded and it was not expressly made an issue, but I accept that it became in fact an issue when the defence evidence was led (it was never raised as part of the plaintiff company's case) and that the learned judge was asked to deal with it as such."

And Law, J.A. at p.134 stated this:-

"Mr. Wekesa also complained that the judge took into consideration, and found as negligence against the appellant, a matter which had not been pleaded, which was the alleged failure on the part of the appellant to ensure good visibility at the scene, in particular, by trimming vegetation. It is true that this was not pleaded, nor was it asserted by the bus driver as a contributory cause, but in my opinion the question of visibility became a general issue at the trial without objection on the part of the appellant, who called two witnesses on this very point."

Thirdly, it is unfortunate that the appellant never appealed against the judgment. That would have been an appropriate and preferable way of challenging the findings of the Court. The appellant did not even give a formal notice of appeal which, as was said by Musoke, J.A. in Njagi vs. Munyiri 1975 E.A.179 at p.180:-

"..... is nothing more than a formal written information to the court of an intention to appeal, and it may be withdrawn at any time. It is normally lodged as a matter of course, on payment of a small fee, by any person wishing to appeal against a decision of a superior court, irrespective of whether the intended appeal has merits or not, and no documents of the superior court are required at this stage."

Nor was any effort made to prefer an appeal; instead the appeallant preferred to file an application for review some eight months after judgment and set out as its only basis that there was an error on the face of the record. But a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The judge considered this carefully and held that since both parties had acquiesced in his determination of the compensation to be paid to the respondent on the basis that the suit land would be acquired by the appellant though not pleaded, he saw nothing wrong in the determination of the compensation involved, and even if he had followed the wrong procedure, this did not constitute an error which was apparent on the face of the record so as to constitute a sufficient ground for reviewing his earlier judgment.

With respect I agree. I find there is no error on the face of record as is defined by the authorities. Determination of an issue even if unpleaded does not disclose an error on the face of the record if the parties acquiesced in such a determination and they left such an issue for the decision of the court. When a party acquiesces in the determination of an unpleaded issue and loses and then seeks to attack the decision on a ground of a variation modification or development of what is originally pleaded then we are in the realm of technicality.

Has there been a failure of justice in this case? In my opinion, I do not see any. I would consider it a failure of justice if the Court were to fail to give effect to the evidence before it on an issue even if there was a departure from the pleadings. I am fortified in my view by what was said by Edmand Davies, L.J. in Domsalla vs. Barr (1969) 3 ALL E.R. 487, when at p.493 he stated:-

> "By adverting to the plaintiff's intention to set up in business on his own account, there was being introduced into the case an entirely new element which had received no adumbration at all in the statement of claim. For that reason, in my judgment, the plaintiff was going outside his pleading, and objection might properly have been taken to the leading of such evidence. The objection, however, was not made, and accordingly it is not right, in my judgment, for this court to say now it will not have regard to such evidence as was called in support of this new, unpleaded matter; but that in no way relieves the court from the duty of carefully assessing such evidence as was adduced in support of this entirely novel allegation."

Widgery, L.J. at p.495 stated as follows:-

> "So far as his prospective loss of future earnings is concerned, this is a case in which the familiar comparison between pre-accident earnings and earnings now available to the plaintiff shows no loss and no immediately prospective loss; and it needs evidence of a very strong character to justify this court in nevertheless assuming that he is going to have any significant financial loss later in his life. I think that the possibility of his setting himself up as a master-man steel erector and making the kind of financial success of it which the learned judge had in mind is too remote to be reflected in an award made at this stage. In my judgment one cannot make any significant addition to the damages on the basis of prospective financial loss; and in the result I feel that justice will be done if the plaintiff is awarded the two sums to which EDMUND DAVIES, L.J., has referred."

Finally, Mr. Mutiso on behalf of the respondent in an able and attractive argument which was a model for brevity and cogency submitted that since judgment and decree of September 27, 1995 the appellant on or about November 28, 1995 made a payment of one million shillings towards and under the decree and cannot, therefore, now appeal as it would be approbating and reprobating the judgment at the same time. This was not controverted by the appellant's advocate and was in the affidavit on behalf of the respondent as part of the record. In my view, approbation of a judgment can only happen after the judgment. I incline to the view that the appellant had in effect affirmed and approbated the judgment and was prevented from attacking such a judgment either by way of a review or otherwise.

I would on my part dismiss the appeal with costs and remit the case to the superior court for amendment of the decree to accord with this decision. But since the majority of your Lordships take a different view, this would not be necessary.

Dated and delivered at Nairobi this 7th day of March, 1997.

A.A. LAKHA

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JUDGE OF APPEAL