



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC. CASE NO. 368 OF 2015**

**(FORMERLY HCCC NO. 20 OF 2006)**

**MAYFAIR HOLDING LTD..... PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF KISUMU.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit on the 6<sup>th</sup> February 2006 against the Defendant vide their plaint dated 20<sup>th</sup> December 2005 seeking for the following orders;

**a) An order of permanent injunction directed at the Defendant and restraining it either by its employee, agents, appointees or officers from interfering with the Plaintiff's quite (sic) possession and enjoyment, by erecting structures to its access road, by licensing, trespassers to carry out business upon the Plaintiff's parcel of land or in any other way, defeating the Plaintiff's in its enjoyment of its proprietary rights over KISUMU MUNICIPALITY/BLOCK 8/297.**

**b) An order of Mandatory injunction directed at the defendant and compelling it to remove or demolish the structures erected along Kibiki road and any other illegal structures by trespassers upon the Plaintiff's parcels of land in order that the Defendant discharges its public duty to the Plaintiff.**

**c) Costs of this suit with interest therein.**

**d) Any other or further remedy.**

The Plaintiff avers that it is the registered proprietor of land parcel Kisumu Municipality/Block 8/297, which lies between Jomo Kenyatta Highway to the West and Kibiki road to the East. That its building plans were approved by the Defendant with access to both the Jomo Kenyatta Highway and Kibiki road. That the Defendant has constructed a structure to the East of the Plaintiff's parcel of land and along Kibiki road thereby blocking the access to the road, and denying the use of the road as a service lane to the Plaintiff's plot. That the Defendant has a duty to ensure the Plaintiff's plot's access is not interfered with, but has instead done the contrary by erecting or authorizing the construction of a structure along Kibiki road. That the Defendant has also authorized Hangover Hotel, CocaCola stand, Kinsman Printers, Arms King Insurance Agency, Copy Bird Computer Services, Toby Star Fashion House and Dr. Ondondi to operate businesses on the Plaintiff's parcel of land without its consent. That the Defendant was served with demand notice but neglected, failed and or refused to comply and hence this suit.

2. The Defendant denied the Plaintiff's claim through their statement of defence dated the 15<sup>th</sup> March 2006 and filed on the 16<sup>th</sup> March 2006. The Defendant avers that the structure complained of is erected within Uhuru Park and has not interfered with any property adjacent to the said park. That the Defendant cannot be compelled to create a road of access where none existed. That the alleged trespass by the businesses listed by the Plaintiff in its pleadings does not fall within the Defendant's mandate. That the approval of the Plaintiff's building plans did not mention its access in relation to the mentioned highway or road. That the Defendant is not aware that the Plaintiff is the registered proprietor of Kisumu Municipality/block 8/297. That Kibiki road does not go past Uhuru Park under the current town planning, existing roads and roads of access. That the Plaintiff's case should be dismissed with costs.

3. M/s Otieno, Yogo and Company Advocates and Onsongo and Company Advocates appeared for the Plaintiff and Defendant respectively.

4. During the hearing on the 27<sup>th</sup> September 2017, Amin Muhamed Gilani, the Managing Director to the Plaintiff, testified as PW1. He adopted his witness statement dated the 27<sup>th</sup> February 2017 and filed on the 28<sup>th</sup> February 2017 and further produced the 14 documents in his list of documents dated 20<sup>th</sup> November 2015 as exhibits. PW1 asked the Court to grant the Plaintiff's prayers and have the illegal occupants evicted. In cross-examination, PW1 stated that the Defendant has not interfered with the Plaintiff's land. That the business listed in the

Plaintiff's pleadings are trespassers on a portion of the Plaintiff's plot and adjacent to that portion is Uhuru Park. That the Defendant has erected a structure on a portion of the road reserve and therefore blocking the access to the Plaintiff's plot. That the Defendant has been sued in respect of the structure blocking the Plaintiff's plot's access and licensing of businesses operated on the Plaintiff's plot.

5. The Defendant closed their case without calling any oral evidence.

6. The Learned Counsel for the Plaintiff and the Defendant filed their written submissions dated 27<sup>th</sup> January 2018 and 9<sup>th</sup> February 2018 respectively. The Plaintiff's counsel's submission is as summarized herein below;

- **That the Plaintiff's suit and evidence stands uncontroverted and unchallenged as the Defendant did not call any witness to support its case. That the Defendant's defence therefore remains as mere statements of facts that are not substantiated.**
- **The Learned Counsel referred to the decision in the case of Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others where the Court held as follows: "...is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of facts 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."** The Learned Counsel for the Plaintiff submitted that this Court should make a similar finding in this case.
- **That the Plaintiff should be taken as the owner of the suit land by virtue of being the registered proprietor as confirmed by their certificate of lease in accordance with Section 24 and 26 (1) of the Land Registration Act No. 3 of 2012 of Laws of Kenya.**
- **That the Defendant breached its duty to the Plaintiff by construction of the structure to the East of the Plaintiff's parcel of land along Kibiki road while having approved the Plaintiff's development plans.**
- **That by licensing other people to operate business on the Plaintiff's land, the Defendant breached its duty to the Plaintiff as it amounted to unlawful use and trespass onto the Plaintiff land. That the licensing further contravened Section 29 (a) of the Physical Planning Act Chapter 286 of Laws of Kenya which empowered the Defendant "to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area."**
- **That the Defendant has a duty to ensure that the Plaintiff's plot is provided with access and that such access is not interfered with but has instead blocked the access to the Plaintiff's plot through the structure erected on Kibiki road and licensing of businesses operated on the Plaintiff's plot unlawfully.**
- **That the Plaintiff has proved its case on a balance of probabilities and judgment should be entered as prayed.**

The Defendant's Counsel's submissions are summarized as follows;

- **That the Plaintiff's pleading has not disclosed a cause of action against the defendant.**
- **That the Plaintiff did not avail a survey report on the suit land to confirm the extent of trespass or encroachments.**
- **That the orders sought if granted are likely to affect those named in the Plaintiff's pleadings who are not parties to the suit and such an order would be in contravention of Article 50 of the Constitution 2010.**
- **That the Plaintiff's suit should, in accordance with Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya, be dismissed with costs.**

7. The following are the issues for the determination by the Court;

- a) **Whether the Plaintiff is the legal owner of land parcel Kisumu Municipality/Block 8/297, the suit land.**
- b) **Whether the Plaintiff has established that the Defendant has erected a structure on Kibiki road, and to the east of the suit property and if so whether the structure is blocking access to the plaintiff's plot.**
- c) **Whether the Plaintiff has established that the Defendant has licensed the seven (7) businesses and or persons operating on a portion of the suit land without the Plaintiff's authority or consent.**
- d) **Whether the failure by the Defendant to call oral evidence makes the Plaintiff's case on the issues of determinations uncontroverted.**
- e) **Who pays the costs.**

8. The Court has carefully considered the parties pleadings as summarized hereinabove, the oral and documentary evidence tendered by PW1, written submissions by both Counsel and come to the following findings;

- a) That the Plaintiff became the registered proprietor of the leasehold interest in land parcel Kisumu Municipality/Block 8/297 on the

1<sup>st</sup> November 1993 as confirmed by the copy of the certificate of lease and certificate of official search produced by PW1 as exhibits.

b) That pursuant to the finding in (a) above, the Court takes the Plaintiff as the absolute and indefeasible owner of the leasehold interest over the said parcel of land in terms of Section 26 (1) of the Land Registration Act No. 3 of 2012. That as the Plaintiff's title to the said land has not been contested or impugned, they are entitled to the rights and privileges of a registered proprietor as set out under Sections 24 and 25 of the Land Registration Act.

c) That the Plaintiff's case that the Defendant has erected a structure on the road reserve next to the Plaintiff's land hence blocking access to the suit land, remains uncontroverted or unchallenged. That likewise the Plaintiff's case that the Defendant has been licensing the seven businesses set out at paragraph 11 of the plaint that are situated on the Plaintiff's land, without their consent and or authority, also remain uncontroverted and or unchallenged. That though the Defendant had filed a statement of defence dated 15<sup>th</sup> March 2006 to the Plaintiff's claim, they did not tender any evidence in support of their pleadings. The Plaintiff's learned counsel, M/s Otieno, Yogo, Ojuro & Company Advocates referred the Court to the Case of **Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others** where the Court held as follows;

***“...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 same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”***

That finding applies in this case as no evidence was called by the Defendant to controvert or challenge that given by PW1 for the Plaintiff.

d) That through the Defendant has approved the Plaintiff's building plans, their continued retention of the structure obstructing the Plaintiff's plot, and their issuing of licenses to business operated on the Plaintiff's plot without their authority, has made it difficult if not impossible for the Plaintiff to carry out the development.

e) That the Defendant owes the Plaintiff a public duty to ensure that the structure obstructing the access to the Plaintiff's plot is removed and that those illegally trading or carrying on business on the Plaintiff's plot are not licensed without first obtaining the authority of the Plaintiff.

f) That following the consent of counsel of both parties of 17<sup>th</sup> May 2018, the suit land parcel number has been amended in the plaint, defence and submissions by replacing the reference of Kisumu Municipality/Block 8/296, with Kisumu Municipality/Block 8/297.

g) That for the parties herein to confirm which of the seven businesses are actually operated on the Plaintiff's suit land, and whether or not the Kibiki road serves the suit land, it is imperative that the County Land Registrar and surveyor do visit the land and confirm its ground boundaries with the neighbouring parcels and public roads.

9. That following from the foregoing, the Court finds that the Plaintiff has established their case against the Defendant on a balance of probabilities. The Court therefore enters judgment for the Plaintiff as follows;

**a) That the parties herein do engage the County Land Registrar and Surveyor to visit Kisumu Municipality/Block 8/297 and confirm its ground boundaries with the neighbouring parcels and public roads of access so as to determine which of the seven businesses are situated on the suit land and which structures erected on the reserve of Kibiki road are obstructing the access to suit land. That the County Land Registrar and Surveyor do file a copy of their report with the Court in sixty (60) days and give a copy thereof to the Counsel for the parties for their information and action.**

**b) That upon the report in (a) above being filed with the Court and shared with the Counsel for the parties, the Defendant do remove or demolish the structures erected along Kibiki road that are found to be obstructing the Plaintiff's access to the suit land in 90 days from the date of the report. That further, the Defendant do recall and cancel the licenses issued to any or all of the seven businesses listed under paragraph 11 of the plaint found to be illegally situated on the Plaintiff's suit land in 90 days from the date of the report.**

**c) That permanent injunction in terms of prayer (a) of the plaint dated 20<sup>th</sup> December 2005 granted.**

**d) The Defendant do pay the Plaintiff's costs of the suit.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF MAY 2018

**In the presence of:**

Plaintiff      Absent

Defendant     Absent

Counsel       Mr. Orero for Ojuro for Plaintiff

                    Mr. Orenge for Onsongo for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**