



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mayfair Holdings Limited v Origa (Environment and Land Case Civil Suit  
214 of 2015) [2024] KEELC 192 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 214 OF 2015  
SO OKONG'O, J  
JANUARY 25, 2024**

**BETWEEN**

**MAYFAIR HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**PHILEMON ORIGA ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff instituted this suit by way of a plaint dated 19<sup>th</sup> August 2015 in which the Plaintiff sought judgment against the Defendant for:
  - a. An order of permanent injunction restraining the Defendant, his agents, representatives or any other person acting under his direction from blocking the Plaintiff's access or in any way interfering the Plaintiff's access to the service lane to land parcel number Kisumu Municipality/Block 8/90, and an order for the Defendant to stop construction on land parcel number Kisumu/Municipality/Block 8/254.
  - b. An order that the Defendant removes the structures on the service lane to land parcel number Kisumu Municipality Block 8/90, and that the Defendant stop the construction on land parcel number Kisumu/ Municipality /Block/ 8/254.
  - c. An order for mense profits.
  - d. Costs of the suit plus interest.
  - e. Any other order that this court may deem fit to grant.
2. The Plaintiff averred that it was the owner of land parcel number Kisumu /Municipality/Block 8/90 (hereinafter referred to only as "Plot No. 90") while the Defendant was the owner of a neighboring



parcel of land known as land parcel number Kisumu /Municipality/Block 8/254 (hereinafter referred to only as “Plot No. 254). The Plaintiff averred that Plot No. 90 was a residential property and that Plot No. 90 and Plot No. 254 shared a common boundary marked with a service lane in between the two plots.

3. The Plaintiff averred that sometime in 2014, the Defendant intimated to the Plaintiff that he intended to put up a building on Plot No. 254 which would go up to about 3 floors. The Plaintiff averred that the Defendant proceeded to construct the said building without consulting the Plaintiff. The Plaintiff averred that the Defendant’s new building had the effect of blocking the easements enjoyed by the Plaintiff’s property, Plot No. 90. The Plaintiff averred that the said action of the Defendant was contrary to Section 32 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and a violation of the Plaintiff’s constitutional right to enjoy its property. The Plaintiff averred that unless the Defendant was restrained by the court, the Defendant would continue with his illegal action complained of with impunity.
4. The Defendant entered an appearance and filed a defence on 10<sup>th</sup> March 2020. The Defendant denied all the allegations that were made by the Plaintiff in the plaint. The Defendant averred that the Land Registrar had confirmed that there was no service lane between Plot No. 90 and Plot No. 254 and that the Plaintiff had mistakenly put up structures on Plot No. 254 owned by the Defendant. The Defendant averred that he had constructed the building complained of by the Plaintiff on Plot No. 254. The Defendant denied that he had blocked any easement that was being enjoyed by the Plaintiff’s property.
5. On 10<sup>th</sup> December 2019, the court ordered by consent of the parties that the County Land Registrar and Surveyor visit Plot No. 90 and Plot No. 254 and establish whether there was in existence a service lane and if there was, to clearly mark the same. The two officers were to file their report in court within 60 days. Following that order, the Ag. County Director of Surveys and the Land Registrar, Kisumu East/Kisumu West visited the suit properties on 2<sup>nd</sup> March 2020 and filed a report in court on 10<sup>th</sup> March 2020. In the report, the officers made the following findings and observations;
  1. The boundary between plot no 90 and plot no.254 was marked with concrete wall fence
  2. A 5-metre service lane existed sometime back between Plot No. 90 and Plot No. 254 according to survey plan F/R No. 53/155.
  3. Survey Plan F/R No. 53/155 which created the said service lane was superseded by Survey Plan F/R No. 110/24 and the Registry Index Map was amended accordingly.
  4. Survey Plan F/R No. 110/24 removed the 5-metre lane which ceased to exist in 1967.
  5. The developments in the area were following the Survey Plan F/R No. 110/24 and any attempt to go back to Survey Plan F/R No. 53/155 that created the said service lane will affect not only the Defendant in the suit but also other adjacent land owners.
6. The report had a diagram showing, the positions of Plot No. 90 and Plot No. 254, the position of the service lane when it existed and the current boundary between the two plots. The officers attached to the report, the Registry Index Map for Kisumu/Block 8, Survey Plan F/R No. 53/155 and Survey Plan F.R No. 110/24. The said report was adopted by the court by consent of the parties as part of the court record on 31<sup>st</sup> August 2020.
7. At the trial, the Plaintiff’s Managing Director, Amin Mohamed Sadruddin Gilani(PW1) told the court that the Plaintiff had sued the Defendant over a service lane between Plot No. 90 and Plot No. 254. PW1 stated that the Plaintiff purchased Plot No.90 in 2006 when the service lane in dispute was in



existence. He stated that the dispute over the service lane arose in 2014 when the Defendant informed them that he wanted to put up a building on the said lane. PW1 adopted his witness statement filed together with the plaint as part of his evidence in chief and produced the Plaintiff's bundle of documents also filed together with the plaint as exhibits. In his witness statement, PW1 stated that when the Defendant informed him of the Defendant's intention to put up the disputed building, he opposed the same because Plot No. 90 had a service lane and the Defendant's development would have the effect of diminishing the value of Plot No. 90 which would lose the service lane and also the natural light that they had enjoyed for over 20 years. He stated that if the Defendant continued with the said development, they would also be forced to remove the water tanks that they had installed on the said service lane thereby interfering with their right to own a property of their choice.

8. During cross-examination, PW1 reiterated that the service lane existed on the ground when the Plaintiff purchased Plot No. 90 and that it was when the Defendant started putting up the contested building that they discovered that the service lane did not exist. He stated that he installed water tanks on the disputed land on the assumption that the same was a service lane.
9. The Plaintiff's next witness was Mbok Geoffrey Okombo (PW2). PW2 testified that he was a surveyor working with the County Government of Kisumu and that he filed a report in court on 9<sup>th</sup> March 2020 about Plot No. 90 and Plot No. 254. He stated that in the report, he provided a Google map showing the common boundary of the two parcels of land. He stated that he found that the service lane in dispute was no longer in existence on the ground. He stated that it had been converted to land and formed part of Plot No. 254. He stated that the lane was done away with and the place where it was had been developed.
10. During cross-examination, he stated that when the service lane existed, it was not specific to any particular parcel of land. He stated that if the service lane was to be recreated, it would affect 14 parcels of land. He stated that there was a procedure for closing lanes. He stated that all the people concerned must be notified and their consent sought. He stated that the intention to close a lane must also be advertised in the newspaper and an opportunity given for the public to comment on the same. He stated that after the lapse of the period given, a Part Development Plan is prepared which informs the subsequent survey. He reiterated that the lane was made to become part of Plot No. 254. On re-examination, he stated that the whole lane in dispute formed part of Plot No. 254 after the closure thereof. On examination by the court, he stated that the closure of the lane and the addition of the same to Plot No. 254 increased the size of the parcel while the size of Plot No. 90 remained the same.
11. The Defendant, Philemon Jos Origa (DW1) adopted his witness statement filed on 10<sup>th</sup> March 2020 together with the defence as part of his evidence in chief. He produced the documents attached to his list of documents dated 9<sup>th</sup> March 2020 as D.EXH.1 and the documents attached to his list of documents dated 13<sup>th</sup> February 2023 as DEXH. 2. He stated in his testimony in court that he purchased Plot No. 254 in 2003 but it took him some time before he started developing it. He stated that he started the first phase of the development in 2006 and finished the same. He stated that he started the second phase in 2015 on the land which the Plaintiff claimed to be a service lane. He stated that he allowed PW1's deceased father to put up a water tank on his land temporarily in 2014 and when he wanted to start construction on the land, he asked him to remove the tank. He stated that instead of removing the tank, the Plaintiff decided to come to court. He stated that the development that he was carrying out on the disputed land was approved by the relevant authorities. He stated that the service lane was done away with and the parcels of land on the side of Plot No. 254 had the benefit of the service lane land being added to them. He stated that the survey plans after 1967 did not show a service lane between his plot and that of the Plaintiff. He stated that in the 1967 survey plan, all the plots on the side of his plot had portions of the said service lane added to them. He stated that the court ordered



that the Land Registrar and the surveyor visit the site and prepare a report. He stated that the Land Registrar and the surveyor confirmed in their report that the service lane ceased to exist in 1967.

12. During cross-examination, DW1 stated that when he bought Plot No. 254, there was an open space between the plot and Plot No. 90 which space belonged to him. He stated that when the service lane was closed, the same was added to the parcels of land on one side of the former lane. He stated that he did not know the reason that informed that decision.
13. DW1 stated that both Plot No. 90 and Plot No. 254 measured 0.1440 Ha. He stated that the 1967 survey that did away with the service lane added some land to Plot No. 254. He stated that when he bought Plot No. 90, there was no service lane in existence. He stated that what was between Plot No. 90 and Plot No. 254 was an open space. He stated that when a dispute arose between him and the Plaintiff, he stopped construction on the area where the Plaintiff's tank was located.

### **The submissions**

14. The parties made closing submissions in writing. The Plaintiff filed submissions dated 25<sup>th</sup> July 2023 while the Defendant filed submissions dated 8<sup>th</sup> September 2023.

### **The Plaintiff's submissions**

15. The Plaintiff framed two issues for determination. The issues framed by the Plaintiff were, whether due process was followed in the closure and removal of the service lane and whether there was public participation in the process of closing and removing the service lane. The Plaintiff conceded that the service lane between Plot No. 90 and Plot No. 254 which was created through Survey Plan F/R No. 53/155 of 1944 was closed and amalgamated with the adjacent parcels of land through Survey Plan F/R No. 110/24 of 1967. The Plaintiff conceded further that the Registry Index Map for Kisumu/ Block 8 confirmed that the service lane did not exist. The Plaintiff submitted that the witnesses who testified in court about the closure of the said service lane and the amalgamation of the same with the adjacent plots did not tell the court the circumstances under which the said closure and amalgamation was carried out. The Plaintiff submitted that there was no evidence placed before the court showing that due process was followed in the closure of the said lane which was a public utility land and allocation of the same to the owners of the adjoining plots. The Plaintiff submitted that there was also no evidence that there was public participation as required by the law before a decision was made to close the said service lane and to amalgamate the same with the adjoining parcels of land. The Plaintiff submitted that the title held by the Defendant being a product of an irregular and illegal process was invalid. The Plaintiff cited several authorities in support of the foregoing submissions including; *Nelson Kazungu Chai & 9 Others v. Pwani University* [2014] eKLR, *Funzi Development Ltd. & Others v. County Council of Kwale* [2014] eKLR, *Munyu Maina v. Hiram Gathiba Maina* [2009] eKLR, *Dina Management Limited v. County Government of Mombasa & 5 others*, Supreme Court, (Petition No. 8 (E010) of 2021, *Khelef Khalifa & 2 others v. Independent Electoral and Boundaries Commission and another* [2017] eKLR, *Republic v. Ministry of Finance & another ex parte Nyongo* [2007] eKLR, *Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & Another* [2013] eKLR, and *Republic v. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others* [2006] eKLR.
16. The Plaintiff urged the court to grant the reliefs sought in the plaint.

### **The Defendant's submissions**

17. The Defendant submitted that the Land Registrar and the Surveyor's Report dated 9<sup>th</sup> March 2020 which was filed in court on 10<sup>th</sup> March 2020 and adopted by the court with the consent of the parties was binding on the court and the parties, and the same was conclusive on the issue of the



boundary between Plot No. 90 and Plot No. 254 since the same was neither reviewed nor set aside. The Defendant submitted that the main issue for determination by the court in the Plaintiff's suit was whether there was a service lane between Plot No. 90 and Plot No. 254. The Defendant submitted that this issue was answered in the negative by the Land Registrar and the Surveyor's report aforesaid.

18. The Defendant submitted that in its submissions, the Plaintiff set out to argue a completely new case that was not pleaded. The Defendant submitted that the issue of whether or not due process was followed in 1967 when the said service lane was closed and whether there was public participation was not part of the Plaintiff's case since the same was not pleaded. The Defendant submitted that parties must stick to their pleadings and that the court can only pronounce a judgment on pleaded issues. The Defendant cited *Galaxy Paints Company Limited v. Falcon Guards Limited*, Court of Appeal Civil Appeal No. 219 of 1998, *Libyan Arab Uganda Bank For Foreign Trade and Development & Anor v. Adam Vassiliadis* [1986] UG CA 6, *Independent Electoral and Boundaries Commission & another v. Stephen Mutinda Mule & 3 others* [2014] eKLR and *Joseph Mbuta Nziu v. Kenya Orient Insurance Company Ltd* [2015] eKLR. The Defendant submitted that the Plaintiff's submissions and the authorities cited were in support of a different case other than the case before the court. The Defendant urged the court to dismiss the Plaintiff's suit.

### Analysis and determination

19. I have considered the pleadings, the evidence tendered and the submissions filed by the advocates for the parties. In *Dakianga Distributors (K) Ltd v. Kenya Seed Company Limited* [2015] eKLR, the Court of Appeal stated as follows:

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12<sup>th</sup> Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“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 purposes 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.”

20. In *Raila Amolo Odinga and another v. Independent Electoral and Boundaries Commission and 4 others & Attorney General and Another* Petition No. 1 of 2017 [2017] eKLR, the Supreme Court quoted with approval the Supreme Court of India in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another* Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR where the court stated that:
21. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.



22. In *Mabamud Mubumed Sirat v. Ali Hassan Abdirabman and 2 Others* [2010] eKLR, Kimaru J. (as he was) stated as follows:

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner’s case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition”.

23. I have cited the above case law to underscore the importance of pleadings. The Plaintiff’s case as pleaded was a straightforward one. The Plaintiff alleged that there was a service lane between Plot No. 90 owned by the Plaintiff and Plot No. 254 owned by the Defendant. The Plaintiff alleged that the Defendant was constructing a building on the said service lane which was interfering with the Plaintiff’s right to use and enjoy the service lane. The Plaintiff claimed that it had an easement over the service lane. In Concise Oxford English Dictionary 12<sup>th</sup>, a lane is defined as: “a narrow road, especially in a rural area...”. I have not found the definition of a service lane in the Concise Oxford English Dictionary or Black’s Law Dictionary. The Law Insider defines a service lane as “a road or lane provided at the rear or side of a plot for service purposes”.

24. The burden was on the Plaintiff to prove the existence of the said service lane and the alleged interference with the easement enjoyed by the Plaintiff. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

25. The *Halsbury’s Laws of England*, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)

26. The evidence placed before the court by the Plaintiff, the Defendant, and the Land Registrar and Surveyor who had been directed by the court to visit the suit properties and file a report in court shows that at the time of filing this suit, there was no service lane between Plot No. 90 owned by the



Plaintiff and Plot No. 254 owned by the Defendant. The evidence on record shows that the alleged service lane was created through Survey Plan F/R No. 53/155 of 1944 and that the lane was closed and amalgamated with the parcels of land that were adjoining it on one side which included Plot No. 254. This was done through Survey Plan F/R No. 110/24 of 1967. The Registry Index Map for Kisumu/Block 8 on which the suit properties are located was duly amended to reflect these changes. This means that the service lane which formed the basis of the Plaintiff's case ceased to exist in 1967 and did not exist at the time the Plaintiff acquired Plot No. 90 in 2006. What the Plaintiff assumed (according to the evidence of PW1) to be a service lane was an open space that formed part of Plot No. 254. It was on this open space that the Defendant was putting up a building. The evidence before the court shows that the space belonged to the Defendant as it was part of Plot No. 254. The Plaintiff has not proved that by constructing the said building on the said open space the Defendant committed any wrong.

27. The Plaintiff contended that the construction was interfering with the easement that the Plaintiff had enjoyed for 20 years. The Plaintiff did not plead and prove that the Plaintiff had acquired an easement on the portion of Plot No. 254 in dispute. The Plaintiff's case was that the disputed portion of Plot No. 254 was a public service lane that he was entitled to use as of right. I am of the view that there are only three (3) ways of acquiring an easement over private land. One can acquire an easement through an agreement with the land owner. Easement of necessity can also be acquired through an application made to the court under Sections 139 and 140 of the *Land Act*, 2012. The third way of getting an easement is by prescription under Section 32(1) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. There is no evidence that the Plaintiff had agreed with the Defendant to have an easement over the disputed portion of Plot No. 254. The Plaintiff had also not moved the court for an easement of necessity under the provisions of the law aforesaid. Although the Plaintiff alluded to it in its plaint, the Plaintiff did not prove that he had acquired an easement over the said portion of land through prescription. The Plaintiff acquired Plot No. 90 on 9<sup>th</sup> June 2006. The Plaintiff needed to have enjoyed the easement for 20 years before it could acquire it by prescription. The Plaintiff's suit was brought in 2015; 9 years after acquiring Plot No. 90. It is therefore my finding that the Plaintiff had not acquired an easement over the portion of Plot No. 254 on which the Defendant was constructing the building complained of by the Plaintiff.
28. Apart from the foregoing issues, the Plaintiff had brought up other issues in its submissions. In the submissions, the Plaintiff challenged the legality of the process through which the service lane was closed and amalgamated with among others Plot No. 254. I agree with the submissions by the Defendant that these issues were not pleaded and as such the Defendant was not given an opportunity to respond to the same. The issues were raised for the first time in the submissions. I refuse the invitation by the Plaintiff to determine the dispute before me on unpleaded issues. I agree with the Defendant that the submissions made on those issues and cases cited are irrelevant to the case before the court. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* (supra) which was cited by the Defendant, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled "*The present Importance of Pleadings*" published in 1960 *Current Legal problems*, at P.174 where the author stated as follows:

As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the



parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

29. I am fully in agreement with the statement of the law.

### **Conclusion**

30. For the reasons given, it is my finding that the Plaintiff has not proved its case against the Defendant on a balance of probabilities. The Plaintiff’s suit is dismissed with costs to the Defendant.

**DELIVERED AND DATED AT KISUMU ON THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**S. OKONG’O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ojuro for the Plaintiff

Mr. Mwamu for the Defendant

Ms. J. Omondi-Court Assistant

