Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 371 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 64 OF 2014

HM OKWENGU, MA WARSAME & JM MATIVO, JJA

MARCH 31, 2023

BETWEEN

THE PRESBYTERIAN FOUNDATION ..... APPELLANT

AND

KIBERA SIRANGA SELF HELP GROUP NURSERY SCHOOL ... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Nambuye, J) dated 12th February, 2010 in HCCC No. 1192 of 1999)

JUDGMENT

1. The Presbyterian Foundation (the appellant), has appealed against the judgment of the High Court of Kenya at Nairobi (Nambuye, J as she then was) delivered on February 12, 2010 in Nairobi HCCC No 1192 of 1999.

2. A succinct account of the litigation in the High Court is necessary in order to properly contextualize the arguments for and against this appeal. By a plaint dated June 7, 1999 filed in the High Court at Nairobi on June 15, 1999 the respondent sued the appellant claiming ownership of L.R. No. 209/13380 together with the developments erected thereon, namely, a nursery school, a community hall and residential houses from which it claimed it earned Kshs.4,800/= per month.

3. The respondent averred that it granted the appellant's church known as the P.C.E.A, Kibera and its other related functions license to occupy its aforesaid premises but in breach of the said authorization, the appellant claimed ownership of the land. Further, on or about February 28, 1999, the appellant destroyed its residential houses on the said land valued at Kshs. 200,000/= prompting the respondent to revoke the said license. However, despite the cancellation, the appellant refused to vacate the premises.

4. In the High Court, the respondent prayed for the following orders against the appellant: (a) possession of the land; (b) damages for trespass; (c) Kshs.200,000/= being the value of the residential premises

demolished by the appellant; (d) mesne profits at the rate of Kshs.4,800/= per month from February 28, 1999 until delivery; (e) an injunction restraining the appellant or its agents from entering or remaining on the said land; (f) costs of the suit and interests, and (g) any other or further relief that this court may grant.

5. In its statement of defence dated August 31, 1999, the appellant denied knowledge of the said property. It claimed that it occupied plot no. 285 measuring 0.4045 hectares since 1971 on which it developed a church, nursery school, water tank, caretaker's house, and residential houses and fenced the plot with barbed wire. It averred that it was allocated the plot by the Commissioner of lands vide a letter of allotment Ref: No. 24605/XV/25 dated June 17, 1998. It denied occupying LR No. 209/13380 and claimed it occupied parcel number 285 as of right and not under licence. In addition, it claimed that it pulled down 8 semi-permanent houses on its aforesaid plot in order to construct permanent residential houses. Lastly, it maintained that LR No. 209/13380 and LR. No. 106/285 are distinct plots situated at different locations.

6. Briefly, during the trial, the respondent's evidence was that they were shown the plot in 1970 to build a nursery school and in 1971 it constructed a hall, a nursery school and teacher's houses. In 1995, it was registered as a self-help group with the Ministry of Culture and Social Services. Subsequently, it was incorporated into a trust and it applied to be allocated the said land. Further, the land was allocated to it vide a letter of allotment dated January 21, 1996, and on December 3, 1997, it paid Kshs.181,760/50 for rates and Kshs.88,000/= for land rent. It was its evidence that the plot was surveyed on January 20, 1997 and a beacon certificate issued. It produced a letter from the Department of Lands to Director of Surveys asking the latter to survey the plot. It also produced documents in support of the allotment, the requisite payments and the beacon certificate. It was its evidence that after completing the above payments, they were issued with a certificate of lease for 99 years from February 1, 1996.

7. The respondent also testified that it allowed the appellant to occupy the premises for the purposes of worshipping on Saturdays and Sundays. Further, the appellant sued the respondent in CMCC No. 156 of 1997, Nairobi demanding that the respondent vacates the land but the court dismissed the case holding that the respondents were not trespassers because they had a title document for the land. Lastly, it stated that the appellant never appealed against the said judgment.

8. On its part, the appellant's evidence was that in 1971, it approached the District Officer, Kibera and asked for land to build a prayer house, which they were shown and on which they erected a mud structure comprising of 8 rooms and a nursery school out of which 4 rooms were rented. On cross-examination, the appellant's witness conceded he did not have the letter they used to apply for the plot nor did they have the original letter of allotment. On further cross-examination, the appellant's witness could not demonstrate that the appellant accepted the conditions in the letter of allotment. Nevertheless, the appellant maintained that they received the allocation in 1998, and they paid for the same and the land was surveyed and they were issued with a beacon certificate. Lastly, the appellant maintained that their plot is distinct from the respondent's plot.

9. After evaluating the evidence, the trial judge was satisfied that the respondent had proved its case to the required standard and allowed the prayers sought in the plaint listed in paragraph (4) of this Judgment save for the prayer for the alleged damage to property which it found was not proved. In particular, the learned judge was satisfied that the respondent established by way of documents that they were allocated the land, they accepted the allotment and paid the requisite rates and land rent as evidenced by receipts produced in court. Further, after the payments, the land was surveyed and a beacon certificate was issued followed by a title deed issued to the respondent under the *Registration of Titles Act*.

10. Lastly, the trial court concluded that the appellant's lease was invalid, null and void and ordered that the same be cancelled forthwith under the prayer "any other further or other relief that the court, may deem fit to grant."

11. The appellant seeks to overturn the above verdict citing 6 grounds of appeal which can be abridged to three, namely: (a) whether the respondent established its case to the required standard; (b) whether the learned judge erred in finding that LR No. 209/13380 and LR No. 106/285 were one and the same parcel of land; (c) whether the trial judge granted a relief which was not sought by ordering the cancellation of the appellant's title.

12. The appellant's submissions in support of the appeal can be summed up as follows: (a) the two parcels of land are separate and distinct; (b) that there was no prayer seeking a declaration that the appellant's title was forged nor did the respondent challenge the legality of the title in its pleadings; (c) the impugned judgment was influenced by the decision in CMCC No. 156 of 1999 yet the said case did not determine ownership of the parcels of land; (d) that the appellant's lease was signed by the director of surveys; and, (e) the respondent did not prove the alleged developments.

13. The respondent's counsel submitted that in CMCC No. 156 of 1997, the court dismissed the appellant's claim that the respondent was a trespasser and held that the respondent rightfully owned the property and that LR Nos. 209/13380 and 106/285 are the same. He also argued that in the plaint the respondent prayed for any other relief the court may be inclined to grant, so the court having found that the lease documents tendered by the defendant were fake, it correctly decreed that the title was null and void. Further, counsel submitted that the allotment letter issued to the respondent was first in time, so it was protected under section 23 of the *Registration of Titles Act* nor did the appellant challenge the respondent's title. Lastly, counsel submitted that the decision was based on facts.

14. We have considered the grounds of appeal and the rival submissions by the parties and the law. This court is required under Rule 31 of the *Court of Appeal Rules*, 2022 to re-evaluate the evidence before the trial court and to subject the whole of the evidence to a fresh and exhaustive scrutiny and arrive at its own independent conclusions bearing in mind that it did not have the advantage of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 and the Court of Appeal for East *Africa in Peters v Sunday Post Limited* (1958) E.A. page 424).

15. First, we will address the appellants' argument that the two parcels of land were separate and distinct. After analyzing the evidence, the learned judge stated:

> " From the above exhibits relied upon by both sides...It is also evident from the oral testimony of each side that in so far as the physical facilities go ..., there is no doubt that the fight is over the same piece of land as the parties claim ownership of the physical structures as well as the land. It therefore follows that the piece of land on which the physical structures stand and which is being claimed by both sides is one and the same..."

16. The learned judge in our view correctly noted that the physical location of the structures on the ground led her to the conclusion that the parties were disputing over the same parcel of land. We find a lot of intellect in this line of reasoning because:

    (a) the physical location of the structures could not change;

    (b) both parties did not dispute the existence of the structures;

    (c) it was common ground that there was a dispute relating to the structures;

(d) the appellant failed to demonstrate by evidence that the structures were not located on the land claimed by the respondents;

(e) there is evidence on record that the appellant approached the respondent in 1974 and requested for permission to use the respondent's hall for prayers on Sundays and Saturdays. (See the evidence of PW2);

(f) there is evidence that the appellant sued the respondents in CMCC No. 156 of 1996 claiming that the respondents were trespassing into their land. At this point there was no mention of two parcels of land.

(g) in the said suit, the appellant prayed for an injunction against the respondents restraining them from trespassing into their premises known as Siranga Nursery School, Kibera;

(h) these were undeniably the same structures which triggered the dispute.

(i) The learned magistrate was categorical that the appellant failed to prove that the respondents were trespassers on the said land. Further, the learned magistrate stated that the appellant had been allowed by the respondent to use their nursery school;

(j) lastly, the said decision was never appealed against. We find no reason to hold otherwise or fault the learned judges finding that the physical location of the structures extinguished the appellant's argument that the two parcels of land were distinct. We associate ourselves with the learned judges finding that the dispute was in respect of the same parcel of land.

17. Next, we will address the issue whether the respondent established its case to the required standard. As we resolve this issue, it is important we examine the ownership documents submitted by the parties in their quest to support their competing ownership claims. Faced with the diametrically opposed documents presented by the parties each asserting ownership of the same plot, the learned judge stated as follows:

> "The question that this court has to ask itself is which of the two sets of allotments is to be believed and upheld? In this Court's opinion, a comparison of the very documents will assist the court determine which of the two sets of documents is to be believed. Starting with the initial request for allocation of the plot, it is evident that from the evidence on record there is only oral testimony from the plaintiffs that they asked and were allocated the suit plot way back in 1971. The defence on the other hand rely on exhibit A dated 1971 but from the evidence none of those witnesses who testified on behalf of the defendants could tell for which plot the application had been presented. It is not disputed that both sides have fronted allotment letters. As mentioned the allotment in favour of the plaintiff exhibit 3 was earlier in time as it is dated January 21, 1996 whereas that of the defence is dated 17th day of June, 1998. The beacon certificate exhibit 6 for the plaintiff is dated 21/1/1997 and is indicated to have been pointed out to the group chairman. Whereas that of the defence is dated 12/9/98 and is alleged to have been pointed out to one Isaac Irungu DW4 by the surveyor."

18. The learned judge further proceeded to find as follows:

> "Turning to the title documents, it is evidently clear that the title for ownership for the plaintiff's namely the beacons certificates, exhibit 6 allotment letter exhibit 3, and the title documents exhibit 8 are consistent in so far as they relate to the title holder namely M/S Kibera Silanga Self-help Group Day Nursery School. Whereas those of the defence differ. The beacon certificate exhibit H and the allotment letter exhibit F1 bear the name of

P.C.E.A. Silanga church. Whereas the certificate of lease and the lease bear the names of a different entity. The Presbyterian Foundation, described in the lease and certificate of lease as a company limited by guarantees. It is instructive to note from the proceedings, that the defendant is described in paragraph 2 of the plaint as a body corporate capable of suing and being sued. Vide paragraph 1 of the defence, the defendant admitted paragraph 1 and 2 of the plaint, meaning that it accepted description itself as a body corporate capable of suing and being sued in its name. Despite this revelation, the defence witness produced no Articles and Memorandum of Association of the said company to show that it indeed exists, that it was the Board of Directors and a resolution of either the Board of Directors or shareholders which was passed authorizing the person who brought the action against the current plaintiffs in the lower court and to defend the current action.

It is also instructive to note that none of the defence witness testified in their capacity as either Directors or shareholders of the said defendant company. As such, in the absence of production of Articles and Memorandum of Association, production of a company resolution to defend the action herein, the court, makes a finding that the evidence on record does not assist the defendant in any way.

Further as observed, in the lease documents, there is a section on the last page of the lease which required the seal of the company to be affixed but the same was not affixed. This is supposed to have been done in the presence of a Director and a Director/Secretary. There are signatures appended with no names. The said signatures are supposed to have been appended before an official of the lands office on a particular date, but the said date remains black, and there is no signature of the person who certified those signatures or the person who identified the person signing on behalf of the company before the certifying officer. For this reason, this court, has no doubt that defence exhibit M, the lease is suspect and invalid due to lack of proper authentication.

Further on the validity of the title documents, issue arises as to whether the defendants documents can oust those of the current plaintiff. The answer to these is in the negative. The reason for giving the answer in the negative is because, the title documents of the plaintiffs were earlier in time, and therefore protected by virtue of the provisions of section 23 of the *Registration of Title Act* which reads:...."

Applying the said ingredients to the rival arguments herein, it is instructive to note that the defendant is not challenging the title holding of the plaintiff, but alleges that it owns a different parcel of land and yet they agree that the physical structures on the land are claimed to have been owned by them both separately.

This being the case, it was necessary for the person sued to prove evidence to show that the land they claim is different from that claimed by the plaintiff.

Further to this, it is instructive to note that unlike the plaintiffs' title documents, those of the defendants do not agree in all respects. For example, those of the plaintiffs all bear the plaintiffs name as the entity which was allotted the land, shown the beacons, and issued with the title documents whereas, those of the defendants do not flow. The beacons certificate and allotment letter were given to the PCEA Silanga Church. Whereas the main title documents were given to the Presbyterian Foundation, a company incorporated under the *Company's Act* cap 468, laws of Kenya, does not have the key back up documents, namely the letter of allotments, and the beacon certificate. Likewise it means that the P.C.E.A. Silanga church only has a letter of allotment and a beacon certificate do not have supporting title documents. This means that neither set of documents support the defendants claims

> to the land. This is so because the letter of allotment contains a disclaimer by the issuing authority to the effect that it will not be held responsible for any prior allocation of the suit property. Meaning that, having ruled that the disputants are fighting for possession over the same piece of land, if the title of the plaintiff is upheld then it means the defendants assertion to the suit land is rendered of no consequence.
>
> For the reasons given in the assessment, the court, is satisfied that the plaintiff has established its case on a balance of probability and that the defendants defence stands ousted…"

19. Essentially, the issues discussed above, namely, whether the two parcels of land were separate and distinct and which party held genuine documents are issues of fact. It is commonplace that the outcome of a lawsuit (and hence the vindication of legal rights) depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus, the procedure by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.

20. A question of fact is resolved by a trier of fact by weighing the strength of evidence and credibility of witnesses. When dealing with the trial court's findings of fact, the court of appeal should take into account that the trial court was in a more favourable position to form an opinion because it was able to observe the witnesses during the trial. An appellate court is not entitled to interfere with trial court's findings of fact unless the findings of fact were perverse and not based on sound reasoning. An Appellate Court will only allow an appeal against a finding of fact where the decision of the lower court was wrong, or unjust because of a serious procedural or other irregularity in the proceedings in the Lower Court.

21. Our analysis of the facts as presented by the parties and the conclusions arrived at by the trial court lead us to the conclusion that the trial court's findings of fact were not perverse or without any reason or based on non-consideration of important piece of evidence. We are satisfied that the findings and conclusions are supported by the record.

22. We will next address the pertinent issue regarding the existence of two titles in respect of the same parcel land. The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title.

23. We are satisfied that the respondent's explanation and supporting documents satisfied this three-fold criteria because the respondent's documents demonstrated a clear origin, and an unbroken chain of the origin of the title (including providing a letter of allotment, evidence of payment of rates and land rent, survey, beacon certificate and issuance of a title deed). On the contrary, the appellant's documents were not only marred by material inconsistencies and contradictions as highlighted by the trial court but also they lacked credibility as highlighted by the learned judge in the above excerpt.

24. The other important point to underscore is the learned judge's finding that the respondent's title being first in time could not be defeated by the appellant's title. In support of this finding, the learned judge cited section 23 of the *Registration of Titles Act*.

25. The above finding is supported by several decisions of our superior courts. For example, the High Court (Sila, J) in *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others* (2016) eKLR confronted with a similar situation stated:

> " A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

26. This court in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR cited its earlier decision in *Dr. Joseph Arap Ngok v Justice Moijo ole Keiwua & 5 others*, Civil Appeal No.NAI.60 of 1997 where this court stated that:-

> " Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

27. Similarly, this court in *Wreck Motors Enterprises v Commissioner of Lands* C.A. No. 71/1997 (unreported) while determining an appeal in respect of a dispute involving two titles over the same parcel of land stated:

> " like equity keeps teaching us, the first in time prevails so that in the event such as this one where...the Commissioner of Lands issued two titles in respect of the same parcel of land, then if both are apparently and on the face they were issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail..."

28. The foregoing being the law, we find and hold that the learned judge correctly held that the respondents title having been issued first in time could not be ousted by the appellant's title which was issued later.

29. In civil cases the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case. In *Stellenbosch Farmers Winery Group Ltd & another v Martell & others* 2003 (1) SA 11 (SCA) at para 5 the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:

> " To come to a conclusion on the disputed issues a court must make findings on

(a) the credibility of the various factual witnesses;

(b) their reliability; and

(c) the probabilities.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness' candour and demeanour in the witness-box,

(ii) his bias, latent and blatant,

(iii) internal contradictions in his evidence,

(iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

(v) the probability or improbability of particular aspects of his version,

(vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

30. From the above dicta, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. The focal point of the exercise remains to find the truth. In our assessment, the appellant's testimony, and in particular its oral evidence and the documents relied upon did not meet the above three tests. Accordingly, we find no reason to fault the learned judge for the manner in which she evaluated the evidence before her and the conclusions arrived at. We must add that her conclusions were supported by the evidence on record. Where the findings and conclusions are supported by the record and no miscarriage of justice has resulted from the decision, the appellate court has no choice but to confirm those findings and conclusions.

31. Lastly, we will address the accusation that the learned judge erred by granting a relief which was not specifically sought in the plaint. In granting the said relief, the learned judge stated:

> "By reason of what has been stated in number 5 above the certificate of lease and lease documents tendered herein by the defendants are declared fake documents. They are null and void and the same ordered to be cancelled forthwith, under any other further or other relief that the court, may deem fit to grant."

32. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. The Supreme Court of India in *Bachhaj Nahar v Nilima Mandal & anr.*, (Civil Appeal Nos. 5798-5799 of 2008), (2008) 17 SCC 491 while addressing the question whether a Court can go beyond what is pleaded in pleadings for adjudication laid down the following fundamental principles:

    a. No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.

    b. A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

    c. A factual issue cannot be raised or considered for the first time in a second appeal.

34. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. The pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

34. The question before us is not whether there was some material on the basis of which the said relief could be granted. The question is whether such relief can be granted, when the appellant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the affected person had no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice.

35. A case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. However, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. (See this court's decision in *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* (2015) eKLR).

36. We have read the plaint and the defence filed in the High Court.

    There were no averments touching on the validity of the appellant's title in the plaint. Also, in the defence, the appellant's case was that its land is different from the respondent's land and that it had a title to its land which it described as LR No. 106/285. Notwithstanding that the plaintiff had sought for "any other relief that the court may be inclined to grant" we find and hold that such a relief must be clearly supported by the averments in the plaint and the evidence.

37. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or

such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. (See *Galaxy Paints Co. Ltd v Falcon Guards Ltd* (2000) 2 EA 385 and *Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 others* Civil Appeal No. 37 of 2003 (2004) 2 KLR 183).

38. In our view, the appropriate relief in the circumstances of this case should have been an order directing the Land Registrar to investigate the said title and to take appropriate action. That way, the court could have in exercise of its inherent jurisdiction addressed the danger of leaving intact two titles in respect of the same property.

39. Flowing from our analysis of the law and the conclusions arrived at, we find and hold that this appeal lacks merit. We affirm the judgment delivered on February 12, 2010 save for the order cancelling the appellant's title which we hereby substitute with an order directing the Registrar of Titles, Nairobi, to investigate the respondents title number LR No. 106/285 and take appropriate action. The appellant shall pay the costs of this appeal and the costs of the High Court proceedings to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

M WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR