



Municipal Council of Kisumu v Mayfair Holdings Limited (Civil Appeal 124 of 2018) [2023] KECA 844 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 844 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 124 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 7, 2023

BETWEEN

MUNICIPAL COUNCIL OF KISUMU APPELLANT

AND

MAYFAIR HOLDINGS LIMITED RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court in Kisumu (Kibunja J.) dated 30th May 2018 in ELC Case No. 368 of 2015 (Formerly Kisumu HCC No. 20 of 2006))

JUDGMENT

Judgment of Mumbi Ngugi JA

1. In its plaint dated December 20, 2005, the respondent averred that it was the registered owner of land parcel number Kisumu/Municipality/Block 8/296 situated between Jomo Kenyatta Highway and Kibiki Road within the then Kisumu Municipality. At a mention before the trial court on May 17, 2018, the title number was amended by consent to Kisumu/Municipality/Block 8/297 (hereafter ‘the suit property’).
2. It was the respondent’s case that it had prepared and submitted to the appellant, which had the legal mandate to control developments in the area, development plans in respect of the suit property. The plans had been approved on the basis that the development would be accessed from both Jomo Kenyatta Highway and Kibiki Road.
3. In breach of its duty to the respondent, however, the appellant had constructed or authorised the construction of a structure on Kibiki Road, which had the effect of not only blocking access to the road from the respondent’s property but also from serving as a service lane to the respondent’s property. Further, it had authorised some seven businesses, named in the plaint, to operate businesses on the respondent’s property.



4. The respondent therefore sought two substantive orders from the court. It sought, first, an order of permanent injunction directed at the appellant restraining it either by its employees, agents, appointees or officers from interfering with the respondent's quiet possession and enjoyment, by erecting structures to its access road, by licensing trespassers to carry out business upon the respondent's parcel of land or in any other way defeating the respondent in its enjoyment of its proprietary rights over Kisumu Municipality/Block 8/297; secondly, a mandatory injunction directed at the appellant compelling it to remove or demolish the structures erected along Kibiki Road and any other illegal structures by trespassers upon the respondent's parcels of land in order that the appellant discharges its public duty to the respondent. The respondent also sought any other remedy from the court, as well as the costs of the suit.
5. In a statement of defence dated March 15, 2006, the respondent denied that the respondent was the registered owner of the suit property. It however admitted that it had the duty to control development in its area of jurisdiction and it was responsible for licensing business premises within the municipality. It averred that the building that the respondent complained of was on Uhuru Park and had not interfered with any properties adjacent to the public park. It asserted that it could not be compelled to create a road of access where none existed.
6. It was its contention further that the alleged trespass by the businesses listed by the respondent in its pleadings did not fall within the appellant's mandate. Further, that its approval of the respondent's building plans did not mention its access in relation to Jomo Kenyatta Highway or Kibiki Road.
7. The respondent's claim was heard through oral evidence in which its director testified. The appellant did not tender any evidence in support of its defence.
8. In its decision dated May 30, 2018, the trial court found in favour of the respondent. It noted that the respondent became the registered proprietor of the suit property on November 1, 1993. It was therefore the absolute and indefeasible owner of the leasehold interest over the suit property in terms of section 26 (1) of the Land Registration Act No 3 of 2012. The court further found that by issuing licences to the structures operated on the respondent's property, the appellant made it impossible for the respondent to carry out the development of the land. It held that the respondent had established its case against the appellant on a balance of probabilities and issued the orders impugned in this appeal, which I shall revert to later in this judgment.
9. The appellant was aggrieved with the decision and it filed the present appeal raising six grounds of appeal in the memorandum of appeal dated June 16, 2018. The appellant contends that the learned trial judge erred in law and fact in:
 - i. 'Failing to find that the evidence tendered by the respondent fell far below the standard of proof;
 - ii. Lowering the standard of proof below that of a balance of probabilities;
 - iii. Shifting both the burden of proof and the incidence of proof against the spirit and letter of sections 107 and 108 of the Evidence Act;
 - iv. Going beyond the respondent's pleadings and witness testimony and making orders on matters which the respondent bore both the burden of proof and the incidence of proof;



- v. Holding that the failure by the appellant to call a witness meant that the respondent had proved its case; and in reaching a decision that is against the weight of the evidence on record.'
10. The appellant asserts in its final ground of appeal that the decision of the trial court went against the weight of evidence.
11. The appellant filed submissions dated November 10, 2022. It was represented by its learned counsel, Mr Onsongo, at the hearing of the appeal. It is its submission that the trial court failed to consider the pleadings before it and granted orders which had not been sought. Further, that there was no evidence to support the respondent's pleadings as in its evidence, it had exonerated the appellant from any wrong doing when its witness confirmed on oath that the persons named in paragraph 11 of the plaint are the ones who erected structures on the appellant's parcel of land.
12. The appellant submits further that the ELC erred when it made orders that are not in consonance with the respondent's pleadings, citing in support of this submission the case of *Captain Harry Gandy vs Caspair Air Charters Ltd [1956]23 EACA 139*.
13. In its submissions in response dated November 9, 2022, the respondent, represented by learned counsel, Mr Ojuro, supported the decision of the trial court. It asserts that it is trite law that the standard of proof in civil cases is on a balance of probabilities. During the trial, it had produced evidence to prove that it is the registered proprietor of Kisumu Municipality/Block 8/297 and that the appellant had approved its building plans. The appellant had not controverted the respondent's evidence that it had issued licences to other people to operate businesses within the suit property. It had proved its ownership of the suit property by producing a certificate of lease, and the burden had shifted to the appellant to disprove such ownership.
14. The respondent submitted further that since the appellant had elected not to tender any evidence, the respondent's evidence remained uncontroverted. The respondent relies on the case of *Autar Singh Babra and Another v Raju Govindji HCCC No 548 of 1998* (unreported) cited in [Molex Knitwear Limited v Gopitex Knitwear Mills Limited \(2009\) eKLR](#) for the proposition that where a defendant fails to tender evidence, its defence is unsubstantiated and the plaintiff's case stand unchallenged.
15. At the hearing of the appeal, learned counsel, Mr Mwamu, appearing for a party who had not participated in the matter before the trial court, supported the appeal. He submitted that the trial court had made a judgment that was not supported by the pleadings and its decision should be set aside.
16. In his submissions in response to Mr Onsongo's submissions, Mr Ojuro contended that the trial court had not given orders not sought by the respondent. Rather, it had only given directions on how the injunctive orders it had issued were to be effected. It was his submission that the court was in order to invite the District Surveyor to visit the land in enforcement of the injunction that had been prayed for by the respondent.
17. Counsel further submitted that in his testimony, the respondent tendered evidence that the structures on the suit land belonged to people who had been licenced by the appellant. Since the appellant was charged with planning in the city, it was proper for the court to issue an order for the removal of those structures by the appellant.
18. This is a first appeal. We are accordingly required, under Rule 31(1) of the [Court of Appeal Rules 2022](#), to re-evaluate the evidence before the trial court and draw inferences of fact, and, as was held in *Selle v Associated Motor Boat Co [1968] EA 123*, arrive at our own independent conclusions.



19. Before embarking on this analysis, I observe, regarding the submissions by Mr Mwamu on behalf of an alleged interested party, that this party did not participate in the proceedings before the trial court, nor was an application made before us for her joinder. I note, however, that she essentially supports the appellant's appeal, so a determination of the issues raised in the appeal will address the arguments raised by Mr. Mwamu on her behalf.
20. Amin Mohamed Gilani testified on behalf of the respondent and adopted his statement dated February 27, 2017. His testimony was that the respondent was the proprietor of the suit property. The appellant had, however, put up structures along Kibiki Road, thereby blocking the respondent's access to the road and denying it the use of the road as a service lane to its land parcel. Mr Gilani produced in evidence a copy of the transfer of lease and a certificate of lease issued in its name. The respondent sought an order of injunction restraining the appellant from interfering with its possession and enjoyment of the suit land and also sought an order compelling the appellant to remove or demolish the structures erected along Kibiki Road and any other illegal structures by trespassers upon the respondent's suit land.
21. In cross-examination, Mr Gilani maintained that the building by the appellant is on the road reserve and is blocking the access to the respondent's land. It had sued the appellant for licencing the developments on the road reserve.
22. The appellant did not call any witness to present its case before the trial court.
23. The appellant has identified three issues for determination: whether the trial court was entitled to make orders and findings that were not prayed for; whether there was evidence in support of the findings and orders of the court; and who should bear the costs of the suit.
24. I have considered the record of appeal and the submissions of the parties. I note that the only evidence before the trial court was presented by the respondent. It produced a transfer of lease and a certificate of lease issued in its name which showed that it was the registered owner of the suit property. While the appellant had, in its statement of defence, disputed the respondent's claim that it was the owner of the suit property, it did not call any witnesses or produce any documents to controvert the respondent's claim of ownership. The trial court noted that the respondent became the registered owner of the suit property on November 1, 1993 as confirmed by the certificate of lease and the certificate of official search produced by the respondent.
25. In making the finding that the respondent was the owner of the suit property, the trial court observed as follows:

' 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*.'
26. Given the evidence before it, the trial court cannot be faulted for making this finding.
27. The appellant argues that the trial court erred in shifting both the burden of proof and the incidence of proof against the spirit and letter of sections 107 and 108 of the *Evidence Act*. These sections provide as follows:

107.



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

28. I have considered these provisions against the decision of the trial court and the evidence before it. The respondent's case was that it was the registered owner of the suit property situated between Jomo Kenyatta Highway and Kibiki Road. It further alleged that the appellant, which had the statutory obligation to control developments in the then municipality of Kisumu, had constructed a building on Kibiki Road. It had further, again in exercise of its statutory mandate, licenced several entities-Hangover Hotel, Coca Cola stand, Kinsman Printers, Arms King Insurance Agency, Copy Bird Computer Services, Toby Star fashion House and Dr Ondondi- to carry out businesses on the respondent's property and on the road reserve.
29. I observe, first, that the appellant has admitted, albeit tacitly, at paragraph 4(c) of its statement of defence, that it had constructed the building that the respondent was complaining about, although it contended that the building was constructed on Uhuru Park. Secondly, while it admitted its statutory duties with respect to control of developments and licensing of business premises, and despite being confronted with the respondent's evidence, oral and documentary, regarding the businesses operating on its premises and on the road reserve, the appellant, did not see it fit to adduce evidence in rebuttal.
30. The trial court found that the appellant had not controverted the evidence adduced by the respondent, which it ought to have done to support the statements of fact in its defence. Where a party fails to call evidence in support of its case, the party's pleadings are not evidence but remain mere allegations which are of no probative value since they remain unsubstantiated pleading which have not been tested by cross-examination. This position was succinctly expressed by Madan, JA in *CMC Aviation Ltd v Crusair Ltd (No 1)* [1987] KLR 103 when he stated:

' The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

As stated in the definition of 'evidence' in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.'

31. However, contrary to the submission by the respondent, in reliance on the High Court decision in *Autar Singh Bahra and Another v Raju Govindji* cited in *Molex Knitwear Limited v Gopitex Knitwear Mills Limited* (supra), the failure of a party to adduce evidence, by itself, is not sufficient to justify the entry of judgment in favour of a claimant. There must be evidence that satisfies the court, on a balance of probabilities, that it should enter judgment for it.



32. In *Charterhouse Bank Limited (Under Statutory Management v Frank N Kamau [2016] eKLR*, this Court considered the burden of proof on the plaintiff where the defendant fails to adduce evidence and stated that:

' We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.'

33. In this case, the respondent produced evidence that it is the registered proprietor of the suit property, situated between Kenyatta Highway and Kibiki Road. It had obtained development approval from the appellant, which had the statutory mandate to give such approval. It had been denied access to Kibiki Road because of a development on the road, tacitly admitted by the appellant, but which the appellant alleged was on Uhuru Park, without calling evidence to prove the fact.

34. The evidence showed further that the respondent had paid the appellant in order to obtain a survey and establishment of the beacons of the suit property as evidenced by a receipt for Kshs 10,000 paid by the respondent to the appellant on December 9, 2004. The respondent's evidence further was that the appellant had licensed several business premises on the road, a fact denied by the appellant while admitting that it had the statutory mandate to licence business premises in the municipality. In the circumstances of this case, the trial court was correct in finding that the respondent had established its case on a balance of probabilities, and it was therefore correct in entering judgment in its favour.

35. I consider, finally, the argument by the appellant that the trial court's judgment should be set aside as the court issued orders that had not been prayed for. The appellant submits that no matter how sympathetic a judge may be to a party, no order can be made, outside a party's pleadings, unless by consent.

36. In its plaint, the respondent sought 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.'

37. In the judgment, the trial court made orders 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 December 20, 2005 granted.
- d) The Defendant do pay the Plaintiff's costs of the suit.'

38. The appellant is partly correct in its assertion that the trial court issued orders that were not prayed for. While it granted, at orders (b) and (c), the orders that the respondent had prayed for in its plaint, order (a) would appear to have been intended to achieve what the respondent sought in its suit. It appears to me that the trial court cannot be faulted for issuing that order. The respondent had sought 'Any other or further remedy', which is an unspecified request for any other relief that the court deems a party is entitled to. The duty of the court is to do substantive justice, and it is not limited, in issuing orders upon determination of a matter, to granting only such orders and in such terms as a party prays for.

39. In its decision in *Timsales Limited v Samuel Kamore Kihara [2016] eKLR*, in considering what orders can be granted under the ambit of the prayer for 'any other or further relief or remedy' this Court stated as follows:

' In *Rex Hotel Ltd versus Jubilee Insurance Co. Ltd [1972] EA 211* the predecessor of this Court was categorical that a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief sought.'

40. Similarly, in its decision in *Bell & another v IL Matterello Limited (Civil Appeal 72 of 2019) [2022] KECA 168 (KLR) (February 18, 2022)* (Judgment), this Court considered the exercise of the inherent powers of the court and the nature of relief that can be granted pursuant to the general prayer encapsulated in 'any other relief' and observed as follows:

' 33. The principles of law that guide a court of law when invoking and applying its inherent power for ends of justice to be met to the parties before the court are as crystallized by case law. See *Equity Bank Limited vs West Link Mbo Limited [2013] eKLR*; and *Board of Governors, Moi High School, Kabarak & Another*



vs Malcolm Bell [2013] eKLR wherein this Court and the Supreme Court of Kenya variously stated inter alia that: inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute; and second, that inherent power is an endowment to the Court such to enable it regulate its internal conduct, and ensure that its mode or discharge of duty is conscionable, fair and just. Those for invoking the general provision of 'any other relief that the court may deem fit to grant', were as enunciated by the predecessor of this court in the case of Rex Hotel Limited vs Jubilee Insurance Company Limited [1972] EA 211 as approved by this Court in Timsales Limited vs Samuel Kamore Kihara [2016] eKLR for the holding, inter alia, that 'a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief.'

41. In this case, the respondent sought orders for the removal of businesses licensed to operate on its premises and on Kibiki Road which were blocking access to its premises. It had established, on a balance of probabilities, that it is the registered owner of the suit property, that the property is situated between Jomo Kenyatta Highway and Kibiki Road; that its development plans had been approved by the appellant, which had also licensed businesses, in accordance with its statutory mandate, to operate businesses on the respondent's premises and on Kibiki Road; and that its access to Kibiki Road had been blocked. The orders issued by the trial court were necessary for the ends of justice and consequential to the grant of the main prayers in the plaint. I am therefore satisfied that the trial court was justified in issuing the said orders, and its judgment cannot be impugned on this basis.
42. In light of the above matters, I am satisfied that the appeal has no merit. I would therefore dismiss it with costs to the respondent.

Judgment of Kiage, JA

43. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA and I am in full agreement with her reasoning, the conclusion she reaches, and the order she proposes.
44. As Tuiyott, J.A is in agreement, the appeal is dismissed with costs to the respondent.

Judgment of Tuiyott, JA

45. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL



*I certify that this is
a true copy of the original*

Signed

DEPUTY REGISTRAR

