



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT KISUMU  
(CORAM: TUNOI, LAKHA & KEIWUA, JJ.A.)  
CIVIL APPEAL NO. 241 OF 1998**

**BETWEEN**

**BALBIR SINGH  
t/a DELUXE FURNISHING HOUSE ..... APPELLANT**

**AND**

**KITAMBA DISTRIBUTORS LIMITED  
RAMJI KHIMJI SHAH  
PRABHULAL RAMJI SHAH  
KAUSHIK RAMJI SHAH  
DAILESH RAMJI SHAH..... RESPONDENTS**

**(Appeal from a Judgment of the High Court of Kenya at Kisumu  
(Justice I.C.C. Wambilyangah) dated 17th February, 1998  
in  
H.C.C.C. NO. 18 OF 1997)**

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**JUDGMENT OF THE COURT**

This is an appeal brought by **BALBIR SINGH t/a DELUXE FURNISHERS HOUSE** who was the defendant in an action brought in the superior court where it was heard by Wambiliangah, J. He delivered judgment in the action on 17 February 1998 for the respondents for vacant possession of **Plot No. Kisumu/Municipality/Block 7/394 (the suit property)** and for general damages in the sum of **K.Shs.686,000** together with costs and interest at court rates.

The relevant facts were these. On 17 September 1970 the Kisumu Municipal Council granted possession to the defendant to store its timber on the suit property on a temporary basis for a period of eight months. Subsequent thereto, on or about 5 May 1986 the Government of Kenya allocated the suit property to the first respondent who sold the same to the second, third, fourth and fifth respondents at an agreed price. Despite a notice of intention to sue, the defendant refused to surrender possession of the suit property.

The plaintiffs then brought their claim in possession against the defendant. This was done by a plaint dated 16 January 1997 wherein the plaintiff claimed an order for a permanent injunction restraining the defendant from continuing to carry on business, entering and remaining on, alienating and or interfering in any way with the plaintiffs' suit property, an order for vacant possession, mesne profits and costs. On the same day the plaintiffs applied by a Chamber Summons for an injunction in substantially the same terms as in the plaint.

By his defence, the defendant, apart from a general denial, raised two issues, both of which were decided against him and in favour of the plaintiffs. The two issues were: first, that the plaintiffs' allocation was

subsequent to that of the defendant's; and, second, it was contended that the plaintiffs had no interest in the suit property having sold the same. Both those issues, as we say, were decided in favour of the plaintiffs by the judge. There is no appeal on the part of the defendant against those findings or the decision of the judge on those defences. The defendant, however, appeals against that part of the judge's decision where he awarded the plaintiffs general damages and an order for eviction and/or possession.

Before we turn to consider the defendant's complaints in respect of these two matters, we must complete our narrative of the events in the superior court. The plaintiffs' application for an injunction dated 16 January 1997 was heard by the learned judge inter partes on 29 January 1997 and ruling delivered on 3 February 1997 granting the injunction. Although it was granted pending the determination of the application an eviction order was apparently issued on 7 February 1997 pursuant to which as the evidence discloses possession was removed from the defendant. Be that as it may, the suit was heard on 4 August and 24 September 1997 when two witnesses gave evidence on behalf of the plaintiffs and the defendant also gave evidence.

The parties filed written submissions. We now deal with the defendant's main two contentions. First, it is contended that the learned judge erred in making an award of general damages as stated in the decree. No relief for general damages was sought or prayed for in the Amended Plaintiff and there was no basis in law for making an award of general damages. Cases are decided on the basis of pleadings and no relief can be granted which is neither sought nor prayed for.

Although the amended plaintiff set out only in the prayers sums of mesne profits, it did not plead a case for mesne profits. In any event, the sums of money claimed were not proved by evidence to support or justify and provide a basis for such a claim for mesne profits. With respect, the learned judge erred in law in making any monetary award as he did.

Secondly, the appellant contends that an order for eviction or recovery of possession did not lie and that the learned judge erred in law in granting such a relief. It is true that such a relief was specifically prayed for in the amended plaintiff, but, it was not in issue since it had already been granted and possession was already surrendered to the plaintiffs at the time of the hearing. During the course of the hearing on 24 September 1997, the plaintiffs' first witness in his testimony stated:-

***"..... When we served a Court order on the defendant, he removed timber and wood from the premises. He also removed old material lying there as scrap."***

The second of the plaintiffs' witness stated during his cross -examination as follows:-

***"..... We got possession after the Court order ..... We got vacant possession in February, 1997."***

During his cross-examination, the defendant stated:-

***" ..... There was no property of mine except a heap of stones which I removed in January, 1997. These were stones of no value ....."***

And finally, in his written submissions, the plaintiffs' advocate stated:

***" ..... First and foremost if we look at the defendant's pleadings which are on record it clearly confirms that he has been in occupation until a court order evicted him ....."***

The record of appeal includes (at p. 96(a)) the Eviction Order from the Deputy Registrar of the superior court addressed to the Court Bailiff to put the plaintiffs into possession of the suit property.

The evidence on behalf of the plaintiffs and that of the defendant above referred to and the plaintiffs' advocate's submissions confirm that the plaintiffs had already recovered possession. It appears, with respect, that the learned judge either overlooked the Eviction Order made and the evidence above set out or failed to give any effect to the same. It is trite that no Court acts in vain and if as in the case the

plaintiffs had already recovered possession then no further order was required to be made and the learned judge, with respect, erred in doing so.

In the present case, therefore, it appears to us that this appeal falls to be allowed with three - fourths costs and the decree of the superior court dated 17 February 1998 in the High Court of Kenya being Kisumu **Civil Case No. 18 of 1997** be and is hereby varied by adding an order dismissing the plaintiffs' suit with costs thereof to the defendant and by wholly deleting the monetary award. It is further ordered that the decretal sum deposited in a joint account of the advocates of the parties in Barclays Bank Kisumu Branch pursuant to a consent order of 8 October 1998 as a condition of stay be paid out forthwith to the defendant. For the avoidance of doubt the orders for vacant possession is confirmed but no execution in respect thereof is to issue since possession was handed over by the defendant to the plaintiffs during the course of the hearing.

**Dated and delivered at Kisumu this 10th day of August, 2001.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**M. KEIWUA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**