



Mahulo (Also suing as the administrator of the Estate of the Late Marcelina Amolo Mahulo) v Okello & 4 others (Environment & Land Case 150 of 2014) [2022] KEELC 13636 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 150 OF 2014
A OMBWAYO, J
OCTOBER 13, 2022**

BETWEEN

**GRACE AYUGI MAHULO PLAINTIFF
ALSO SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE
MARCELINA AMOLO MAHULO**

AND

**SAMUEL OKELLO 1ST DEFENDANT
GEORGE OCHIENG 2ND DEFENDANT
LAMECK ARODI 3RD DEFENDANT
MWANAISHA TUNDUKA 4TH DEFENDANT
BRIGIT ODERA 5TH DEFENDANT**

JUDGMENT

1. Grace Ayugi Mahulo (also suing as the administratrix of the estate of the late Marcelina Amolo Mahulo (hereinafter referred to as the plaintiff) in a plaint dated March 31, 2014 and filed on June 3, 2014 on her behalf and on behalf of the estate of the late Marcelina Amolo Mahulo has brought this action against the defendants Samuel Okelo, George Ochieng, Lameck Arodi, Mwanaisha Tunduka and Brigit Odera claiming that at all material times relevant to this suit, the plaintiff and the Marcelina Amolo Mahulo (deceased) are the current registered owners/proprietors of all that parcel of land known as Kisumu/kinyakwar“A”/27 hereinafter referred to as the ‘the suit property’.
2. The plaintiff claims that in execution of a decree dated January 16, 2007 in Kisumu CMCC Land Case No 36 of 2006, the District Land Registrar, Kisumu East/West issued a Title Deed dated August 2, 2012 in the names of the plaintiff and Marcelina Amolo Mahulo (now deceased) as co-owners.



3. The defendants (jointly and severally) who had no proprietary, legal and or equitable interests in the plaintiff's said parcel of land are currently unlawfully, illegally and without any colour of right occupying the plaintiff's said land; they have erected structures in the said land and are using the same as business premises as well as for residential purpose and hence denying the plaintiff access and use of her parcel of land.
4. As a result of the defendants' said action (jointly and severally), the plaintiff who is entitled to exercise proprietary rights in her said parcel of land has been denied use, occupation and or possession of the same as a result of which she had suffered and continues to suffer damages in the nature of mesne profits for loss of use at the rate of Kshs 30,000/= per month which she claims and seeks to recover from the defendants jointly and severally.
5. There was a previous suit, Kisumu High Court (ELC) No 58 of 2012, Grace Ayugi Mahulo & another v Samuel Okello & 4 others that was withdrawn before being heard on account of the fact that it had been instituted in the names of the Plaintiff and Mercelina Amolo Mahulo who had by then passed on. The cause of action arose within the jurisdiction of this honourable court.
6. The plaintiff prays a declaration/finding that the plaintiff is the owner/proprietor of all that parcel of land known as Kisumu/kinyakwar "A"/27 and the defendants jointly and severally who are currently occupying the same are trespassers. moreover, an eviction order against the defendants jointly and severally. furthermore the plaintiff prays for a permanent mandatory injunction restraining the defendants jointly and severally by themselves, their servants or agents or any other person claiming their authority from remaining on, occupying, using, developing, or in any other way interfering with the Plaintiff's proprietary rights over/in all that parcel of land known as Kisumu/kinyakwar "A"/27.
7. Lastly, the plaintiff prays for Mesne profits for loss of use at Kshs 30,000.00 per month with effect from August 2, 2012 (the date of issue of the title deed for the said parcel of land) until the defendants jointly and severally surrender the said parcel of land in vacant possession or their eviction. Costs of the suit. Interests on the above.
8. The 1st and 3rd defendants filed defence denying allegations by the plaintiff and averred that they are in occupation of the un-surveyed residential plots number 122 and 120 Migori site and service Scheme Kisumu Municipality respectively. They claimed to be bonafide purchasers of the suit property and therefore are in lawful possession. The 2nd, 4th and 5th defendants did not file any statement of defence.
9. When the matter came up for hearing the plaintiff called five (5) witnesses namely; Grace Ayugi Mahulo, Paul Kibet Rugut, Elly Ogolla, Nelson Ogeto and John Absalom.
10. Grace Ayugi Mahulo as PW1 testified that she is the owner of all that parcel of land known as Kisumu/kinyakwar "A"/27 along with her co-wife Mercelina Amollo Mahulo and that they became so registered on the basis of a decree in Winam PMCC No 36 of 2006. That after such registration, she undertook a survey to establish the extend and boundaries of the said parcel of land only to find out that the defendants jointly and severally were occupying and were in physical/actual possession of a portion of her land. She demanded that they vacate but to no avail. During her testimony, she produced several documents as exhibits namely, the original title deed (exhibit p1), a copy of grant of letters of administration (exhibit p2), and all the other documents listed in the plaintiff's list of documents dated June 5, 2014. Accordingly, she produced exhibits 1 to 11. The defence did not call any evidence.
11. The plaintiff filed submissions whose import is that the plaintiff is the lawful owner of Kisumu/kinyakwar "A"/27 and that the defendants are in possession without her permission and therefore the occupation is illegal. The gravamen of the plaintiff's submissions is that there was no creation of plots number 120 and 122 as there are no documents supporting the creation of the plots.



12. I have considered the evidence on record submissions by counsel and do find that the suit property is registered in the names of the plaintiff and that plots number 120 and 122 are non-existent. The plaintiff's rights to property are protected by article 40 of the Constitution of Kenya 2010 and section 26 of the Land Registration Act 2012 that provides:-
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
13. In considering section 26 in Republic v Land Registrar Taita Taveta District & another [2015] eKLR, this court held as follows:
34. The court must therefore uphold the rule of law with regard to the applicant's rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 .
14. There is no evidence of fraud, illegality or corrupt Scheme attributable to the plaintiff in acquisition of the title in respect of Kisumu/kinyakwar“A”/27 hence the title cannot be impeached. I do find that the plaintiff has made her case on a balance of probabilities and I do grant a declaration that the Plaintiff is the owner/proprietor of all that parcel of land known as Kisumu/kinyakwar“A”/27 and the defendants jointly and severally who are currently occupying the same are trespassers.
15. Further I do grant an eviction order against the defendants jointly and severally. Moreover, I do grant a permanent mandatory injunction restraining the defendants jointly and severally by themselves, their servants or agents or any other person claiming their authority from remaining on, occupying, using, developing, or in any other way interfering with the plaintiff's proprietary rights over/in all that parcel of land known as Kisumu/kinyakwar“A”/27.
16. I do decline to grant mesne profits as the same was not proved. Costs of the suit to the plaintiff. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF OCTOBER, 2022

A. O OMBWAYO

JUDGE

