



Mahulo (Suing on her Behalf and as the Administrator of the Estate of Marcelina Amolo Mahulo) v Okello & 4 others (Environment & Land Case 150 of 2014) [2024] KEELC 7427 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 150 OF 2014
SO OKONG'O, J
OCTOBER 31, 2024**

BETWEEN

**GRACE AYUGI MAHULO PLAINTIFF
SUING ON HER BEHALF AND AS THE ADMINISTRATOR OF THE ESTATE
OF MARCELINA AMOLO MAHULO**

AND

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

RULING

1. The full facts of this case are set out in the judgment of this court delivered on 19th June 2024. In summary, the Plaintiff filed this suit through a plaint dated 31st May 2014. The Plaintiff averred that the Plaintiff together with one, Marcelina Amolo Mahulo, deceased (hereinafter referred to only as “the deceased”) were the registered owners of all that parcel of land known as Kisumu/Kanyakwar “A”/27 (hereinafter referred to only as “the suit property”). The Plaintiff averred that the suit property was registered in her name and that of the deceased on 2nd August 2012 following a decree that was issued in their favour in Kisumu Land Case No. 36 of 2006 (hereinafter referred to only as “the lower court case”).
2. The Plaintiff averred that the Defendants who had no proprietary interest in the suit property were occupying the same illegally and had erected structures thereon which they were using for business and



- residential purposes. The Plaintiff averred that the Defendants had denied her access and use of the property as a result of which she had suffered and continued to suffer loss and damage.
3. The Plaintiff sought judgment against the Defendants jointly and severally for;
 - a. A declaration that the Plaintiff was the proprietor of the suit property and that the Defendants jointly and severally were trespassers thereon;
 - b. An order of eviction of the Defendants from the suit property.
 - c. A permanent injunction restraining the Defendants jointly and severally by themselves and/or through their agents and/or servants and/or anyone claiming title under them from remaining on, occupying, using, developing, or in any other way interfering with the Plaintiff's proprietary rights over the suit property.
 - d. Mesne profits for loss of use at the rate of Kshs. 30,000/- per month with effect from 2nd August 2012 until possession of the suit property is surrendered to the Plaintiff.
 - e. Costs of the suit and interest.
 4. The 1st and 3rd Defendants filed a joint statement of defence on 22nd July 2014. The 1st and 3rd Defendants denied that they were occupying the suit property unlawfully. The 1st and 3rd Defendants averred that they were in occupation of a parcel of land known as unsurveyed residential Plot No. 122 and unsurveyed residential Plot No. 120 respectively within Migosi Site & Service Scheme, Kisumu Municipality (hereinafter referred to together as "the Defendants' Plots" and individually as "Plot No. 122" and "Plot No. 120" respectively). The 1st and 3rd Defendants denied that they were occupying the suit property. The 3rd Defendant averred that he was a bona fide purchaser of Plot No. 120 from one, Isaya Owalla Odembo.
 5. The 1st and 3rd Defendants denied that they had denied the Plaintiff occupation and use of the suit property and that the Plaintiff had suffered any loss or damage. The 1st and 3rd Defendants denied that they were liable to the Plaintiff for mesne profits in the sum of Kshs. 30,000/- per month or at all. The 1st and 3rd Defendants denied that the previous suit between the parties namely; Kisumu ELC No. 58 of 2012, Grace Ayugi Mahulo & another v. Samuel Okello & 4 others had been withdrawn. The 1st and 3rd Defendants averred that the Plaintiff's suit was incompetent and urged the court to dismiss the same with costs.
 6. The 2nd, 4th and 5th Defendants did not enter appearance to the Summons to enter appearance. Interlocutory judgment was entered against them on 3rd July 2014. On 18th January 2023, the 5th Defendant applied to enter an appearance and file a defence out of time. The application was dismissed on 9th February 2023.
 7. The court heard the parties and entered judgment for the Plaintiff against the Defendants on 19th June 2024. In the judgment, the court declared that the Plaintiff was the owner of the suit property and that the Defendants were trespassers thereon. The court ordered the Defendants to vacate the suit property within 30 days from the date of the judgment in default of which they be evicted therefrom. The court also awarded the Plaintiff mesne profits of Kshs. 1,000,000/-, and the costs of the suit.
 8. What is now before the court is the 5th Defendant's application brought by way of an undated Notice of Motion filed on 21st August 2024 seeking a stay of execution of the judgment delivered on 19th June 2024 pending the hearing and determination of the appeal the 5th Defendant (hereinafter referred to only as "the Applicant") intends to file in the Court of Appeal against the same.



9. The application was brought on several grounds. The Applicant averred that she was dissatisfied with the said judgment and intended to appeal against the same to the Court of Appeal. The Applicant averred that her appeal had a high chance of success. The Applicant averred that the court ordered among others that the Applicant be evicted from the suit property which eviction if carried out would be irreversible and as such would cause her irreparable harm. The Applicant averred that she was willing to abide by any term that the court may impose as a condition for granting the stay sought. The Applicant averred further that the Plaintiff was a person of unknown means and if the decretal amount is paid to her, she may not be able to refund the same should the appeal be successful thereby rendering the appeal nugatory. The Applicant averred that she would suffer substantial loss and damage if the orders sought were not granted.
10. The application was opposed by the Plaintiff through grounds of opposition dated 27th August 2024. The Plaintiff contended that the Applicant did not have an interest in the suit property and as such lacked the locus standi to apply for a stay of the judgment of 19th June 2024. The Plaintiff contended that the applicant did not meet the threshold for granting a stay. The Plaintiff contended that the application lacked merit and urged the court to dismiss the same.
11. When the application came up for hearing, the parties left it to the court to determine based on the material on record. I have considered the Applicant's application and the affidavit filed in support thereof. I have also considered the Plaintiff's grounds of opposition filed in opposition to the application. The Applicant's application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that:
 - “6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub-rule (1) unless-
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as ultimately be binding on him has been given by the applicant.”
12. In *Kenya Shell Limited v. Karuga* (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI rule 4 of the [Civil Procedure Rules](#) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has



to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

13. I am satisfied that the Applicant’s application was brought without unreasonable delay. However, I am not satisfied that the Applicant stands to suffer substantial loss if the stay sought is not granted. As I mentioned earlier in this ruling the Applicant (5th Defendant) did not defend this suit. Having not defended the suit, this court is unable to establish the nature of the interest if any that the 5th Defendant has on the suit property which needs to be protected by an order of stay.
14. In the ruling delivered on 9th February 2023 on the Applicant’s application to set aside the interlocutory judgment that was entered against her on 3rd July 2014 and for leave to file a defence out of time, this court stated as follows:

“I am also not persuaded that the 5th defendant has an arguable defence to the plaintiff’s suit. The evidence placed before the court by the 5th defendant in support of her claim to a portion of the suit property shows that her claim is based on Plot No. 28 which was cancelled from the adjudication map and record in 1985. The parcel of land on which the 5th defendant’s claim over the suit property is based is therefore nonexistent. I am not persuaded either of the merits of the 5th defendant’s adverse possession claim. The 5th defendant has not explained how she intends to pursue her adverse possession claim in this suit. There is no such claim in the draft defence annexed to the application.”
15. Substantial loss referred to in Order 42 Rule 2(a) of the Civil Procedure Rules must relate to an existing interest or right in the subject matter of the suit which the court should preserve pending the hearing of an appeal. In the application before me, the Applicant had a duty to demonstrate that she had a right or interest in the suit property which was contested in the present suit and which was not upheld by the court in the judgment of 19th June 2024, and which interest or right she wishes to pursue in the Court of Appeal. I am not satisfied that the Applicant has a right or interest in the suit property which should be preserved pending the hearing of the appeal.
16. As concerns, the monetary award of Kshs. 1,000,000/-, the Applicant has not persuaded me that she will suffer substantial loss if she pays the said amount. The Plaintiff has a judgment in her favour for the said sum of Kshs. 1,000,000/- which in my view is not substantial. The burden is not on the Plaintiff to prove that she has the means to refund the said amount to the Applicant should the Applicant succeed in her intended appeal. The burden is on the Applicant who has claimed that the Plaintiff may not refund the said amount to establish that fact. It is my finding that this burden has not been discharged. A bare assertion that a decree-holder is not a person of means is not sufficient to earn a judgment debtor a stay of money decree.
17. In the final analysis, I find no merit in the Applicant’s undated application filed on 21st August 2024. The application is dismissed with costs.

DATED AND DELIVERED AT KISUMU ON THIS 31ST DAY OF OCTOBER 2024.

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Onsongo for the Plaintiff

N/A for the 1st and 3rd Defendants



N/A for the 2nd, 4th and 5th Defendants

Ms. J. Omondi-Court Assistant

