



Free Pentecostal Fellowship in Kenya Registered Trustees v Macedonia Resort Club Limited & 2 others (Environment and Land Case Civil Suit 15 of 2013) [2024] KEELC 6995 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 15 OF 2013
SO OKONG'O, J
OCTOBER 23, 2024**

BETWEEN

FREE PENTECOSTAL FELLOWSHIP IN KENYA REGISTERED TRUSTEES PLAINTIFF

AND

MACEDONIA RESORT CLUB LIMITED 1ST DEFENDANT

HON. KENNEDY ODHIAMBO NYAGUDI 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. The full facts of this case are set out in the judgment of this court that was delivered on 29th February 2024. In summary, the Plaintiff brought this suit against the 1st and 2nd Defendants on 25th February 2013. The plaint was amended on 27th September 2021 to add the 3rd Defendant to the suit. In its amended plaint, the Plaintiff averred that at all material times, Free Pentecostal Fellowship in Kenya (the Church) was the registered owner of all that property known as Unsurveyed Plot No. “A”-Kisumu Municipality measuring approximately 1.2 hectares (hereinafter referred to only as “the suit property”). The Plaintiff averred that the Church had occupied and used the suit property since 1997. The Plaintiff averred that the Church had put up a church building on the suit property.
2. The Plaintiff averred that the 1st and 2nd Defendants illegally and fraudulently caused the suit property to be registered in the name of the 1st Defendant. The Plaintiff averred that the Church did not sell the suit property to the 1st and 2nd Defendants and as such the allotment and registration of the suit property in the name of the 1st Defendant was fraudulent, illegal, null and void. The Plaintiff averred that on 5th April 2013 while this suit was pending, the 2nd Defendant working in cahoots with the Registrar of Titles and the 3rd Defendant contemptuously, illegally and fraudulently registered the suit



property in the name of the 1st Defendant as L.R No. 29685 and L.R No. 29686. The Plaintiff sought judgment against the Defendants for;

1. An order for the Chief Land Registrar to cancel the letter of allotment dated 10th March 1999 in respect of the property known as Unsurveyed Plot No. "A"-Kisumu Municipality in the name of the 1st Defendant.
 2. An order directing the Chief Land Registrar to cancel the titles for L.R No. 29685 and L.R No. 29686 in the name of the 1st Defendant.
 3. An order for the Chief Land Registrar to issue a fresh letter of allotment in the name of the Plaintiff and register the Plaintiff as the owner of the property.
 4. An order of inhibition inhibiting the registration of any dealing with the property known as Unsurveyed Plot No. "A"-Kisumu Municipality.
 5. A permanent injunction restraining the Defendants by themselves, their servants and/or agents from entering or disposing of the property known as Unsurveyed Plot No. "A"-Kisumu Municipality or any part or parts thereof and from interfering with the Plaintiff's use, occupation or enjoyment of the property.
 6. Costs of the suit plus interest.
3. The 1st and 2nd Defendants filed separate statements of defence on 15th February 2022 in which they denied the Plaintiff's claim in its entirety. The 1st Defendant averred that the letters of allotment issued to it in respect of L.R No. 29685 and L.R No. 29686 were lawful the same with the leasehold titles issued to it for the properties. The 1st Defendant averred that the Plaintiff was not entitled to the reliefs sought. On his part, the 2nd Defendant averred that he was a stranger to the Plaintiff's claim. The 2nd Defendant denied all the allegations of fraud pleaded against him. The 2nd Defendant averred that the amended plaint disclosed no cause of action against him. The 2nd Defendant urged the court to strike out and dismiss the suit against him with costs.
4. In the judgment delivered on 29th February 2024, the court found that the 1st Defendant had acquired L.R No. 29685, Grant No. 151216 (formerly known as Unsurveyed Plot No. "A"-Kisumu Municipality) fraudulently and illegally, and entered judgment for the Plaintiff against the Defendants for;
1. A declaration that the purported letter of allotment dated 10th March 1999 issued to the 1st Defendant in respect of Unsurveyed Plot No. "A"-Kisumu Municipality was fraudulently issued and as such the same was null and void.
 2. An order cancelling Grant No. I.R 151216 for L.R No. 29685 issued to the 1st Defendant pursuant to the said letter of allotment.
 3. An order that the 3rd Defendant considers the Plaintiff's pending application for allotment of the parcel of land situated at Kibos-Kisumu Municipality occupied by the Plaintiff and makes a decision on the application within 90 days from the date of service upon it of the judgment and a decree extracted therefrom.
 4. Half the costs of the suit to be paid by the 1st and 2nd Defendants.
5. What is now before me is a Notice of Motion application dated 8th April 2024 filed by the 1st and 2nd Defendants on 9th April 2024 seeking a stay of execution of the said judgment pending the hearing and determination of an appeal that the Defendants have lodged against the same in the Court of Appeal.



The 1st and 2nd Defendants (the Defendants) have contended that they intend to appeal to the Court of Appeal against the said judgment of the court that cancelled their title to L.R No. 29685 and ordered them to pay the costs of the suit to the Plaintiff. The Defendants have averred that they have already filed a Notice of Appeal against the judgment and stand to suffer substantial loss if the stay sought is not granted. The Defendants have averred that their intended appeal has a very high chance of success and they are willing and ready to abide by any condition the court may impose while granting the stay sought.

6. The application is opposed by the Plaintiff through a replying affidavit sworn by Rev. Samuel Gichane Kamau on 26th April 2024. The Plaintiff has contended that the Defendants would not suffer substantial loss if the stay sought is not granted having regard to the nature of the orders that were made by the court. The Plaintiff has averred that the court made a finding that the Plaintiff was in possession of the suit property. The Plaintiff has averred that the Defendants have never been in possession of the suit property and that land being an immovable property, the same would still be available for whoever emerges as the winner in the Court of Appeal. The Plaintiff has contended further that the Defendants have not demonstrated that they have an arguable appeal, and have also not furnished any security for the due performance of the decree of the court. The Plaintiff has urged the court to dismiss the application with costs.
7. The Defendants' application was heard through written submissions. The Defendants filed submissions dated 20th August 2024 while the Plaintiff filed submissions dated 30th September 2024. I have considered the Defendants' application and the affidavit filed in support thereof. I have also considered the Plaintiff's affidavit filed in reply to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The Defendants' 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."
8. 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.”

10. I am satisfied that the Defendants’ application was brought without unreasonable delay. I am also satisfied that the Defendants are likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the 1st Defendant has a title to the suit property. It is also not disputed that in the judgment of the court in respect of which a stay has been sought, the court ordered that the 1st Defendant’s said title to the suit property be cancelled and that the 3rd Defendant should consider issuing a new title to the Plaintiff for the suit property. There is no doubt that unless the stay sought is granted the Defendants risk losing the suit property if they succeed in their intended appeal. On the issue of security, the Defendants have stated in their affidavit in support of the application that they are willing to abide by any order on security that the court may make as a condition for granting the stay sought. In their submissions, the Defendants have indicated that they are willing to furnish the court with a bank guarantee as security if the stay is granted.
11. The upshot of the foregoing is that the Defendants’ Notice of Motion application dated 8th April 2024 has merit. The application is allowed in terms of prayer (b) thereof. The Defendants shall deposit in an interest-earning bank account in the joint names of the advocates on record for the parties a sum of Kshs. 500,000/- as security within 30 days from the date hereof in default of which the stay granted herein shall stand discharged without any further reference to the court. There shall also be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as L.R No. 29685, Grant No. I.R 151216 pending the hearing and determination of the Defendants’ appeal. The status quo prevailing as of the date hereof relating to the occupation and use of the suit property by the Plaintiff shall also be maintained pending the hearing and determination of the Defendants’ appeal. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 23RD DAY OF OCTOBER 2024

S. OKONG’O

JUDGE

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

Ms. Khafafa for the Plaintiff

N/A for the Defendants

Ms. J. Omondi-Court Assistant

