



**Wamwandu & 157 others v Changamwe Housing Scheme Limited & another;  
Garissa Mattresses Limited (Aggrieved Party) (Environment and Land Case Civil  
Suit 57 of 2010) [2022] KEELC 15093 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15093 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 57 OF 2010  
SM KIBUNJA, J  
NOVEMBER 23, 2022**

**BETWEEN**

**MARGARET WALEGWA WAMWANDU ..... 1<sup>ST</sup> PLAINTIFF  
BENSON LUSWETI WANYONYI ..... 2<sup>ND</sup> PLAINTIFF  
PAUL KIZUMBI & 155 OTHERS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**CHANGAMWE HOUSING SCHEME LIMITED ..... 1<sup>ST</sup> DEFENDANT  
TRUST BANK LIMITED [IN LIQUIDATION] ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**GARISSA MATTRESSES LIMITED ..... AGGRIEVED PARTY**

**RULING**

**[Notice of Motion dated 24th July 2020]**

1. The plaintiffs brought the notice of motion dated the July 24, 2020 under article 159 of the Constitution of Kenya, section 3a , 63 of the Civil Procedure Act, order 45 and 51 rule 3, 5 and 15 of the Civil Procedure Rules, seeking for orders that;
  - a. Spent
  - b. Spent.
  - c. “That the consent orders dated February 28, 2013 and October 22, 2013 be and hereby reviewed, varied, vacated or discharged and or set aside and the suit reinstated.



- d. That this honourable court be pleased to set aside all dismissal orders dismissing this suit for want of prosecution including one delivered on the March 20, 2017 by the honourable Enock Cheroni and reinstate this suit for hearing and determination on merit.
- e. That the cost of the suit be provided for.”

The application is based on the twenty-eight (28) grounds on its face marked (a) to (bb), and supported by the affidavit sworn by Paul Kizumbi on the July 24, 2020. It is the plaintiffs case that this is a representative suit for 158 members, who had not instructed MS F W Njoroge & Co Advocates to record consent orders dated the February 28, 2013 and October 22, 2013, filed in court on the March 18, 2013 and October 24, 2013 respectively, to withdraw or discontinue the suit, or to set aside the judgement delivered in their favour on the November 18, 2011. That the decree arising out of the judgement was registered at the Land Registry against the title of the suit land and what had remained was for a title to be issued in their favour. That the suit land’s file at the land registry was subsequently tampered with, and the aggrieved party registered as the owner. That the plaintiff reported the forgeries to the police under OB No 10/31/05/2019, and to EACC. That investigations were carried out and the report dated January 28, 2012 confirmed that forgery was committed by the Defendants. That MS F W Njoroge & CO Advocates has refused to hand over the plaintiffs’ file to them, and a report has been made to the LSK. That the entire process of recording the consents to withdraw the suit, and setting aside of the judgement was fraudulently done and unless their application is granted, the plaintiffs stand to suffer irreparable loss and damages as they have lived on the suit land with their families for over 40 years. That further schools, churches and other institutions have been established on the land for the plaintiffs use.

2. The defendants did not file any documents in response to the application. The aggrieved party filed six (6) grounds of opposition dated the November 16, 2020, and notice of intention to rely on affidavits sworn by Ibrahim M Salat on the May 30, 2019 and July 3, 2018, and another sworn by Felistus Wanjiru Njoroge on the May 23, 2010. It is the aggrieved party’s case that the plaintiffs’ application is *res judicata*, that there is no consent order dated the February 28, 2013, that the allegations that signatures of the officials of Kwa Punda Self Help Group were forged is not sufficient ground to set aside the consent dated October 22, 2020 and that the issue of Ms Felistus Wanjiru Njoroge advocate, having acted without instructions from the plaintiff has been found to be untrue *vide* the ruling of February 5, 2020. That further, the said advocate had come on record for the plaintiffs on their instructions and upon obtaining the court’s leave *vide* the ruling delivered on the February 19, 2013.
3. The court gave directions for filing and serving submissions on the November 19, 2020, and subsequently, the learned counsel for the plaintiffs and aggrieved party filed the submissions dated the December 17, 2020 and February 9, 2021 respectively.
4. The plaintiffs inter alia submitted that the consent orders to discontinue the suit and to set aside the judgement entered into on the February 28, 2013 and October 22, 2013 respectively were erroneous, recorded by mistake, misrepresentation and or fraudulently. That their advocates on record either had no instructions to enter into the said consents or their actions were *ultra vires* the mandate given to the plaintiffs’ officials. They further submitted that their advocates colluded with the advocates for the other parties to defraud the plaintiffs’ of the fruits of their judgement. That the documents used by the aggrieved party to obtain registration with the suit land were confirmed to have been forgeries through the DCI report dated the February 27, 2020. That the aggrieved party had not sought the court’s leave to be joined as a party and has no capacity to respond to the application for the defendants who have lost interest with the suit. That the replying affidavit filed by the aggrieved party and that of Ms Njoroge advocate in support should not be relied on.



5. The aggrieved party submitted that the suit was commenced by the plaintiffs through the originating summons filed on the March 1, 2010 through Ms J J Chesaro & Co Advocates. That the matter was heard and judgement entered on the November 18, 2011 in favour of the plaintiffs. The plaintiffs then changed their legal representation from Ms J J Chesaro & Co Advocates to F W Njoroge & Co Advocates. That vide a consent dated March 15, 2013 and filed on the March 18, 2013, that was executed by the three counsel on record for the plaintiffs, 1<sup>st</sup> and 2<sup>nd</sup> defendants, the suit was discontinued. The consent was adopted by the court on the May 21, 2013 and subsequently, a consent executed by the same counsel for the three parties was filed on the October 24, 2013 setting aside the judgement of November 18, 2011. An application dated the March 29, 2018 was filed through the counsel now appearing for the plaintiffs seeking for inter alia, the setting aside of all the orders dismissing the suit. The application was initially allowed through the ruling of June 20, 2018. That the aggrieved party then filed the application dated the July 3, 2018 for its review and vide the ruling delivered on the 22<sup>nd</sup> February 2019, the ruling of June 20, 2018, was set aside and the application dated March 29, 2018, fixed for hearing afresh. The said application was later heard and dismissed through the ruling delivered on the February 5, 2020. The plaintiffs then filed the current application, and the aggrieved party filed the grounds of opposition and notice of intention to rely on affidavits on record dated the November 16, 2020. It is the aggrieved party's submissions that the issues raised in the application have already been dealt with by the court. That as the suit was withdrawn by consent, the plaintiffs cannot be entitled to costs of the suit. That prayer 4 of setting aside dismissal orders is *res judicata* as a similar prayer had been sought through the application dated the March 29, 2018, that was dismissed on the February 5, 2020. That on prayer 3 of setting aside the consents dated the February 28, 2013 and October 22, 2013, the aggrieved party submitted that there was no consent dated the February 28, 2013 on the record. That the allegations against the plaintiffs' then counsel have been denied through the affidavit sworn by Felistus Wanjiru Njoroge filed on the May 30, 2019 in which she confirmed that she had acted for the plaintiffs with instructions. That the issue of whether the said counsel had acted with instructions is therefore *res judicata* as it was determined through the ruling of February 5, 2020. The aggrieved party further submitted that the plaintiffs have not explained the delay in challenging the consents that were made eight (8) years ago, and that the application should be dismissed with costs.
6. The following are the issues for the court's determinations;
  - a. Whether the issues raised by the plaintiffs in the application are *res judicata*.
  - b. Whether the plaintiffs have established a case for setting aside, reviewing, varying, vacating or discharging the consent orders, setting aside the dismissal orders and reinstating their suit.
  - c. Who pays the costs of the application.
7. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by counsel as summarized above, superior courts decisions, the record and come the following findings;
  - a. That a look at the prayers on the notice of motion dated the July 24, 2020 confirms that what the plaintiffs seeks is the setting aside or reviewing the consent and dismissal orders, and costs. The court has looked at the plaintiffs' earlier application dated the March 29, 2018 and it is apparent prayers 1 and 2 were seeking for setting aside "... all dismissal orders dismissing or discontinuing this suit ... and relist the matter for hearing of the notice to show cause why this suit should not be dismiss for want of prosecution" "...review and set aside all dismissal order dismissing or discontinuing and or withdrawing this suit .....and judgement delivered on the November 18, 2011 ... and the decree issued therein on December 19, 2011 be reinstated."



That as submitted by counsel for the aggrieved party and confirmed by the record, the court rendered its ruling on the application on the February 5, 2020, ordering inter alia as follows;

21. ...I am aware that the applicants contest the manner in which the suit was withdrawn or discontinued, for the consent to discontinue was entered into before the setting aside of the judgement. That was certainly an anomaly but it is clear that the applicants wished to withdraw this suit and have a negotiated out of court settlement over the land, which is what they exactly proceeded to do, for they did enter into an agreement with the company where the company purchased their interest. I do not see how the applicants can argue that they never gave instructions to Ms Njoroge, yet they do not deny executing the agreement with the company, which was drawn by the same Ms Njoroge that they now wish to disown.
22. The applicants do not also deny receiving money from the company. If indeed they did not enter into any agreement with the company as they allege, and did not accept the setting aside of the judgement as they allege, then on what basis were they receiving money from the company? The applicants cannot have their cake and eat it.....
23. On the issue of dismissal of the suit for want of prosecution, that would only apply if the court considered that the suit had not been withdrawn. But either way, it does not help the applicants. If the suit was discontinued, then their case over the land is no more. If indeed the suit was discontinued, after setting aside of the judgement, then it is now dismissed for want of prosecution and I would see no reason to set aside that order of dismissal.
24. To set the record straight, the correct position of the matter is that the judgement herein was set aside by consent. The plaintiffs then either withdrew the suit out of their own volition or the suit was dismissed for want of prosecution. There is therefore no suit for prosecution before this court and there is no decree in favour of the applicants that may be executed. There is in fact nothing more that may be litigated in this matter. What the applicants are trying to do is to flog a dead horse which is an exercise in futility.
25. Whichever way one wants to look at it, there is no merit in this application and the same is hereby dismissed with costs to the aggrieved party. [ Emphasis added]

That from the foregoing extracts from the court's ruling of February 5, 2020, it is apparent the issues raised in the current application were substantially in issue in the application dated the March 29, 2018 and were determined on merit through that ruling.

- b. That indeed the plaintiffs, through the same counsel appearing for them in the instant application, filed the notice of appeal dated February 7, 2020 and an amended notice of appeal dated on the February 20, 2020 expressing that they intend to appeal to the Court of Appeal against the whole of the said ruling. There is nothing on record to confirm the status of that appeal and none of the parties in the instant application addressed this court on it. The court will therefore take it that the appeal on the ruling of February 5, 2020 is pending before the Court of Appeal.
- c. The record further confirms that on the June 23, 2022, the court among others ordered that "this file otherwise be closed and archived." Then during the subsequent mention of November 9, 2022, the court was alerted that the application dated the July 24, 2020 was still



pending determinations and hence this ruling. That in view of the finding in (a) above, that the issues herein have been decided upon by this court *vide* the ruling of February 5, 2020, which ruling is the subject matter of an appeal by the plaintiffs to the Court of Appeal that is pending, the inevitable conclusion is that, unless otherwise directed by the appellate court, all the issues in the notice of motion dated the July 24, 2020 have already been determined by a court of competent jurisdiction, and the application is hence *res judicata*.

- d. The finding in (c) above leads the court to find that it does not need to go to the questions as to whether the plaintiffs have made out a case for the setting aside, reviewing, varying, vacating or discharging the consents or dismissal orders and reinstating of the suit, as that had more or less been determined *vide* the ruling of February 5, 2020. I agree that what the plaintiffs have been trying to do through this application, and the previous one subject matter of the ruling of February 5, 2020, is to as it were flog a dead horse indeed. The suit is as dead as a dodo until and unless revived through the appeal process. That is the direction the plaintiffs should be channeling their efforts towards.
  - e. That in terms of section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, the plaintiffs having failed in their application should pay the aggrieved party costs.
8. That flowing from the foregoing, the court finds and orders as follows;
- a. That the plaintiffs notice of motion dated July 24, 2020 and filed on August 11, 2020 is without merit and is dismissed for being *res judicata*.
  - b. The plaintiffs will pay the aggrieved party costs in the application.
  - c. There being nothing pending, and as earlier directed, this file be closed.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER 2022.**

**S M Kibunja, J**

**ELC MOMBASA.**

**IN THE PRESENCE OF;**

PLAINTIFFS: Absent

DEFENDANTS: Absent

AGGRIEVED PARTY: Absent

COUNSEL : M/s Chesaro for Plaintiff

Mr Oluga for Aggrieved Party

COURT ASSISTANT: WILSON

S M Kibunja, J

ELC MOMBASA.

