



Walegwa & 159 others v Changamwe Housing Scheme Limited & another; Garissa Mattresses Limited (Aggrieved Party) (Environmental and Land Originating Summons 57 of 2010) [2024] KEELC 5227 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 57 OF 2010**

SM KIBUNJA, J

JULY 10, 2024

BETWEEN

MARGARET WALEGWA 1ST PLAINTIFF

BENSON LUSWETY WANYONYI 2ND PLAINTIFF

PAUL KIZUMBI & 157 OTHERS & 157 OTHERS & 157 OTHERS & 157 OTHERS 3RD PLAINTIFF

AND

CHANGAMWE HOUSING SCHEME LIMITED 1ST DEFENDANT

TRUST BANK LIMITED (LIQUIDATION) 2ND DEFENDANT

AND

GARISSA MATTRESSES LIMITED AGGRIEVED PARTY

RULING

1. The plaintiffs moved this court vide a notice of motion dated 16th February 2023 seeking the following orders:
 1. “Spent.
 2. Spent.
 3. That the NTSC issued on 6th December 2022 against the 1st, 2nd and 3rd applicants be suspended until the hearing and determination of MSA ELC No. 316 of 2014 - *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*.



4. That the Honourable court be pleased to order stay of Execution Proceedings in Mombasa [sic] pending the hearing and determination of the Intended Appeal.
5. That costs hereof be provided for.”

The application is based on the eleven grounds on its face and supported by the affidavit of Paul Kizumbi Makanga, the 3rd defendant who inter alia deposes he is the treasurer of Kwa Punda Self Help Group; that the notice to show cause coming up for hearing on 22nd February 2023 was invalid as they were never served with the concerned bill of costs and certificate of costs; that they had never been served with an application for notice to show cause or even the concerned decree; that the suit property was subject to investigations by the DCI Changamwe who confirmed that the aggrieved party used forged documents to obtain a title deed to the suit property; that the aggrieved party filed a similar matter, being ELC 316 of 2014, *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*, where the issue of fraud and forgery is being addressed and that the notice to show cause is a ploy to defeat justice; that execution proceedings be stayed pending determination of ELC 316 of 2014, *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*.

2. The aggrieved party opposed the application through grounds of opposition, inter alia that ELC 316 of 2014, *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*, is a separate and independent suit from the instant one; that the plaintiffs have not met the threshold for stay pending appeal; that the plaintiffs have a propensity of filing numerous and incessant applications.
3. Counsel for the plaintiffs and the aggrieved party filed their submissions dated the 8th February 2024 and 7th March 2024 respectively, which the court has considered.
4. The court finds the following as the issues for determination:
 - i. Whether the plaintiffs have met the threshold for stay orders to issue.
 - ii. Who bears the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior court decisions cited thereon and come to the following findings:
 - a. Counsel for the plaintiffs submitted on prayer 4 only, and the court takes it that they have abandoned prayer 3. Counsel for the aggrieved party submitted that ELC 316 OF 2014, *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*, is an independent and separate suit and that they were not consolidated. That the two suits were not similar. and that no proof was tendered by the plaintiffs to show that the aggrieved party intended to frustrate the plaintiffs.
 - b. Out of abundance of caution, the court has perused the pleadings in ELC 316 of 2014, *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*, and observed that the prayers therein were over the consent entered into on the 28th March 2013 between the parties, and the prayers sought were inter alia for a declaration that the suit property belongs to the aggrieved party, and a declaration that the plaintiffs had been compensated, and the court does not therefore, see any correlation between the ELC 316 of 2014, *Garissa Mattresses Limited v Margaret Walegwa, Benson Luswety Wanyonyi, Paul Kizumbi & Others*, and this suit.



- c. The court cannot belabor enough the ingredients required under Order 42 rule 6 of the *Civil Procedure Rules*. The record confirms that prayer 4, had been dealt with by the court, presided over by the learned Lady Justice Hon. M. Odero, vide the ruling delivered on the 5th April 2012. Later, the court presided by the learned Mr. Justice Munyao, through his ruling of 30th June 2020, held that he cannot issue a stay against the consent, which set aside the judgment of 18th November 2011, and discontinued the suit.
- d. Has the situation changed now that there are costs being pursued? Order 42 rule 6 of *Civil Procedure Rules* provides for stay pending appeal, and starts by emphasizing that no appeal or second appeal shall operate as a stay of execution or proceedings. The court however has the discretion on application to order stay, if satisfied that substantial loss may be occasioned, and where the application was made timeously, and security for due performance of decree or order has been offered. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the matter before the court, I find the plaintiffs have not demonstrated that they stand to suffer substantial loss, if the stay order sought is not granted. Their application is therefore without merit.

- e. Costs generally follow the event unless where there is good reason to depart from the rule, as provided for in section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
6. In view of the above conclusions, the court finds and orders as follows:
- a. That the notice of motion dated 16th February 2023 is without merit and is hereby dismissed.
- b. Costs to be borne by the plaintiffs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : Absent

Defendants : Absent

Mr. Kilonzo For Oluga For Aggrieved Party.

Leakey – Court Assistant.



S. M. KIBUNJA, J.
ELC MOMBASA.

