



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 57 OF 2010

MARGARET WALEGWA MAWAMWANDU & OTHERS.....PLAINTIFFS

VERSUS

CHANGAMWE HOUSING SCHEME LTD.....1ST DEFENDANT

TRUST BANK LTD (IN LIQUIDATION).....2ND DEFENDANT

AND

GARISSA MATTRESSES LTD.....AGGRIEVED PARTY

RULING

(Application seeking inter alia to execute a judgment; record showing that the judgment was set aside and the suit discontinued; nothing therefore to execute; application dismissed)

1. The application before me is that dated 29 March 2018 filed by the plaintiffs. It is an application said to have been brought pursuant to the provisions of Article 159 of the Constitution of Kenya, Section 3A, 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 45 and 51 Rules 3, 5, and 15 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks the following orders :-

(i) That this Honourable Court be pleased to set aside all the dismissal orders dismissing or discontinuing this suit with one delivered on the 20th March 2017 by the Honourable Justice Enock, Cheroni (sic) and relist the matter for hearing of the Notice to Show Cause why this suit should not be dismissed (sic) for want of prosecution.

(ii) That this Honourable Court be pleased to review and set aside all the dismissal order (sic) dismissing or discontinuing and/or withdrawing this suit resting with the one delivered on the 20th March 2017 by the Honourable Justice Enock, Cheroni (sic) and judgment delivered on the 18th November 2011 by Hon. Lady Justice M. Odero and the decree issued herein on 19th December 2011 be reinstated.

(iii) That ruling dated 21/07/2016 in case No. 316 of 2014 be and is hereby implemented.

(iv) That the costs of the suit be provided for.

2. The application is based on various reasons and is opposed. Before I go into these, I think that it is prudent that I provide the background leading to this application.

3. This suit was commenced through an Originating Summons which was filed on 1 March 2010 through the law firm of M/s J.J. Chesaro & Company Advocates. In the suit the applicants sought orders inter alia that it be declared that they have acquired title, by way of adverse possession, to the land parcel LR No. 15/V/MN (the suit land) which land was registered in the name of Changamwe Housing Scheme Limited and the title charged to Trust Bank Limited. The two companies were sued as the 1st and 2nd respondents (for ease of reference referred to here as defendants). The matter was heard and judgment delivered by M. Odero J, on 18 November 2011 in favour of the applicants, the Court holding that they are entitled to the land by way of adverse possession. The defendants in the main suit then filed a Notice of Appeal to the Court of Appeal but I do not think that they ever pursued any appeal.

4. A lot happened after judgment and I have painstakingly tried to piece together what transpired which has not been an easy task as the record is not very well kept. From what I can discern, after judgment, the applicants changed law firms from M/s J.J Chesaro & Company

Advocates to M/s F.W. Njoroge & Company Advocates.

5. I have seen on record a consent dated 15 March 2013 and filed on 18 March 2013 executed by M/s F.W Njoroge & Company Advocates for the applicants, M/s Guram & Company Advocates for the 1st defendant, and M/s Sharpley Barret & Company Advocates for the 2nd defendant. That consent reads as follows :-

“By consent, the plaintiff’s (sic) suit against the defendants be wholly discontinued with no order as to costs.”

6. On 19 March 2013, an application was filed by one Jerusa Muthoni Ngari on behalf of 215 others seeking orders to stay the decree and for leave for them to be enjoined to this suit. They claimed that they had been residing on the land but were left out of this case by the applicants. That application came up for directions before Mukunya J, who made the following order on 27 May 2014.

“This court is functus officio. The suit has been discontinued by the parties. See earlier orders.”

7. Nothing therefore arose out of that application.

8. On 24 October 2013, a consent was filed executed by M/s F.W. Njoroge & Company Advocates for the applicants, M/s Guram & Company Advocates for the 1st defendant, and M/s Sharpley Barret & Company Advocates for the 2nd defendant. That consent provides as follows :-

“By consent the Judgment issued by the court on 18th November 2011 together with all consequential orders pertaining thereto be set aside with no order as to costs.”

DATED at Nairobi this 22nd October 2013.”

9. On 24 October 2014, there was filed an agreement said to have been made on 12 March 2013 between Margaret Walegwa Wamwandu, Benson Lusweti Wanyonyi, Francis Abungu Dienya and Chiti Mele Nyawa, Abubakar Faki Yunus identified as the registered officials of Kwa Punda Self Help Group, and said to be the plaintiffs in this suit, on one part, and Garissa Mattresses Limited on the other part. I do not need to go too much into detail, at this stage, on the agreement, for it is contested, save to state that in it there is mention of a sale of the property or the houses therein to Garissa Mattresses Limited.

10. On 5 December 2014, the law firm of M/s Mogaka, Omwenga & Mabeya, filed a Notice of Appointment of Advocates on behalf of Garissa Mattresses Limited who were said to be beneficiary/purchaser. There was however no application nor were there any further mentions for directions by the court, the last direction being that of 27 May 2014.

11. The next entry in the file is of 20 March 2017, when this file was placed before Justice Enock Cherono (not *Cheroni* as stated in the body of the subject application). The learned judge made a note that this suit was dismissed on 9 November 2015 for non-attendance. On my part, I have not seen any record in the year 2015, and as I have mentioned, the last record prior to this date was that of 27 May 2014 when Mukunya J, stated that the court is *functus officio*.

12. What followed was an application dated 23 May 2017 and filed on 25 May 2017 by M/s J.J. Chesaro & Company Advocates. That application sought orders that Benson Lusweti Wanyonyi be removed from the executive committee as Secretary of Kwa Punda Self Help Group and replaced with Chiti Mele Nyawa, and further that the Registrar of Titles be directed to register Margaret Walegwa Wamwandu, Chiti Mele Nyawa and Paul Kizumbi Maganga, as the trustees and proprietors of the suit land and title deed be issued to them. There is no indication on record that this application was ever prosecuted. This application was then filed on 29 March 2018 by M/s J.J Chesaro & Company Advocates. I have seen however that on 29 May 2018 /s J.J Chesaro & Company Advocates filed a Notice of Appointment of Advocates stating that the said firm has been instructed to act in place of M/s F.W Njoroge & Company Advocates.

13. On 3 July 2018, a Notice of Appointment of Advocates was filed by M/s Oluga & Company Advocates, providing that the said law firm has been appointed by Garissa Mattresses Limited the “aggrieved party” in this suit. On the same day, Garissa Mattresses Limited filed an application seeking to stay the execution of the judgment and further orders that the suit stands discontinued by the consent filed on 18 March 2013. It also sought orders that the judgment of 18 November 2011 be set aside. It further sought orders that the order of 20 June 2018 granting the plaintiffs liberty to continue with execution be set aside. On 9 July 2018, a Notice to Act in Person was filed by Margaret Walegwa, Benson Wanyonyi and Paul Kizumbi acting on their own behalf and for the rest of the applicants. The application of 3 July 2018 was thus argued with the applicants being in person and this was on 18 September 2018. The ruling was read on 22 February 2019. In the said ruling, the learned Judge, Honourable Justice Omollo J, allowed the application and made orders inter alia setting aside the ruling of 20 June 2018 which allowed the application of 29 March 2018 and the Judge made the following further directions/orders :-

“... I also find that the application is merited for the reasons given above. I do therefore allow it on terms that the orders giving plaintiffs liberty to continue with execution is hereby set aside and is instead substituted with the orders that the plaintiffs’ suit remain discontinued until :

(i) The application dated 29.3.2018 is heard and determined on its merits.

(ii) The plaintiffs have liberty to apply.

(iii) The costs of this application awarded to the aggrieved party payable by the plaintiffs jointly and severally.”

14. In essence, the order above reinstated the application dated 29 March 2018 for hearing afresh and that is how this application is now before me after Omollo J was transferred to another station. Before I go to the gist of the application, there is an order entered on 11 June 2019 allowing the law firm of M/s J.J. Chesaro to be on record on behalf of the applicants.

15. The grounds upon which the application is founded include the reasons that the NTSC was not served; that the suit was heard and determined and what is pending is execution of the judgment; that the applicants were misguided by M/s F.W Njoroge & Company Advocates; that the suit should not have been dismissed for want of prosecution or withdrawn as it had already been concluded; that the decree is already registered against the title to the suit land; that the order withdrawing the suit and consent was set aside in the case No. 136 of 2014. The application is supported by the affidavit of Paul Kizumbi. He has more or less elaborated on the grounds above and annexed inter alia a ruling in Mombasa ELC No. 316 of 2014.

16. The application is opposed by two replying affidavits, one sworn by Ibrahim M. Salat, a director of Garissa Mattresses Limited, and Felistus Wanjiru Njoroge of M/s F.W. Njoroge & Company Advocates. In her affidavit, Ms. Njoroge has deposed inter alia that she came on record in the matter on 19 February 2013 following the order of Mukunya J, and she engaged in negotiations on behalf of the plaintiffs with Garissa Mattresses Limited. This resulted into consents by which this suit was withdrawn and the judgment delivered by Odero J, set aside. She has deposed that the consideration for the withdrawal of the suit and the setting aside of the judgment was payment of compensation to her erstwhile clients. She has deposed that she updated and involved the applicants and the result was the agreement of 12 March 2013 and Disclaimer Agreements where the plaintiffs agreed to relinquish their interest in the suit property and vacate the same in exchange for payment of compensation by the aggrieved party (Garissa Mattresses). She has averred that the applicants agreed to the terms of the said agreements voluntarily and were fully paid.

17. On his part, Mr. Salat has deposed inter alia that before this suit was filed, Garissa Mattresses (the company) had purchased the suit land in an auction and became registered as owner on 3 October 2014. He has deposed that this suit was discontinued by consent on 18 March 2013 and has asserted that Mukunya J ruled on 21 May 2013 that this suit is settled. He has deposed that another consent dated 22 October 2013 was filed on 24 October 2013 setting aside the judgment. He has deposed that the discontinuation of the suit and the setting aside of the judgment followed a series of negotiations which culminated in an agreement dated 12 March 2013 between the plaintiffs and the company. The company then compensated the squatters and paid a further Kshs. 1,500,000/= to 6 officials of Kwa Punda Self Help Group and a Disclaimer Agreement was signed. The applicants then withdrew a caveat that they had placed against the title. He has deposed that the applicants not only instructed M/s F.W Njoroge & Company to act for them but also derived benefit from the consents by accepting payments from the company. He has deposed that the consents setting aside the judgment was made in 2013 and he has wondered why it has taken 5 years for the applicants to file this application. He has stated that the dismissal of the suit for want of prosecution on 20 March 2017 was superfluous since the suit was withdrawn by consent in 2013. He has also raised other issues regarding the application, including the reasons that when it was filed M/s J.J Chesaro had not yet obtained leave to come on record in place of M/s F.W Njoroge & Company Advocates and that at the time, Ms. Joyce Chesaro, had not taken up a practising certificate.

18. Paul Kizumbi swore a supplementary affidavit to counter the above depositions. He deposed inter alia that the company is a total stranger to this suit and cannot now be entertained; that if the company had purchased the property in an auction it ought to have applied to be enjoined to this suit before judgment; that if the company has a certificate of title, the same was fraudulently obtained; that Ms. Njoroge acted fraudulently inter alia by sneaking in and filing a consent without the plaintiffs' instructions; that if any consent was recorded it was without their approval; that they never instructed Ms. Njoroge to set aside the judgment and if this was done then it was done fraudulently; that the agreement was not about setting aside the judgment but selling the land after title had been issued in their names; that the company did not comply with the terms of agreement; that there was never an agreement for sale of land; that the aggrieved party has no locus standi.

19. I took in the submissions of Ms. Chesaro for the applicant and Mr. Oluga for the company. There was no appearance on the part of counsel for the 1st and 2nd defendants and they filed nothing on the application. I have taken note of these submissions before arriving at my decision.

20. To reiterate, this application seeks the setting aside of the order of Cheron J dismissing this suit for want of prosecution; seeks a reinstatement of the judgment of Odero J; and seeks implementation of a ruling in the Case No. 316 of 2014.

21. It is not in dispute that the applicants obtained judgment in their favour on 18 November 2011. It is also not disputed that after that judgment, they instructed M/s F.W Njoroge & Company Advocates to come on record on their behalf. The said firm of Advocates did enter into a consent discontinuing the suit and the further consent dated 22 October 2013, setting aside the judgment. The applicants in this application allege that the suit was withdrawn without their permission and that they never instructed Ms. Njoroge to enter into any consent setting aside the judgment. Well, if that is what they allege, then what the applicants needed to do was to file an application to set aside the consents that they now want to impugn. They have not within this application sought any order to set aside the consents and it is not therefore in my place to proceed to set the same aside. The applicants of course wish to have orders to reinstate the judgment and allow for execution to proceed, but this cannot happen, for they no longer have any judgment in their favour, given that they already entered into a consent to have the same set aside and they also discontinued the suit. 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 judgment. 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 also do not 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 judgment as they allege, then on what basis were they receiving money from the company? The applicants cannot have their cake and eat it. If they wanted to keep the land pursuant to the judgment, then they would simply have proceeded to execute, and would not have entered into any negotiations over the land or receive money for the same. I am aware that the applicants claim that the company did not comply with the terms of the agreement. If that is the position, their remedy does not lie in these proceedings but in separate proceedings regarding the performance of that agreement.

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 continued, after the setting aside of the judgment, 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 judgment 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.

26. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of February 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Ms. Chesaro for the applicants.

Mr Oluga for the aggrieved party.

No appearance on the part of M/s Guram & Co. for the 1st defendant.

No appearance on the part of M/s Shapley Barret & Co for the 2nd defendant.

Court Assistant; David Koitamet.