

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 57 OF 2010 (O.S)

MARGARET WALEGWA WAMWANDU & 157 OTHERS.....APPLICANTS

VERSUS

CHANGAMWE HOUSING SCHEME LIMITED.....1ST RESPONDENT

TRUST BANK LIMITED (IN LIQUIDATION) 2ND RESPONDENT

AND

GARISSA MATTRESSES LIMITED AGGRIEVED PARTY

RULING

(Application for stay pending appeal of a ruling; ruling declared that the suit by the applicants was withdrawn and/or discontinued by consent, or dismissed for want of prosecution; nothing out of this order which may be stayed; applicants also not demonstrating any loss if the application is not allowed; application dismissed)

1. This ruling is in respect of the application dated 27 February 2020 filed by the applicants to this Originating Summons. The applicants seek orders for stay of execution of the ruling dated 5 February 2020 pending the hearing and determination of an intended appeal to the Court of Appeal. The application is supported by the affidavit of Joyce Chesaro, who is counsel on record for the applicants. The application is opposed.

2. By way of background, the applicants commenced this suit seeking a declaration that they have acquired through adverse possession, title to the land parcel LR No. MN/V/15 (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 were named as the respondents in the suit. The case was heard and judgment delivered on 18 November 2011 in favour of the applicants. Later, the parties entered into negotiations vide which, in my interpretation, the judgment was set aside and the suit discontinued. The suit was however listed for dismissal for want of prosecution on 20 March 2017, and the suit was marked as dismissed. It is instructive to state that the suit land was subsequently transferred to Garissa Mattresses Limited, who are in this suit as the “aggrieved party”, and principally, the respondent in this application, for the respondents in the main suit no longer seem to have an interest in this suit. There followed a couple of applications, but what is important for us, is the application dated 29 March 2018, which resulted in the ruling that is sought to be appealed against. That application sought orders inter alia to set aside the order marking this suit as dismissed or discontinued, and for a review of the order of dismissal or discontinuation, so that the applicants may proceed to execute the judgment that had earlier been delivered in their favour.

3. I heard the application and dismissed it in my ruling of 5 February 2020. My important findings were that although the applicants had obtained judgment in their favour, they voluntarily entered into a consent that set aside the judgment, and further proceeded to discontinue this suit. I found that the applicants entered into negotiations with the respondent, and entered into an agreement dated 12 March 2013, where they were paid for the land. I found that given these events the applicants cannot now seek to set aside the judgment or the consent that discontinued the suit. I found that it was immaterial that the suit was dismissed for want of prosecution for the same had already been discontinued by consent, but either way, whether discontinued by consent or dismissed, the suit was no more.

4. The applicants filed a Notice of Appeal on 12 February 2020 and later filed this application. I have already mentioned that this application seeks a stay of execution pending appeal. The aggrieved party/respondent, filed Grounds of Opposition, the main argument being that there is no positive order that is capable of being stayed.

5. I invited counsel to file written submissions which they both did. In her submissions, Ms. Chesaro, learned counsel for the applicants, inter alia submitted that the applicants reside on the suit land with their families and that the respondent has title to the land. It is submitted that if the order of stay is not granted, there is every likelihood that the respondent will deal with the title and evict the applicants, which will cause them irreparable loss. For the respondent, Mr. Oluga, learned counsel, inter alia submitted that all that this court did was to dismiss the applicants’ application dated 29 March 2018 and the court did not order any of the parties to do, or refrain from doing, anything.

6. I have considered the application. In as much as Ms. Chesaro submitted that her clients stand to suffer irreparably, there is no affidavit from the applicants to state what this irreparable or substantial loss to them may be. If the applicants wished to demonstrate to this court that they stand to suffer substantially, then it is them, who ought to have sworn an affidavit, clearly demonstrating what substantial loss they stood to suffer. As it is, they have not filed any, and I am not persuaded that there has been any demonstration of substantial, or indeed any other loss, to the applicants. Further, what I held in my ruling of 5 February 2020, is that the applicants by consent set aside the judgment and discontinued this suit. I did not make any other order. I wonder what the applicants wish to have stayed.

7. There is no point of saying any more. For the above reasons, this application is dismissed with costs.

DATED AND DELIVERED THIS 30TH DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.