



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC SUIT NO. 57 OF 2010 (OS)

MARGARET WALEGWA WAMWANDU

BENSON LUSWETI WANYONYI

PAUL KIZUMBI & 155 OTHERS.....PLAINTIFFS/RESPONDENTS

-VERSUS-

CHANGAMWE HOUSING SCHEME LIMITED.....1ST DEFENDANT

TRUST BANK LIMITED (IN LIQUIDATION).....2ND DEFENANT

GARISSA MATTRESSES LIMITED.....AGGRIEVED PARTY

RULING

1. The application for determination is dated 3rd July 2018 brought by Garissa Mattresses Limited calling itself the aggrieved party. The application is brought under section 80 of the Civil Procedure Act, Order 45 of Civil Procedure Rules and section 13 (7) of the Environment & Land Court Act. The orders sought are:

1. Spent

2. Spent

3. Spent

4. The order made on 20.6.2018 granting the plaintiffs liberty to continue with execution be and is hereby reviewed and set aside and is instead substituted by the following orders:

(i) This suit stands discontinued pursuant to and in accordance with the consent of the parties filed on 18th March 2013 and adopted by the Court on 21st May 2013.

(ii) The judgment delivered on 18th November 2011 and any consequent decree therefrom stand and remain set aside in accordance with the consent of the parties filed on 24th October 2013 and the plaintiffs are hereby barred from executing the said judgment and any consequent decree ensuing therefrom.

5. Costs of this application be borne by the plaintiffs jointly and severally.

2. The application is premised on the grounds inter alia:

(a) GARISSA MATTRESSES LIMITED, the Aggrieved Party herein, is presently the registered owner of the suit property.

(b) The plaintiffs are in the process of executing the judgment of this Court delivered on 18th November 2011 by Justice M. Odero and the consequent decree the execution of which will result in the transfer of the suit property to the plaintiffs.

(c) This suit was withdrawn by consent of the parties and an order to that effect was made by Justice Mukunya on 21st May October 2013.

(d) The withdrawal of this suit and the subsequent setting aside of the judgment and decree has been previously reiterated, underscored and confirmed by this Court (Mukunya, J. and Cheron, J.).

(e) The plaintiffs obtained the orders of 20th June 2018 which allowed them to continue with execution through fraud and non-disclosure of material facts to the Court including the fact that the suit had been discontinued and judgment set aside by consent as well as the fact that the plaintiffs were fully compensated and paid off by the Aggrieved Party.

(f) Following their full compensation, the plaintiffs no longer have interest in the suit property.

3. The applicant deposed that before the suit was filed, the applicant had purchased the suit property in an auction. That the suit was discontinued by consent of the parties on 18th March 2013 as shown in the document marked as **'IS – 5'** and the consent adopted on 21.5.2013 – annex **'IS – 6'**. Further that the consent judgment dated 18th November 2011 was also set aside. The applicant deposes that the discontinuation of the suit was pursuant to a series of negotiations held between the applicant and the plaintiffs through their erstwhile advocates F W Njoroge & Co Advocates and a compensation agreed upon.

4. Sometimes last year the plaintiffs filed an application dated 29.3.2018 which application was allowed unopposed on 20th June 2018. The applicant argued that the orders of 20.6.2018 were issued without material disclosure to them i.e. that the orders reinstating the suit was made ex parte. The aggrieved party argues further there is no case in existence or a decree capable of being executed. Further that Ms J. J Chesaro & Co advocates did not seek leave of the Court before coming on record in place of F. W Njoroge & Co advocates making the application to be fatally defective. The applicant urged the Court to allow his application on account of the reasons stated.

5. The application is opposed by the plaintiffs/respondents vide a replying affidavit sworn on 12th September 2018 and a further affidavit sworn on 1st October 2018. Mr Paul Kisumbi deposed that the applicant was lying by stating that it purchased the suit property through a public auction in 2009. That the aggrieved party/applicant used unprocedural means to defraud the plaintiffs of the suit property.

6. Mr Kisumbi continued that by their application dated 20.3.2018 the Court set aside the dismissal orders made on 20.3.2017. According to the plaintiffs, the compensation agreement was for removal of houses and structures on the land to allow for the selling of the suit plot to the applicant who had shown an interest to buy. That the applicant did not comply with the terms of that agreement i.e. make payment within 14 days from the date of the agreement. The plaintiffs also state that they properly served their former advocates M/s F. W Njoroge Advocates through registered mail via a letter sent on 21.5.2018. It is the plaintiffs' case that the present application lacks merit and should be dismissed with costs.

7. In the further affidavit, Mr Kisumbi deposed that they got a judgment in their favour on 18th November 2011 and caused the same to be registered on the title at entry No 34. That the applicant is a total stranger to this suit and the plaintiffs do not understand how she removed the caveats they had registered on the title. The plaintiffs urged the Court to disallow the application and nullify the applicant's title.

8. The issues arising for my determination are:

(i) Whether this suit was discontinued by consent of the parties and so should be reinstated by consent or otherwise.

(ii) Whether the judgment entered on 18th November 2011 was set aside.

(iii) If the applicant has locus to bring the present application.

9. On 18.11.2011, Justice Odero rendered a judgment in favour of the plaintiffs. While this judgment was alive, Ms F W Njoroge & Co advocates was allowed to come on record for the plaintiffs in place of J. J. Chesaro & Co advocates on 5.2.2013. On 21st May 2013 when the file was listed as a mention pursuant to an application of J. J Chesaro & Co advocates, Ms Njoroge advocate told the trial Court that the interim orders that had been issued were made in error as the whole suit had been withdrawn with consent of the parties filed on 28th March 2013. The trial Court on this date proceeded to mark the suit as discontinued. The trial Court again said on 27th May 2014 that the Court was functus officio since the suit had been discontinued by consent of the parties.

10. The consent that discontinued the suit and which the trial Court was referring to has been annexed by the applicant as **"IS – 9"**. The plaintiffs have not denied the contents of the said agreement. They only took issue with the consent on terms that the compensation was for structures on the land and not the land itself. Secondly that the applicant herein did not comply with part of the terms of that consent that provided for making payment within 14 days of its execution.

11. The plaintiffs having appreciated the existence of this consent, they are deemed in law to be bound by its terms the same having been adopted as an order of the Court. The net effect of that consent was that:

(1) It set aside the judgment of 18th November 2011.

(2) It discontinued the suit.

(3) It provided for compensation to persons in occupation.

Consequently the proper procedure to follow if the plaintiffs wanted to set aside that consent was to move the Court to set it aside as they did by filing the application dated 29.3.2018 seeking inter alia an order for review and or setting aside the order of continuation of their suit. The

only mistake in my view was failure to serve the application on all the parties who had signed the consent. The only person served with the application was their previous advocates (see proceedings of the Court of 20th June 2018) and facts deposed in the replying affidavit.

12. The impugned consent was executed between the plaintiffs' named representatives and the applicant. The plaintiffs neither served the defendants nor the applicant to put them on notice that they were backtracking on the consent order.

In effect, the application dated 29.3.2018 was granted as unopposed in error which error is apparent on the face of the record. In such instances, the Court on its own is permitted to remedy the error once the same is discovered. Given that the applicant was a party to the consent that set aside the judgment and discontinued the suit and which imposed a responsibility on him to pay compensation funds that she has shown evidence of payment it goes with saying that she has locus to bring an application for review as she was indirectly involved in setting the suit.

13. In any event section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules is worded in such a way that any party affected by the order can move the Court. The plaintiffs herein in their execution process will have the applicant's title nullified/cancelled. This makes the applicant qualified to challenge such an order so as to get an opportunity to present her case. Lastly the plaintiffs have accused the applicant of obtaining his title fraudulently and that the compensation was only for the structures and not for purchase of the land. This is a question that can only be determined after the orders of 20.6.18 are set aside.

14. In conclusion, I find that the applicant has locus to bring the present application dated 3rd July 2018. 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.

Dated, signed & delivered at Mombasa on 22nd February 2019

A. OMOLLO

JUDGE