



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE. 316 OF 2014

GARISSA MATTRESSES LTD.....PLAINTIFF/APPLICANT

-VERSUS-

MARGARET WALEGWA WAMWANDU & 6 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The applicant Lucy Kina filed a motion dated 9th September 2015 premised under the provisions of section 3A, 80 of the Civil Procedure Act. The motion is also brought under Order 1 Rule 8 and Order 45 Rule 1 and 2 of the Civil Procedure Rules. The applicant seeks the following orders;

- 1) Spent
- 2) **That this Court be pleased to enjoin the applicant to this suit and to be heard on this application**
- 3) Spent
- 4) **This honourable Court be pleased to set aside the judgement herein.**

2. The motion is supported by seven (7) grounds on the face of it and the supporting, supplementary and further affidavits sworn by Lucy Kina. The applicant avers that they obtained a decree in HCCC No 57 of 2010 which granted them the suit land. Later an application was made to enjoin names of residents left out in HCCC No 57 of 2010. The applicant then gave a narrative of events post judgement in HCCC No 57 of 2010 which file is not for determination before this Court.

3. The applicant referred to suit No HCCC 187 of 2014 filed to secure the interests of the residents left out in the case No 57 of 2010. It is the applicant's contention that the agreement dated 12.3.2013 and the consent of 18.12.2013 were not signed by all the parties in HCCC No 57 of 2010 and that the decree in No 57 of 2010 could not be withdrawn.

4. The applicant deposes that the officials of the Self Help group did not have the authority to sign the agreement on behalf of the members of the group. Further that the plaintiff required a resolution to engage in the transaction of 12.3.2013 and also use the company seal. That the applicant did not authorize the defendants to defend this suit on her behalf.

5. In the supplementary affidavit, the applicant deposed that she did not acquire her right entitlement to the suit property through the Kwa Punda Self Help Group. She made reference to the decree in HCCC 57

of 2010, and their application to be joined in that suit. That they did not sign the consent filed in Court on 15.3.2013 which discontinued HCCC No 57 of 2010. The effect of this order was that there was no judgement to set aside.

6. The applicant states further that the plaintiff was aware of their claim in the suit property. That the plaintiff could not bring this claim as it was statute barred and that the present defendants do not hold a power of attorney of any of the residents on the suit property.

7. In the further affidavit, the applicant deposes that she has always lived on the suit property although she was left out of the original suit No 57 of 2010. She deposes that the consent of 15.3.2013 is null and void in purporting to set aside a suit that was already determined. That the plaintiff cannot claim the suit was discontinued while at the same time rely on the consent filed after the alleged discontinuation. Further it is not true that all persons living on this land have been compensated and that documents filed by the plaintiff illustrating payment of compensation are forgeries. The applicant wondered how a caveat registered on the title was removed. She urged the Court to grant the orders sought.

8. The application is opposed by both the plaintiff and the defendants. The plaintiff swore a replying affidavit through one of its directors, Ibrahim Mohamed Salat. The plaintiff deposes that the applicant herein lacks *locus standi* to bring the application so does her advocates Ms Wameyo Onyango & Associates advocates.

9. The plaintiff deposes that the bonafide members of Kwa Punda are 308 as per the list annexed and all of them have been compensated. Mr Salat deposes that suit No 187 of 2014 has been instituted by strangers and it does not disclose who the alleged 373 residents of Kwa Punda Mikindani are. According to the plaintiff, the order of 18.11.2011 was never registered as the same was stayed.

10. The plaintiff contends that the applicant has not disclosed who the members of Kwa Punda Settlement are hence she is just a busy body and the application is without merit and should be dismissed with costs. In the further affidavit, Mr Salat reiterated the contents of his replying affidavit. It is his contention that the genuine residents of Kwa Punda have been compensated and have since moved out of the suit land. He deposed that the plaintiff herein properly acquired title to the suit property.

11. The defendants filed a replying affidavit through Margaret Walegwa the 1st defendant herein. She described herself as the chair person of Kwa Punda Self Help Group. She deposed that she is swearing the affidavit on her own behalf and on behalf of Benson Luswetti – Secretary General and Paul K. Makanga the treasurer. She deposed that the applicant's motion dated 7.9.2015 is defective as the applicant is not a plaintiff as indicated in the application and that the affidavit in support of that motion is undated.

12. The 1st defendant deposes that the applicant has never applied to be joined in these proceedings as a party hence she remains a stranger to these proceedings and thus lacks *locus* to institute the present motion. She denied that the applicant is a resident of Kwa Punda Settlement. Ms Margaret deposed that all the squatters on the plot No MN/V/15 have already been determined and compensated.

13. She is unaware of case No HCCC187 of 2014. Further she deposes that the suit property has never at any one time been in the name of Kwa Punda Self Help Group or any of its members. The 1st defendant denies that the applicant has ever lived on the suit property. The 1st defendant is aware of their advocates letter dated 8th July 2014 notifying the deputy County Commissioner Changamwe sub-county and copied to all relevant authorities that the plaintiff had compensated all the bonafide members of Kwa Punda Self Help Group.

14. The 1st defendant deposed that the plaintiff was to take over vacant possession of the land in August 2014 and that a notice was to be served upon a few remaining squatters but Lucy Kina was not one of them. That they were served with summons which they passed on to their advocates. She confirms the consent of 18.12.2014 was reached between the plaintiff and themselves, the applicant not included.

15. The defendants depose that they were given authority by the bonafide members of Kwa Punda which authority has never been revoked. She has denied the contents of the applicant's supplementary affidavit and re-stated that the consents questioned by the applicant were properly executed. She urged the Court to dismiss the notice of motion dated 7.9.2015.

16. At the close of these pleadings, each of the parties herein through their advocates filed written submissions. The applicant submits that she is a resident of Kwa Punda and her name appears in the list attached to the application dated 19.3.2013 and therefore is affected by the judgement in this case. That the order of eviction as extracted will affect the applicant. Further that HCCC No 57 of 2010 was instituted in the names of individual plaintiffs not as officials of Kwa Punda Group and that that suit has no relationship to the present suit.

17. The applicant submitted that the suit No HCCC 57 of 2010 cannot be discontinued by consent of parties in the absence of an application after a final judgement was entered. It was thus mischievous to record that consent. However if she took the position that the suit was withdrawn, she submitted that then all documents filed therein would be withdrawn; the effect of which is that the plaintiff could not therefore obtain a better title than Changamwe Housing Scheme and Trust Bank Ltd (in liquidation).

18. Lastly the applicant submits that the plaintiff's suit is time barred as provided for under section 7 of the Limitation of Actions Act. To support this, the applicant cites cases of **Ndatho vs Humo & 2 Others (2002) 2 KLR** and **Ngethe vs Gitau & Another (1999) I E.A 225**.

19. The plaintiff on its part reiterated the contents of its replying affidavit. It is submitted that the applicant has not demonstrated that there was fraud, forgery, error or mistake in the consent judgement. In support of the submission, the plaintiff cited the following cases;

- i. **The Board of Trustees NSSF vs Michael Mwalo (2015) eKLR paragraph 29.**
- ii. **Mungai vs Ndaba (1981) KLR**
- iii. **Mugunga General Stores vs Pepco Distributors Ltd (1987) KLL 150**
- iv. **Mbogo & Another vs Shah (1987) E. A 93**

20. The defendants on their part submitted that the application is premised on the provisions of the law relating to review instead of setting aside judgement. Secondly it is submitted that the application is purported to have been brought by the plaintiff which is not the case. The defendants have also submitted on whether the applicant had capacity to bring the motion.

21. In support of their submissions, the defendants have quoted the cases of; **FKF vs KPL & Others (2015) eKLR** and **Maurice Ooko Otieno vs Mater Hospital** amongst others. The defendants went ahead and gave a list of names of persons referred to as bonafide squatters. It is the defendant's view that Lucy Kina remains a stranger in both cases and thus lacks capacity to file an application for review or setting aside a judgement properly entered. Lastly the defendants submitted that there is no proof of fraud committed by the defendants or any mistake made at the time when the consent judgement was entered. They urged the Court to dismiss the application.

22. Having considered all the pleadings and submissions rendered; this Court finds for determination three issues ;

1. **Whether the applicant has locus to bring this application.**
2. **Whether the application as filed is defective for want of compliance with the Rules of Procedure.**
3. **If (1) and (2) are in the negative, does the application have any merit ?**

23. While writing this ruling, I noted that there are two applications filed by the applicant. One is dated 7th September 2015 which only sought two prayers i.e for stay of the judgement and setting aside the judgement. The 2nd application is dated 9th September 2015. When the matter came before Emukule J. on 8th September 2015, it must have been in respect of the application dated 7.9.15. Subsequently, the

applicant came before me on 9th September with the application dated 9.9.2015 where I granted ex parte orders. In the affidavits filed in reply to the application, the defendants and the plaintiff referred to the application dated 7th September 2015. In the submissions by the plaintiff, it referred to the application dated 9th September 2015 which included a prayer for the applicant to be joined as a party to these proceedings. The defendants still addressed this Court on the application of 7th September 2015 in their submissions. The applicant selectively did not make reference to which application it was referring to.

24. In the interest of justice I will consolidate the two applications so that it save judicial time by avoiding dealing with hearing two applications essentially seeking the same orders except the 2nd application had an extra prayer for joinder. Secondly it was the 2nd application that was active before me. In the result the application dated 7.9.2015 is consolidated and is determined together with the application dated 9th September 2015.

25. Now with this background that the applicant also made a prayer to be enjoined in the proceedings, does she have locus to obtain the orders sought in the application? The applicant pleaded that she has lived on this land for a long time and that the orders obtained directly affect her as she will be evicted. The defendants on their part pleads that the applicant has never lived on the suit parcel of land. From the documents annexed by both parties, the applicant was not a party to the proceedings in HCCC 57 of 2010. An application was made in that suit to join the applicant and several others on 19th March 2013. The fate of that application is not clear as it seems it was never prosecuted before the entire suit was “withdrawn”.

26. The applicant also referred to HCCC No 187 of 2014 filed on 15th October 2014. The applicant's name does not appear on the pleadings and the list of the 373 on whose behalf the suit was commenced was also not annexed to this application. This suit is still pending. Lastly the applicant was not a party to the present suit when it was concluded. She has however sought to be joined and asked for stay of execution of that judgement pending determination of this application and that the said judgement be set aside.

27. The applicant bases her prayer on the failure of the plaintiff to notify all the residents which failure was a breach of order 1 of the Civil Procedure Rules. The said order 1 rule 3 defines who may be joined as defendants to include **“all persons against whom any right in respect or arising out of the same act or transaction is alleged to exist or where any common question of fact or law would arise”**. For instance in paragraph 11, the applicant deposes that, **“we have lived on the suit property for a period in excess of 30 years.”** However no document was filed in compliance with order 1 rule 13 (2) of the Civil Procedure Rules.

28. Secondly in the suits referred to (application dated 19.3.2013 in HCCC No 57 of 2010 and HCCC No 187 of 2014) the applicant has demonstrated to this Court that she had not signed any document to any of the named defendants to secure her interests in the suit land. Since the applicant has asked to be joined as a party to the present proceedings, it would present an opportunity to prove whether she indeed resides on the suit property or not. In any event, her rights under article 22 of the Constitution cannot be taken away. In my view, she has taken up a step towards the realization of such a right. Consequently I do not agree with the Respondents that the motion as presented, the applicant is indeed a stranger to these proceedings as the decree obtained will directly affect her during the execution process.

29. Is the application defective for want of procedure? The application is brought under section 3A and 80 of the Civil Procedure Act and Order 45 Rule 1 and 2 of the Civil Procedure Rules. Section 3A deals with inherent powers of this Court. Section 80 and Order 45 deals with review of orders or decree. The orders sought by the applicant are for setting aside and not for review. The applicant did not give any explanation either in her supplementary/further affidavits or submissions despite the issues being raised by the Respondents.

30. Although the inherent powers of the Court has been invoked under section 3A, does the application become defective for using wrong provisions of the law? I do agree that parties ought to comply with the

rules of procedure as the Rules were not made in vain. The parties were able to deduce from the pleadings the intention of the applicant. The quoting of the wrong section of the Civil Procedure Act and Rules does not therefore make the application defective. It is my opinion and I so hold that it is one of those defects curable by the provisions of article 159 of the Constitution.

31. Lastly does the application have merit? The issues raised by the applicant as regards the validity or otherwise of the consent discontinuing HCCC No 57 of 2010 and its effects are issues this Court would consider as a defence and not a ground for setting aside. Similarly whether the Plaintiff/Respondent's suit is time – barred is not a ground for setting aside a consent judgement.

32. The grounds for setting a consent judgement was laid in the case of **Flora Wasike vs Wamboko** (1982) I KAR 625 which are similar to reasons that would result into setting aside a consent. It becomes tricky for this applicant to establish any of these grounds challenging the consent judgement given that she was not a party to the proceedings that resulted into this consent.

33. However the defendants and the plaintiff have not denied that the applicant is one of the persons to be evicted from the suit premises. To the extent that she will be affected by the consent judgement, it is my humble opinion and I so hold that she should be given an opportunity to be heard before being evicted. I will therefore exercise my powers under section 1A, 1B and 3A of the civil procedure Act and thereby set aside the consent judgement entered on 18.12.2014 to allow the applicant an opportunity to present her case.

34. In conclusion, I make a finding that the motion dated 7th September 2015 consolidated with the motion dated 9th September 2015 has merit and is allowed. I make an order that the applicant be and is hereby joined as a defendant to these proceedings. The consent judgement entered by this Court on 18.12.2014 be and is hereby set aside. The applicant now defendant No 7 is allowed to file her defence within 15 days of this ruling.

Ruling dated and delivered at Mombasa this 21st day of July 2016

A. OMOLLO

JUDGE