



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 58 OF 2020

MARIANGELA BELTRAMI.....PLAINTIFF

VERSUS

MTWAPA BAY INVESTMENT LTD.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 29th July 2020 as well as a Notice of Preliminary Objection dated 1st September 2020. By the said Notice of Motion, Mariangela Beltrami (the Plaintiff) prays for orders against Mtwapa Bay Investment Ltd (the Defendant) as follows: -

3. That a permanent injunction do issue restraining the Defendant/Respondent whether by itself, its agents or servants or whosoever from trespassing, (or) entering in Section Numbers A & B and Shops Numbers 5 & 6 located within Malindi Township within (Kilifi) County pending the hearing and determination of the suit.

4. That the Defendant be compelled to sub-divide LR No. Portion 10810 (Original No. 10809) and transfer the sub-divided portions to the Applicant/Plaintiff as the bonafide purchaser with value after payment of the entire full purchase price.

2. The application which is supported by an affidavit sworn by the Plaintiff is based on the grounds that: -

i. Through a sale agreement dated 20th September 2015, the Defendant sold Portions A & B and Shops Nos. 5 & 6 situated on LR No. 10810 to the Plaintiff;

ii. Before signing the agreement, the Defendant had requested payment of 36000 Euros which was paid out of the purchase price of Euros 300,000/-

iii. That the Defendant gave the Plaintiff priority to purchase the portions of the shops and sections because she was operating a bar and a restaurant as a tenant within the suit premises from 1st January 2009 to sometimes in 2014 when the idea to sell was made by the Defendant;

iv. That upon receipt of Euros 50,000/- the Defendant failed to carry out the sub-divisions of the portions purchased by the Plaintiff as agreed and the efforts to compel the Defendant to carry out the same fell on deaf ears;

v. That the persistent refusal to carry out the sub-division prompted the Plaintiff to be part of CMCC No. 282 of 2019 to protect the Plaintiff's goods from being attached and auctioned;

vi. That the Defendant instructed another Auctioneer to levy distress upon the Plaintiff as a result whereof the Plaintiff was pushed to be part of HCCC No. 5 of 2019 before it was dismissed for want of procedure; and

vii. That as a lay person, the Plaintiff relied heavily on legal advice of the law firms of some advocates which ended up filing rent disputes in wrong Courts. The mistake of the said Advocates should not be visited unto the client.

3. Mtwapa Bay Investment Ltd (the Defendant) is opposed to the application. In a Replying Affidavit sworn and filed herein on 27th October 2020 by its Advocate on record Gicharu Kimani, the Defendant avers that on 24th June 2019, the Plaintiff filed **Malindi High Court Civil Suit No. 5 of 2019** seeking similar orders. The Defendant in response filed a Preliminary Objection dated 27th June 2019 to the effect that the High Court had no jurisdiction. That objection was allowed with orders that the suit be transferred to the Environment and Land Court at

Malindi.

4. Being dissatisfied with the orders of the High Court ordering the transfer, the Defendant again filed another Preliminary Objection dated 24th September 2019 which was upheld by the Environment and Land Court on 21st November 2019.

5. The Defendant further avers that the Plaintiff subsequently on 13th December 2019 filed an application in **Malindi CMCC No. 282 of 2019** seeking similar orders as those sought herein. The Defendant once again filed a Preliminary Objection which was upheld on 23rd June 2020.

6. The Defendant asserts that the Plaintiff also did file **Malindi CMCC No. 205 of 2018** but later withdrew the same. The Defendant avers that by filing the said suits and applications, the Plaintiff is out to frustrate the Defendant in incessant litigation and is engaged in forum shopping for a suitable outcome in her favour.

7. In addition to the Replying Affidavit, the Defendant has also filed a Notice of Preliminary Objection herein dated 1st September 2020 seeking to have the entire suit struck out on the grounds: -

“That the Plaintiff’s entire suit is fatally defective, null and void ab initio and the same ought to be struck out with costs in that the suit is Res Judicata as the matter has been heard and determined by the Honourable Court in Malindi CMCC No. 282 of 2019 and HCCC No. 5 of 2019 and as such this Honourable Court has no jurisdiction to entertain the instant suit.”

8. I have carefully considered both the Motion and the Objection thereto. I have also perused and taken into account the submissions and authorities placed before me by the Learned Advocates for the parties.

9. By their Preliminary Objection dated 1st September 2020, the Defendant contends that this suit as filed is *res judicata* and that the same has been the subject of proceedings in both **Malindi CMCC No. 282 of 2019** and also in **Malindi High Court Civil Case No. 5 of 2019** and this Court therefore lacks the jurisdiction to hear and determine the same.

10. It is trite law that where a question of jurisdiction is raised, the Court seized of the matter ought to deal with the same right away on the material before it. As Nyarangi J.A. observed in the celebrated case of **Owners of Motor Vessel “Lillian S” -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1: -**

“.....jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. In the matter before me, the Plaintiff does not contest the contention that the issues herein have been the subject of two previous Court Proceedings. While the two previous suits are not mentioned anywhere in the main substance of her pleadings, the Plaintiff mentions them at the end of the Plaint dated 29th July 2020 at paragraph 14 as follows: -

“14. That there is neither a suit pending in any Court (sic) save for the matter i.e HCCC No. 5 of 2019 and CMCC No. 282 of 2019, (where) the Plaintiff was in the wrong Court and the same were disposed off for lack of jurisdiction and/or filing them in wrong Courts but the Plaintiff has no matter where she has filed against the Defendant in singular.”

12. The Plaintiff however makes a more elaborate reference to the two cases at paragraphs 14 to 15 of her Supporting Affidavit in which she accuses the Defendant of seeking to sell her movable properties with that of a third party known as Karen Blixen Company Ltd in distress for rent and avers as follows: -

“14. That after the Proclamation the Plaintiff/Applicant rushed to a firm of advocates and instructed them to move the Court and seek restraint/injunctive orders to stop the ill-intended attachment by the said Auctioneers as the issue of purchase and whose goods are being proclaimed are being sorted out. The Firm of Advocates moved in a rush and filed HCC No. 5 of 2019 in a Civil Registry which matter was disposed off for lack of jurisdiction before the merits and demerits of the Applicant/Plaintiff interest in the suit premises could not be properly ventilated (sic).

15. That the Applicant/Plaintiff upon realizing the apparent mistake of her advocates and the eventual dismissal of HCC No. 5 of 2019 she instructed another firm of advocates with a view to salvage the situation because the Respondent/Defendant had again instructed two other firms of auctioneers that is Malindi Auctioneers and for Beyond Auctioneers to levy distress on the Applicant/Plaintiff’s business for purportedly being in rent arrears to which the Plaintiff/Applicant’s Advocates again filed injunctive application and in between the lines on that application the said firm of advocates erroneously annexed the sale agreement dated 20th August 2015 showing that the purchase price of the suit premises was Ksh 30,000,000/- which in any event is far above the jurisdiction of the Lower Court and as a result the Court in its wisdom excused itself for want of jurisdiction hence CMCC No. 282 of 2019 was disposed off at the Preliminary Objection stage without real issues being ventilated and more particularly the amount of Euros 50,000/- already paid to the Defendant/Respondent and failure by the Respondent/Defendant to conduct sub-division as was agreed between the parties noting that all the firms of auctioneers were proclaiming goods of Karen Blixen Company Ltd and not the Applicant/Plaintiffs.

16. That in a nutshell the Applicant/Plaintiff got her two cases dismissed for want of jurisdiction and by previous advocates mixing or bringing in several parties who never participated in the sale agreement. This is purely a glaring mistake caused

by advocates who the Plaintiff/Applicant relied on to get justice and for proper legal advice and services.”

13. That being the case, the Plaintiff concedes that she was responsible for the institution of the two previous suits and that her previous Advocates were responsible for the wrong choice of forum as well as the joinder of the parties thereto. From the material placed before me the said **Malindi HCCC No. 5 of 2019** was subsequently on 20th September 2019 transferred to this Court and was registered as **Malindi ELC Case No. 76 of 2019; Vauxhall Ltd & 2 Others –vs- Mtwapa Bay Investment Ltd & 4 Others**. Save for a copy of this Court’s Ruling striking out the suit on 21st November 2019, annexed to the Defendant’s Replying Affidavit, none of the parties availed the pleadings filed in the previous suits.

14. Given however that this Court had been seized of the said **ELC Case No. 76 of 2019**, this Court took the liberty to call for and peruse the said file with a view to establishing if indeed the matter was res judicata. A perusal thereof reveals that the said suit was filed against the Defendant herein together with four auctioneers that had been instructed by the Defendant at different periods to recover rent that was said to be owing to the Defendant.

15. In their Plaint dated 21st June 2019, the three Plaintiffs listed there in as Vauxhall Limited (the 1st Plaintiff), the Defendant herself (as the 2nd Plaintiff) and the said Karen Blixen Company Ltd (the 3rd Plaintiff) pray for orders listed as follows against the Defendants: -

- a. A permanent injunction restraining the Defendants jointly and severally in any manner whatsoever from interfering with the 3rd Plaintiff’s business known as Karen Blixen Restaurant situate at Galana Centre along Lamu Road Malindi;
- b. That the 2nd Plaintiff prays for an order of specific performance of the sale agreement and for special and general damages against the 1st and 4th Defendants for their illegal actions and resultant loss and damage suffered;
- c. That the 1st and 3rd Plaintiffs pray for special and general damages for abuse suffered in the hands of the 1st and 3rd Defendants by sending the 2nd and 3rd Defendants to levy distress;
- d. A declaration that the tenancy agreement entered into between the 1st and 3rd Defendants dated 8th June 2018 and the termination of lease dated 21st January 2019 be voided and be deemed unconscionable and unconstitutional and a further declaration that the subsequent new lease dated 21st January 2019 entered between the 3rd Plaintiff and the 1st Defendant be voided and be deemed unconscionable and unconstitutional;
- e. A declaration that the 2nd and 3rd Plaintiffs are not tenants but bona-fide purchasers for value and are not obligated to pay rent and that the rent so far collected by the 1st Defendant be computed and deducted from the balance of the purchase price after transfer of the purchased portion (by the 2nd Plaintiff) is effected by the 1st Defendant;
- f. An order that (the) issue of rent payment by the 2nd and 3rd Plaintiff to the 1st Defendant be stopped until such transfer is effected; and
- g. Costs and interest.

16. Those prayers are largely in consonance with those presently before me in the current suit wherein the Plaintiff who was the 2nd Plaintiff in the previous suit now prays for: -

- a. A permanent injunction restraining the Defendant, its servants, agents from interfering with Sections A & B and Shops Numbers 5 & 6 on LR No. 10810 (Original No. 10809) forthwith;
- b. The Defendant be compelled to carry out sub-division on LR No. 10810 (Original No. 10809) and hip out (sic) sections A & B of the same to the Plaintiff upon receiving entire purchase price;
- c. The Defendant do with immediate effect remove the big padlocks which it placed at the main entrance of the suit premises to enable the Plaintiff get access to the suit premises;
- d. A declaration that Sections A & B and Shops 5 & 6 (Original No. 10809) was properly purchased by the Plaintiff through a valid contract;
- e. That the Defendant be declared a trespasser on Sections A & B and Shops 5 & 6 which are part of LR No. 10810;
- f. The Defendant do pay damages for loss of business amounting to Kshs 45,000,000/- or after being assessed;
- g. In the alternative the Defendant to be compelled to refund 50,000 Euros with interest from 5th December 2014;
- h. The Defendant be compelled to refund Kshs 6,145,500/- for renovations done on the areas which are being utilized by the Plaintiff as a bar and restaurant;
- i. Costs of the suit be provided for; and

j. Interest at Court rates on (f) and (g) above.

17. From a perusal of their Notice of Motion application dated 21st June 2019 as filed in the said **Malindi ELC 76 of 2019**, it was evident that all the three Plaintiffs named therein are related as the Plaintiff herein and her husband Roberto Ciavolella are shareholders and/or directors in both the 1st and 3rd Plaintiff. While the parties may have been the same however it was evident that none of the two previously filed suits had proceeded on merit.

18. From a perusal of **Malindi ECL Case No. 76 of 2019**, it is apparent that the same was struck out for having been initially filed in a Court that lacked jurisdiction. It was similarly evident that **Malindi CMCC No. 282 of 2019** was struck out by the Honorable W.K Chepseba, CM on 23rd June 2020 for the reason that the Court lacked the pecuniary jurisdiction to deal therewith.

19. As the Supreme Court stated in the **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR**, the doctrine of res judicata only applies where: -

a. The suit or issue was directly and substantially in issue in the former suit;

b. That former suit was between the same parties or parties under whom they or any of them claim;

c. Those parties were litigating under the same title;

d. The issue was heard and determined in the former suit; and

e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

20. Given that the matter has never proceeded for determination on its merits in any of the Courts that had previously dealt with the dispute, I did not find any basis for the objection on the basis of res judicata.

21. Be that as it may, I am in agreement with the Defendant’s submissions that the Plaintiff has time and again abused the processes of the Court to frustrate the Defendant by engaging in incessant litigation over the same dispute.

22. In both her suit and the application before me, the Plaintiff asserts that she bought the suit premises being Section Nos. A & B and Shop Nos. 5 & 6 situated on LR No. 10810 Malindi. She urges this Court to injunct the Plaintiff from interfering with those portions and to compel the Defendant to sub-divide the suit property and to transfer the cited portions to herself. Those prayers are based on her contention that she bought the property vide a Sale Agreement dated 20th August 2015.

23. I have perused a copy of the said Agreement attached to the Plaintiff’s Supporting Affidavit. The said Agreement puts the purchase price for the portion of the property that was being purchased at Euros 300,000/- with the completion date set for 30th December 2015. Nowhere in her Affidavit does the Plaintiff state that she paid the said purchase price. Instead it is her case that she paid 50,000/- Euros to the Defendant and was waiting for the sub-division of the property until sometimes on 3rd August 2019 when the Defendant sent auctioneers to her premises claiming she owed them rent.

24. Throughout her pleadings herein, the Plaintiff avers that she is a purchaser and owner of the property and that there is no tenancy agreement between herself and the Defendant.

25. It was however evident to me that the intended sale between the two parties collapsed and that there existed a tenancy agreement between the parties herein. Whereas the Defendant did not file anything much in response to the pleadings herein, a perusal of paragraphs 12 to 19 of the Plaintiff filed in **Malindi ELC Case No. 76 of 2019** reveals that the parties executed a new lease agreement on 8th June 2016 as well as another one on 21st January 2019 upon termination of the 2016 agreement.

26. That fact is indeed reinforced by the grounds on the face of the Plaintiff’s Notice of Motion dated 21st June 2019 as filed on 24th June 2019 in the said **Malindi ELC Case No. 76 of 2019** wherein the Plaintiff and her Co-Plaintiffs aver that the rent arrears demanded are contested and unreasonable.

27. When the Defendants first demanded payment of the rent due in 2018, the Plaintiff herein and here Co-Plaintiffs first moved to Court vide **Malindi CMCC No. 205 of 2018** wherein they obtained orders of injunction against the Defendants on 29th June 2018. From a perusal of the Supporting Affidavit of Roberto Ciavolella sworn and filed in Court on 24th June 2019, those orders remained in place until 29th May 2019 when the suit was withdrawn.

28. While the Plaintiff’s husband denies that they gave instructions for the withdrawal of the said suit, it was apparent that a month after the withdrawal of the said suit, the Plaintiffs instituted another suit being **Malindi HCCC No. 5 of 2019** claiming the same relief against the Defendant. When that suit was struck out for want of jurisdiction on 21st November 2019, the Plaintiff and 2 others moved to the Lower Court and instituted **Malindi CMCC No. 282 of 2019** which suit was struck off for want of pecuniary jurisdiction on 29th July 2020.

29. A month later the Plaintiff instituted this current suit when the Defendant attempted to recover rent once again and she accuses her previous Advocates of misleading her into filing the three previous suits in the wrong forums.

30. In my mind, the civil litigation system in this Country depends much on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment or unfair advantage, the system breaks down and the determination of civil disputes becomes unnecessarily delayed, unjust and expensive.

31. From a perusal of the material placed before me in respect of the four suits so far filed by the Plaintiff and/or her cohorts in respect of the rent dues demanded by the Defendant, the purpose thereof is spent once the Defendant obtains interim orders and the prospect of distress for rent by the auctioneers appointed by the Defendant dissipates.

32. As the Court of Appeal stated in *Muchanga Investment Ltd –vs- Safaris Unlimited (Africa) Ltd & 2 Others (2009) KLR 229*: -

“The term abuse of the Court process has the same meaning as abuse of the judicial process. The employment of the Judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. The term abuse of process has an element of malice in it.....The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are:

i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

ii. Institution of different actions between the same parties simultaneously in different Courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness

33. The Court of Appeal in the *Muchanga Investment Ltd (supra)* further went on to observe thus: -

“In our view, the often quoted principle that a party should have his day in Court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the Court on a need basis and not as a matter of routine. Judicial time is the only resource the Courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice... We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of ASHMORE –VS CORP OF LLOYDS (1992) 2 ALL ER 486 at page 488 where Lord Roskil states: -

“It is the trial Judge who has control of proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial Judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial Judge’s time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge’s time as it necessary for the proper determination of the relevant issues.”

Unless a trial is on discernible issues it would be farcial to waste judicial time on it.”

34. In the circumstances herein, I am in agreement with the Defendant’s submissions that the Plaintiff herein is only bent on frustrating the Defendant with incessant litigation. The four cases so far filed by the Plaintiff in the rent dispute amounts to playing lottery with the judicial process and this Court has a responsibility to bring the abuse of its processes to an end.

35. In the premises, I dismiss the Motion dated 29th July 2020 and strike out the Plaintiff’s suit with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

J.O. OLOLA

JUDGE