



REPUBLIC OF KENYA



**Marino v Passoto (Miscellaneous Application E054 of 2022)
[2023] KEELC 17398 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E054 OF 2022**

EK MAKORI, J

MAY 11, 2023

BETWEEN

MAURIZIO MARINO APPLICANT

AND

NELSON RICCARDO PASSOTO RESPONDENT

JUDGMENT

1. For determination is the Applicant's Notice of Motion dated November 28, 2022 wherein the Applicant seeks the following orders;
 - i. Spent
 - ii. The court be pleased to issue an order of eviction against the Respondent and/or any other person that he may have placed on Plot Number 863 (Original Number 857/6) Watamu removing him from occupation, possession and access of the house erected on Plot Number 863 (Original Number 857/6) Watamu and vacant possession be given to the Applicant.
 - iii. The court be pleased to issue an order that the Applicant is at liberty to appoint any court bailiff or auctioneer to execute the eviction order.
 - iv. The court be pleased to issue an order directing the OCS Watamu Police Station to provide security during the eviction exercise.
 - v. All costs, including the costs of this application and the auctioneer's costs be borne by the respondent.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of Maurizio Marino the Applicant stating that he is the legally registered owner of Plot Number 863 (Original Number 857/6) Watamu which he purchased from Piva Armido, Cesarata



- Diocleziana and Piva Michela and he has erected a residential house thus he is the legally registered owner of the suit plot. It was deposed that the Applicant and the Respondent entered into a written sale agreement with the Respondent for the said house dated November 13, 2015 but the Respondent failed to complete the payment and sued him in Malindi ELC Case No 246 of 2016. That the said suit was dismissed with costs and the Respondent was ordered to complete payment of the purchase price which order he has completely refused to comply with. It was further deposed that despite warrant of attachment being obtained against the respondent, he has refused to comply and respondent continues to occupy the said house.
3. The Respondent filed grounds of opposition and a Notice of Preliminary objection objecting to the application on grounds abridged as follows:
 - a. Jurisdiction must exist at the time of filing suit
 - b. The application offends the mandatory provisions of Order 3 Rule 4 and Order 40 Rule 1 of the Civil Procedure Rules 2010.
 - c. The issues raised in the application are *res judicata* as the same were determined in Malindi ELC No 246 of 2016
 4. The application and the Preliminary Objection were disposed of by way of written submissions. It was submitted by counsel for the applicant that this court is competent and has the jurisdiction to entertain the application. Additionally, it was submitted that the issues raised in the present suit are different from the issues raised in the dismissed suit thus the instant application is not *res judicata*. Counsel for the applicant relied on the following authorities: Kennedy Mokuia Ongiri v Jogn Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR and Njangu V Wambugu and another.
 5. Counsel for the applicant further submitted that the respondent has failed to comply with the provisions of the sale agreement and court orders therefore being in unlawful possession and occupation of the suit premises and should be evicted. Counsel cited the authorities of Margaret Karwirwa Mwongera v Francis Kofi [2019] eKLR and R V Attorney General & Another Exparte James Alfred Koroso [2013] eKLR.
 6. On his part, counsel for the respondent submitted that this court has no jurisdiction to determine this matter as the same was determined by a court of concurrent jurisdiction and setting aside of such judgment is the reserve of the appellate court. To this, counsel for the respondent cited the authority of Mashreq Bank P.S.C V Kuguru Food Complex Limited [2018] eKLR.
 7. It was also submitted that as per clause 7 of the memorandum of agreement between the parties herein, the available remedy to the applicant in case of default by the respondent was to sue for the unpaid sums but eviction was not provided for in the agreement and therefore a court cannot rewrite a contract between parties. Counsel relied on the authority of David Sironga Ole Tukai vs Francis Arap Muge & 2 others [2014] eKLR.
 8. Counsel further submitted that, Olola J in dismissing Malindi ELC No. 246 of 2016 did not issue a positive order declaring the applicant owner of the suit property that is capable of being executed. Moreover, the applicant had not pleaded for eviction in the counterclaim in that suit thus there was no basis upon which eviction could be ordered.
 9. It was argued that the applicant is guilty of material non-disclosure that the respondent transferred the suit property to the applicant and has since the decree in Malindi ELC No 246 of 2016 paid to the Applicant Kshs 400,000/= in execution of the said decree. In support of material non-disclosure,



counsel cited the authority of *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others* Civil Appeal No. 210 of 1997.

10. I have considered the application by the applicant and the response thereto, the submissions by the parties to me the issues arising for determination are:
 - a. Whether the issues raised in the application is res judicata.
 - b. Whether eviction can issue in this matter.

11. In order to decide as to whether a matter is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:
 - i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

The test was summarized in *Bernard Mugo Ndegwa V James Nderitu Gitbae and 2 Others* [2010] eKLR, as follows:

- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
12. ELC No. 246 of 2016 was heard and determined on its merits. The decision is reported as *Nelson Riccardo Pasotto v Maurizio Marino* [2020] eKLR. The claim was summarized by Olola J. as follows:

“I have perused and considered the pleadings filed herein by the parties. I have equally considered the oral testimonies of the witnesses, the evidence adduced as well as the Written Submissions by the Learned Advocates acting for the parties herein.¹⁷ The facts leading to the dispute herein are rather straightforward. On or about 13th November 2015, the two parties herein entered into a sale agreement by virtue of which they were to exchange two buildings they both owned. By the said agreement, the Plaintiff was to purchase a house belonging to the Defendant and erected on Land Portion No. 865 Watamu while the Defendant was to purchase an apartment No. 6E belonging to the Plaintiff and erected on Land Portion No. 863 Watamu.¹⁸ Apparently the value of the two were different and it was by the said agreement also expressly provided that the Plaintiff would, in addition, pay the Defendant a sum of Euros 70,000/-. The agreement prepared by the two parties initially in Italian further provided in the penultimate paragraph thus:-

“It is further agreed with specific mention, as follows:-

- A. The respective properties will be handed over with the annexed furnishings as seen and liked, with double bed at the first floor of the property sold by Mr. Marino, in the property of the current tenant, in case he wants to take it out.



B. The furnishings sold by Mr. Marino to Dr. Pasotto currently in lease to a third party, he should hand it over in perfect condition and without damages caused by the current tenant or by other people, through negligence. In case there should be some damages caused by the stay of the tenant, it is agreed that Mr. Marino will commit himself to bear the costs, and damages caused by the current tenant.”

13. After full trial, the court ruled that the plaintiff who is the respondent herein was to pay Euro 12,000 with interest at court rates and pay to the defendant who is the applicant herein, costs of that suit which had been dismissed.
14. Pursuant to the decree, the applicant commenced proceedings to execute for the decretal amount. Eviction was not part of the remedies sought, as the same was not pleaded in the primary suit. The reasons I can garner was, the applicant in this matter had already been put in possession of the respondent’s premises apartment No. 6E erected on Land Portion No. 863 Watamu and has it in his possession to date. What remains in the primary suit is the execution for the balance or top up arising from the agreement entered by the two parties on the exchange of their respective premises.
15. Section 152E of the *Land Law Amendment Act, 2016* envisions who can be evicted and how, when it comes to private land if it is shown that:

‘a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction’
16. The applicant has brought the current suit under Section 152E of the Land Law Amendment Act, 2016 claiming that since the respondent has failed to settle the decree in ELC No. 246 of 2016 and since the property is still in his name and being private land, then eviction should issue. The issue of eviction was not discussed in the primary suit because as already alluded to the parties already exchanged their respective houses voluntarily and at their own terms. Olola. already made a finding in the primary suit that the respondent is bound to pay the remaining top up to the applicant. The matter is pending execution. The applicant well aware of what they had mutually agreed, cannot go back in time and be heard to claim that the respondent is a trespasser on his private land yet he is executing for the remaining balance of their bargain in exchange for their respective houses.
17. Even if eviction was not discussed and decided in the primary suit, the remedy was not available in view of the agreement by the parties, which provided a roadmap on how it was to be discharged and enforced. In this suit too, eviction is not available. The manner the court has been approached to grant the same to me will be irregular and unlawful even if the suit property is still registered in the name of the applicant. The respondent as stated contend that he already transferred apartment No. 6E erected on Land Portion No. 863 Watamu partially fulfilling his part of the bargain. To evict him will mean that he loses his property he already transferred to the applicant and the applicant further retains his un-transferred portion contrary to the agreement they entered. It will in my mind amount to unjust enrichment. The applicant has not said that he is ready to transfer back what he got from the respondent in the bargain or that in the spirit of restitutio ad integrum he is ready and willing to place the respondent in the position he was before their respective bargains by returning his house he transferred to him.



18. As held by the court of Appeal in *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd* [200] 2 EA 503:-

“A Court of law cannot rewrite a contract between parties. The parties are bound by the terms of their Contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the Charge. As was stated by Shah JA in the case of *Fina Bank Ltd vs Spares and Industries Ltd* (2000) 1EA 52:-

“It is clear beyond peradventure that save for those special cases where equity might be prepared to retrieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape a bad bargain.”

19. In my considered view, the applicant has a decree against the respondent, which should be executed settling the parties’ bargain. Eviction in the manner sought here will not be allowed by the operations of the law. The respondent is not a trespasser as envisaged in Section 152E of the Land Law Amendment Act 2016.

20. The application dated November 28, 2022 is hereby dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 11TH DAY OF MAY 2023.

E K MAKORI

Judge

In the Presence of: -

M/s Kimakia for the Respondent

Mr Binyenya for the Applicant

Court Clerk: Happy

