



**Beltrami v Mtwapa Bay Investments Ltd (Civil Appeal E045 of 2021)
[2024] KECA 78 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 78 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E045 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 9, 2024**

BETWEEN

MARIANGELA BELTRAMI APPELLANT

AND

MTWAPA BAY INVESTMENTS LTD RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) dated 30th July 2021 in E.L.C No. 58 of 2020)

JUDGMENT

1. The appellant, Mariangela Beltrami, operated a bar and restaurant as tenant on LR No. 10810 (Original No. 10809) more particularly described as shop Nos. 5 and 6 and sections A and B thereof situate in Galana area of Malindi Sub-County (the suit premises), which belonged to the respondent, Mtwapa Bay Investments Limited, at a monthly rent of KShs. 150,000. From the record as put to us, but without the benefit of the tenancy agreement, we gather that the appellant's tenancy commenced on 1st January 2009.
2. Sometime in 2014, the respondent offered the suit premises for sale to the appellant and entered into an Agreement for Sale dated 20th August 2015. The purchase price was agreed at €300,000 on account of which she paid €36,000 as deposit and, thereafter, €14,000 upon execution of the Agreement. The balance of €250,000 became due and payable on or before the completion date set for 30th December 2015.
3. The appellant having failed to pay the outstanding sum of €250,000 in completion of the sale and purchase of the suit premises, the Agreement for Sale collapsed whereupon the parties reverted to the previous tenancy agreement under which the respondent demanded payment of rent allegedly in arrears in 2018.



4. In response to the demand, the appellant, jointly with other tenants, filed suit in Malindi CMCC No. 205 of 2018 and obtained orders of injunction against the respondent. It is noteworthy that the scanty record before us does not disclose the basis of their claim or the terms of the injunctive relief thereby obtained. Suffice it to observe that the appellant and co-plaintiffs subsequently withdrew their suit on 29th May 2019.
5. Soon thereafter, the appellant instituted fresh proceedings against the respondent in the High Court of Kenya at Malindi on 24th June 2019 in HCCC No. 5 of 2019 apparently seeking reliefs similar to those previously sought in Malindi CMCC No. 205 of 2018, but which are not specified in the record as put to us. That suit was struck out on 21st November 2019 for want of jurisdiction.
6. Prior to striking out the appellant's suit in Malindi HCCC No. 5 of 2019, the respondent moved to levy distress on 3rd August 2019 to recover rent arrears allegedly outstanding in the sum of KShs. 1,659,710. A second attempt was made on 22nd November 2019, which prompted the appellant to institute fresh civil proceedings in Malindi CMCC No. 282 of 2019 on 13th December 2019. Once again, the record as put to us does not disclose the basis of her claim or the reliefs thereby sought. As fate would have it, this suit was also struck out on 29th July 2020 for want of pecuniary jurisdiction.
7. Relentless, the appellant filed yet another suit sometime in August 2020 in the Environment and Land Court at Malindi in ELC Case No. 58 of 2020 accompanied by her Notice of Motion dated 29th July 2020 praying for: a permanent injunction restraining the respondent from "... trespassing or entering in section numbers A and B and shops numbers 5 and 6 located within Malindi township;" and that the respondent be compelled to subdivide LR No. 10810 (Original No. 10809) and transfer the subdivided portions to the appellant. The appellant's Motion was supported by her annexed affidavit sworn on 29th July 2020.
8. The appellant's case was that the respondent had sold to her the suit premises for €300,000 vide the above-mentioned Agreement for Sale; that she had been operating a bar and restaurant business during the period between 2009 and 2014 when the respondent proposed to sell the suit property to her; that despite receipt of €50,000 deposit, the appellant refused or failed to carry out the agreed subdivisions and transfer the property to her; that the respondent's persistent refusal prompted her, jointly with others, to file Malindi CMCC No. 282 of 2019 to prevent attachment and sale of her goods on "the pretext that she was a tenant in rent arrears;" that the respondent levied distress again, which compelled her to institute proceedings in Malindi HCCC No. 5 of 2019; and that the appellant had complied with all the conditions under the Agreement for Sale and, yet, the respondent delayed the process of subdivision and brought "fake claims" of rent arrears.
9. The respondent opposed the appellant's Motion vide the replying affidavit of its learned counsel Mr. Gicharu Kimani sworn on 27th October 2020 deposing that the application was vexatious and an abuse of the court process; that, on 24th June 2019, the appellant filed suit in Malindi HCCC No. 5 of 2019 seeking similar orders; that, in determination of the respondent's preliminary objection dated 27th June 2019, the court (R. Nyakundi, J.) allowed the respondent's objection vide his ruling dated 20th September 2019 and transferred the appellant's suit to the ELC in Malindi ELC No. 76 of 2019; and that the case in ELC No. 76 of 2019 was struck out for want of jurisdiction vide the ruling of J. O. Olola, J. dated 21st November 2019.
10. In addition to the affidavit in reply to the appellant's Motion, counsel for the respondent filed a notice of preliminary objection dated 1st September 2020 praying that the appellant's entire suit be struck out with costs on the grounds that the suit was res judicata in that the dispute between the appellant



and the respondent had been heard and determined in Malindi CMCC No. 282 of 2019 and Malindi HCCC No. 5 of 2019; and that the trial court had no jurisdiction to entertain the suit.

11. Upon hearing the appellant's Motion and the respondent's preliminary objection, the trial court (J. O. Olola, J.) dismissed the appellant's Motion and struck out her suit with costs to the respondent. In his ruling dated 30th July 2021, the learned Judge had this to say:
 20. Given that the matter has never proceeded for determination on 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.
 34. 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 process to an end."
12. Aggrieved by the decision of Olola, J., the appellant moved to this Court on appeal on 7 grounds set out in her memorandum of appeal dated 30th September 2021, and on which she faults the learned Judge for: not finding that Malindi CMCC No. 282 of 2019, Malindi CMCC No. 205 of 2018, Malindi HCCC No. 5 of 2019 and Malindi ELC No. 76 of 2019 were not heard and determined on merit; finding that, immediately the sale transaction collapsed, a tenancy relationship was created; relying on Malindi CMCC No. 205 of 2018, which had been withdrawn; finding that the appellant participated in instituting cases in wrong courts, which were dismissed for want of prosecution; finding that the appellant improperly used judicial powers, hence eroding the administration of justice; not making any reference to part of the purchase price paid by the appellant, and the renovations done by the appellant; and for not finding the existence of a conditional sale agreement dated 20th August 2015, whose specific paragraphs could have been invoked in the event that the sale collapsed. She urged the Court to allow the appeal, set aside the impugned ruling and substitute therefor an order allowing the appellant's Motion dated 29th July 2020.
13. In support of the appeal, learned counsel for the appellant M/s. Ochoki & Ochoki filed written submissions dated 26th September 2023 advancing bare arguments, which Mr. Sausi highlighted orally citing no judicial authorities. Counsel urged us to allow the appeal. The respondent neither filed written submissions nor attended court at the hearing of the appeal.
14. Having considered the record of appeal, the impugned ruling and orders of the High Court (J. O. Olola, J.), the written and oral submissions of counsel for the appellant and the law, we form the view that the appeal before us stands or falls on our finding on the following three main issues, namely: whether Malindi CMCC No. 282 of 2019, Malindi CMCC No. 205 of 2018, Malindi HCCC No. 5 of 2019 and Malindi ELC No. 76 of 2019 were heard and determined on merit so as to render Malindi ELC Case No. 58 of 2020 *res judicata*; whether the tenancy relationship between the appellant and the respondent survived and subsisted consequent upon collapse of the agreement for sale of the suit premises; whether the multiplicity of suits filed by the appellant amounted to abuse of the court process and, if the answer is in the affirmative, whether the appellant can be excused on account of mistake of counsel; and what orders ought we to make in determination of this appeal, including orders on costs.
15. On the 1st issue, the finding of the learned Judge is self-explanatory. None of the suits in issue had proceeded for determination on merits. Accordingly, he dismissed the respondent's objection on the ground that Malindi ELC No. 58 of 2020 was by no means *res judicata*. We fail to understand the



reason behind the appellant's position from which she appears to take issue with the learned Judge's finding on the matter. To our mind, this is at best a non- issue, and we need not say more.

16. On the 2nd issue, the appellant admits that “the appellant defaulted in clearing the purchase price as per the agreement in which the respondent issued threats by instructing several firms of auctioneers with instructions to proclaim the appellant's assets for rent arrears.” This, too, is a non-issue. To our mind, the agreement for sale having collapsed, we find nothing to fault the learned Judge for finding as a fact and holding that the tenancy relationship subsisted consequent upon collapse of sale of the suit premises. In his words, the learned Judge observed:

“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 Complaint 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.”

17. Turning to the 3rd issue, the written submissions of counsel for the appellant speak for themselves. The following paragraphs constitute express admission of the multiplicity of suits in abuse of the court process. All that counsel does is to blame the appellant's previous advocates. All said, we commend counsel for their candid admission of facts as they are. And this is what they had to say:

“The appellant is indeed suffering for mistakes committed by her former advocates who not only filed her cases in wrong divisions but also brought in parties who never participated in the sale agreement dated 20th August 2015 hence a mistake of advocate and their law firms should have not visited onto appellant]sic[

The multiplicity of cases filed in various registries was as a result of advocate's mistake which ought not to have visited the appellant.” (Sic)

18. This Court has time without number pronounced itself on the principle that mistake of counsel does not avail excuses to a litigant whose hands are soiled with procedural transgressions. The Court in Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2015] eKLR had this to say:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

19. We need not overemphasise the fact that a litigant's duty to take care of their own interests extends to the propriety of the steps taken in furtherance of their interests in judicial proceedings. Indeed, there is no paucity of competent legal representation in our jurisdiction. Having thus pronounced ourselves, nothing remains to be said. The appeal before us stood on quick sands of misperception and cannot hold. In conclusion, the appeal fails and is hereby dismissed with costs to the respondent. Consequently, the ruling and orders of the High Court (J. O. Olola, J.) are hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

