



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 12 OF 2020

(CONSOLIDATED WITH PETITION NO. 10 OF 2020)

IN THE MATTER OF: THE RIGHT TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION

AND

IN THE MATTER OF: INTEGRITY OF THE COURT PROCESS UNDER CHAPTER SIX OF THE CONSTITUTION AND COMPLIANCE WITH COURT ORDERS BY THE DIRECTOR OF PUBLIC PROSECUTION WHILE EXERCISING MANDATE UNDER ARTICLE 157 OF THE CONSTITUTION, THE PENAL CODE AND OTHER LAWS

AND

IN THE MATTER OF: THE POWERS OF THE DIRECTOR OF PUBLIC PROSECUTION UNDER ARTICLE 157 OVER ISSUES UNDER ACTIVE AND CONCLUDED ISSUES IN CIVIL PROCEEDINGS, THE HIERARCHY OF COURTS, DOCTRINE OF FINALITY WITHIN THE PROVISIONS OF CHAPTER TEN OF THE CONSTITUTION

AND

IN THE MATTER OF: THE RIGHT TO A FAIR TRIAL UNDER ARTICLES 50 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF: HCCC NO. 118 OF 2009 – MALINDI, COURT OF APPEAL CIVIL APPEAL NO. 36 OF 2015 – MALINDI, COURT OF APPEAL CIVIL NO. 43 OF 2018 – MALINDI AND SRMCC CRIMINAL CASE NO. 854 OF 2020 – MOMBASA

AND

IN THE MATTER OF: PETITION BY SALAMA BEACH HOTEL LIMITED, ISAAC RODROT AND STEFFANO UCCELLIFOR PROTECTION OF THEIR FUNDAMENTAL RIGHTS AND FREEDOMS UNDER CHAPTER 40 OF THE CONSTITUTION, AND THE RIGHT TO FAIR TRIAL UNDER ARTICLE 50 AND THE RIGHT TO GOOD HEALTH UNDER ARTICLE 43(a) OF THE CONSTITUTION

BETWEEN

SALAMA BEACH HOTEL LIMITED.....1ST PETITIONER

ISAAC RODROT.....2ND PETITIONER

STEFFANO UCCELLI.....3RD PETITIONER

-AND-

THE DIRCETOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

-AND-

HANS JURGEN LANGER.....1ST INTERESTED PARTY

TEMPLE POINT RESORT LIMITED.....2ND INTERESTED PARTY

RULING

CORAM: Hon. Justice R. Nyakundi (Presiding), Hon. Justice Eric K. Ogola & Hon. Lady Justice Anne Onginjo

INTRODUCTION

I. HISTORY OF THE LITIGATION

1. The parent suit that gave birth to the myriad of litigation between the parties herein is Malindi HCCC No. 118 of 2009. On the strength of the judgment delivered in Milan Court, Italy on 14th December, 2001, where the Court directed Accredo AG to be paid a sum of 825,000 Euros plus interests and costs of 2,470 Euros by Viaggi, Accredo AG filed Malindi HCCC No. 118 OF 2009 seeking to enforce the said Judgment against Salama Beach Hotel Ltd as it is a subsidiary of Viaggi.

2. In the said suit, Accredo also sought warrants of attachment against the suit property and orders to take control and management of Salama Beach Hotel Limited. During the pendency of the said suit, Hans & Zahra Langer, Isaac Rodrot and Stefano Uccelli were enjoined as co-defendants in the said suit. On 21st January, 2010, a consent was recorded compromising the suit which was followed by a plethora of applications one of them dated 20th November, 2014 where Stefano Uccelli sought for an order of review and/or setting aside of the said decree consent, on grounds that he was neither a majority shareholder in Salama Beach Hotel Limited nor did he have any authority to sign any consent on behalf of the other shareholders. Consequently, according to him, the said Consent lacked legitimacy.

3. Stefano Uccelli further contended that the enforcement of the Milan Judgment was premature as Accredo AG had not taken out the requisite proceedings as provided for under the Foreign Judgment (Reciprocal Enforcement) Act Cap 43 Laws of Kenya, hence the Court lacked jurisdiction to enforce the Milan Judgment. After the hearing of the application dated 20th November, 2014, Chitembwe J. delivered a ruling on 30th April, 2015 where he held that there was no judgment issued by the Court in Milan on 14th December, 2001, and that all that was issued was a payment order and if the Respondent was opposed to the said claim, it was at liberty to file its opposition.

4. Chitembwe J. further held that the said order that was issued by the Court at Milan on 14th December, 2001 is similar to summons to enter appearance, whereas the deed of assignment can be equated to garnishee proceedings under the Kenyan Law. Accordingly, the application dated 20th November, 2014 was allowed in the following terms: -

1. As indicated hereinabove, the application by the 4th defendant dated 20th November, 2014 is granted as prayed.
2. The Registrar of Companies shall remove the names of the 2nd and 3rd Respondents, that is to say, Hans Jurgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009.
3. The 2nd and 3rd defendants to hand over all the properties belonging to Salama Beach Hotel Limited within seven (7) days hereof to the 4th and 5th defendants. Counsel for both parties to participate in the transfer process.
4. The 2nd and 3rd Respondents' names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009.
5. In view of previous disobedience of Court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the Court Order is effected as hereinabove.
6. Costs of the application to the Applicant.

5. Dissatisfied by the said ruling, Hans and Zahra Langer filed an appeal being Malindi Civil Appeal No. 36 of 2015 against Isaac Rodrot & Stefano Uccelli. The Court of Appeal affirmed the decision of Chitembwe J. in its judgment delivered on 15th December, 2017. It further held that although there might have been no reciprocity between Kenya and Italy such a judgment, had there been one, would have been enforceable under common law. This was followed by an application dated 8th January, 2018 filed by Accredo AG, Hans & Zara Langer seeking injunctive orders and clear and concise directions as to the execution of the various conflicting orders in this suit.

6. A ruling was thereafter delivered by Korir J. on 20th March, 2018 in respect to the application dated 8th January, 2018 where the judge held that the said application was res judicata to the extent that it attempted to superintend the decision of Chitembwe J. that had been affirmed by the Court of Appeal. This decision was appealed vide Malindi Civil Appeal No. 43 of 2018. However, the appeal was dismissed. The appellants' application for leave to appeal to the Supreme Court was equally dismissed.

7. In Malindi HCCC No. 118 of 2009, parties are not entirely in agreement whether the cause of action has been determined with finality.

THE CONSTITUTIONAL PETITIONS

8. On 27th April, 2020 Jan Ramin Langer and 41 others, being accused persons in Malindi Criminal Case No. 240 of 2020 filed the Constitutional Petition No. 10 of 2020 in Malindi seeking to quash their arrest. They had been charged with the offence of forcible detainer. On the other hand, Isaac Rodrot and Steffano Uccelli the accused persons in Mombasa Criminal Case No. 854 of 2020 filed Malindi Constitutional Petition No. 12 of 2020 seeking *inter-a-lia*, judicial review orders of certiorari.

9. On 1st September, 2020 a ruling was delivered in Malindi Constitutional Petition No. 10 of 2020 by Hon. Nyakundi. J. in respect of a notice of motion dated 13th May, 2020 where the Court issued orders staying and/or suspending plea taking and further proceedings in Malindi Chief Magistrate's Court Criminal Case No. 240 of 2020. The court further directed that in view of the reconcilable and critical cross-cutting issues between Petitions No. 10 and 12 of 2020, the Chief Justice empanels a constitutional bench to hear and determine Petitions No. 10 and 12 of 2020, which the Chief Justice did.

10. Pursuant to the empanelment of the 3 Judge Bench, and during the pre-trial conference, it became apparent that there were other constitutional petitions filed in Garsen and in Malindi High Courts touching on the same subject matter, and which were yet to be determined. These constitutional petitions were:

1. No. 13 of 2015
2. No. 6 of 2019
3. Misc. Criminal Application No. 1 of 2021

11. Arising from above, it was the view of the Court, shared by some of the parties in those petitions, that judicial time would be saved if the petitions were consolidated and determined together. Pursuant to this view formal applications were filed for consolidation and hearing of all the petitions together. These applications are the applications before the court for determination. These are:

1. Notice of Motion Application dated 22/3/2021 (in Petition No. 12 of 2020) in which the Applicant, the 1st Interested Party, Hans Jurgen Langer, prays for the following orders:

(a) That the honorable court do make a finding that the issues, facts and disputes raised in Malindi HCCC No. 118 of 2009, Malindi HCCNO. 10 OF 2019 and Malindi HCCC NO. 10 OF 2020 are substantially similar, closely connected and cross-cutting with the issues, facts and the underlying dispute raised in Malindi Petition No. 10 of 2020 (aka Mombasa HC Petition No. 128 of 2020) and Malindi HC Petition No. 12 of 2020(aka Mombasa petition No.129 of 2020).

(b) That upon grant of prayer in (1) above, the Honourable court be pleased to stay the hearing and determination of the present petition and Malindi HC Petition No. 10 of 2020 (aka Mombasa HC Petition No. 128 of 2020) pending the hearing and determination of Malindi HCCC No. 118of 2009, Malindi HC Petition No.10 of 2019 and Malindi HCCC NO. 10 OF 2020.

(c) That in the alternative of prayer 2 above, the Honourable court be pleased to admit for hearing and determination Malindi HCCC No. 10 of 2009, Malindi HCCC No. 10 of 2019 and Malindi HCCC No.10 of2020 in priority to or before the hearing and determination of the present petition and Malindi HC Petition No. 10of 2020 (aka Mombasa HC Petition No. 128 of 2020).

(d) That the court any other orders it deems fit and appropriate for the expeditious hearing and disposal of the petition herein.

(e) That the costs of this application be in the cause.

2. Notice of Motion dated 17/3/2021 (in Petition No. 12 of 2020). The Applicant is the Director of Public Prosecutions (DPP) and the application prays for the following orders:

1. *THAT the Honourable Court do make a finding that the issues, facts and point of law raised in Malindi HC Petition No. 13 of 2015 (GARSEN HC PETITION 3 of 2016 and Malindi HC Misc. Crim. Application 1 of 2021 are substantially related and connected to the issues, facts and points of law raised in the Petition herein and Malindi HC Petition No. 10 of 2020 (aka Mombasa HC Petition No. 128 of 2020).*

2. *THAT upon grant of Prayer (1) above, the Court be pleased to certify that the Malindi HC Petition No. 13 of 2015 (GARSEN HC PETITION 3 of 2016), Malindi HC Petition No. 6 of 2019 and Malindi Misc. Crim. Application 1 of 2021 do raise substantial and directly related questions of law and order that they be consolidated and/or heard together by the 3-Judge Bench with the present Petition and Malindi HC Petition No. 10 of 2020 (aka Mombasa HC Petition No. 128 of 2020).*

3. *THAT upon grant of prayers in (1) and (2) above, the Court do refer the matter to the Honourable Chief Justice to vary the Directions issued herein on 6.10.2020 and expand the mandate and terms of reference of the 3-Judge Bench Court to*

also hear and determine Malindi HC Petition No. 13 of 2015 (GARSEN HC PETITION 3 of 2016), Malindi HC Petition No. 6 of 2019 and Malindi Misc. Crim. Application 1 of 2021 together with Malindi HC Petition No. 10 of 2020 (aka Malindi HC Petition No. 128 of 2020) and the Petition herein.

4. THAT the Court may issue any other orders it deems fit and appropriate for the expeditious hearing and disposal of the Petition herein.

5. THAT the costs of this application be in the cause.

12. The application was premised on the grounds set out therein and was supported by the affidavit sworn by **Victor Amugo Alenga** on 18/03/2021. The Petitioners' responses were by way of an affidavit and grounds of opposition dated 16.03.2021 and 24.03.2021 respectively.

13. The Applicant's case is that the court is currently constituted as a 3-Judge Bench to hear and determine the present Petition; that Malindi HC Petition No. 10 of 2020 (aka Mombasa HC Petition No. 128 2020) was instituted by Forty-Two (42) employees of Temple Point Resort Limited against the DPP and the Inspector General challenging constitutional validity of their arrest and prosecution in Malindi CM Criminal Case No. 240 of 2020; Republic -vs- Jan Ramin Langer and 41 others whereas the said Petitioners are charged with the offence of forceful entry into premises known as Temple Point Resort situate in Watamu on the 10/3/2020. The Applicant avers the Petitioners have made allegations in an ownership dispute pitting Hans Jurgen Langer on one hand and Isaac Rodrot and Steffano Uccelli on the other hand, and that the complainant in Malindi CM Criminal Case No. 240 of 2020 is Isaac Rodrot who is one of the Petitioners herein and an interested party in the Malindi HC Petition No. 10 of 2020 alias Mombasa HC Petition No. 128 of 2020.

14. The deponent further avers that Malindi HC Petition No. 12 of 2020 (aka Mombasa HC Petition No. 129 of 2020) was instituted by Isaac Rodrot and Steffano Uccelli against the DPP and the Attorney General challenging their arrest and prosecution in Mombasa CM Criminal Case No. 840 of 2020; Republic -vs- Isaac Rodrot & Steffano Uccelli on charges relating to the forgery of ownership documents relating to Salama Beach Hotel Limited. Further, that there are also three (3) other Petitions/applications involving some or all of the same parties and arising from or connected to the dispute relating to Salama Beach/Temple Point Resort.

15. The Applicant contends that all the criminal cases being challenged through the Constitutional Petitions including those in which a criminal complaint is yet to be lodged with the police, the complainants and accused persons are either Hans Jurgen Langer, Isaac Rodrot, Steffano Uccelli or their connected agents or entities and in all the Constitutional Petitions mentioned, the parties are Hans Jurgen Langer, Isaac Rodrot and Steffano Uccelli invariably as either Petitioners or Interested Parties and all the Respondents having a link with the orders of the High Court in Malindi HCCC 118 of 2009 and Court of Appeal in CA No.36 of 2015 Nairobi. That whether or not the actions of the Respondents are contrary to the said decisions is itself a substantial question of law requiring the empanelment of a 3-judge bench as opposed to disposal by a single judge.

16. The Applicant's case is that the multiplicity of complainants and counter complainants, and the ever changing positions of complainants and accused persons over events or connected matters have the potential to clog the flow of justice and is a hindrance to the determination and conclusion of various criminal cases, which are pending at different stages in different courts.

17. The Applicant further states that the multiplicity of Constitutional Petitions on similar or connected matters is not prudent utilization of the limited judicial resources and might lead to conflicting decisions on the same issues or connected matters or limit access to justice by other parties who may be interested and adversely affected in the outcome of the controversy without the opportunity to be heard. Similarly, that there are Court Orders issued by the various courts stopping the criminal prosecutions pending hearing and determination of the Petitions and the continued state of affairs that has resulted in inordinate delay in the determination of the suits is hindering the 1st Respondent from discharging its mandate properly and effectively.

PETITION NO. 6 OF 2019

18. The 2nd application Notice of Motion dated 9/3/2021 was brought under the provisions of Article 25 (c), 48, 50 and 165 (4) of the Constitution of Kenya, Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 1A & B of the Civil Procedure Act, Order 1 Rule 10, Order 2, Order 8 Rule 3 & 5, Order 17, Order 18 and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. The 2nd interested party/Applicant seek the following orders: -

1. Spent;

2. This Honourable Court be pleased to certify that the suit herein raises substantial questions of law and forthwith refer the case to the Honourable Chief Justice for appointment of a bench of an odd number of judges being not less than three pursuant to Article 165 (4) of the Constitution;

3. The Honourable the Chief Justice be pleased to give directions that this suit be heard by the three Judge bench already empaneled in Malindi Petition Nos.10 and 12 of 2020 - Salama Beach Hotel & 2 others v The DPP & 2 Others.

4. The Honourable Court be pleased to give directions on the hearing and final determination of this suit.

5. The costs of this application be awarded to the Applicant.

19. The application was supported by the grounds on the face of the motion, that there are several matters pending in Court in relation to this petition which have the same parties and revolve around the same facts. When directions were given, it emerged that this matter was being dealt with by a single judge and no formal application had been made to have the suit placed before the three judges. This matter has never

been heard on its merits since over the years the proceedings have solely dealt with interlocutory applications.

20. The application was supported by an affidavit sworn by Hans Jurgen on 7/7/2020.

21. In response thereto, the Petitioner herein filed a replying affidavit sworn on 19th March, 2021 by Steffano Uccelli. He deposed that the said petition should be consolidated and heard together with constitutional petition No. 10 of 2020 and 12 of 2020.

SUBMISSIONS

22. Mr. Jami learned Counsel for the Director of Public Prosecutions submitted correctly, that the petition herein Nos. 10 & 12 are already consolidated. Counsel sought to have the two matters consolidated with Petition No. 13 of 2015 (formerly Garsen Petition No. 3 of 2016), Malindi Petition No. 6 of 2019 and Malindi Misc. Criminal Application No. E001 of 2021 on grounds that issues, facts and points of law raised in the petitions are substantially similar with those raised in Petition Nos. 10 & 12 of 2020. He further submitted that all the petitions herein are brought against the Director of Public Prosecutions as the Respondent, and they are all related to a property called Temple Point/Salama Beach Hotels Limited. Counsel further submitted that there was a common thread in all these petitions since they all seek to restrain the Director of Public Prosecutions from alleged harassment of the Petitioners in relation to Temple Point/Salama Beach Hotels. Therefore, the said consolidation will help the court to avoid possibility of conflicting decisions if they are heard separately by courts of similar jurisdiction. Counsel submitted that on alternative the court can still deliver different judgments in each petition, but after hearing them together as one, or concurrently.

23. Mr. Karanja learned Counsel for the Petitioner in Petition No. 6 of 2019 submitted in support of the applications for consolidation on grounds that they are all of a similar nature.

24. Mr. Muniyithya learned Counsel for the Petitioner herein, Mr. Ndegwa Counsel for the Petitioner in Petition No. 13 of 2016, Ms. Githogori for the 2nd interested party in Petition 12 of 2021, Mr. Makori for the AG and Mr. Makambo for the Petitioner in Petition 10 & 12 of 2021 all supported the application for consolidation. Mr. Muniyithya adopted Mr. Karanja submissions and abandoned his grounds of opposition dated 24th March, 2021.

25. Mr. Makambo learned Counsel for the Petitioner in Petition 10 & 12 of 2021 submitted that the issues, facts and disputes raised in HCC No. 118 of 2009, No. 10 of 2019 and HCCC No. 10/2020 are similar and closely connected to the issues and facts raised in High Court Petition No. 10/2020 and Petition No. 12/2020. He urged the Court to stay the hearing and determination of the present petitions pending the determination of the three commercial suits above or in the alternative, to admit the hearing of the three civil suits with the present constitutional petitions.

26. Counsel further submitted that both Constitutional Petitions No.10 & 12 of 2020 make reference to the three civil suits especially HCC No. 118 of 2009; that from the affidavit it appears all the petitions are founded on the dispute between the 2nd and 3rd Petitioners, Mr. Langer and his associates over the contract and ownership of Salama Beach Restaurant Limited/Temple Point Resort. Accordingly, the issues raised in the Petition Nos. 10 & 12 of 2020 are substantially similar to the issues in the three aforementioned civil matters.

27. Mr. Makambo argued that all these suits involve the 1st, the 2nd Petitioners, and the 1st Interested Party while the common dispute is the said hotel. Therefore, the issues raised in these petitions can be answered by determining the rightful ownership of the said hotel. It was counsel's contention that if the court answers the raised question, the court will have settled the issues raised in the three civil suits without affording the parties a hearing date.

28. Mr. Muniyithya in a rejoinder submitted that Malindi ELC No. 66/2020 is relevant for resolution of the question of ownership because between 2012 and 2018, while acting as Director of Salama Beach Hotel Limited, Mr. Langer, the Interested Party fraudulently obtained title deed to the said hotel and had it transferred to the 2nd Interested Party. Counsel submitted that the issue before the court can only be solved by the determination of title ownership of the suit property. Therefore, the effect of the consolidation would be to enable the group led by Mr. Langer to remain in control of the hotel unlawfully.

29. In rejoinder, Mr. Makambo submitted that should the court make an order in favour of consolidation, the ELC matters can be frozen pending the outcome on decisions on civil suits and on the petitions. Counsel further submitted that HCCC No. 118 of 2009 was never concluded. The orders were on an interlocutory basis. The main suit has never been heard.

THE ISSUES FOR DETERMINATION

30. We have carefully considered the applications, replying affidavits and the grounds of affirmation in support of consolidation of the petitions herein together with the written and oral submissions by Counsel. In our view the issues that arise for determination by this Court are as hereunder: -

1. Whether there should be consolidation
2. Whether the commercial suits should be heard together with the Constitutional Petitions.

Whether there should be consolidated

31. Consolidation of suits is provided under **Order 11 Rule 3(h) of the Civil Procedure Rules 2010** to wit:

3.(1) *With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—*

(h) *consider consolidation of suits*

32. The guiding principles in consolidation of pleadings were stated in **Mombasa HCCC No. 992 of 1994 Nyati Security Guards and Services v Municipal Council of Mombasa** as follows:

“The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

(a) Some common question of law or fact arises in both or all of them; or

(b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or

(c) For some other reason it is desirable to make an order for consolidating them.”

33. In **Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others [2018] eKLR**, Nzioka J observed as follows:

“43. Similarly, the case law on consolidation of suits as evidenced by the authorities cited above is now settled and the principles that arise there from are that;

(i) that the suits should have common questions of law and facts;

(ii) the reliefs sought in both cases in respect of or arise from the same transactions or a series of transactions; and

(iii) Any other reason desirable to make the order.

44. It is therefore clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice, and expeditious disposal of matters, consequently promote judicial economy, so long as it is not to prejudice any of the Parties.”

34. The authorities that have been cited above relate to where an application for consolidation of suits is made by one of the parties. We are however of the view that the Court on its own motion can also effect consolidation where the consolidation advances the overriding objectives.

35. In **Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others [supra]** the Court went on to hold that:

“the Court has a broad discretion to order for consolidation of suits even on its own motion and can consolidate to tie more than one action together for separate individual actions into one and get a single judgment, where the issues and witnesses are the same and the rights of the parties can be determined in one suit. (See Tommie vs La Chance 412 SO 2nd 439 (Fla 4th DCA 1982).”

36. Appreciating the just, expeditious and cost-effective disposal of suits as being a suitable grounding for consolidation of suits, the Court in **Korean United Church of Kenya & 3 Others vs Seng Ha Sang (2014) eKLR** opines that:

“Consolidation of suits is done for purposes of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

37. Further, this legal position, was expounded in **Republic V Paul Kihara Kariuki Ex Parte Law Society of Kenya [2020] eKLR** as follows: -

“11. The principles of consolidation of suits are settled. They were best explained in Stumberg and another v Potgeiter [1] as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

12. *The Supreme Court Case of India in Prem Lala Nahata & v Chandi Prasad Sikaria [2] had this to say: -*

“...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises

where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

13. In *Law Society of Kenya v The Centre for Human Rights and Democracy*,^[3] the Supreme Court of Kenya had this to say about consolidation of suits: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.” (Emphasis added)

14. From the above jurisprudence, a broad principle emerges relating to consolidation of suits. That is, where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered. However, it is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical.

15. The plea to consolidate the cases was raised in response to the courts invitation to the parties to address the existence of an identical suit filed by the Law Society of Kenya, Nairobi branch based on the same set of facts seeking similar orders as sought in this case. As the Supreme Court observed in the above cited case, consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. If the instant cases are examined in the light of the above settled legal propositions, then it becomes clear that the plea for consolidation cannot stand judicial scrutiny in this case. The issues at hand are crystal clear, namely, whether this suit offends the question of sub judice and whether it is an abuse of court process. If the answers are in the affirmative, then consolidation would be impermissible because its application was never meant to cure or cover the doctrine of sub judice or abuse of court process. Put differently, a plea for consolidation is not permissible in circumstances whereby it is evident it is being used to evade the wrath of the sub judice rule as opposed to serving the settled principles of consolidation laid down in the above authorities.”

38. Giving effect to the facts of this case and applications before the Court and the guiding principles, we find and hold that the subject matter of the petitions under consideration are substantially similar and can effectively be consolidated and heard together without prejudice to any of the parties.

Whether the commercial suits should be heard together with the Constitutional Petitions.

39. In the case of *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Lenaola, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked: -

“I should only say this as I conclude; in *Francis Waiethaka -vs- Kenyatta University Petition No. 633 of 2011*, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang -vs- Ariong (1987) LRC (const.) 517* where it was held as follows: -

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the Constitution under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

40. Lenaola, J went on to observe as follows after citing the above case: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

41. We fully agree with the legal logic expressed in the above authorities. In our view the claims in HCCC No. 10/2019; HCCC No. 118/2009 and HCCC No. 12 of 2020 are purely commercial in nature and do not require constitutional interpretation and/or declarations. Further, these matters are at different stages of adjudication before courts of concurrent jurisdiction and there would be no reason for the constitutional court to assume jurisdiction over them.

42. From the foregoing, we are satisfied that a case has been made for the consolidation of petitions considered herein. On the other hand we are equally satisfied that the commercial matters considered in this application do not merit being consolidated with the petitions.

43. In the end we allow the application for consolidation in the following terms:

1. Malindi High Court Petition No.13/2015; Malindi High Court Petition No. 6/2019; and Malindi Misc. Civil Application No. 1/2021 be and are hereby consolidated with Malindi High Court Petition Nos. 10 and 12 of 2020.

2. As a consequence of order 1 above we hereby do refer this matter to the Honourable the Chief Justice to vary the directions issued herein on 6/10/2020, and to expand the mandate and terms of reference of the 3-Judge Bench Court to also hear and determine Malindi High Court Petition No. 13/2015 (formerly Garsen High Court No. 3/2016); Malindi Petition No. 6/2019 and Malindi Misc. Criminal Application No. 1/2021 together with Malindi High Court Petition No. 10/2020 (Malindi High Court Petition No. 128/2020) and the petition herein.

3. Costs shall abide the outcome of the petitions.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021.

R. NYAKUNDI

JUDGE

E. K. OGOLA

JUDGE

A. ONG'INJO

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Munyithya for Petitioner in Petition No. 12/2020

Mr. Anangwe for Petitioner in Petition No. 12/2020

Mr. Makambo for Petitioner in Petition No. 10/2012

Mr. Karanja for Petitioner in Petition No. 13/2015

Mr. Odhiambo for Registrar of Companies

Mr. Ndegwa for Mr. Langer in Petition No. 10/2020 and 13/2015

Mr. Jami for DPP

Ms. Peris Court Assistant