



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 8 OF 2019**

**BETWEEN**

**SAFEPAK LIMITED.....APPELLANT**

**AND**

**HENRY WAMBEGA .....1<sup>ST</sup> RESPONDENT**

**KEA SUDI JUMAA.....2<sup>ND</sup> RESPONDENT**

**DAMA CHARO MWANGO.....3<sup>RD</sup> RESPONDENT**

**VINCENT MWANYONYO DECHE.....4<sup>TH</sup> RESPONDENT**

**ESTHER TEZI WANJE.....5<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**KATHINI SPRING WATER LIMITED.....7<sup>TH</sup> TESPONDENT**

**COOPERATIVE BANK HOUSING SOCIETY.....8<sup>TH</sup> RESPONDENT**

**CANNON ASSURANCE COMPANY LIMITED..... 9<sup>TH</sup> RESPONDENT**

**HEDGE FARM LIMITED.....10<sup>TH</sup> RESPONDENT**

**NAAMAN BIN ALI BIN MUSES.....11<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....12<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of the Environment and Land Court at Mombasa (Omollo, J.) dated 13<sup>th</sup> December, 2018 in ELC PET. No. 2 of 2018)*

**JUDGMENT OF THE COURT**

1. This appeal arises from a ruling delivered on 13<sup>th</sup> December 2018 by the Environment and Land Court (ELC) at Mombasa (**Omollo, J.**) ordering the 1st to 5th respondents to elect, within 30 days of that ruling, whether to pursue redress for alleged historical land injustices through ELC Constitutional Petition No. 2 of 2018 or through ELC Case Nos. 13 of 2014 as consolidated with ELC Case No. 142 of 2014. The ELC further ordered that “*in default of exercising such an election*” ELC Constitutional Petition No. 2 of 2018 “*shall stand dismissed with costs to the respondents.*”

**Background**

2. On 25<sup>th</sup> January 2018, the 1st to 5th respondents (the petitioners), on their own behalf and on behalf of many other persons, petitioned the

ELC at Malindi in Constitutional Petition No. 2 of 2018 seeking declarations: that their right to property and their right to dignity under Articles 40 and 28 respectively of the Constitution have been violated; that the numerous properties mentioned in the petition, described as Plot No 8 Sec III MN; CR 14107; CR 5606/14 and 7120/15 Sub division 514 (Original No. 286/4 Sec 111 MN; Sub division 437(Orig 15/1.2 &286)1 SEC 111 MN); CR 5692 Plot No 1589/13 Sec 111 MN, Plan No 20800; Sub division No 470 (Original No. 5/3) Sec III Mainland North; CR No. 13026/1, Transfer registered as No. 5770/19, Land Survey Plan No. 80138 and Subdivision 4399 Orig No 15/4.5 & 286/3 Sec II MN Plan No 75772, CR 5692/4,(the properties) all comprising approximately 800 acres situated in Kilifi County and referred to as Jeuri Village are ancestral lands; that the same should be declared trust land, be adjudicated under the Land Adjudication Act to ascertain the original occupiers descendant's interest in the land (by virtue of the history of the land); and that the registered proprietors of the properties, the 7<sup>th</sup> to 11<sup>th</sup> respondents, be compensated.

3. The petitioners contended in that petition that prior to colonization, the properties were communal and were occupied by their forefathers; that titles over the properties were issued in 1908; that the occupants of the properties were forcefully evicted therefrom sometime between 1960 and 1962; that by virtue of their ancestors having been the original occupiers of the properties, and being descendants of the original occupiers, their right to the properties has crystallized through the doctrine of ancestral domain or alternatively through an implied inter-generational trust on the land; and that the Government of Kenya has failed to take measures, including legislative measures and also failed to compensate the registered owners, the 7<sup>th</sup> to 11<sup>th</sup> respondents, in order to remedy the situation. The petitioners averred that their right to dignity under Article 28 of the Constitution has thereby been violated.

4. By an application dated 20<sup>th</sup> April 2018, the petitioners applied to the ELC for a temporary injunction order to restrain the 6<sup>th</sup> to 12<sup>th</sup> respondents *"from clearing and/or felling down trees and/or exhuming bodies from graves and/or constructing structures on the suit premises popularly known as Kayas and/or dealing with the suit premises in any manner, whatsoever detrimental to the rights and interest of the petitioners/applicants"* pending the hearing and determination of the petition. That application was based on the grounds that the 6<sup>th</sup> to 12<sup>th</sup> respondents had unlawfully and illegally embarked upon clearing and felling down trees and erecting structures on the properties thereby interfering with the petitioners traditions; that the actions of the 6<sup>th</sup> to 12<sup>th</sup> respondents rendered the petitioners and those they represent homeless and the actions were intended to dispossess them of their inheritance to the land.

5. The 8<sup>th</sup> respondent, Cooperative Bank Housing Society Limited, responded with an application dated 20<sup>th</sup> June 2018 praying that the petition as well as the application dated 20<sup>th</sup> April 2018 be struck out *"for being time barred"* and for *"being an abuse of the court process"*. That application was based on the grounds that there is adequate statutory procedure under Section 15 of the National Land Commission Act, No. 5 of 2012 for addressing historical injustices; that the petitioners were seeking to convert ordinary civil disputes, as confirmed by reference to already existing suits in Mombasa ELC No. 13 of 2014 and ELC No. 142 of 2014 over the same dispute, into a constitutional dispute.

6. On 16<sup>th</sup> July 2018 the ELC directed that the petitioners' application for temporary injunction and the 8<sup>th</sup> respondent's application for striking out *"be heard together"*. At the same time, the ELC ordered *"the parties to keep on hold any buildings and/or constructions on the land and/or transfer of the titles in dispute pending further orders."*

7. On 2<sup>nd</sup> October 2018, Safepak Limited, the appellant herein, applied before the ELC to be joined in the petition and that the order issued on 16<sup>th</sup> July 2018 be set aside, discharged, vacated, varied or be stayed as against the appellant. In the alternative, the appellant prayed that the petitioners be ordered to provide security for the appellant's costs of the petition as well as security in the form of bank guarantee for Kshs.95,000,000.00 as projected damages to the appellant arising from the injunction order given on 16<sup>th</sup> July 2018.

8. The appellant's application was based on the grounds that it is the registered owner of one of the properties subject of the suit, namely, Land Reference Number MN/III/4781 situated in the North East of the Mombasa Municipality, Kilifi District having purchased it from its previous owner, Pride Industries Limited; that with a view to developing and constructing warehouses on that property, the appellant had obtained a loan of Kshs.95,000,000.00 from the bank and obtained all required approvals; and that construction on that property was ongoing until 8<sup>th</sup> September 2018 when the appellant's construction workers were served with the order stopping the construction.

9. The appellant averred that having perused the petition and the petitioners' application for injunction, it was apparent that the petitioners were inviting the ELC to usurp the mandate of the National Land Commission under Article 67(2) of the Constitution and Sections 5(1)(e) of the National Land Commission Act to investigate and resolve historical land injustices related to land; that the petitioners should have utilized the mechanism provided in the National Land Commission Act and the NLC (Investigation of Historical Land Injustices) Regulations, 2017 to address their claims; that the petitioners had not established any legal basis for claiming ownership over the property; and that the petitioners had not met the threshold for the grant of an injunction.

10. The appellant further averred that the injunction issued by the ELC on 16<sup>th</sup> July 2018 was hurting it in that its construction had been paralyzed midway and the delay in completing the same was exposing the appellant to liability by the lender and the contractor and further loss; that further delay in concluding the construction would result in the appellant defaulting in the loan repayment to the bank to its detriment.

11. Simultaneously with its application presented on 2<sup>nd</sup> October 2018, the appellant filed a notice of preliminary objection asserting that the petitioners petition and application offend Article 67 of the Constitution and Section 15 of the National Land Commission Act and that the same should be struck out *in limine*.

12. The application by the 8<sup>th</sup> respondent to strike out the petition and the appellant's application presented on 2<sup>nd</sup> October 2018 alongside the notice of preliminary objection are the subject of the impugned ruling delivered by the ELC on 13<sup>th</sup> December 2018.

13. In its said ruling, the ELC upheld the complaint by the 8<sup>th</sup> respondent and by the appellant that the petitioners were guilty of abuse of

process of the court. In reaching that conclusion, the Judge stated:

***“The last issues for determination is whether or not this petition is an abuse of the Court process in view of the existence of ELC cases No. 13 of 2014 and 142 of 2014. The parties in both suits are the same. The claim in the two earlier cases relate to a claim of rights acquired by virtue of adverse possession. The claim in this petition relates to one of a historical injustice. Can this claim be adjudicated under the existing suits in light of the provisions of section 6 of the Civil Procedure Act? My answer is in the positive since the line of evidence to be adduced in my estimation relates to issue of occupation. I am also of the considered opinion that although the nature of this claim cannot be said directly and substantially in issue as in the former suit, the issues can still be determined in one suit by seeking separate prayers on reliefs/..... For this reason the petitioners are guilty of abuse of Court process by failing to bring the two claims in one suit and or electing which of the two they wish to pursue. If they are allowed to pursue both claims in different suits it amounts to wasting judicial time; putting the Respondents to multiple cost of litigation over same subject matter and also wanting to benefit twice. Consequently it is on this ground that the application succeeds.”*** [Emphasis added]

14. The learned Judge was however not persuaded that striking out the petition was the appropriate relief. Instead of striking out the petition the Judge ordered as follows:

***“In light of my above finding, I do grant the petitioners a period of 30 days to elect between this petition and ELC case Nos 13 & 142 (both of 2014 consolidated) they wish to pursue and or amend. In default of exercising such an election, the current suit which is this petition shall stand dismissed with costs to the Respondents. Further whatever the option is taken by the petitioners the costs of the suit to be withdrawn shall be awarded to the Respondents. The matter to be mentioned on a date given in Court during the delivery of this ruling for further orders. The costs of the application is awarded to the 3<sup>rd</sup> Respondent and the Interested Party.”***

15. It is that order made by the ELC in lieu of striking out the petition that aggrieved the appellant, hence this appeal.

#### **The appeal, Cross-appeal and submissions by counsel**

16. In its memorandum of appeal the appellant complains that the Judge improperly exercised her discretion in declining to strike out the petition and allowing the petitioners to elect and decide the fate of the petition; that the Judge should have held that the constitutional mandate to determine historical injustices concerning land is vested exclusively on the National Land Commission and therefore erred in *“arrogating to herself jurisdiction to hear and determine grievances related to historical land injustices as of first instance...”*

17. On its part, the 8<sup>th</sup> respondent in its notice of cross appeal contends that in addition to the grievances raised by the appellant, the impugned decision of the ELC should be varied or reversed on the additional ground that the Judge should have found the petition was statute barred under Section 7 of the Limitation of Actions Act.

18. In support of the appeal and cross appeal, learned counsel **Mr. Esmail Abbas** appeared for the appellant; learned counsel **Miss Mburu** for the 8<sup>th</sup> respondent and learned counsel **Ms. Nafula** for the 10<sup>th</sup> respondent. Counsel for the 10<sup>th</sup> respondent filed written submissions in support of the appeal but did not appear. In opposition to the appeal **Mr. Kenga**, learned counsel appeared for the petitioners.

19. It was submitted in support of the appeal that the ELC has no jurisdiction to determine a claim for historical land injustices; that the jurisdiction to determine such claims is exclusively vested on the National Land Commission; that under Article 67(2)(e) of the Constitution; Section 15 of the National Land Commission Act; and National Land Commission (Investigation of Historical Land Injustices) Regulation, 2017, the mandate to investigate historical land injustices is vested in the National Land Commission; that the role of ELC is limited to entertaining appeals from decisions of the NLC; and that the Judge fell into error in holding that the ELC has jurisdiction over the matter. In support reference was made to the Supreme Court advisory opinion ***In the Matter of the National Land Commission [2015] eKLR***; a decision of this Court in the case of ***Lucy Mirigo & 550 others vs. Minister for Lands & 4 others [2014] eKLR***; and a High Court decision in ***Leidi Ole Tuta & others vs. Attorney General & 2 others [2015] eKLR***.

20. It was submitted that where, as here, an alternative dispute resolution mechanism is provided, such mechanism should be pursued and it is not permissible to approach the court for redress. In that regard the decisions of this Court in ***Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR***; ***Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille [2017] eKLR*** and ***Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR*** were cited.

21. Having correctly held that the petition was an abuse of the process of the court on account of multiplicity of actions by the petitioners over the same matter, the learned Judge erred, it was submitted, for allowing the petitioners to elect which proceedings to pursue instead of striking out the petition. According to counsel, that constituted a wrong exercise of discretion.

22. On the cross petition, it was urged for the 8<sup>th</sup> respondent that the petitioners claim as *“occupants of the land”* fell within the criteria set in Section 15(3) of the National Land Commission Act and was time barred; that assuming the ELC had jurisdiction over the matter, the statute limited that jurisdiction to claims made within 5 years from the date of commencement of the National Land Commission Act; that in any event the claim was barred under Section 7 of the Limitation of Actions Act and the petitioners are also caught up by the doctrine of laches.

23. In opposition to the appeal and Cross appeal, it was submitted that whereas the National Land Commission has the mandate to investigate issues of historical land injustices and recommend appropriate redress, under Section 15(3)(b) of the National Land Commission Act the ELC is permitted to deal with historical injustice claims capable of being addressed through the ordinary court system; that the jurisdiction of the ELC in that regard has not been ousted by either the Constitution or the National Land Commission Act; and that the Commission does not have a monopoly on the mandate of addressing historical land injustices. In that regard, the decision of this Court in ***Chief Land***

Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] eKLR was cited.

24. On limitation, it was submitted that Section 15(3)(e) of the National Land Commission Act requiring historical land injustice claims to be brought within 5 years of the commencement of the Act was pursuant to amendment to that Act brought about by Section 38 of the Land Laws (Amendment) Act, 2016; that in effect, claims would be permissible up to 2012; that in Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others (above), the Court recognized that the commencement date under Section 15(3)(e) of the National Land Commission Act was 21<sup>st</sup> September 2016.

25. With regard to the order granting the petitioners the choice of the action to pursue, it was submitted that the Judge properly exercised her discretion in granting the petitioners the latitude to choose which suits to pursue; that pursuant to that order, the other suits that were then pending, namely ELC No. 13 of 2014 and ELC 142 of 2014 (both consolidated) have since been withdrawn with costs to the 8<sup>th</sup> respondent and there is accordingly no prejudice to any party.

### **Analysis and Determination**

26. We have considered the appeal and the cross-appeal and the submissions by counsel. Three issues arise for consideration. The first is whether the Judge was right in holding that the ELC has jurisdiction to entertain historical land injustice claims. The second is whether the petitioners claim is statute barred. The third is whether the court properly exercised its discretion in granting the petitioners the option to choose the action to pursue.

27. On the question of jurisdiction of the ELC to deal with historical land injustice claims, the learned Judge had this to say:

***“Section 13(1) of the Environment & Land Act gives this Court original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of the Constitution and with provisions of this Act or any other written law relating to environment and land I am not bound with the findings of the case of Stanley Ngethe Kinyanjui supra that parties should not constitutionalise simple processes which should be done through ordinary claims as there are different positions taken on this particularly the provisions of article 159 (2) of the Constitution that requires the Courts to look at the substance rather than form. However the petitioners claim is premised on a matter clearly provided for under article 67 of the Constitution. The mode of resolving the dispute is provided to be done through the processes given under section 15 of the National Land Commission Act. However because this Court also enjoys original jurisdiction on land & environment matters, I find nothing wrong with a party who chooses this Court as his first vehicle to ventilate his claim. (See the decision of Munyao J in the case of Ken Kasinga vs Daniel Kiplagat Kirui & 5 others (2014) eKLR.”***

28. It is established that jurisdiction is everything and without it the court must down its tools. To that extent, we would agree with counsel for the appellant and counsel for the 8<sup>th</sup> respondent that if indeed the ELC was, by reason of Article 67 of the Constitution and Section 15 of the National Land Commission Act section, divested of jurisdiction, then the ELC should have declined jurisdiction. In the famous words of Nyarangi, J.A. in the often cited case of The Owners Of Motor Vessel Lilian “S” vs. Caltex Oil (Kenya) Ltd [1989] KLR 1 at page 14:

***“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the 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.”***

29. The Supreme Court of Kenya followed in the same path in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, where it pronounced that:

***“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”***

30. We bear those principles in mind in considering the question whether it is within the mandate or jurisdiction of the ELC to deal with historical land injustice claims. The issue arose in the case in Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others (above), to which we were referred, where, like here it was contended that in light of Article 67(2) of the Constitution the proper forum to investigate claims of historical land injustices lay with the National Land Commission, to the exclusion of the court. The Court rejected that contention. In doing so, the Court stated, and it is necessary to quote at length:

***“ On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from our reading of Article 67(2) (e) of the***

***Constitution. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and***

***Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the National Land Commission Act which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.***

***Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice.”***

31. That passage, we believe, accurately represents the state of the law on the matter and provides a complete answer to the appellant’s contention on jurisdiction and we need not say more. There is however the additional complaint in the present case that the petitioners’ first port of call before approaching the ELC, should have been the National Land Commission on which the specific function of carrying out investigations into historical land injustices is vested. The advisory opinion of the Supreme Court in opinion ***In the Matter of the National Land Commission*** (above), the High Court decision in ***Leidi Ole Tuta & others vs. Attorney General & 2 others*** (above), and decision of this Court in ***Speaker of the National Assembly vs. James Njenga Karume*** (above) were cited in support. Those authorities stand for the proposition, with which we agree, that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be followed provided that the remedy thereunder is effectual.

32. Based on the material placed before the Court, it would appear that the petitioners did indeed refer the claim to the National Land Commission, the 12<sup>th</sup> respondent in this appeal. There is for instance a letter in the record of appeal dated 21<sup>st</sup> September 2017 in which the 12<sup>th</sup> respondent states that it is “*mandated to resolve disputes like the one pertaining to this parcel*”; that “*the Commission is keen to settle this dispute*” and that “*the National Land Commission Kilifi Office is working on this issue.*”

33. The record of appeal is however silent on the outcome of the intervention by the National Land Commission, which though privy to this appeal did not participate in the hearing of the appeal. In those circumstances, whether, and to what extent the National Land Commission dealt with the petitioners grievances is a matter of evidence with which the trial court would have to address at the hearing of the petition.

34. The upshot of the foregoing is that, in our judgment, the ELC was right in holding that it has jurisdiction over the matter.

35. We turn to the contention that the petitioners claim is statute barred. In that regard, the Judge pronounced:

***“The right to bring a claim for historical injustice was introduced in the Constitution of Kenya 2010. Article 67 does not put a time limit when the claim ought to be brought to Court. However if the provisions of section 7 of the Limitation of Act (sic) is to apply then in my view the 12 year period runs from date of commencement of the right creation of the right i.e. from August 2010 when the Constitution was passed. In the instant case, the twelve years has not lapsed. The argument of limitation thus fail because while it is true that the parties sued had a right to have claims brought in time, the previous law did not make for a direct provision for the petitioners herein or anyone else to bring such a claim. I hold that the indolence if at all was not of the petitioners’ own making.”***

36. The question therefore is whether the Judge was right in rejecting the contention that petitioners claim was not time barred. As the Judge correctly stated, Article 67 of the Constitution does not place a time limit within which redress under that provision may be sought. But does that mean that time for seeking redress for constitutional violation is forever at large? It does not. In ***Wellington Nzioka Kioko vs. Attorney General [2018] eKLR***, this Court, in an appeal arising from a decision of the High Court on a petition for a declaration that the fundamental rights and freedoms of the petitioner therein had been violated, upheld the High Court that institution of a claim over 30 years after the cause of action had arisen constituted inordinate delay. The Court expressed that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The Court adopted, with approval, a decision of the High Court in the case of ***James Kanyita Nderitu vs. A.G and another, Petition No. 180 of 2011*** where **Majanja, J.** expressed that:

***“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”***

37. In ***Chief Land Registrar & 4 others vs. Nathan Tirop Koeh & 4 others*** (above), this Court also addressed the question of limitation in the context of constitutional petitions. After reviewing past decisions on the subject, the Court concluded that there is no time limit for filing of a constitutional petition and that the period of limitation in the Limitation of Actions Act does not apply to violation of rights and freedoms guaranteed under the Constitution. The Court stated:

***“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; Otieno Mak’Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003).***

***In our view, subject to the limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits....”***

38. Whether a constitutional petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done. In present case, the Judge determined, correctly in our view, that Section 7 of the Limitation of Actions Act does not apply to this matter. The Judge was also satisfied that the claim was not defeated under the doctrine of

laches. We do not have a basis for interfering with that decision.

39. On the last issue, the appellant complains that having found the sustenance of the petition alongside two other cases before the ELC was tantamount to an abuse of the process of the court, the Judge should have struck out the petition and not given the petitioners the option to elect which action to pursue. The question therefore is whether the ELC properly exercised its discretion in granting the petitioners the option to choose the action to pursue.

40. The principles on which the court acts when dealing with a motion to strike out a suit are captured in *D.T Dobie & Company Ltd vs. Joseph Mbaria Muchina & another [1980] eKLR* where Madan, JA cautioned that a court seized of such application should act cautiously and carefully and that “*a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal*”.

41. Undoubtedly the power and the remedy of striking out a suit has its place and a court should not shy away from giving it in the warranted circumstances. The power to strike out pleadings is not mandatory but permissive. It is a discretionary power. As already stated, it is a power to be exercised sparingly. It should only be exercised in the clearest of cases. It is a remedy that is sometimes considered to be draconian and unless a case be absolutely clear, that remedy should not be granted.

42. In the present case, the Judge found that the pursuit of relief by the petitioners in different suits in different forums over the same cause of action was an abuse of the process of the court. The consequence of that finding was a matter entirely in the discretion of the Judge. It does not follow that the only remedy the Judge could grant was to strike out the petition. It was in our view a proper exercise of discretion by the Judge to direct the petitioners to elect, within the time the Judge stipulated, which of the actions to pursue and which to discontinue.

43. The record shows that the petitioners elected to pursue the petition and discontinue the parallel consolidated suit in the ELC No. 13 and 142 of 2014 which have since been withdrawn with costs. It has not been demonstrated by the appellant what prejudice it has thereby suffered. Having regard to the principles in *Mbogo vs. Shah [1968] EA 93* on the basis of which we can interfere with the exercise of discretion by a judge, the circumstances in this case do not warrant interference.

44. The result of the foregoing is that the appeal and cross appeal fail.

45. The aforesaid notwithstanding, we appreciate the appellant claims that it is an innocent purchaser of property; that it has embarked on developing the property and has taken loans for that purpose; and that the continued suspension of construction works on the property on account of orders given by the ELC in the petition is a matter of great concern and that it stands to suffer great loss. In our view, the remedy lies in expediting the hearing of the petition before the ELC. We accordingly direct that the petition before the ELC be placed for mention before that court within 14 days from the date of delivery of this Judgment with a view to giving directions for an expedited hearing and determination of the petition.

We make no orders as to costs.

**Dated and delivered at Malindi this 11<sup>th</sup> day of July, 2019.**

**ALNASHIR VISRAM**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

**A.K MURGOR**

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**