IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A

CIVIL APPEAL NO. 51 OF 2015

BETWEEN

CHIMWELI JANGAA MANGALE…….…….....……..…1ST APPELLANT

PATRICK SHAURI NYAWA.....2ND APPELLANT

JACKSON NYAMAWI NDORO.....3RD APPELLANT

BENGO RAI LELI.....4TH APPELLANT

AND

HAMISI MOHAMED MWAWASAA…….…….....……1ST RESPONDENT

ASHISH MANSUKHLAL MAJITHIA.....2ND RESPONDENT

TIMIR PRABHUDAS MAJITHIA.....3RD RESPONDENT

MILIND MANSUKLAL MAJITHIA.....4TH RESPONDENT

THE DIRECTOR OF LAND ADJUCATION & SETTLEMENT.....5TH RESPONDENT

THE REGISTRAR OF TITLES, MOMBASA.....6TH RESPONDENT

THE SECRETARY FOR LANDS, HOUSING & URBAN DEVELOPMENT....7TH RESPONDENT

THE COUNTY GOVERNMENT OF KILIFI.....8TH RESPONDENT

THE NATIONAL LAND COMMISSION.....9TH RESPONDENT

THE ATTORNEY GENERAL.....10TH RESPONDENT

STEPHEN MWACHOHA.....11TH RESPONDENT

MGANDI KAMBIJI.....12TH RESPONDENT

AND

OSCAR MUMO NZANAH.....1ST INTERESTED PARTY

BERNARD WAFULA SIKUKU.....2ND INTERESTED PARTY

RAPHAEL KYALO ILUNGA.....3RD INTERESTED PARTY

SUSAN KANINI.....4TH INTERESTED PARTY

(Appeal from the order of the High Court at Mombasa, (Emukule, J.) dated 30th April 2015

in Petition No. 72 of 2014, Consolidated with ELC No. 202 of 2012)

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JUDGMENT OF THE COURT

In this interlocutory appeal, the four appellants, ***Chimweli Jangaa Mangale, Patrick Shauri Nyawa, Jackson Nyamawi Ndoro*** and ***Bengo Rai Leli,*** who claim to represent 60 other members of the ***Mwadzine Clan,*** are aggrieved by the order of the High Court, ***(Emukule, J.)*** dated 30th April 2015 by which the learned judge consolidated their ***Constitutional Petition No. 72 of 2014 (the petition)*** with ***Environment and Land Court Case No. 202 of 2012 (the suit).*** Apparently, Stephen Mwachoha, ***the 11th Respondent*** filed the suit against **Mgandi Kambiji,** ***the 12th respondent*** and in issue in both the petition and the suit is the property known as ***L.R. No. 29853, Mariakani (the suit property).*** We use the word "apparently" advisedly because none of the parties deemed it necessary to include the pleadings in the suit in the record of this appeal or in a supplementary record.

The appellants' memorandum of appeal sets forth some 6 grounds of appeal, but they all raise the central question whether in the circumstances of this appeal, the learned judge erred by consolidating the petition with the suit and directing that the same be heard by the Environment and Land Court (ELC). It is apt to consider the circumstances under which the learned judge made those orders, before we consider whether the learned judge was in error by so proceeding.

From the scanty information on record relating to the suit, it was the first in time to be filed, in the ELC at Mombasa. The intitulment of the record before us shows that the suit is between the 11th and 12th respondents. However, when learned counsel for the appellants, ***Mr. Steve Kithi*** appeared before ***Muriithi, J.*** in the High Court at Mombasa on 25th November 2014 in connection with the petition, he is recorded informing the learned judge as follows:

> ***"Mr. Kithi: We have served all the respondents specific number 1 and 7 respondent (sic). There is a matter before the E & L court where 2, 3, and 4 respondents are the plaintiff against 4 interested parties (sic). The 1st respondent produced a title deed over the suit premises, at a time when part of the land belonged to the applicants and it had showed (sold?) part of it to the interested parties."***

As regards the petition, the appellants filed it in the High Court at Mombasa on 20th November 2014. They averred that at all material times, they were in occupation of the suit property uninterrupted for more than 12 years, when the ***Director of Land Adjudication & Settlement*** and the ***Registrar of Titles, Mombasa,*** irregularly and illegally, allocated it to ***Hamisi Mohamed Mwawasa (the 1st respondent)*** for commercial purposes, who in turn sold and transferred the same to ***Ashish Mansukhlal Majithia (the 2nd respondent), Timir Prabhudas Majithia (the 3rd respondent)*** and ***Milind Mansuklal Majithia (the 4th respondent).***

The appellants claimed further that the allocation, sale and transfer of the suit property was in violation of ***Article 43 (1) (b)*** of the ***Constitution***, which guarantees them accessible and adequate housing, and exposed them to the risk of eviction and homelessness. It was the appellants' further averment that the commercial interests of the allottees of the suit property could not override their constitutionally guaranteed right to accessible and adequate housing. In addition they contended that the allocation and sale of the suit property violated their right to fair administrative action under ***Article 47*** of the Constitution, because they were not afforded an opportunity to be heard before the allotment. By paragraph 3 of the affidavit sworn on 20th November 2014 by the 1st appellant in support of the petition, it was deposed that the purpose of the petition was to acquire title to the suit property by adverse possession.

Accordingly the appellants sought a host of reliefs, among them declarations that the allocation, sale and transfer of the suit property violated ***Articles 2(5)*** of the Constitution and the ***United Nations General Comment 4*** on the Right to Adequate Housing; ***Article 28*** on human dignity; ***Article 43(1)(b)*** on the right to accessible and adequate housing; and ***Article 47(1)*** on the right to fair administrative action. They also sought an order prohibiting the respondents from interfering with their occupation of the suit property and costs of the petition.

On 26th March 2015, the petition was listed before Emukule, J. when he advised counsel for the parties that the matter involved a dispute over land and ought to be handled by the ELC. He accordingly adjourned the petition for mention on 30th April 2015, and directed counsel to take instructions from their clients with a view to having the matter heard and determined by the ELC.

On the appointed day, all counsel for the respondents agreed that the dispute was a land dispute, which should be heard and determined by the ELC. It was also brought to the attention of the court that the suit was pending before the ELC and that it involved the same suit property and some of the parties in the petition. Counsel for the appellants however requested the learned judge to give his reasons for the view that the petition should be heard and determined by the ELC.

In a short and succinct order, the learned judge ruled that the dispute was essentially a property dispute, which was best handled by the ELC. He also reasoned that such action would obviate a multiplicity of actions between the same parties, seeking the same reliefs. Accordingly he directed that the petition and the suit be consolidated and heard and determined by the ELC. That is the order that aggrieved the appellants, leading to this appeal, which by consent, was heard by written submissions with no oral highlights.

According to Mr. Kithi, the learned judge erred in the exercise of his discretion to consolidate the petition and the suit and to transfer the same to the ELC. It was submitted that the learned judge did not properly inquire into whether the suit and the petition raised common questions of law, whether the reliefs sought were the same and whether the dispute was between the same parties. Citing the decisions of the High Court in ***Nyati Security Guards & services Ltd v. Municipal Council of Mombasa, HCCC No. 992 of 1994 (Mombasa)*** and ***Hangzhou Agrochemical Industries Ltd v. Panda Flowers Ltd, HCCC No 97 of 2009,*** counsel submitted that the learned judge misapplied the principles of consolidation of suits.

It was also the appellants' contention that the learned judge did not have the ELC file before him and therefore his exercise of discretion to consolidate and transfer the petition and the suit was based on no, or on insufficient grounds. For good measure, it was urged that the parties to the suit were not before the learned judge and were therefore denied an opportunity to be heard. Lastly it was submitted that the mere existence of the ELC with jurisdiction to hear disputes touching on land did not preclude the High Court from entertaining a suit for enforcement and protection of fundamental rights guaranteed by the Constitution. In learned counsel's view, the ELC did not have jurisdiction to try the issues raised in the petition.

Only the 1st, 2nd, 3rd and 4th respondents filed written submissions. Through their advocates, ***Messrs. Kamoti Omolo & Company Advocates,*** the said respondents opposed the appeal and contended that the exercise of discretion by the learned judge was proper. It was urged that the learned judge had given the

parties an opportunity to consider and ruminate on the question of consolidation of the suit and the petition and their and transfer to the ELC and all save the appellants were in support of consolidation and transfer.

Submitting that the appellants had not demonstrated any prejudice that they would suffer from the order of consolidation and transfer, the respondents argued that there was nothing in the ELC Act which precluded that court from entertaining actions alleging violation of fundamental rights relating to land. Otherwise the respondents indicated that they were indifferent to which court heard the matter so long as it was disposed off expeditiously.

We have duly considered the record of appeal, the impugned order of the High Court, the record of appeal, submissions by counsel, the authorities they have relied upon and the law. The ELC is established by ***Article 162 (2) (b)*** of the Constitution and has the status of the High Court. Its constitutional remit is to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Pursuant to ***Article 162 (3)*** of the Constitution, Parliament enacted the Environment and Land Court Act. ***Section 13*** thereof made further provisions on the jurisdiction of the court as follows:

> ***"13 (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***
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> ***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***
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> a. ***relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
> b. ***relating to compulsory acquisition of land;***
> c. ***relating to land administration and management;***
> d. ***relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
> e. ***any other dispute relating to environment and land.***
>
> ***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution."***

The Constitution has therefore created a specific court, with equal status to the High Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and "***any other dispute relating to land".*** It cannot be gainsaid that when the Constitution has created a specific mechanism for redress of particular grievances, that mechanism must be resorted to. (***See Narok County Council v. Transmara County Council & Another, CA No. 25 of 2000*** and ***Mutanga Coffee & Tea Company Ltd v. Shikara Ltd & Another, CA No 54 of 2014 (Malindi).*** Indeed, ***Article 165 (5)*** of the Constitution provides in express terms that the High Court shall not have jurisdiction over matters falling within the jurisdiction of the Environment and Land Court. Again by dint of ***Article 165(6)*** of the Constitution, the supervisory jurisdiction of the High Court does not extend to the ELC, which is a superior court like the High Court itself.

In ***Karisa Chengo & 2 Others v. Republic, Cr App Nos. 44, 45 and 76 of 2014 (Malindi),*** this Court considered the rationale of setting up specialized courts like the Environment and Land Court in the Constitution and stated thus:

> ***"We must therefore resort to our peculiar history and circumstances to understand why it was necessary to have an ELC. Land in Kenya is an emotive issue and for good reasons; agriculture is the backbone of the country's economy. In our view there was need to have expeditious disposal of land and environment matters and a specialized court would ensure that was done as well as provide jurisprudence on adjudication of land and environment disputes. The need***

therefore for preserving the objective of creating the specialized courts contemplated under Article 162(2) of the Constitution cannot be gainsaid."

Does the ELC have jurisdiction to entertain an action for enforcement or protection of fundamental rights where the alleged violations arise from or relate to matters within its jurisdiction, such as violation of the right to property? This Court considered the issue in ***Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012*** and in ***Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014***, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of the Constitution. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant's claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.

That leads us to the question whether the learned judge erred by consolidating the petition and the suit. In ***Nyati Guards & Security Ltd v Mombasa Municipal Council, HCCC No 992 of 1994, Maraga, J.*** (as he then was) stated as follows regarding consolidation of suits:

> ***"Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-***
>
> > ***1. some common question of law or fact arises in both or all of them; or***
> >
> > ***2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series or transactions, or***
> >
> > ***3. for some other reason it is desirable to make an order for consolidating them.***
>
> ***The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated."***

(See also ***Stumberg & Another v. Potgieter [1970] EA 323***).

Clearly the purpose of consolidating suits is to expedite their hearing and disposal, cut on costs and expenses, save judicial time and ultimately to ensure that justice is administered without undue delay as demanded by ***Article 159 (2) (b)*** of the Constitution. It does not amount to observing that constitutional demand to hear largely the same dispute between largely the same parties in two different courts and on two or more different occasions. Such approach entails tying down two courts and calling the same witnesses twice thus incurring unnecessary costs and expense. ***Order 11, rule 3(1) (h)*** of the ***Civil Procedure Rules*** regarding pre-trial directions and conferences nowadays empowers the court, with a view to furthering expeditious disposal of cases and case management, to among other things, consolidate suits.

In addition, the ***overriding objective*** found in virtually all the legislation regulating the procedure of the High Court, the ELC and even this Court stipulates that the objective of the legislation is to facilitate the just, expeditious, proportionate and affordable resolution of disputes and requires all the courts to give effect to that objective, so as to achieve the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, and the timely disposal of the proceedings at a costs affordable by the parties.

At the same time a duty is placed upon the parties assist the court towards achieving those ends.

In this case, the suit property in dispute is the same. Some of the parties in the petition and the suit are common. We have also held that the ELC has jurisdiction to hear the issues raised in the petition and in the suit. Taking into account the constitutional demand in Article 159 that justice shall not be delayed, the overriding objective, and the fact that there is no apparent prejudice that the appellants stand to suffer by the consolidation of the petition and the suit and their transfer to the ELC for hearing and determination, we cannot fault the learned judge for the order consolidating the suit and the petition. Accordingly we find no merit in this appeal and the same is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Malindi this 15th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR