IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 65 OF 2015

BETWEEN

SAMSON CHEMBE VUKO…….…….....…….APPELLANT

AND

NELSON KILUMO …….....…….....… 1ST RESPONDENT

MATILDA KASHINDO…….....…….……2ND RESPONDENT

KENNETH KAZUNGU (The registered officials of

Prisons Kiwandani Residential Upgrading CBO)……..3RD RESPONDENT

(Being an appeal against the ruling of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 5th September, 2014

in

E &L.C. C. No. 57 of 2014)

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JUDGMENT OF THE COURT

The appellant purchased **Plot Numbers 0665** and **595** both situate at Prisons/Kiwandani informal settlement in Kilifi, "*the suit premises*" sometimes in May, 2010. He thereafter put up various structures thereon including a residential house and a stone perimeter wall. The appellant too is a member of the Prisons/Kiwandani Residential Upgrading, a Community Based Organization *"CBO"* formed by persons residing in the area who had encroached and informally settled as squatters on Government land that had been designated as an Agricultural Show Ground and dumping site within Kilifi Township. The objectives of the CBO were to advocate for land rights of the said squatters by engaging the relevant Government organs to have their land tenure formalized and also to engage the then Kilifi Town Council to have the Prison/Kiwandani Informal Settlement upgraded by having a Part Development Plan "*PDP*" prepared and approved. As the exercise got underway, members were allowed to commence the development of the plots they had settled on. This is how the appellant came to put up a residential house

and a perimeter wall on the suit premises.

During the upgrading of the roads within the settlement, it was discovered that some members including the appellant had built on areas reserved for roads in the PDP. For the appellant, it was part of his perimeter wall. They were accordingly served with notices for the demolition of the offending structures. Fearing that the respondents would carry through their threats to demolish part of his perimeter wall, the appellant sought the intervention of the court. He therefore filed a suit in the Environment and Land Court at Malindi in which he prayed for; a permanent injunction barring the respondents from demolishing any building or structures on the suit premises and or interfering with his quiet enjoyment of the suit premises.

In their defence, the respondents pleaded that the boundaries of the suit premises were not technically determined through a proper survey but was through arbitrary apportionments of land by the appellant and that the respondents did not approve the construction. That being an informal settlement, there was need to regulate, formalize and control the developments hence the preparation of the PDP after picking exercise to determine the position of structures so as to position roads appropriately. That this exercise was carried out with the entire population being kept abreast of all the happenings. That the beaconing of the resultant parcels having been done, it was discovered that the appellant's perimeter wall protruded into the road reserve hence the request to him to demolish it so as to pave way for the road, which request the appellant turned down and instead rushed to court. For good measure, the respondent added that **Section 13, 15** and **26** of the Physical Planning Act "*the Act*" provides a dispute resolution mechanism for an aggrieved party to appeal any decision of the Director of the Physical Planning with respect to the PDP and in so far as the appellant had not utilized the said procedure, the High Court lacked jurisdiction to entertain the suit by virtue of **Sections 19(5)** and **38(5)** of the Act. Accordingly, they reserved the right to raise a preliminary objection on the said grounds.

True to their word, the respondents on 8th May, 2014, filed a Notice of Preliminary Objection in those terms. The Preliminary Objection was canvassed before **Angote, J.** who in a ruling dated 5th September, 2014 upheld the Preliminary Objection. In so doing, he delivered himself thus:-

> **"19. It therefore follows that this court has unlimited jurisdiction to deal with disputes relating to the environment and land in accordance with Article 162(2)(b) of the Constitution, the court is required to look at other governing statutes to determine whether it has the original or appellate jurisdiction in a given case.**
>
> **20. Where a statute provides the mode of resolving disputes relating to the environment and the use and occupation of and title to land, then that mode must be resorted to first.**
>
> **21. The provisions of the Physical Planning Act are clear that the High Court, in this case the Environment and Land Court, can only hear appeals from the National Liaison Committee on matters pertaining to a regional physical development plan, unless it is shown that that body do not exist.**
>
> **22. Consequently, this court does not have jurisdiction to deal with issues arising from a regional physical development plan at the first instance unless it is shown that the District Physical Planning Liaison Committees and the National Liaison Committee have since ceased to exist. I have not been told that those bodies do exist.**
>
> **23. For those reason, I uphold the Defendant's Notice of Preliminary objection dated 2nd May, 2014."**

Unpersuaded by the reasoning of the trial court, the appellant lodged the instant appeal on three grounds to wit; that the trial court erred in failing to find that it had jurisdiction to hear and determine the suit, in

finding that the mechanism for the resolution of the dispute was not followed by the parties; and, in failing to appreciate that the respondents had failed to follow the requisite procedure hence compelling the appellant to invoke the court's unlimited original jurisdiction to solve the dispute.

When the appeal came up for hearing on 18th December, 2015, parties agreed to canvass it by way of written submissions. The respective written submissions were subsequently filed and exchanged. Highlighting the submissions on 3rd May, 2016, **Mr. Kimani**, learned counsel for the appellant, submitted that it was not in dispute that PDP was gazetted. However, the appellant wrote to the respondents expressing his reservations. Soon thereafter, the respondents marked for demolition part of the suit premises. To the appellant, whereas he followed the procedure and the law, the respondents did not. Counsel further submitted that **Article 162(2) (b)** as read with **Article 165(3)** of the Constitution and **Section 13(1)** of the Environment and Land Court Act granted the trial court the original jurisdiction to entertain the dispute. Finally, counsel submitted that the respondent acted arbitrarily in marking part of the appellant's suit premises for demolition.

In response, **Mr. Manyale**, learned counsel for the respondents, submitted that the Act has inbuilt dispute resolution mechanism. That the appellant had not invoked it; and in failing to do so he denied the trial court jurisdiction; that the trial court had only an appellate jurisdiction under the Act. Therefore, the trial court was right in upholding the Preliminary Objection. For all these propositions, counsel relied on the following authorities:-

i. Speaker of the National Assembly v Karume [2008] 1KLR 425.
ii. Owner of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.

The central question in this appeal is whether the trial court had jurisdiction to entertain the dispute in view of the dispute resolution mechanism availed to the appellant in the Act. Whereas the appellant does not concur with the trial court's decision that it had no jurisdiction by virtue of the foregoing, the respondents are totally of a divergent view.

It is common ground that the suit arose out of the planning of an area known as Prison /Kiwandani within Kilifi Town. It is also common ground that the area was subject to the Act in view of the fact that the land had never been planned, surveyed or demarcated and was in fact in occupation of squatters. Finally, it is not disputed that the squatters including the appellant wanted the area brought under the provisions of the Act for purposes of upgrading and issuance of ownership documents.

From the record, it is clear and as required by the Act that vide Gazette Notice dated 28th November, 2013, the PDP for the area was gazetted. By the said Gazette Notice and pursuant to the provisions of **Section 19(1)** of the Act, the PDP was open for inspection by the public for a period of 60 days to allow for any objections. As required by **Section 19(3)** of the Act, any objection to any PDP as was the case here by the appellant ought to have been addressed or relayed to the Director of Physical Planning. In effect, the appellant ought to have addressed his objection to the Director of Physical Planning and not the respondents. If a party is not satisfied with the decision of the Director of Physical Planning, he then appeals to the Liaison Committee under **Section 13** of the Act and if a party is still unhappy with the decision, he can appeal further to the National Liaison Committee under **Section 15** of the Act. In the event that the party is still dissatisfied, then by virtue of **Section 19** of the Act, he has a right of appeal to the High Court and in this case, the Environment and Land Court. This is the inbuilt dispute resolution mechanism in matters falling under the Act, like the appellant's case. As it can readily be seen, the Environment and Land Court's jurisdiction in matters pertaining to the Act is purely appellate. Accordingly, the appellant's arguments anchored on **Articles 162(2)(b)** and **165(3)** of the Constitution as well as **Section 13(1)** of the Environmental and Land Court Act cannot be sustained. Indeed, we are satisfied that they were appropriately addressed and answered by the trial court. We see no fault at all in the reasoning by the trial court.

The Act provides for a dispute resolution mechanism and confers only an appellate jurisdiction to the High Court. It is obvious that the appellant did not invoke the said mechanism under the Act. All he did was to write a letter of protest to the respondents. Under the Act, for that protest to be taken as an

objection it ought to have been addressed to the Director of Physical Planning. That the appellant addressed the alleged protest letter to the respondents as opposed to the Director of Physical Planning, cannot be deemed that the Director received an objection from the appellant within the 60 days statutory period. Accordingly and in so far as the dispute resolution mechanism established under the Act was not triggered, the High Court lacked jurisdiction to entertain the dispute as properly found by the learned Judge.

There being no objection raised by the appellant or any other resident(s) of the proposed Squatters Upgrading Project, as required, how can the respondents be condemned for issuing the enforcement notice dated 24th March, 2012. **Section 38(4)** and **(5)** of the Act, provides for an appeal against an enforcement notice to be firstly lodged with the relevant Liaison Committee established under **Section 13** of the Act; and an appeal thereof to the National Liaison Committee established under **Section 15** of the Act. Once again, an appeal against the decision of the National Liaison Committee on the enforcement notice lies to the High Court under **Section 38(5)** of the Act. It would appear that the appellant failed as well to utilize this elaborate dispute resolution mechanism to challenge the enforcement notice served on him.

It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. Indeed, in the case of the **Speaker of the National Assembly** (supra), this Court stated:-

> **"…….Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed….."**

Recently in the case of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another**, **[2015] eKLR,** we reiterated the foregoing in these terms:-

> **"…..This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes.** SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME **(supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:**
>
> > *"[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*
>
> (See also KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS (2008) 3 KLR (ER) 296)**.**
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> **"It is readily apparent that in those cases the Court was speaking to issues of the correct** *procedure* **rather than of the correct** *forum* **for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.**
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> **The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution,** *including* **reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word** *"including"* **leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court**

> **would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.**
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> **Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.…**
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> **…..We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very** *raison d'etre* **of the mechanisms provided under the two Acts……"**

Of course jurisdiction is everything as observed by **Nyarangi, JA**. in the **M.V Lillian, S** case (supra):-

> **"…….without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction……."**

However, with special regard to this appeal, the following extract from **Words and Phrases Legally defined-volume 3: 1-N** at page 1 are pertinent:-

> **"……By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."**

What the appellant was asking the court to do is to assume jurisdiction which it did not have. The consequence is that the decision therefrom would have amounted to nothing.

On the whole, we are satisfied that the trial court did not err by upholding the Preliminary Objection to the extent that the appellant's suit sought to invoke the original jurisdiction of the High Court in a matter that was left to be dealt with by alternative dispute resolution mechanism by an Act of Parliament. The appellant for reasons best known to himself refused to invoke it.

In view of the conclusion we have reached, this appeal fails and is accordingly dismissed with costs.

Made and dated at Mombasa this 27th day of May, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR