

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Njoki & Lenaola, SCJJ)

PETITION NO. 4 OF 2017

—BETWEEN—

COAST PROFESSIONAL FREIGHTERS LIMITED.....APPELLANT

—AND—

WELSA BANGE OGANDA.....1ST RESPONDENT

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION.....2ND RESPONDENT**

NADHIA LIMITED.....3RD RESPONDENT

(Being an appeal from the Judgment of Court of Appeal at Mombasa dated 17th February 2017 in Civil Appeal No.18 of 2016, Makhandia, Ouko and M’Inoti, JJA)

RULING ON A PRELIMINARY OBJECTION

A. INTRODUCTION

[1] Sometime in 1998, the 1st Respondent, Welsa Bange Oganda, filed a suit at the High Court in Mombasa (**HCCC No.58 of 1998**). After what was described by the trial Judge, *Kasango J*, as “a long journey”, Judgment was eventually delivered on 21st August 2015 with the following orders being issued:

- (a) The alleged auction of 17th September 1997 of property Mombasa/Block X/219 is hereby declared null and void.**
- (b) The title Mombasa/Block X/219 shall hereof be rectified to revert back to the Plaintiff, Welsa Bange**

Oganda. In that regard, Coast Professional Freighters Limited shall vacate Mombasa Block X/219 within 30 days from today's date failing which, eviction orders shall issue.

(c) There shall be Judgment jointly and severally against Industrial and Commercial Development Corporation and Coast Professional Freighters Limited for the Plaintiff for Kshs.8 Million.

(d) 1st to the 3rd Defendants shall pay the Plaintiff's costs of this suit.

[2] On appeal, the Court of Appeal, having re-evaluated the evidence and applying the applicable law to the same, dismissed the appeal with costs to the 1st Respondent. That decision triggered the present appeal.

B. PRELIMINARY OBJECTIONS

[3] We are now confronted with preliminary objections as follows:

- (i) The first by the 1st Respondent dated 13th March 2017; and*
- (ii) The second by the 2nd and 3rd Respondents dated 2nd March 2018.*

[4] All the three parties have raised objections to the hearing of the Petition of Appeal on the ground that, whereas the Appellant has not indicated what jurisdiction of this Court it is invoking, the appeal is not a proper one as a matter of right under Article 163(4)(a) of the Constitution nor does it raise a matter of general public importance as is the expectation of Article 163(4)(b) of the Constitution. Consequently, it is urged, this Court has no jurisdiction to hear and determine the appeal and instead, the same should be struck off with costs.

[5] In response to the Preliminary Objections, the Appellant has submitted that the dispute revolves around Article 40 of the Constitution which protects the right to property and whereas the Petition of Appeal is not grounded on Article 163(4)(b) on matters of general public importance, the same is properly before

this Court as one involving the interpretation and application of the Constitution under Article 163(4)(a). To that extent therefore, it is urged that the Appeal is properly before this Court as a matter of right and should be determined on the merits.

C. ANALYSIS AND DETERMINATION

[6] Since the Appellant has admitted that Article 163(4)(b) is inapplicable to its appeal, it not being one involving a matter of general public importance, we shall only interrogate the applicability of Article 163(4)(a) i.e. whether the appeal is one filed as a matter of right under the said Article and requiring the interpretation and application of the Constitution by this Court.

[7] In doing so, we must from the onset state that, we shall not tire in reminding parties that this Court's jurisdiction is circumscribed by the Constitution itself so that not every matter qualifies as an appeal to us. It therefore behoves every party to state, with a measure of specificity and precision, what jurisdiction it is invoking in approaching this Court. It is not for the Court to peruse an appeal, speculate on what jurisdiction it should assume, then proceed to determine such an appeal on that assumption. Where a party therefore fails to address the jurisdictional question *ab initio* and which therefore gives it standing before this Court, the appeal is one for striking out without further ado. That position is true of the present appeal.

[8] The above finding notwithstanding, we deem it fit to state with clarity whether indeed the appeal is properly before us under Article 163(4)(a) of the Constitution. Does it require the application and/or interpretation of the Constitution?

[9] Our perusal of the record at the High Court and Court of Appeal would show that as shown above, *Kasango J* was dealing with the question whether, the 2nd Respondent, having decided to exercise its rights as chargee over L.R. No.

Mombasa/Block X/219 registered in the name of the 1st Respondent and who had allegedly failed to repay a loan he had taken from it, breached its agreement with the latter.

[10] As a corollary, the learned Judge determined the question whether, in the sale (*at a public auction*) and transfer of the 1st Respondent's property aforesaid to the Appellant, fraud was committed by the Appellant and the 2nd Respondent.

[11] It is our view in that context that, nowhere in her Judgment did *Kasango J* make any attempt at interpreting or applying the Constitution because as can be seen by the final orders she issued (para 1 of this Ruling), no such issue arose for her determination. What of the Court of appeal?

[12] In their Judgment, the learned Judges of Appeal distilled the following issues for determination:

- (i) *Whether or not the High Court (Commercial Division) had jurisdiction to hear and determine the dispute;*
- (ii) *Whether the exercise of statutory power of sale by the 2nd and 3rd Respondents was proper and or lawful;*
- (iii) *Whether the Appellant participated in the public auction held on 17th September 1997;*
- (iv) *If the answer to (iii) is in the affirmative, whether the Appellant emerged or was declared the successful bidder in the auction; and,*
- (v) *Whether the award of Kshs.8 Million to the 1st Respondent, jointly and severally, against the Appellant and the 2nd Respondent was sustainable.*

[13] In addressing all the above questions, the Court of Appeal did not once address any constitutional issue as is the expectation of Article 163(4)(a) i.e. the

requirement for the interpretation and application of the Constitution to trigger our jurisdiction thereof.

[14] Without belabouring the point, this Court's decisions on the issue confronting us and as enunciated in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, *Hassan Ali Joho and Anor v Suleiman Said Shalabal & 2 Others* [2014] eKLR; *Aviation and Allied Workers Union of Kenya v Kenya Airway Ltd & 3 Others* [2017] eKLR; are succinct in making the point that, where an appeal does not require the interpretation and application of the Constitution; and where the superior Courts below have also not done so, then no appeal lies as a matter of right under Article 163(4)(a) of the Constitution. The present appeal is one such appeal and we deem it frivolous and vexatious as it is obvious to us that the Appellant, well represented by Counsel, ought to have known that it has no right to approach this Court if it had looked at its dispute from the prism of the Constitution and not mere displeasure and dissatisfaction with the decisions of both the High Court and the Court of Appeal.

[15] What of costs? Having found that the appeal is so frivolous that it ought not to have been filed in the first place, it follows that the Appellant shall pay costs to all the Respondents.

D. DISPOSITION

[16] Consequent upon our findings above, the following are our final Orders:

- (i) The Preliminary Objections by the 1st, 2nd and 3rd Respondents are hereby upheld.**
- (ii) The Petition of Appeal herein is struck off.**
- (iii) The Appellant shall pay costs of the proceedings before this Court to all the Respondents.**

[17] It is so Ordered.

DATED and DELIVERED at NAIROBI this 30th Day of April 2020.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original


REGISTRAR
SUPREME COURT OF KENYA