

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)*

**PETITION NO. 1 OF 2020**

**—BETWEEN—**

**HONOURABLE ATTORNEY GENERAL.....PETITIONER/APPLICANT**

**—AND—**

**ZINJ LIMITED.....RESPONDENT**

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*(Being an application for enlargement of time to file a supplementary record in Court of Appeal at Malindi (**Visram, Karanja & Musinga JJA**) in Civil Appeal No. 56 of 2018*

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**RULING OF THE COURT**

[1] **UPON** reading the Notice of Motion by the Petitioner dated 3<sup>rd</sup> February 2020 and filed on 6<sup>th</sup> February 2020 which application is brought pursuant to the provisions of Articles 159(2)(d) & 163(4)(a) of the Constitution, Sections 3, 21(2) & (3) of the Supreme Court Act, 2012 and Rules 23, 26, 33(6) & (7), 34 and 55 of the Supreme Court Rules, 2012 and in which the Petitioner seeks enlargement of time to file its Supplementary Record of Appeal; and

[2] **UPON** reading the supporting affidavit of Ruth Chepkembo Lutta, and those of Dr. Ibrahim M. Mohamed, the Principal Secretary Ministry of Defence, and Ya'Qub Omar in response to the Respondent's application all dated 26<sup>th</sup> May 2020 and filed on 3<sup>rd</sup> June 2020 respectively in which the Petitioner states that this Court had, on 15<sup>th</sup> January 2020, allowed its application dated 24<sup>th</sup> January 2019 which extended time within which to file his Petition and Record of Appeal and **FURTHER**, that he filed and served the Respondent with the Petition and Record of Appeal on 22<sup>nd</sup> January 2020, which was within the prescribed time; and

[3] **NOTING** that with regards to obtaining certified copies of the order and proceedings from the Court of Appeal in **Civil Appeal No. 56 of 2018**, the Petitioner submits that on 5<sup>th</sup> April 2019, he had endorsed a draft order of the Court of Appeal and returned the same to the Respondent's advocates for preparation of the final order in accordance with Rule 34(2) of the Court of Appeal Rules, 2010; and

[4] **FURTHER NOTING** the submission by the Petitioner that the Respondent would not be prejudiced in any manner and that there was no undue delay on the part of the Petitioner to obtain the decree and certified copies of the proceedings from the Court of Appeal and that it would be in the interest of justice for this Court to extend the time for filing the Supplementary Record of Appeal so as to enable this Court determine the real question in dispute; and

[5] **THAT** in the further submissions dated and filed on 5<sup>th</sup> June 2020, the Petitioner submits that on 6<sup>th</sup> February 2020, the Deputy Registrar issued directions in Court, directing the Petitioner to file its Supplementary Record of Appeal within 20 days from the date of the directions and **FURTHER** submitted that the Supplementary Record of Appeal as well as the Petitioner's submissions

in the Petition were filed on 20<sup>th</sup> February 2020 and that the record is now complete; and

[6] **NOTING** that the Respondent on 3<sup>rd</sup> June 2020 contemporaneously filed its Replying Affidavit in opposition to the Petitioner's application with his application predicated on Rules 23(1), 33 and 37 of the Supreme Court Rules seeking to strike out and have withdrawn the Petitioner's Record of Appeal dated 24<sup>th</sup> January 2020 on the grounds that;

- (a) *The Petitioner having approached this Court for extension of time within which to file his Petition, and upon being granted the extension failed to comply with the orders, and seeking a further extension is an abuse of the Courts processes;*
- (b) *That Petitioner failed to follow the laid down procedures of this Court and completely ignored its orders;*
- (c) *The actions of the Petitioner are prejudicial, biased and malicious and aimed at denying the Respondent the fruits of its Judgment delivered by the Court of Appeal in Civil Appeal No. 56 of 2018; and*
- (d) *That the Notice of Appeal and Record of Appeal are prejudicial, unjust and unfair to the Respondent; and*

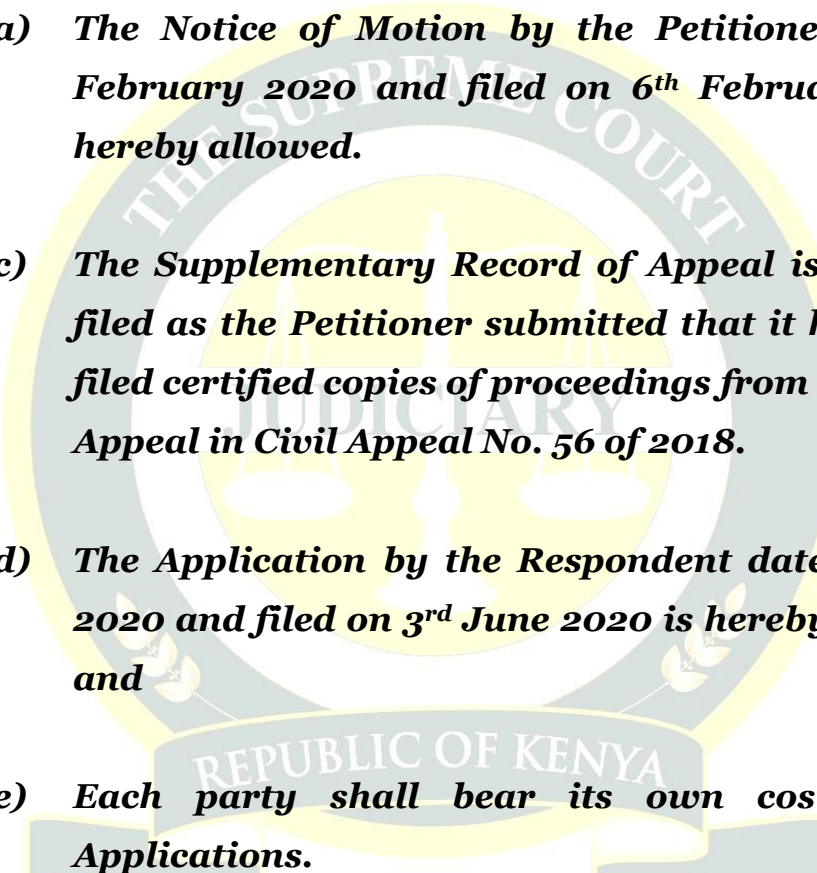
[7] **FURTHER NOTING** that the above grounds are replicated in both the Respondent's affidavit in support of the application and the Replying Affidavit of Mohammed Maadhbuti sworn on 26<sup>th</sup> May 2020, and are further reiterated in the submissions filed on 26<sup>th</sup> May 2020 both in response to the Petitioner's application dated 3<sup>rd</sup> February 2020 and filed on 6<sup>th</sup> February 2020; and

[8] **HAVING** considered the two concomitant applications, we opine as follows;

- (a) *This Court has the jurisdiction to consider and allow an application for leave to extend time as expressed in **Anuar Loiptip v. Independent Electoral & Boundaries Commission** SC Petition (App.) No. 18 of 2018; [2018] eKLR and as provided for under Section 21(3) of the Supreme Court Act and Rule 53 of the Supreme Court Rules, 2012;*
- (b) *That the application by the Petitioner dated 3<sup>rd</sup> February 2020 and filed on 6<sup>th</sup> February 2020 satisfies the principles set out by this Court in **Hamida Yaroi Shek Nuri v. Faith Tumaini Kombe & 2 others** SC Petition (App.) No. 38 of 2018; [2019] eKLR, **Hassan Nyanje Charo v. Khatib Mwashetani & 3 others** SC Application No. 15 of 2014; (2014) eKLR and **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others** SC Application No. 16 of 2014; (2014) eKLR on extension of time because;*
- i) *the Petitioner has given reasonable and cogent reasons for the delay in filing the Supplementary Record of Appeal.*
  - ii) *the said record, being certified copies of the Court of Appeal record in Civil Appeal No.56 of 2018 is not a contested record and its filing will cause no prejudice to the Respondent.*

**[9] IN THE CIRCUMSTANCES,** we exercise discretion and grant the Petitioner's Notice of Motion dated 3<sup>rd</sup> February 2020. Conversely, we hereby disallow the Respondent's application dated 26<sup>th</sup> May 2020 as it would have no merit once the former has been allowed.

**[10]** In the event, we now make **ORDERS** as follows;

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- (a) The Notice of Motion by the Petitioner dated 3<sup>rd</sup> February 2020 and filed on 6<sup>th</sup> February 2020 is hereby allowed.*
- (c) The Supplementary Record of Appeal is deemed as filed as the Petitioner submitted that it had already filed certified copies of proceedings from the Court of Appeal in Civil Appeal No. 56 of 2018.*
- (d) The Application by the Respondent dated 26<sup>th</sup> May 2020 and filed on 3<sup>rd</sup> June 2020 is hereby dismissed; and*
- (e) Each party shall bear its own costs in both Applications.*

**[11]** Orders accordingly.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of August, 2020.**

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

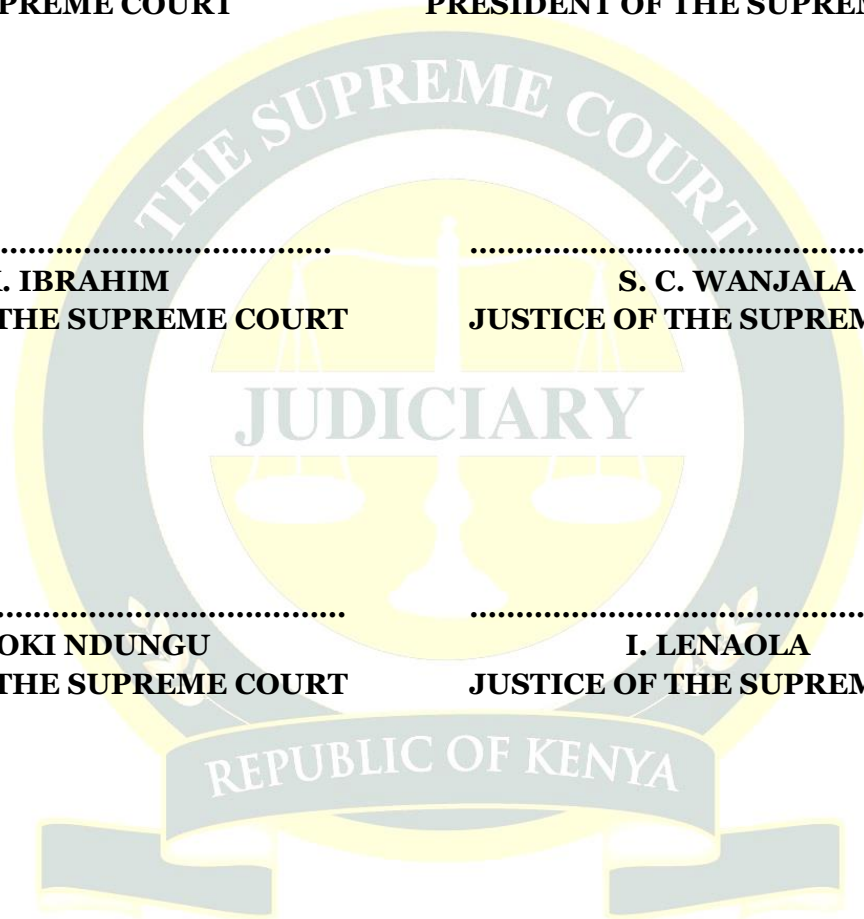
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**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

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

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**S. C. WANJALA**  
**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**