

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 4 OF 2017

—BETWEEN—

COAST PROFESSIONAL FREIGHTERS LIMITED.....APPLICANT

—AND—

WELSA BANGE OGANDA.....1ST RESPONDENT

INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORATION.....2ND RESPONDENT

NADHIA LIMITED.....3RD RESPONDENT

(Being an application to file Additional Grounds of Appeal and a Supplementary Record in the Appeal of the Judgment and Orders of the Court of Appeal (Makhandia, Ouko & M'Inoti JJA) at Mombasa delivered on 17th February, 2010 in Civil Appeal No. 133 of 2011)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion in the application by the Applicant dated and filed on 2nd June, 2017 brought under Sections 8, 17 and 20 of the Supreme Court Act 2011 and Rule 26 of the Supreme Court 2012, seeking that this application be certified urgent and that the Court does allow the Applicant to file additional grounds of appeal herein as well as a Supplementary record of appeal; and

[2] UPON reading the Applicant's grounds in support of the application and the Supporting affidavit sworn on 1st February, 2019 which state that "the crux of the appeal and all the grounds serialized by the former applicant's Advocates crystallize into the grounds proposed to be added" which addition is principal to understanding the dispute and the substance of which, in sum, is that the High Court erred by ignoring the pleadings filed by the Applicant and proceeded to grant remedies to the 1st Respondent (which were not sought against the Applicant) and the order returning the property in dispute to the 1st Respondent amounts to unjustified enrichment since the Applicant has since made significant improvements to the property and no compensation was awarded to the Applicant in respect of this; and without a corresponding order for recovery of the improvements amounts to an arbitrary deprivation of property of any description or of any interest in or right, over, any property of any description as provided in the Constitution; and

[3] UPON considering the Applicant's written submissions dated 19th February, 2019 and filed on 20th February, 2019 wherein the Applicant submits that the additional grounds of appeal it now seeks to add allow it to approach this Court as of right in terms of article 163(4)(a) as the appeal concerns the application and interpretation of the property clause in article 40(1)(2) and (3) as well as the section 99 of the Land Act; and

[4] UPON reading the 1st Respondent's grounds of opposition dated 5th February, 2018 and filed on 8th February, 2018 stating that the application is incompetent since this Court has no jurisdiction to entertain the appeal within which the application has been filed; adding that the application is baseless, bad in law and vexatious as well as an abuse of this Court's processes; lastly, stating that the orders sought would serve no useful purpose as the additional grounds are already covered by the grounds in the appeal filed; and

[5] UPON considering the 1st Respondent's written submissions dated and filed 7th June, 2019 in which it has submitted that because this Court lacks jurisdiction to entertain the substantive appeal then so too does it lack jurisdiction to deal with the application quoting *Owners of the Motor Vessel "Lilian S" v Caltex Oil Ltd [1989] eCLR* where it was said that "**jurisdiction is everything. Without it, a court has no power to make one more step...**";

[6] WE FIND as follows;

- (a) Although the 1st Respondent correctly quotes the dictum on jurisdiction, the conclusion that this Court lacks jurisdiction is premature since the jurisdiction in question is that in respect of the Courts' power to determine this application and not the substantive appeal.
- (b) Granting the orders sought by the Applicants would be prejudicial to the Respondents as it brings before this Court issues not taken on appeal in the Court of Appeal. The additional grounds of appeal are new grounds which neither formed part of the appeal in the Court of Appeal nor were the Respondents able to respond to such substantive grounds of appeal.

[7] HAVING therefore considered the application and affidavit in support thereto and the written submissions of the respective parties, by a unanimous decision of this Bench, we make the following orders;

ORDERS

- (a) ***The application dated 2 June, 2017 is hereby dismissed;***
- (b) ***The Applicant shall bear the costs of this application.***

[8] Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of April, 2019

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

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

.....
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

