

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION (APPLICATION) NO. 4 OF 2017

COAST PROFESSIONAL FREIGHTERS LTD.....PETITIONER

—VERSUS—

1. WELSA BANGE OGANDA.....1ST RESPONDENT

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

3. NADHIA LIMITED.....3RD RESPONDENT

Being an application for stay of execution of the Judgment and Decree of the Court of Appeal (Makhandia, Ouko & M’Inoti JJ.A) in Mombasa, Civil Appeal No. 18 of 2016, dated 17th February, 2017)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion Application dated 23rd February, 2017 and filed on even date under Section 21 and 24 of the Supreme Court Act, 2011 Rule 26 of the Supreme Court Rules, 2012; wherein the applicant seeks Orders of stay of execution of the Judgment of the Court of Appeal dated 17th February, 2017 together with the Judgment of the High Court in HCCC No. 50 of 1998 dated 21st August, 2015 and an Order to restrain the 1st respondent by himself, his servants and/or agents from transferring through sale or assignment of the title to plot No. MOMBASA/BLOCK X/291, pending the hearing and determination of the petition herein;

[2] UPON reading the grounds on the face of the application, the affidavit sworn on 23rd February, 2017 in support of the application by Patrick Mutune Kiasyo; and the applicant's written supplementary submissions dated 27th April, 2017; and

[3] UPON reading the Notice of Preliminary Objection and replying affidavit sworn by the 1st respondent, Welsa Bange Oganda, all filed on 13th March, 2017, and the respondent's written submissions, list of authorities and case digest filed on 29th March, 2018 in opposition to the application; and

[4] UPON reading the 2nd and 3rd respondents' joint Notice of Preliminary Objection and written submissions all dated 12th June, 2018 in opposition to the application; and

[5] UPON considering the applicant's argument that it purchased the suit property by way of public auction through the 2nd respondent's exercise of statutory power of sale; that the applicant has invested heavily on the suit property; that the 1st respondent took possession of the suit property on 23rd February, 2017 following the Judgment of the High Court, cancelling the applicant's title in favour of the 1st respondent; that the applicant fears that the 1st respondent may dispose, sell or transfer the suit property before the hearing and determination of the petition; that the applicant satisfies the principles to be considered for stay of execution of Orders as set out in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR to wit that *the appeal is arguable and not frivolous and unless the order of stay is granted, the appeal were it to eventually succeed, would be rendered nugatory*; and that the appeal filed involves a matter of constitutional application and interpretation; and

[6] UPON considering the 1st respondent's Preliminary Objection on the grounds; that the Court lacks jurisdiction to entertain the appeal within which the application under consideration has been filed; the Judgment sought to be stayed has already been executed and the application has therefore been overtaken by events and should be struck out together with the appeal; that the applicant's appeal does not involve interpretation or application of the Constitution; the applicant has no automatic right of appeal and ought to have obtained certification under Article 163(4)(b) of the Constitution as read with Section 15(1) of the Supreme Court Act, 2011, the absence of which renders the application incompetent as set out by this Court, in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR and ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Limited & 3 Others*** [2017] eKLR; the applicant vacated the suit premises on 23rd February, 2014 and the 1st respondent took vacant possession on the same day; that the 2nd respondent has already paid to the 1st respondent the damages and costs awarded to the 1st respondent in the High Court; that having lost his cases both in the High Court and Court of Appeal; that the applicant has not given any good reason why a stay should be granted while they pursue a second appeal and that the prayer for injunction has no foundation because the appellant has not sought any such prayer either in the High Court or Court of Appeal; and

[7] UPON considering the 2nd and 3rd respondents' objection on the point of law that this honourable Court has no jurisdiction to hear and determine the application seeking interlocutory Orders, until it first hears and determines the 2nd and 3rd respondents' Preliminary Objection dated 2nd March, 2018 challenging the jurisdiction of this Court to hear and determine the appeal based on their reliance of this Court's decision in ***Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v. Judicial Service Commission & Judiciary*** [2016] eKLR;

[8] AND having considered the application, by a *unanimous* decision of this Bench, we make the following Orders under Section 23(2)(a) of the Supreme Court Act, and Rule 24(5) of the Supreme Court Rules, 2012.

ORDERS	REASONS
<i>The Notice of Motion Application dated 23rd February 2017, is hereby dismissed. There shall be no Order as to Costs.</i>	<i>(i) The prayer for stay of execution has been overtaken by events since the petitioner vacated the premises and the 1st respondent took vacant possession of the suit premises on 23rd February 2017.</i> <i>(ii) The Court cannot consider the merits of the appeal at this stage.</i>

DATED and DELIVERED at NAIROBI this.....Day of..... , 2018.

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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

.....
S. N. 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