



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO 614 OF 2004

ZACHARIA MBORI & ANOTHER.....PLAINTIFFS

VERSUS

RAJENDRA RATILAL SANGANI & OTHERS.....DEFENDANTS

RULING

[1] The Notice of Motion dated **13 October 2016** was filed by the Defendants under **Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 45 of the Civil Procedure Rules, 2010** for orders that:

- [a] That the application be certified urgent and service thereof dispensed with in the first instance;
- [b] That pending the hearing and determination of this application *inter partes*, the Court be pleased to grant a stay of execution of the Ruling and Orders delivered on **5 October 2016**.
- [c] That the Court be pleased to review, vary and/or set aside the ruling and orders made on **5 October 2016**.
- [d] That in the light of new important evidence before the court in **Civil Appeal 228 of 2015: Rajendra Ratilal Sanghani & 3 Others vs. Zachariah Mbori & Another**, the Court be pleased to review, vary and/or set aside the ruling and orders dated **5 October 2016**.
- [e] That pursuant to prayer [c] above, the Court be pleased to set aside all consequential orders and processes obtained as a result of the said ruling of **5 October 2016**.
- [f] That the costs of the application be provided for.

[2] The application is supported by the Affidavit annexed thereto, sworn by the 2nd Defendant/Applicant, **Pradeep Karamshi Shah**, on **13 October 2016**. The Defendants contend that new and important matters have since arisen, in the sense that the Appeal has been fixed for highlighting of submissions on **17 February 2017**, and that if the Orders granted in the Ruling dated **5 October 2016** are enforced, the Defendants would suffer substantial loss. They thus request that the application be certified urgent and that stay be granted in the interim.

[3] The application is opposed by the Plaintiffs/Respondents and to that end, **Mr. Chacha-Odera**

Counsel for the Plaintiffs swore the Replying Affidavit that was filed herein on **14 October 2016**. It was averred by **Mr. Chacha-Odera** that, though the Defendants filed an application under Certificate of Urgency in the Court Appeal pursuant to **Rule 5(2)(b) of the Court of Appeal Rules**, the Court declined to certify the application as urgent; and that since that application is still pending, it amounts to an abuse of the process of the Court for the Defendants to file the instant application, granted that the relief sought is, in effect, similar. He added that the intention of the Defendants in filing the instant application is to deny the Plaintiffs of the fruits of their Judgment.

[3] The application was filed under Certificate of Urgency, and as such, this Ruling is limited to Prayers [a] and [b] above; and having considered the averments in the Supporting and Replying Affidavits, the annexures thereto, as well as the submissions made by Learned Counsel, there is no gainsaying that the Defendants did file an application before the Court of Appeal dated **7 October 2016** under **Rules 5(2)(b) and 47 of the Court of Appeal Rules**. The prayers sought in that application are that it be certified urgent and that stay of this Court's Ruling dated **5 October 2016** be granted pending the hearing and determination of the application by the Court of Appeal. It is further not disputed that the facts relied on are the same, going by the Certificates of Urgency and the Supporting Affidavits filed in either case. There is equally no disputation that the Court of Appeal, having considered the application aforementioned, did not certify it urgent, and that it has been listed for highlighting of submissions on **17 February 2017**.

[4] In the premises, I would agree with **Mr. Chacha-Odera** that it is inappropriate for the Defendants to run back from the Court of Appeal to this Court, for orders that have already been declined by the Court of Appeal. Accordingly, there being no justification for the interim orders sought, I would decline to certify the application urgent. I similarly decline the interim orders of stay sought herein.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2016

OLGA SEWE

JUDGE