



**Njoroge v Nduati & another (Civil Appeal (Application)
E903 of 2022) [2025] KECA 82 (KLR) (20 January 2025) (Ruling)**

Neutral citation: [2025] KECA 82 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E903 OF 2022
GV ODUNGA, JA
JANUARY 20, 2025**

BETWEEN

MARY NJERI NJOROGE APPLICANT

AND

GEORGE MUNENE NDUATI 1ST RESPONDENT

SOFIA NJERI NDUATI 2ND RESPONDENT

*(Application for certification of urgency of the application dated 25th September 2024
from the decision made on 1st October 2024 declining to certify the matter urgent)*

RULING

1. This ruling arises from the inter partes consideration of an application seeking that the applicant's application dated 25th September 2024 be certified urgent. The inter partes consideration is pursuant to rule 49 of the [Court of Appeal Rules, 2022](#) which provides that:
 1. An application which the applicant desires to set down for hearing as a matter of urgency shall be accompanied by a certificate of urgency signed by the applicant or the applicant's advocate, supported by affidavit setting forth the matters upon which the applicant relies as showing that his or her application should be heard without delay.
 2. The application under sub-rule (1), certificate and supporting affidavit shall be placed before a single judge, who shall peruse it, and the application shall not be set down for hearing as a matter of urgency unless the judge certifies that it is urgent.
 3. The Registrar may maintain, in addition to the Court register of applications, a separate register of each application made under subrule (1) which shall be numbered consecutively in each year showing the date the application was made, the parties, if any, and the decision of the single judge thereon.



4. The provisions of this rule shall apply to the hearing of urgent applications during the term and in recess.
 5. The refusal by the judge to certify an application as urgent under this rule shall not be subject to a reference to the Court under rule 55, but the applicant may apply informally for the matter to be placed before a single judge for hearing inter partes.
 6. Where an application is certified urgent by a single judge, the application shall be set down for hearing within sixty days after the certification or such other specified period as the President may direct, depending on the urgency of the matter.
2. On 1st October 2022, the matter was placed before me for the purposes of certifying the application as urgent and in the exercise of the discretion conferred upon a single Judge of this Court, I expressed myself as hereunder:

“The application for stay which the applicant seeks to be certified urgent is in respect of a judgement delivered in February 2022. The applicant's ground for seeking certification of urgency is that contempt proceedings have been commenced. I am not satisfied, considering the date of the judgement that the application is urgent.”

3. By letter dated the following day, 2nd October 2024, the applicant's counsel requested the Deputy Registrar of this Court to fix the certificate of urgency for hearing inter partes of pursuant to rule 49(5) of the *Rules of this Court*. I directed the parties to file their submissions in regard to the said issue. While the applicant has filed submissions, the respondents filed a replying affidavit in which, instead of addressing the issue of urgency, they addressed the main application for stay of execution pending the hearing of the appeal. It would follow that the respondents do not oppose the certification of urgency.
4. It is clear from rule 49 of the *rules of this Court* that an applicant who desires that his application be set down for hearing must file a certificate of urgency supported by an affidavit. That affidavit is separate from the affidavit in support of the application and its purpose is to set forth the matters upon which the applicant relies as showing that his or her application should be heard without delay. The affidavit ought to be comprehensive enough to bring out the urgency of the matter without necessarily dwelling on the merits of the application itself. In my view the affidavit in support of the certification ought to be self-contained and whereas the Judge considering the urgency is at liberty to consider the record of the application, an applicant should not expect the Judge to plough through the whole record in order to find if there is any material on the record of the application that would justify its certification.
5. Urgency, it has been held, arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. Urgent applications are therefore, those where if the courts were to fail to act or to act speedily, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.
6. As regards the circumstances under which a Judge would certify a matter urgent it has been stated that what constitutes urgency is not only the imminent arrival of the day of reckoning but that a matter is urgent if at the time the need to act arises, the matter cannot wait. Where there is delay, the certificate of urgency or the supporting affidavit must contain an explanation of the non-timeous action. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account; time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be.



7. From the foregoing discourse there are two paramount considerations in considering the issue of urgency, that of time and consequences. The former denotes the need to act promptly where there has been an apprehension of harm while the latter denotes the effect of a failure to act promptly when harm is apprehended as well as the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis.
8. Therefore, an applicant has a duty to lay out, in the founding affidavit, the reasons as to why the matter is urgent and this is because a party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. An urgent application being an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue, that indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter cannot wait. The need for the certificate of urgency is therefore meant for the benefit of the generality of the hapless litigants who are about to be jumped in the queue but cannot speak for themselves because they are never consulted or given an opportunity to object. For that reason, there is need for a judge to proceed with caution and due diligence so that justice may be done and be seen to be done to all litigants.
9. The certifying lawyer therefore carries a heavy responsibility in which he guides and provides assistance to the presiding judge and that duty must be discharged conscientiously with due diligence and due attention to the call of duty as an officer of the court and in so doing must lay down the basis upon which the legal practitioner expresses his opinion of urgency. The certificate of urgency should show that the legal practitioner carefully examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual. However, while the certificate plays a critical role as an assisting aid to the court, it is not a substitution to the discretion of the court.
10. Consequently, a party seeking to be accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike. Accordingly, the applicant must act promptly when the need to act arises and must show that if the court does not hear the matter urgently, he will suffer irreparable harm. Where the applicant fails to act timeously, he has a duty to give a reasonable explanation for the delay, otherwise in my view, even if it is shown that irreparable harm will be suffered, the matter cannot be heard on urgency. The applicant must treat the matter as urgent and this can be discerned from the action taken and how closely related such action is to the time when the apprehension of harm is realized. See the persuasive opinions in *Gumbo v. Porticulis (Pvt) Ltd* SC 28-14 delivered by the Supreme Court of Zimbabwe on 9th December, 2013, *Mayor Logistics (Private) Limited v Zimbabwe Revenue Authority* CCZ 7/14; *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (HC); *Gwarada v Johnson & Ors*, HH 91/09, *Documents Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H), HH 381/16, *Condurago Investments (Pvt) Ltd v Mutual Finance (Pvt) Ltd* HH 630/15 and *Curlewis in R v Heerworth* 1928 AD 265 at
11. In this case, it is not denied that the applicant is exposed to execution by way of committal to jail. I declined to certify the application as urgent based on the delay in making the application. However, it is clear that unless the application is certified urgent, the outcome of the hearing may well be rendered purely academic, whatever decision the Court makes, should the threat to commit the applicant come to pass.
12. I accordingly, revise the order made on 1st October, 2024 and certify the Motion dated 25th September 2024 urgent



13. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2025.

G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is the true copy of the original,

Signed

Deputy Registrar.

