



REPUBLIC OF KENYA



**Ndiritu v Kinuthia (Civil Application E356 of 2024)
[2024] KECA 894 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 894 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E356 OF 2024**

LA ACHODE, JA

JULY 26, 2024

BETWEEN

JOHN MALOGO NDIRITU APPLICANT

AND

MOSES KINUTHIA RESPONDENT

(Being an application under rule 49 (5) of the Court of Appeal Rules 2022 for certification of urgency against the ruling of the Commercial & Admiralty Division at Nairobi (Mong'are J) dated 13th May, 2024 in HCCOMM NO. E456 of 2022)

RULING

1. The applicant herein filed an application dated 9th July 2024 under Certificate of Urgency seeking that the application be certified urgent, be granted an early hearing date and that the same be heard on priority basis. The applicant intends to appeal against the ruling of the Commercial and Admiralty Division of the High Court by Mong'are J dated 13th May 2024 in Milimani HC COMM No. E456 of 2022, and in the interim to seek for stay of execution orders.
2. On 12th July 2024 the application was placed before the duty Judge who declined to certify it as urgent. Pursuant to Rule 49 (5) of the *Court of Appeal Rules* 2022, this matter was brought before me, sitting as a single Judge today on 23rd July 2024 for inter-partes hearing. Learned counsel Mr. Mbichire appeared for the applicant and learned Counsel Mr. Kiplangat appeared for the respondent.
3. Mr. Mbichire posited that the superior court judge allowed the respondent's application for summary judgment in the sum of Kshs. 104,000,000 against the applicant, despite his plea for leave to file a defence out of time and for consolidation of two suits arising cause of action. He submitted that thereafter, the applicant's advocate filed an application seeking to set aside the ruling instead of appealing in this Court. The application was set down for hearing on the 8th July 2024. When the judge intimated that the judgment was only appealable, counsel realized that they ought to have



appealed against the judgment instead of attempting to move the superior court for setting aside of the judgment.

4. Unfortunately, time to institute an appeal to this Court had been expended. As such, he urged that this application is urgent as the intended appeal cannot be filed before time is enlarged, whereas there is nothing preventing the respondent from executing the decree. Additionally, that the respondent has already filed his bill of cost in the superior court and has also applied for the decree.
5. In rebuttal, Mr. Kiplangat urged that the application is not urgent as they have not undertaken any activity to execute the decree and that the applicant has not placed before this Court any material to show that this matter is urgent and should jump the queue. He however, conceded that the bill of costs has been filed although it does not have a date for taxation yet.
6. I have considered the application, the affidavit in support and in opposition and the brief rival submissions. The applicant cannot file for stay of execution without a Notice of Appeal and he cannot file the Notice of Appeal without the leave of Court for expansion of time within which to file it. I observe that that the respondent has already filed his bill of cost in the superior court and has also applied for the decree.
7. From the foregoing I note that there is nothing to prevent the respondent from commencing the process of execution of the superior court's decree before the application of the enlargement of time is heard and determined. The application is therefore, found to have merit and is hereby certified as urgent.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

