Sheth & another v Sampa Investment Limited & another (Civil Appeal (Application) E111 of 2022) [2023] KECA 94 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 94 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E111 OF 2022

GV ODUNGA, JA

FEBRUARY 3, 2023

BETWEEN

VIPUL JASVANTRAI SHETH ..... 1ST APPELLANT

JITENDRA LAKHAMSHI DANDHIA ..... 2ND APPELLANT

AND

SAMPA INVESTMENT LIMITED ..... 1ST RESPONDENT

SUMMER PROPERTIES COMPANY LTD ..... 2ND RESPONDENT

(Being an Appeal from the ruling delivered on 18th May, 2022 by the Hon. Justice A. E. Dena at the ELC, Kwale in ELC No. 115 of 2021 formerly Mombasa ELC No. 125 of 2021)

RULING

1. By a motion on notice dated November 2, 2022, the applicants herein sought orders that the application be certified urgent and that the court stays proceedings in Kwale ELC No 115 of 2021 pending the hearing and determination of the appeal. They also sought for provision as to the costs of the application.

2. The gist of the application, as can be gleaned from the supporting affidavit, was that the applicants being dissatisfied with the ruling of Dena, J in Kwale ELC No 115 of 2021 has lodged this appeal having filed the notice of appeal on May 31, 2022. In the meantime, the applicants' apprehension is that the matter before the trial court is scheduled to be heard on 15th and February 16, 2023 and unless the application is certified urgent and heard on a priority basis the ELC matter shall proceed to hearing and render this appeal nugatory thereby occasioning great prejudice to the Applicants by denying them their right to be heard on appeal. The applicants further contended that should both the appeal and the ELC matter proceed to hearing simultaneously, it would lead to an absurd and/or embarrassing scenario as it may lead to conflicting outcomes.

3. According to the applicants this application is not intended to delay the appeal or the ELC hearing since the main appeal has already been filed and the parties before the ELC have already complied with order 11 of the *Civil Procedure Rules*. It was disclosed that the certified copies of the proceedings were only ready for collection on September 18, 2022 and that a certificate was issued to that effect. It was contended that the application was brought in good faith, without unreasonable delay and that no prejudice is likely to be caused to any party if the application is allowed.

4. When the matter was placed before the single judge of this court, Hon Mr Justice Gatembu, on November 16, 2022, the learned judge formed a dim view of the urgency and declined to certify the application urgent.

5. By a letter dated January 16, 2023, counsel for the applicants urged the deputy registrar to fix the application for hearing and by a letter dated January 25, 2023, counsel applied that the matter be placed before a single judge for inter partes hearing of the certificate of urgency. It is that inter partes hearing that is the subject of this ruling.

6. At the virtual hearing of the application on January 31, 2023, learned counsel Mr Ngaine appeared for the applicants and the 2nd respondent while Mr Olendo appeared for the respondents. Both parties had filed their respective affidavits and submissions.

7. Mr Ngaine regurgitated the contents of the supporting affidavit and submitted that in order to avoid waste of precious judicial time it is prudent that a decision be made on the application for stay of proceedings. In support of his submissions, Mr Ngaine relied on *Re Global Tours & Travel Ltd HCWC No 43 of 2000* amongst other decisions with similar holdings.

8. On the part of the 1st respondent, it was deposed that the application was brought after an inordinately long delay, as the notice of appeal was lodged on June 30, 2022 and yet the application was filed after five (5) months in November, 2022. It was averred that the delay was unjustified since the certified copies of proceedings are only eight (8) pages and that the ruling appealed against was already ready and typed on the date of its delivery on May 18, 2022. It was contended that the letter bespeaking the proceedings was never sent to the 1st respondent and no step has been taken either towards regularising the issue or expediting the hearing of the appeal, an indication of lack of interest in the appeal.

9. According to the 1st respondent, the notice of appeal is defective as it was lodged way outside the stipulated fourteen (14) days after the date of the ruling and that the applicants filed their record of appeal outside the stipulated sixty (60) days, from the date of lodging the notice of appeal. Therefore, as the appellants failed to institute the appeal within the stipulated time, they are deemed to have withdrawn their notice of appeal and the 1st respondent intimated that he shall, at the appropriate time apply to have the appeal herein struck out. Based on the history of the subject litigation, it was the 1st respondent's contention that the appeal has no chances of success.

10. In his written submissions and in oral address before me, Mr Olendo reiterated the aforesaid averments since the issue before the trial court revolved around the joinder of parties, there is nothing urgent about the matter.

Determination

11. I have considered the informal application, the affidavits in support of and in opposition to the said application, the submissions made and the authorities relied upon. I am mindful of the fact that before me is not an application for stay of proceedings but a consideration as to whether that applicants is urgent.

12. The matter before me is grounded on rule 49 of the *Court of Appeal Rules, 2022* which states as follows:

> 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
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> > 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.
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> 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.
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> 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.
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> 4. The provisions of this rule shall apply to the hearing of urgent applications during the term and in recess.
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> 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.
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> 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.
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> 1. I have deliberately set out the said rule in full so that we can appreciate its full meaning and purport. In my view, while there are no timelines prescribed for making the informal application under rule 49(5) of this court's rules, it is expected that such an application will be made within a reasonable time which depends on the facts of a particular case.

14. It is clear from the rule 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. However, an affidavit that is drawn in a very casual manner would not meet the threshold for certification under the said rule. 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.

15. In this case, the affidavit in support of the application does not disclose what the nature of the ruling appealed against is. While it may not be necessary in all cases to disclose the nature of the decision appealed against, prudence, in my view requires that such material be disclosed since the decision whether or not to certify a mater as urgent is an exercise of discretion. Like any other judicial discretion, such decision must be based on fixed principles and not on private opinions, sentiments and sympathy

or benevolence but deservedly and not arbitrarily, whimsically or capriciously. It must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of the factors that the Judge may, and not must, consider is the nature of the decision sought to be appealed against.

16. 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: a matter is urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there had been any delay. 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. 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. Urgent applications are therefore, those where if the courts fail to act, 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.

17. 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.

18. Therefore, an applicant has a duty to lay out in his founding affidavit why he says 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. 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 and in so doing must lay down the basis upon which the legal practitioner expresses his opinion of urgency. 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.

19. 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. 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. 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 December 9, 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), Mushore v Mbanga & 2 Ors HH 381/16, Condurago Investments (Pvt) Ltd v Mutual Finance (Pvt) Ltd HH 630/15*, *Kuvarega v Registrar General & Anor 1998 (1) ZLR 188* and *Curlewis in R v Heerworth 1928 AD 265 at 277*,

20. In this case it is not disputed that the notice of appeal was filed on May 31, 2022. The instant application was filed on November 15, 2022. That was a delay of some 4 and half months. The reason given for this delay is, firstly, that the applicants intended to file the application with the record of appeal. In my view that is not a good reason to justify a delay where there is real urgency in the matter since an application does not necessarily depend on whether an appeal has actually been filed. The second reason is that, by the time of the filing of the notice the hearing date for the matter before the trial court had not yet been fixed. In my respectful view, a party who waits until an event takes place that threatens his interest in order to move the court when he had all the time to do so before that event, cannot be said to be genuinely desirous of protecting his interest. To my mind, a party who moves the court once an adverse order is made but which has the potential of threatening his interests though no action has been taken in that direction stands in good stead in convincing the court that the application is made in good faith and not merely for the purposes of derailing the other party in the quest for justice.

21. I have considered the material placed before me and while it may well be true that the scheduled hearing before the trial court may well take away the wind from the sails of the applicant's appeal, I find that the applicants did not move this court with the alacrity required of a party desirous of having his matter gain an advantage over other litigants by jumping the queue, while the other hapless litigants are bidding their time on the queue.

22. Like my learned brother Gatembu, JA and based on the conduct of the applicants and insufficient material, I am not persuaded that the motion dated November 2, 2022 is urgent. Accordingly, I decline to certify the same as such.

23. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 3RDDAY OF FEBRUARY, 2023.

GV ODUNGA

JUDGE OF APPEAL

I certify that this is a A true copy of the original

Signed

DEPUTY REGISTRAR