



**Board, Export Processing Zones Authority v Cabinet Secretary,
Industrialization, Trade & Enterprise Development & 4 others (Civil
Application 068 of 2023) [2023] KECA 414 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 414 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 068 OF 2023
A ALI-ARONI, JA
MARCH 31, 2023**

BETWEEN

THE BOARD, EXPORT PROCESSING ZONES AUTHORITY APPLICANT

AND

**THE CABINET SECRETARY, INDUSTRIALIZATION, TRADE & ENTERPRISE
DEVELOPMENT 1ST RESPONDENT**

HON ATTORNEY GENERAL 2ND RESPONDENT

MR HENRY OBINO 3RD RESPONDENT

OKIYA OMTATA OKOITI 4TH RESPONDENT

MR EZEKIEL OWUOR OTIENO 5TH RESPONDENT

*(Being an application seeking stay of execution of the Judgment and
Decree of the Employment & Labour Relations at Nairobi (Rika,
J) delivered on 29th July, 2022) in ELRC Case No. E133 of 2021)*

RULING

1. The applicant, The Board, Export Processing Zones Authority being aggrieved by the judgement in ELRC Case No E133 of 2021 moved this court inter alia under Rule 5(2)(b) of this [Court's Rules](#) seeking to stay the orders of the trial court pending hearing and determination of the appeal. The matter was placed before me for certification on the 2nd of March, 2023.

Upon consideration of the certificate of urgency, the affidavit in support, the application and the accompanied affidavit I was not persuaded to certify the matter as urgent. Pursuant to Rule 49(5) of this [Court's Rules](#) the applicant's counsel wrote to the Registrar of the court seeking to have the application placed before me for inter parte hearing on the question of urgency.



2. In support of the issue at hand the applicant's counsel filed submissions. The matter was fixed for hearing for the 13th of March, 2023 and despite service of the hearing notice dated the 7th of March, 2023 none of the respondent filed documents in opposition to the application. The 3rd, 4th, and 5th respondent did not appear either for hearing of the said application.
3. Counsel for the applicant in his submissions urged that failure to certify the application urgent may result in the applicant being cited for contempt and will force the 1st respondent to gazette the 5th respondent as the new Chief Executive Officer (CEO) of the EPZ Authority thus the substratum of the appeal will be lost and the appeal will rendered nugatory. Further, it was submitted that it had been discovered vide Gazette Notice Vol. CXVIII of November, 2016 that the 5th respondent had been charged and convicted under the proceeds of Crime and Anti- Money Laundering Act in High Court (Ethics and Economic Crimes Division) Misc. Application No 4 of 2017, thus rendering the 5th respondent's appointment illegal and contrary to Article 10 of the Constitution. The appeal is not frivolous as it raises weighty issues. Counsel relied on the following cases, *Henry Muli Munguti & 6 Others v Cyrus Robbert Sala Zibu & 13 others*(2018) eKLR, *Daniel Njenga Muiriruri & 2 Others v Esther Njeri Mburu & Another* (2014) eKLR, and *Diamond Hasham Lalaji & Anor v Attorney General & 4 Others* (2014) eKLR.
4. At the hearing of the application the only respondents represented were the 1st and 2nd respondents and they supported the application.
5. Briefly, by way of a background to this matter; the 4th respondent moved the Employment and Labour Relations Court (ELRC) in relation to the appointment of the 5th respondent as the CEO of the Export Processing Zone Authority by the appellant. The dispute revolved around the roles played by the Cabinet Secretary, the 1st respondent and the Board of the said Authority, the appellant, in the impugned appointment. The appellant had undertaken a recruitment exercise and had conducted interviews and recommended the appointment of the 5th respondent as the best candidate, however, the 1st respondent faulted the exercise and re-appointed the 3rd respondent in an acting capacity for three (3) months. It is against the said background that the 4th respondent petitioned the court seeking for various reliefs. The trial court upon determining the matter declared that the action of 1st respondent in re-appointing the 3rd respondent as an Acting CEO for three months was invalid, null and void abinitio, it declared further that the 1st respondent could not over rule the board's decision, further the court quashed the 1st respondent's letter re-appoint the 3rd respondent, and directed the 1st respondent to immediately gazette the 5th respondent as the new CEO.
6. The applicant aggrieved by the said decision moved to the superior court seeking for a review of the judgment. The court declined the application and it is at this point the applicant set to move this Court.
7. From the onset it is to be noted my mandate for now is very limited. It is confined to merely forming an impression from the pleadings placed before me whether this matter is urgent and deserves to jump the queue to be heard on priority basis and not wait to be heard in the ordinary course of business. I am being called upon to exercise discretion, which discretion is to be exercise judiciously, where there is good reason and to ensure the ends of justice are met. I am not expected to delve into the merits of the matter at this juncture.
8. In the case of *Equip Agencies Ltd v Abdullahi Kassam Esmail and Others* (2015) eKLR this Court held as follows:

“An application will not be certified urgent on an applicant's or his advocates' say – so, without more. This is the reason for the requirement not only of a certificate of urgency by



the applicant or his advocate, but evidence as well by way of a sworn affidavit in proof of the imminence of the threat and risk apprehended. Such risk must be real and immediate. It must portend a present danger to rights and interests.

Without a clear demonstration of real, clear and present peril of harm, I apprehended that it would be a misuse and abuse of the Rule 47 mechanism to certify an application as urgent and thereby have it leap-frog other application previously filed or have the equally deserving business of the Court placed aside or otherwise re-organized to pave way for its hearing. Such queer – jumping, in my way of thinking, must be in the most deserving of case.”

9. The applicant has demonstrated that there is a decree likely to be executed and if this happens the substratum of the appeal may be lost, thus rendering the appeal nugatory. Based on the supporting affidavit and submissions of counsel in the absence of any opposition from the 3rd, 4th and 5th respondents, the 1st and 2nd respondent supporting the application, and in order to avert a situation that may hinder the applicant’s wish to appeal I am persuaded to rescind my earlier decision and certify the application as urgent. It is so ordered.

Dated and delivered at Nairobi this 31st of March, 2023.

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

