



Globe Developers Limited v Mark Properties Ltd (In Administration) (Civil Appeal (Application) E194 of 2023) [2023] KECA 942 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 942 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E194 OF 2023
HA OMONDI, JA
JULY 28, 2023**

BETWEEN

GLOBE DEVELOPERS LIMITED APPLICANT

AND

MARK PROPERTIES LTD (IN ADMINISTRATION) RESPONDENT

(Being an application for stay of execution of the judgment/order of the High Court of Kenya at Nairobi (Mongare, J.) dated 27th April 2023 in HCOMMARB E001 of 2022)

RULING

1. The applicant through the firm of Wandabwa Advocates filed the Notice of Motion dated May 15, 2023 seeking orders of stay of execution of the decree of the High Court pending the hearing of proposed appeal. The matter was placed before me as duty judge on 5th June for purposes of certification. However, upon consideration, I declined to certify the application as urgent.
2. By a letter dated June 8, 2023, the applicant through its advocate, requested the Deputy Registrar to have the matter placed before a single judge for inter partes hearing the Notice of Motion dated May 15, 2023 on the question of urgency under rule 49(5) of the Court of Appeal Rules, with the aim of applying for preservative orders over the subject of the appeal.
3. The applicant through its counsel Mr Wandabwa, explains that the urgency stems from the fact that the respondent has Garnishee Orders against the applicant with respect to its bank accounts, essentially attaching all proceeds in the said accounts in answer to the decree passed against the applicant on the April 27, 2023 by Mongare, J.
4. The applicant through the supporting affidavit dated May 15, 2023, sworn by the applicant's General Manager, Imran Kasmani states that the impugned decision allows the respondent to enforce an arbitral award which involves a colossal amount, and the potential outcome of the said execution will render the instant application otiose as it will be overtaken by the dreaded event - the not so subtle



overtone being that the respondent has many creditors, and there is every likelihood that the money will be applied to service such facilities; with the result that the applicant will suffer substantial and irreparable loss, and the appeal will be rendered nugatory.

5. It is further explained that the garnishee proceedings are just between the judgment creditor and the garnishee, and does not involve the judgment debtor, thus it is possible that the funds will be released to the judgment creditor, upon the decree nisi being made absolute; that once this happens, it will be the last that the funds will ever be seen, as the respondent is currently under administration. Counsel urges me to certify both this matter as well as Civil Application No E 193 of 2023 (although the parties are not disclosed), as urgent.
6. The respondent on the other hand through learned counsel, Mr. Mutuku submits that there can be no sudden sense of urgency just because the tables have now turned against the applicant who in the past, has applied every known delaying tactic. Through the replying affidavit dated June 18, 2023, sworn by Khushbu Kerai, the respondent's manager states that the applicant has in the last four (4) years, engaged in 'theatrics' and 'delaying tactics' couched as legalities, so as to delay the logical conclusion of this matter. That this is borne by the previous conduct of the applicant which includes: failure to set timelines and action directed by the Tribunal; reckless disregard for directions issued by the Tribunal's Chair; failure to avail witnesses timeously; inordinate delay in filing written submissions; and that this conduct was replicated before the High Court, resulting in the arbitral proceedings taking three (3) years to finalise and another one and a half years for the award to be recognised and adopted; and it all boils down to the fact that since the applicant has not been able to get a favourable ruling in its litigation journey, it will perpetually throw a delay spanner into the works just to deny the respondent the opportunity to enjoy the fruits of the judgment. That the respondent has been kept away from its finances for the last 5 years, leading to its being placed under receivership.
7. It is further pointed out that the money being garnished does not even belong to the applicant, as it is being claimed by three other people who include directors of the applicant; and the applicant has no money at all; that in any event; the respondent has a sound financial base in the form of assets in excess of Kshs 500,000,000,000/- (Five hundred billion) compared to the amount in issue here which is just Kshs 200,000,000/- (Two hundred million).
8. I have carefully considered the certificate of urgency, the affidavit in support, and submissions by learned counsel. I must reiterate that certifying an application urgent, is not a matter of course; and the issue as to whether or not to certify an application urgent for immediate hearing is a discretionary power which like all judicial discretionary power, must be exercised, not arbitrarily, whimsically or capriciously, but rather on the basis of evidence and reason.
9. The basis and effect of certifying a matter urgent was expressed in *Jared Okello vs Charles Otiemo Opiyo & 3 Others*, CA No 151 of 2017 (UR), in this manner:

“Certifying a matter urgent means that the same is to be set down for hearing and determination immediately. It gets priority over other matters, even though they were filed earlier in time and the parties have been waiting patiently for their turn. Before a matter can be allowed to jump the queue, it must be shown to deserve priority hearing. That approach is deliberate and dictated by the principles and values of fairness to all litigants and case management considerations, to the end that deserving applications filed first in time, are not relegated to the periphery while later applications of equal or less urgency get fast-tracked and given preferential treatment.”



10. What is it that the applicant is stating as urgent? The applicant maintains that the application was filed timeously, but what has aggravated the situation to urgent status is the execution process which has begun. I have also set out in detail the grounds upon which the urgency is based. Unfortunately, most of the issues that counsel of both sides submit on, and even what the respective parties depose to in their respective affidavits are what I would refer to as missiles best reserved for arguing the application for stay. All that I require at this stage is a demonstration that despite my earlier rejection to certify the matter urgent, things on the ground have changed to near imploding proportions, so as to allow this application to jump the queue and get priority hearing.
11. My jurisdiction as a single judge does not extend to delving or forming an opinion on those issues at this stage. Indeed, in *Railways & Allied Workers Union vs Rift Valley Railways Workers Union*, CA No Nai. 29 of 2015 [UR], it was held that to justify certifying an application urgent, the applicant must satisfy the Court that there are circumstances in the application tending to show that if the matter is not heard promptly, the application and the intended appeal may be rendered nugatory.
12. Having carefully perused the affidavits and submissions on record, and the fact that there is no denial that the execution process has begun, I am persuaded that the applicant's application merits being certified urgent, and I so do.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

