



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wahiu & 2 others v Wahiu & another (Civil Appeal (Application)  
E196 of 2023) [2023] KECA 961 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 961 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E196 OF 2023  
HA OMONDI, JA  
JULY 28, 2023  
IN THE MATTER OF AN INTENDED APPEAL**

**BETWEEN**

**ALEXANDER ANTHONY WAHIU ..... 1<sup>ST</sup> APPLICANT  
SAMUEL MWAI ..... 2<sup>ND</sup> APPLICANT  
NICHOLAS MUIRURI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**JOSEPH KARIHA WAHIU ..... 1<sup>ST</sup> RESPONDENT  
THUMBI KAMAU ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution of the judgment/order of the High Court of Kenya at Nairobi (Bor, J.) dated 4th May 2023 in ELC Case No. 239 of 2018)*

**RULING**

1. The applicant through the firm of Kingara and Co Advocates filed the notice of motion dated May 16, 2023 seeking that pending hearing and determination of the applicant’s intended appeal, this court do issue temporary orders of injunction and stay of execution of the decree and judgment of the Environment and Land Court (ELC) (Bor, J) delivered on May 4, 2023. The matter was placed before me as duty judge on May 18, 2023, for purposes of certification. Upon consideration I declined to certify the application as urgent having made the following remarks:

“ Can Counsel confirm the decision being appealed against. The ruling in the file by Judge Bor is dated August 9, 2021 and judgment dated September 23, 2022. I do not see any judgment dated May 4, 2023 at all. I am thus unable to certify this matter.”



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 16, 2023 on the question of urgency under rule 49(5) of the [Court of Appeal Rules](#), ‘in view of new developments set out in the affidavit in support of the urgency dated June 7, 2023, and sworn by Stanley Kingara, as well as a further affidavit dated June 7, 2023, sworn by Alexander Anthony and a copy of the judgment dated May 4, 2023 (Bor, J.)’
3. At the hearing, learned counsel, Mr Kingara appeared for the applicant while learned counsel Mr Mikwa appeared for the 2<sup>nd</sup> respondent. There was no appearance for the 1<sup>st</sup> respondent although service was effected on June 28, 2023. The applicants explained that at the time of filing the application for certification, they had not been furnished with a copy of the judgment, but were nonetheless constrained to come to court as the 1<sup>st</sup> respondent’s counsel has by a letter dated June 2, 2023, notified the applicants to vacate the suit property (which has been their home since childhood) within seven (7) days thereof. Apparently, the letter and copy of the judgment were not available to the applicants in the first instance.
4. The applicants explained that the 1<sup>st</sup> respondent is their father who has sold the property in question, whilst the 2<sup>nd</sup> respondent is the purchaser, whose counsel wrote another letter dated June 20, 2023, notifying the applicants that they shall be forcefully evicted from the premises within 90 days. It is as a result of these developments that the applicants pray that the matter be certified urgent.
5. The 2<sup>nd</sup> respondent through his advocate Mr Mikwa submits that there is nothing to be certified urgent as the suit before the ELC was dismissed, and the 2<sup>nd</sup> respondent, being the registered proprietor has commenced eviction process; that if the applicants wish to challenge the eviction, there is a legal procedure which they should adopt, but certainly not moving to this court under certificate of urgency.
6. I have carefully considered the certificate of urgency, the affidavit in support, and submissions by learned counsel. There is no gain-saying that certifying an application urgent, is not a matter of course; and 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. See *Sabit Investments Ltd v Josephine Akoth Onyango*, CA No 27 of 2015 (UR).
7. The basis and effect of certifying a matter urgent was expressed in *Jared Okello vs Charles Otieno Opiyo & 3 Others*, CA No 151 of 2017, 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.”
8. What is it that the applicant is stating as urgent? It is the looming threat of eviction, which had been stated even at the initial stage when the matter first came for certification. It had not been certified urgent as the impugned decision was not availed to the court. I confirm that the said judgment has now been availed, and with this fulfilled requirement, the application is certified urgent.

**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**

