



**Kenya Medical Supplies Agency v Revital Health Care (EPZ) Limited & 2 others
(Civil Appeal 65 of 2016) [2023] KECA 1378 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1378 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 65 OF 2016
GV ODUNGA, JA
NOVEMBER 24, 2023**

BETWEEN

KENYA MEDICAL SUPPLIES AGENCY APPELLANT

AND

REVITAL HEALTH CARE (EPZ) LIMITED 1ST RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

*(Application for certification of urgency of the application dated
7th September, 2023 from the decision of a single judge (Lesiit, JA)
made on 8th September, 2023 declining to certify the matter urgent)*

RULING

1. This is a ruling arising from an interpartes application for consideration of whether or not the applicant's application dated September 7, 2023 is urgent pursuant to rule 49 of the [Court of Appeal Rules, 2022](#). The said rule provides 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 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.
 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.
 3. The Registrar may maintain, in addition to the Court register of applications, a separate register of each application made under sub rule (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.

4. The provisions of this rule shall apply to the hearing of urgent applications during the term and in recess.
 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.
 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.
2. On September 8, 2023, the matter was placed before Lesiit, JA who, in the exercise of her undoubted discretion, declined to certify the matter urgent. I must point out that where a Judge of this Court declines to certify the matter urgent, and the applicant is dissatisfied with that decision and requests for reconsideration of the matter inter partes, the prudent and usual practice is to place the matter before the same Judge who declined to certify the matter for inter partes consideration. This is because, an inter partes consideration of urgency is not an appeal but a mere re-look at the matter upon hearing the other side. This matter fell on my laps because, Lesiit, JA whose decision is being revisited is no longer attached to this court station.
3. By letter dated the same day, the applicant's counsel urged the Deputy Registrar of this Court to fix the application for hearing inter partes hearing of the certificate of urgency pursuant to rule 49(5) of the Rules of this Court.
4. At the virtual inter partes hearing of the application for certification on 1st November, 2023, Learned Counsel Mr Waudo appeared for the Applicant while Mr Oluga appeared for the 1st Respondent. There was no appearance for the 2nd and 3rd respondents, notwithstanding service on them of the hearing notice.
5. Mr Waudo regurgitated the contents of the supporting affidavit and relied on his submissions while Mr Oluga addressed me orally. In the written submissions which were highlighted before me. Mr Waudo in paragraphs 14 to 17 as follows:
14. The Applicant cannot avail itself of the procedure under Rule 17 of the Court of Appeal Rules 2022 to file a reference against the Deputy Registrar's aforesaid ruling delivered on August 29, 2023 without an order of certification from this Court, which is the purpose that the application intended to be certified urgent is intended to achieve. Please refer to *Tbika Coffee Mills vs. Rwama Farmers' Co-operative Society* (2018) eKLR
 15. While delivering his impugned ruling on August 29, 2023, the Deputy Registrar granted a stay of execution of forty five (45) days which lapsed on October 14, 2023.
 16. In the absence of a stay of execution of the aforesaid ruling and orders delivered on August 29, 2023, which is sought in the Applicant's aforesaid Notice of Motion application in respect of which certification of urgency is sought, there is an imminent threat of execution by the Respondent for the sum of Kshs 5,542.735/- which is the difference between the costs taxed by the Deputy Registrar in his aforesaid rulings dated August 29, 2023 and November 1, 2021. The said execution which might render the Applicant's aforesaid application nugatory. Please refer to *Rosemary Kinamu Gituma Another v. Kenya Commercial Bank Limited* (2013) eKLR;



Henry Muli Munguti & 6 Others v Cyrus Robert Sala Zibu & 13 Others (2018) eKLR; and *Halai Another v. Thornton & Turpin (1963) Ltd* (1990) eKLR.

17. The Applicant's aforesaid Notice of Motion application dated September 7, 2023 was filed expeditiously. The delay of two days which is highly regrettable was not inordinate. The aforesaid reference on urgency was also made expeditiously.
6. In his submission, Mr Oluga stated that there is no material on the basis of which the Court can certify the matter urgent.
7. In the certificate of urgency, the only allusion to urgency was in paragraph 9 thereof and it was to the effect that "unless the order sought is granted the applicant may suffer substantial loss as it may experience undue difficulty in recovering the aforesaid taxed amount." In the affidavit in support of the certificate of urgency, similarly the only allusion to urgency appeared in paragraph 18 to the effect that "the respondent (sic) may suffer irreparable harm if execution proceedings are instituted by the Respondent before this application is heard and determined."
8. Clearly the issues now being submitted on were not placed before Lessit, JA when the matter was presented for certification.
9. It is clear from rule 49 of the rules of this Court 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.
10. 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. Urgent applications are therefore, those where if the courts were to fail to act or to act speedily, 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.
11. 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 but that a matter is urgent if at the time the need to act arises, the matter cannot wait. Where there is delay, the certificate of urgency or the supporting affidavit must contain an explanation of the non-timeous action. 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.
12. 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.



13. 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 to all litigants.
14. 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 as an officer of the court and in so doing must lay down the basis upon which the legal practitioner expresses his opinion of urgency. 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. 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.
15. 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. 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 and *Curlewis in R v Heerworth* 1928 AD 265 at 277.
16. In this case, the applicant seeks to challenge, on reference the decision of the taxing officer of this Court on the ground that such taxation is excessive. The taxation in question was in effect a re-taxation and based on the earlier taxation, the respondent paid a substantial amount to the applicant. The effect of the re-taxation is that the applicant risk being directed to refund to the respondent the sum the respondent had paid to the applicant pursuant to the earlier taxation.
17. I have considered the material placed before me and while it may well be true that the delay in hearing the application may well have the effect of the applicant being compelled to refund the earlier taxed amount, at least a substantial portion of it, I am not satisfied, based on the material placed before me that that action will have the effect of rendering the applicant's application of no use.
18. I therefore have no reason to interfere with the discretion by Lesiit, JA in declining to certify the matter urgent. Accordingly, I too decline to certify the application dated September 7, 2023 urgent.
19. It is so ordered.



DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

