



REPUBLIC OF KENYA



KENYA LAW
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Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme v Kenya Railways Corporation & 3 others (Civil Application E434 of 2023) [2023] KECA 1351 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1351 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E434 OF 2023
F TUIYOTT, JA
NOVEMBER 10, 2023**

BETWEEN

**THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF
RETIREMENT BENEFITS SCHEME APPLICANT**

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

HIGHER EDUCATION LOANS MANAGEMENT BOARD ... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE DIRECTOR SERVICES 4TH RESPONDENT

(An application for stay of execution and stay of proceedings pending the hearing and determination of an intended appeal against the Ruling and order of the Environment and Land Court at Nairobi (O. A. Angote, J) dated 18th May 2023 in ELC Case No. 59 of 2014)

RULING

1. This ruling arises from an inter partes hearing pursuant to Rule 49(5) of The [Court of Appeal Rules, 2022](#).
2. On 13th October, 2023, being the duty Judge, I declined to certify as urgent a notice of motion dated 12th October, 2023 in which the applicant seeks an order for stay of proceedings of Nairobi Environment and Land Court Suit No. 59 of 2014 pending the hearing of an intended appeal therefrom. By a letter dated 17th October 2023 learned Counsel representing the applicant requested that he makes submissions on the request for urgency that had been declined five days earlier. In effect, an application for inter partes hearing under Rule 49(5), which proceeded on 26th October, 2023.



3. The power to certify an application as urgent for immediate hearing is a discretionary power which ought to be exercised, not arbitrarily, whimsically, or capriciously, but rather on the basis of evidence and reason. The Court, however, does not certify applications urgent as a matter of course (See *Sahit Investments Ltd v. Josephine Akoth Onyango*, CA. No. 27 of 2015).
4. Brief facts that precipitated the application are that the ELC on 8th November, 2022 allowed the applicant's counsel's application to cease acting and dismissed the applicant's suit with costs for want of prosecution. The applicant then filed an application for review of those orders but the ELC similarly dismissed that application on 18th May, 2023. The said orders are the subject of the intended appeal.
5. The grounds upon which the applicant asked the Court to certify the motion as urgent are revealed in the Certificate of Urgency dated 12th October, 2023 and an affidavit in support thereof by Kenneth Wabwire Akide, Senior Counsel, sworn on the same date. The grounds are that; the applicant has filed a memorandum of appeal and an application dated 14th June, 2023 for stay of execution of the orders of 18th May, 2023 and proceedings and the stay application is yet to be heard and determined; the ELC has proceeded to hear the suit in its absence and parties in the suit are at the stage of filing submissions and the matter listed for mention on 17th October, 2023 to confirm the filing; if the urgency was not granted and subsequently the application for stay is not heard, considered and granted, the appeal would be rendered nugatory as the matter in the ELC will proceed to conclusion in the absence of the applicant who is the bona fide owner of the suit property. What was not disclosed was that my Brother Justice K. M'noti had on 19th June, 2023 declined the applicant's request to certify the application dated 14th June, 2023 as urgent, an application which seeks similar orders as the application now before Court. Fortunately, this order was brought to my attention by the registry and as will be obvious shortly, this revelation influenced my chamber decision.
6. During the inter partes hearing, learned counsel appearing for the applicant, Mr. Mureithi, informed the Court that the suit before the ELC had progressed and judgment had been reserved for the 1st February, 2024. It was imperative therefore that the certification request be granted as the applicant, the main claimant in the suit property, can no longer participate in the suit since it was dismissed on 8th November, 2022.
7. Mr. Maruti, learned counsel for the 2nd respondent urged me not to certify the application urgent because the applicant had not adduced any reason to justify such certification. He contended that since the appeal itself was not an arguable one, then the application for stay cannot be said to be urgent.
8. The arguments put forth by the applicant at inter partes hearing fall short of persuading me to reconsider my initial decision refusing to certify the application as urgent. A party who moves a single Judge under Rule 49(1) must be candid and give full disclosure on matters upon which certification is sought. Here, it was not revealed to me that a similar request for certification had been made and refused, and I came to learn of it only because it was brought to my attention by the Court Registry. The discretion of a single judge will not be exercised in favour of a party who withholds information which may be material in assisting the Judge carry out that judicial task. Moreover, it has not been explained to me why the applicant did not move the Court (a single Judge) for inter partes hearing on the first refusal and instead chose to mount a second application.
9. Another reason for my refusal is that the request of 12th October 2023 did not reveal when the ELC made the order that filing of submissions be confirmed on 17th October 2023. The information was necessary because a party requesting certification ought to satisfy the Court that it acted promptly as soon as it learnt of the event or danger that is sought to be arrested. This Court should not be put on an emergency mode simply because an applicant has failed to act diligently. I am reminded of a Board



put up in a place of prominence in the reception of a certain advocate's chambers with a message to his clients or potential clients that "Poor planning on your part should not necessarily be an emergency on mine."

10. I once again decline to certify the application urgent and direct that it be listed in the normal manner. Costs of this inter partes hearing shall be in the main application.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

