



**Savannah Heights Limited v Seruji Limited & another (Civil Application
E349 of 2021) [2022] KECA 414 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 414 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E349 OF 2021
RN NAMBUYE, JA
MARCH 4, 2022**

BETWEEN

SAVANNAH HEIGHTS LIMITED APPLICANT

AND

SERUJI LIMITED 1ST RESPONDENT

SAVANNAH CEMENT LIMITED 2ND RESPONDENT

*(Application for injunction and stay of execution pending the hearing of the
Appeal against the Judgment and order of the High Court of Kenya (A. Mabeya
J.) dated 10th September 2021 in Nairobi HC Misc. Application No. E445 of 2021)*

RULING

1. This matter was placed before me as a single Judge on 7th October, 2021 for certification of the application dated 6th October, 2021 as urgent. Upon perusal of the record in light of the grounds set out in the certificate of urgency as reasons for seeking of the said Notice of Motion to be certified as urgent, I declined to certify the matter as urgent. For purposes of the record, only the prayers sought are as follows:
 - “ 1. That this Honourable Court be pleased to certify this application as urgent in the first instance.
 2. That this Honourable Court be pleased to issue an injunction restraining the 1st respondent from presenting and holding itself out to be a shareholder of the 2nd respondent and participating in the affairs of the 2nd respondent in the capacity of a shareholder pending the hearing and determination of the applicant’s appeal; and also pending the hearing and determination of the dispute regarding the validity of its shareholding in the 2nd respondent.



3. That this Honourable court be pleased to issue an injunction restraining the 1st respondent's representatives appointed to the Board of the 2nd respondent at the Extra Ordinary General Meeting of the 2nd respondent held on 15th September, 2021 from presenting and holding themselves out as directors of the 2nd respondent; and from sitting in any board meeting(s) of the 2nd respondent and passing any resolutions whatsoever pending the hearing and determination of the applicant's appeal; and also pending the hearing and determination of the dispute regarding the validity of its shareholding in the 2nd respondent.
 4. That pending the hearing and determination of the applicant's appeal and the hearing and determination of the dispute regarding the 1st respondent's shareholding in the 2nd respondent, this Honourable court be pleased to issue an order staying or suspending the implementation or acting on by the 2nd respondent or by any other third parties, of any resolutions passed at the Extra Ordinary General Meeting of the 2nd respondent held on 15th September, 2021; or any resolutions passed at any board meeting of the 2nd respondent held after 15th September, 2021.
 5. That this Honourable Court be pleased to issue any other or further orders which it may deem fit and just to grant in the circumstances.
 6. That the applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit and just to grant.
 7. That costs of and incidental to this application be borne by the 1st respondent."
2. As usual these were and are still supported by grounds on its body, a supporting affidavit sworn by John Gachanga, a director of the applicant together with annexures thereto and a certificate of urgency. As already mentioned above, I was requested to certify the application as urgent. I accordingly perused the record and considered it in light of the grounds applicant had set out in the certificate of urgency as reasons for seeking to have the application heard as a matter of urgency. They are the same ones that have been replicated in the applicant's submissions in support of their plea to have me rescind the order declining to certify the application urgent and substitute it with an order certifying the application as urgent. The written submissions are dated 24th February, 2022 filed pursuant to directions given to the respective parties vide the hearing notice for inter partes hearing on the certificate of urgency served electronically on the respective parties herein by the Deputy Registrar of this Court on Wednesday, February 23, 2022 at 11.47am.
 3. In summary, the applicant averred in its certificate of urgency, inter alia, that the proceedings in the High Court of Kenya at Nairobi Commercial Division in Misc. Application No. E445 of 2021 (OS) pitched Seruji Limited the 1st respondent herein as the applicant at the trial, Savannah Cement Limited the current 2nd respondent as the respondent therein while Savannah Heights Limited the applicant herein was cited as an interested party.
 4. At the conclusion of the proceedings, the trial Judge, A. Mabeya, J. issued orders on 10th September, 2021 granting leave to the respondent therein who is the current 2nd respondent to hold an Extra Ordinary Meeting within seven (7) days of that date as per the Agenda annexed to the application notwithstanding the provisions of Article 17 of the Memorandum and Articles of Association of the respondent (2nd respondent). The above direction was subject to the 2nd respondent serving a notice



- of the intended Extra Ordinary General Meeting on the interested party at least within three (3) days to the meeting pursuant to section 280(3) and 4 of the Act with an attendant order that the costs of the application were awarded to the 1st respondent the applicant therein as against the interested party who is the applicant herein.
5. The applicant averred further that they were aggrieved by the impugned orders and had in fact filed an appeal against those orders. They did not however give dates of either the notice or memo of appeal or the appeal itself. Because of what the respondents raised in both their replying affidavit and submissions against certification of the application as urgent. I called for the relevant notice of appeal through the registry. The availed copy indicates that the same was dated on 20th September, 2021 and lodged on 24th September, 2021 intending to appeal against the whole of the impugned decision by A. Mabeya, J. of 20th September, 2021.
 6. The reasons for seeking to have the application certified urgent in both sets of documents are that they have an arguable appeal with high chances of success as more particularly expounded in the said certificate of urgency. Upon going over them, I got the impression that the reasons given in the certificate of urgency dwelt more on the arguability of the appeal as opposed to the reasons as to why the application should be certified as urgent. Finding no basis for certifying the application urgent, I declined to do so. It is on record as currently laid before me that the applicant was aggrieved by my failure to certify the application urgent and addressed a letter to the President of this Court ref: RWC/LIT-05302021-02 dated 12th October, 2021 requesting that the issue of certificate of urgency be placed before a full bench for consideration.
 7. The above communication was followed up by another one similarly addressed to the President of this Court ref: AKK/CIV/-85-2016-01 dated 9th February, 2022 requesting for an expedited hearing date for the Notice of Motion. I presume that is how the President of this Court in the exercise of his supervisory mandate of the court's business directed the Deputy Registrar of this Court to have the matter placed before me as a single Judge for hearing inter partes as to whether the matter should be certified as urgent.
 8. The matter was placed before me as a single Judge on 1st March, 2022 for inter partes hearing on the certificate of urgency. It was canvassed through the applicant's certificate of urgency already on the record, filed alongside the application, written submissions dated 24th February, 2022, an affidavit of Donald Kiboro Mwaura dated 24th February, 2022. I have accordingly perused the said documentation. My take thereon is that the applicant laments that failure to certify the application as urgent has greatly prejudiced both the applicant and the 2nd respondent as it has exposed them to injury following the holding of the Extra Ordinary General Meeting pursuant to which Directors of the 1st respondent who are in the majority were admitted to the Board of Directors of the 2nd respondent. It is contended that these incoming Directors who are now in the majority have run down the company as both operations and production have ground to a halt. There is also complaint about embezzlement and misappropriation of funds, risk of loss of jobs, inability to meet its financial obligations to banking institutions and loss of investment.
 9. Interim order in terms of prayer 2 is therefore necessary to provide a platform for the parties to resolve all the issues affecting the 2nd respondent especially with regard to the long standing conflict as to whether the 1st respondent is a bona fide shareholder of the 2nd respondent. There is also mention that they have filed a notice of appeal against the order of Majanja, J. dismissing the applicant's claim in Nairobi High Court Commercial and Admiralty Division Civil Suit No. 170 of 2010 on 11th February, 2011 for want of prosecution. They have already filed a notice of appeal dated 21st February, 2022.



10. In opposition to the applicant's plea that the application be certified as urgent, the 1st respondent in response to the Deputy Registrar's hearing notice aforementioned has filed a replying affidavit sworn by Benson Sande Ndeti on 28th February, 2022 together with annexures thereto, written submissions dated the same date together with legal authorities. Cumulatively the 1st respondent relies on the case of *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1*, for the holding, inter alia, that where issue of jurisdiction is raised, the same must be determined first, since jurisdiction is everything and without it the court cannot proceed further. They have also relied on the case of *Charles Kamuren vs. Grace Jelagat Kipchoim & 2 Others [2013] eKLR* and submit that this Court has no mandate to grant any relief on the application that is pending not even a certificate of urgency for want of jurisdiction. They contend the application is anchored on a faulty notice of appeal and in respect of which they have filed an application dated 14th October, 2021 seeking to strike it out.
11. It is therefore their position that in light of the pendency of their application challenging the validity of the notice of appeal on which the application is anchored, I should adopt the position taken by the court in the decision cited above and down my tools until the issue of striking out the notice of appeal is dealt with in finality. They have also relied on the case of *Stephen Kipkatam Kenduiywa & 6 Others vs. Isamil Gulamali & 3 Others [2010] eKLR* in which the court declined to certify an application urgent over and above all matters pending hearing before it and likewise invite me to adopt the position taken above by the Judge therein and decline to accord the applicant's application primacy over all other matters pending before this Court as according to them there is no basis for an exercise of such discretion in favour of the applicant.
12. In their opinion, all that the applicant has done as their proof of urgency is to put forth defamatory and unsubstantiated allegations which do not pass the burden of proof as required under section 107 of the *Evidence Act*. They also contend that the applicant is undeserving of the Court's exercise of its discretionary mandate in its favour. It is their position that the contrary view is the correct position herein. It is the applicant who is frustrating the 1st and 2nd respondents' efforts to keep the company afloat. They cite in instances where they proposed a project if operationalized would have brought down the cost of power supply for the company's operations which was scuttled by the applicant forcing the entire project to be put on hold to the detriment of the company's interests.
13. Lastly, that it is not correct as asserted by the applicant both in the original certificate of urgency and facts put forth by them in support of the inter partes hearing on the certificate of urgency that there is a pending dispute over the shareholding of the 2nd respondent in Nairobi High Court Civil Suit No. 170 of 2016. According to them the said Civil Suit was dismissed for want of prosecution by the high Court, Majanja, J. on 11th February, 2022.
14. I have considered the record in totality in light of the rival submissions on whether my order of 7th October, 2021 declining to certify the application pending herein urgent should be reviewed, discharged and or otherwise set aside as invited by the applicant and or affirmed as invited by the 1st respondent. Before I delve into the merits of the matter, I find it prudent to determine whether pendency of an application to strike out the notice of appeal on which the application is anchored is sufficient basis for me to down my tools and not proceed further. My take thereon is that unless and until the notice of appeal on which the application is anchored is vitiated, the application is properly before me and I will therefore proceed to pronounce myself on its merit.
15. On the merits, the position I take is that I am alive that the court in the exercise of its mandate either as a single Judge as it was then constituted on 7th October, 2021 and now, or as a full bench declines to certify a matter urgent, it exercises a discretionary mandate.



16. The guiding principles in the exercise of this mandate have now been crystallized by case law. I take it from the case of *Githiaka vs. Nduriri [2004] 1 KLR 67* in which Ringera Ag, J.A (as he then was) stated explicitly that the exercise of judicial discretion is unfettered with the only caveat being that it must be exercised with reason and not whim, caprice or sympathy. Secondly, it should be for the sole purpose of rendering justice to the parties before the court.
17. I have applied the threshold in the Githiaka case [*supra*] to the rival position herein. As mentioned earlier on the reasons why I declined to certify the matter urgent, was because all that the grounds in the certificate of urgency dwelt with then and now were those touching on the arguability of their appeal. These usually fall for consideration when dealing with the substantive application to determine as to whether the threshold for granting relief under Rule 5(2)(b) has been met and therefore do not fall for consideration as to whether the matter should be certified urgent. Likewise, those proffered in their submissions for the same purpose have dwelt on the turn of events after the delivery of the ruling appealed against and what is currently happening on the ground, a position contested by the 1st respondent. The 1st respondent's contest notwithstanding, I find nothing in those assertions demonstrating sufficiently as to how and why these should be applied to fast track the application.
18. The upshot of the totality of the above lengthy assessment and reasoning is that there is nothing to make me change the position I took on 7th October, 2021 when I declined to certify the application urgent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

