Kenya National Capital Corporation Limited v Galot & 5 others (Civil Appeal (Application) E198 of 2022) [2022] KECA 536 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 536 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E198 OF 2022

K M'INOTI, JA

APRIL 28, 2022

BETWEEN

KENYA NATIONAL CAPITAL CORPORATION LIMITED ..... APPLICANT

AND

MOHAN GALOT ..... 1ST RESPONDENT

L.P GALOT ..... 2ND RESPONDENT

S.P GALOT ..... 3RD RESPONDENT

G.P GALOT ..... 4TH RESPONDENT

GALOT INDUSTRIES LTD ..... 5TH RESPONDENT

KING WOLLEN MILLS LTD. (FORMERLY MANCHESTER OUFITTERS SUITING DIVIDION LTD) ..... 6TH RESPONDENT

(Application for stay of proceedings pending appeal from the order of the High Court of Kenya at Nairobi (Mabeya, J.) dated 21st March 2021 in HCCC No. 2054 of 1993)

RULING

1. On 7th April 2022, I declined to certify this application urgent on two grounds. First, there was no affidavit in support of urgency as required by rule 47 (1) of the *Court of Appeal Rules*. All that the applicant had presented was a bare certificate of urgency, followed by the Motion and affidavit in support of the Motion. Secondly, the applicant did not present any notice of appeal against the order of the High Court dated 21st March 2021. It cannot be gainsaid that evidence of existence of a notice of appeal is a basic requirement before the jurisdiction of the Court under rule 5(2) (b) is evoked.

2. The applicant was dissatisfied with my refusal to certify the application urgent and by a letter dated 13th April 2022, informally applied for inter parties hearing on urgency pursuant to rule 47 (5). On

19th April 2022, I directed the application be served on the respondents for inter partes hearing on urgency on 25th April 2022. On that date, it transpired that Mr. Kangethe, learned counsel for the applicant, had not served the application on the respondents because he apparently believed it was not necessary in an inter partes hearing on urgency. I however directed counsel to serve the application on the respondents and adjourned the hearing of the issue of urgency to 27th April 2022.

3. I have considered the applicant's undated written submission and the oral highlights in support of certification of the application as urgent. Mr Kangethe submitted that the application is urgent because the trial court has allowed the respondent to adduce evidence in support of its claim, but denied the applicant similar opportunity in support of its counterclaim. He contended that nothing is more urgent that avoiding a trial in breach of the right to be heard and the rules of natural justice. If the application is not certified urgent, counsel urges, a judgment will be rendered without considering the applicant's evidence, which is contrary to all known tenets of fitness and justice. As regards compliance with rule 47(1), counsel blandly asserted that the applicant had strictly complied with the rule.

4. Ms. Awiti, learned counsel who held brief for Ms. Maumo for the 1st respondent urged me not to certify the application urgent. She relied on her grounds of opposition dated 26th April 2022, and submitted that the hearing at the High Court is already concluded and that the parties are only waiting for judgment. I need not dwell more on those grounds of opposition because they address the merits of the substantive motion rather than the question of urgency.

5. Next, I heard Mr. Kaka, learned counsel for the 4th respondent, who also held brief for Mr. Kenyatta for the 2nd and 3rd respondents. He urged me not to certify the application because it is not urgent. He contended that the applicant was merely seeking to jump the queue without demonstrating good reasons for doing so. He added that there was inordinate delay in making the application and that the applicant had fully participated in the hearing before the High Court.

6. Mr. Tiego, learned counsel for the 5th and 6th respondents, had serious technical challenges participating in the virtual hearing. He however urged me to consider his grounds of opposition and list of authorities on record, which I have. The position taken by these respondents is that there is no basis for certifying the application urgent because the application is incompetent. They question the existence of Civil Appeal No. E 198 of 2022, which they state has not been served upon them. These two respondents also submit that in the absence of the mandatory affidavit in support of urgency required under rule 47(1) the Court has no basis for certifying the application urgent.

7. It was further submitted, relying on *Benjoh Amalgamated Ltd v Kenya Commercial Bank Ltd & another* (2018) eKLR that the applicant has not placed any material before the Court to justify an order whose effect is to allow the applicant to jump the queue over prior and pending applications. It was also contended that the dispute has been in court for the last 29 years and ought to be finalised.

8. I have considered the submissions by the parties on urgency. I bear in mind that whether or not to certify an application urgent is a matter of discretion, which has to be exercised judiciously and that applications are not certified urgent as of right or as a matter of course. The Court stated the rationale for certifying applications urgent as follows in *Jared Okello v. Charles Otieno Opiyo & 3 Others*, CA No. 151 of 2017:

> "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."

9. Some of the submissions made by the parties before me go into the merits of the application for stay of proceedings under rule 5(2) (b), which is not my bailiwick; that is a matter for the full Court. As I stated at the begging of this ruling, to change my mind and certify this application urgent, the applicant must demonstrate that there is a notice of appeal on record and that there is an affidavit in support of urgency as required by rule 47(1).

10. I have gone through the applicant's entire electronic application again. The same has 36 pages. I am still satisfied that those two vital documents are not on record. Without evidence of a notice of appeal, the Court clearly has no jurisdiction to entertain the application for stay of proceedings and I would be failing in my duty if I certified as urgent a matter where on the face of it a jurisdictional document is missing. (See *Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR). A judge called upon to consider the urgency of an application is not an automaton, he or she must be satisfied that the application meets basic jurisdictional threshold.

11. Secondly, rule 47 (1) requires in mandatory terms that the certificate of urgency must be accompanied by an affidavit in support of the urgency. In *Sahit Investments Ltd. v. Josephine Akoth Onyango & 2 Others*, CA No. 27 of 2015 (UR 25/2015) the Court emphasised the importance of the affidavit in support of urgency in these words:

> "It bears repeating on the other hand, that certification of an application as urgent is not a matter of course. The effect of certification of a matter as urgent entitles the same to be set down for hearing forthwith without having to take its due place in the queue. It is precisely for that reason that rule 47(1) requires, not merely a certificate of urgency, but more importantly an affidavit; a statement under oath deposing to the matters upon which the applicant relies to justify immediate hearing of the application. In my view, these requirements are informed by deliberate case management considerations which seek to ensure 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 preferential treatment."

12. For the foregoing reasons, the applicant has still not satisfied me to change my mind and certify the application urgent. I once more decline to certify the application urgent. Costs shall abide the outcome of the application.

DATED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR