



Mwamunga & Mwamunga ((Sued as the Executors of the estate of Eliud Timothy Mwamunga-Deceased) v Sagalla Lodge Limited (Civil Application E039 of 2022) [2022] KECA 986 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 986 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E039 OF 2022
SG KAIRU, JA
SEPTEMBER 23, 2022**

BETWEEN

**SAMUEL MAZERA MWAMUNGA & JOSIAH CHOLA
MWAMUNGA APPLICANT
(SUED AS THE EXECUTORS OF THE ESTATE OF ELIUD TIMOTHY
MWAMUNGA-DECEASED**

AND

SAGALLA LODGE LIMITED RESPONDENT

(An application for stay of execution of a ruling of the Environment and Land Court Civil Case No. E242 of 2021 at the Environment and Land Court at Mombasa pending the lodging, hearing and determination of the intended appeal from the decision of Honourable Justice Naikuni delivered on 27th April 2022 and an order of stay of proceedings in that suit)

RULING

Ruling on the question of urgency

1. On June 28, 2022, I declined to certify as urgent the applicants' application dated June 24, 2022 in which the applicant seeks an order of stay of execution of a ruling of the Environment and Land Court ruling delivered on 27th April 2022 in ELC Case Number 242 of 2021 and an order of stay of proceedings in that suit. By a letter dated July 13, 2022, the advocates for the applicant applied for inter parties hearing on the question of urgency.
2. The matter was then fixed for hearing inter parties before me on the issue of urgency on August 17, 2022 when learned counsel Mr. Kiwinda appeared for the applicants and while Mr. Nyange, learned counsel, appeared for the respondents.



3. The grounds on which the applicants assert that the application is urgent as set out in the certificate of urgency and in the affidavit in support of urgency sworn by Jamuel Mwakandana Kiwinga advocate as amplified by Mr. Kiwinga in his submissions is that in the interlocutory ruling of the ELC of April 27, 2022 subject of the intended challenge on appeal, the ELC granted temporary orders of injunction allowing the respondent to continue conducting business on the suit property; that the intended appeal raises serious triable issues; that the applicants are the executors of the registered proprietor of the suit property with the duty to manage the estate to prevent wastage; that the temporary injunction granted in favour of the respondent is an abuse of the process of the court as it was initially granted to the respondent in a previous suit before the Chief Magistrates Court at Voi and the same was stayed by the ELC Mombasa; that the applicants raised that matter and the issue of the application being res judicata and the suit being sub judice; that the suit premises is a hotel in a dilapidated state attributable to the respondent and is losing its international stature.
4. Counsel for the applicant stressed that there are parallel proceedings involving the same subject matter and that if the matter is not certified as urgent, the respondent will continue abusing the process of the court.
5. Counsel for the respondent Mr. Nyange began by pointing out that beside being served with a hearing notice, he was not copied in on the letter seeking inter parties hearing and had therefore not had an opportunity to file a replying affidavit but had managed on to file a list of authorities.
6. Counsel submitted that the applicants have not demonstrated that there is urgency in the application; that matters raised by the applicant are matters on the merits of the application to be canvassed before the full bench; that the dispute arises from a tenant and landlord relationship and there is nothing to show that the suit property, a hotel, is under threat of disposal. It was submitted that there is no risk of conflicting decisions between the matter said to be before a court in Voi and the matter before the ELC and no reasons justifying certification of the matter as urgent have been given.
7. As I have already indicated, I in the first instance declined to certify the matter as urgent following which the applicant applied for inter parties hearing. I have considered the submissions. The applicant is required to demonstrate that the matter deserves to be heard on basis of priority and to justify why it should be fast tracked for hearing.
8. In the case of in *Benjob Amalgamated Limited v Kenya Commercial Bank Limited & another* [2018] eKLR, M’Inoti, JA articulated the applicable standard as follows:

“Whether or not to certify an application urgent for immediate hearing is a discretionary power. (See *Sabit Investments Ltd v. Josephine Akoth Onyango*, CA. No. 27 of 2015). The Court does not certify applications urgent as a matter of course. However, like all judicial discretionary power, that power has to be exercised, not arbitrarily, whimsically or capriciously, but rather on the basis of evidence and reason.

In Jared Okello v Charles Otieno Opiyo & 3 Others, CA No. 151 of 2017, the basis and effect of certifying a matter urgent was expressed as follows:

“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. And later in the same decision:

“In *Railways & Allied Workers Union v. Rift Valley Railways Workers Union*, CA No. Nai 29 of 2015, it was held that to justify certifying an application urgent, the applicant must satisfy the Court that there are circumstances in the application tending to show that if the matter is not heard promptly, the application and the intended appeal may be rendered nugatory. (See also *New Kenya Co-operative Creameries Ltd v. Olga Ouma Adede*, CA No. Nai 316 of 2014 and *Kenya Oil Co. Ltd v Jayantilal Dharamshi Gosrani*, CA No. 117 of 2010).”

10. In my view, the matters on the basis of which the applicants contend the application dated June 24, 2022 should be fast tracked are matters to be urged in support of the application before the full bench. They are matters by which the applicant is seeking to demonstrate that the intended appeal is arguable and do not go to demonstrating why the application should jump the queue as it were.

11. I am therefore not persuaded that the application merits certification as urgent. I direct that the application shall be fixed for hearing in the normal manner.

12. I make no orders as to costs.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

