



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (NAMBUYE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 389 OF 2018 (UR 316/2018)

THIKA COFFEE MILLS.....APPLICANT

AND

RWAMA FARMERS COOPERATIVE SOCIETY.....RESPONDENT

(An Application for leave to appeal to the Supreme Court from the Judgment of the Court of Appeal at Nairobi (Makhandia & Kiage,JJA)

in

Civil Appeal No. 251 of 2013)

RULING

On the 12th day of October, 2018, the applicant's appeal to the Court of Appeal against the ruling and decree of the High Court of Kenya at Nairobi (Mabeya, J.) dated 28th September, 2012 was dismissed by **Makhandia, Kiage, JJA**. The applicant was aggrieved by that decision and filed a notice of appeal dated 22nd October, 2018 intending to appeal to the Supreme Court against the whole of that decision. It was pursuant to the mentioned notice of appeal that the applicant filed the notice of motion dated the 24th day of December, 2018 and filed on the 28th December, 2018 under a certificate of urgency.

The file was then placed before a single Judge (Nambuye, JA) for certification of the application as urgent which request was declined. The applicant being aggrieved has invoked Rule 47(5) of the Court of Appeal rules 2010, vide the letter of its advocate on record dated 9th January, 2019 to have the issue of the certificate of urgency canvassed *inter partes*. Directions were accordingly given for the parties to appear before the single Judge on 21st January, 2019 at 2.30pm to canvas the issue of the certificate of urgency *inter partes*.

Learned counsel **Mr. Allan Muga**, appeared for the applicant, while learned counsel **Gitonga K. Muriuki**, appeared for the respondents.

In support of the certificate of urgency, **Mr. Muga** submits that the application is urgent as they require the matter to be certified by this Court in line with the prerequisite rules of the Supreme Court before they can invoke the jurisdiction of the Supreme Court; that time is of the essence as the Supreme Court rules provide for time lines within which a matter can be filed before the said Court. It is further **Mr. Muga's** submission that the matter is also urgent as the decree issued by the High Court has partially been executed and there is a threat to execute for the balance of the said decree.

In response to the above applicant's submission, **Mr. Muriuki** has submitted that there is nothing urgent about the pending application and that I should not recall and interfere with my decision not to certify the matter as urgent.

The reasons **Mr. Muriuki** has advanced in support of that proposition are as follows: first, the application is incompetent and the applicant therefore stands non suited for their advocates' failure to comply with Order 9 Civil Procedure Rules. Second, the application is an exercise in futility as time for filing of an appeal to the Supreme Court lapsed 30 days from the date of the filing of the notice of appeal on account the applicant's failure to file its memorandum of appeal within the time lines stipulated in the supreme Court rules of procedure. Thirdly, the litigation giving rise to the application involves private rights not constitutionally justiciable by the Supreme Court.

Although, **Mr. Muriuki** concedes that, the decree has partially been satisfied from funds previously held in a joint account in the joint names of advocates for both parties, and that there is an outstanding balance to be met, he none the less submits that there is no threat of execution as accounts have to be rendered and the bill of costs taxed before any further execution can be levied.

In reply to that submission, **Mr. Muga** has asserted that order 9 Civil Procedure Rules does not apply to proceedings before this Court; that although they concede that the decree has partially been satisfied from funds previously held in the joint names of advocates for the respective parties, the threat of execution for the balance is imminent as there is no stay order in place to shield the applicant from further execution at the instigation of the respondent. **Mr. Muga** however, concurs with **Mr. Muriuki's** contention that they ought to have filed their memorandum of appeal to the Supreme Court within thirty days of the lodging of the notice of appeal to that Court. He has however explained that they could not so comply with that time line so without first of all obtaining an order from this Court for certification of the matter to the Supreme Court which is the very purpose intended to be served by the application they seek to have certified as urgent. Further, that it is the strict time lines that they are required to meet before filing their appeal to the Supreme Court that has majorly contributed first to the filing of the application under certificate of urgency in the first instance, and now second, to have the request for the application to be certified urgent canvassed *inter partes* in the second instance.

Although parties have submitted extensively on the matter, my jurisdiction under **rule 47(5)** of the Rules of the Court is restrictive. All that is required of me in the exercise of my mandate under the said rule is simply to determine as to whether a case has been made out for me to recall and interfere with my order declining to certify the pending application as urgent. It provides as follows:-

“(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.”

I have considered the above restrictive mandate in light of the rival submissions set out above. It is my view, that matters that go to the merits of the pending application do not fall for my consideration at this point in time as doing so, may either preempt or embarrass the outcome of the pending application. Bearing that in mind, it is my finding that in light of the above concurrent positions that in order to access the jurisdiction of the Supreme Court where the applicant is headed, one has to comply with the strict time lines stipulated for in the Supreme Court rules; and Second, that the applicant cannot avail itself of the said procedures without an order of certification from this Court; and for which purpose the application intended to be certified urgent is intended to achieve, I am satisfied that sufficient basis has been made for me to recall and interfere with the order of 4th January, 2019, declining to certify the applicant's application dated 24th December, 2018 and filed on 28th December, 2018 as urgent. The order is accordingly set aside and substituted with an order certifying the application as urgent for the reason given above.

Dated and delivered at Nairobi this 25th day of January, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.