



IN THE COURT OF APPEAL

AT MALINDI

(BEFORE: GATEMBU, JA)

CIVIL APPEAL (APPLICATION) NO. 49 OF 2018

BETWEEN

KENYA PORTS AUTHORITY..... APPLICANT

AND

MAUR ABDALLA BWANAMAKA..... RESPONDENT

(Being an application to arrest judgment and to re-hear this appeal)

RULING ON QUESTION OF URGENCY

1. On 18th July 2019, I declined to certify as urgent, an application by the respondent dated 17th July 2019 seeking orders for arrest of judgment and for the rehearing of this appeal. Subsequently, the respondent sought a hearing *inter partes* on the question of urgency under Rule 47(5) of the Court of Appeal Rules. I heard counsel on the matter of urgency on 24th September 2019.
2. Learned counsel for the applicant, **Mrs. Makuto**, submitted that during the hearing of the appeal on 17th June 2019, the advocate who was handling the matter on behalf of the respondent in the appeal, Mr. Muchiri, was unwell and the hearing of the appellant's appeal proceeded *ex parte* and judgment was reserved for 4th October 2019; that there is urgency in that the applicant, in the application dated 17th July 2019, seeks arrest of that judgment so that the respondent in the appeal can be heard.
3. According to **Ms. N. Malik** learned counsel for the appellant, there is no urgency in the application. Had the application been urgent, counsel argued, it should have been presented soon after the hearing on 17th June 2019. Furthermore, counsel urged, there is no material to show that Mr. Muchiri was either admitted in hospital or was unable to attend court on 17th June 2019.
4. It was submitted that prior to the hearing of the appeal on 17th June 2019, directions at case management for written submissions to be filed, yet the respondent did not comply and in the circumstances there are no grounds for certifying the application as urgent.
5. I have considered the arguments on the question of urgency. In the certificate of urgency and affidavit in support of urgency, Mr. Muchiri advocate states that he was prevented from attending the hearing that was scheduled on 18th June 2019 (there appears to be a mix up on the date when the appeal was heard) on account of illness; that his partner in the law firm was on maternity leave and could not also attend court during the hearing with the result that the appeal was heard in the absence of the respondent.
6. Whether or not there are good reasons for arresting the judgment and rehearing the appeal are matters for consideration during the hearing of the application. For now, what I have to consider is whether the applicant has made out a case to justify fast tracking of the hearing of the application.
7. It is noteworthy, as pointed out by counsel for the appellant, that although the hearing of the appeal proceeded on 17th June 2019 with prior notice to the parties, the application sought to be fast tracked was not presented until a month later on 17th July 2019. There is no mention in the affidavit in support of urgency or in the certificate of delay why the applicant did not present the application to arrest the judgment promptly after the hearing. That delay has not been explained. Furthermore, in his affidavit in support of urgency, beyond stating that he was unwell and that his partner in the law firm was on maternity leave, Mr. Muchiri does not say what efforts he made to ensure there was effective representation at the hearing of the appeal. On the whole therefore I am not persuaded that there are sufficient grounds for fast tracking the application dated 17th July 2019.

8. Accordingly, I direct that the application dated 17th July 2019 be fixed for hearing in the registry in the normal cause.

Orders accordingly.

Dated and delivered at Mombasa this 26th day of September, 2019.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR