



**REPUBLIC OF KENYA IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 344 OF 2019**

**BETWEEN**

**KENYA HOTELS AND ALLIED WORKERS UNION.....APPLICANT**

**VERSUS**

**SOUTHERN SUN HOTEL.....RESPONDENT**

*(Being an Application to Order the respondent to deposit in court security of Kenya Shillings 15,191,105.26*

*pending an intended Appeal against the Ruling and Order of the Employment and Labour*

*Relations Court of Kenya at Nairobi (M. Onyango, J.) dated 27th September, 2019*

**in**

***Cause No. 1986 of 2015)***

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**RULING**

On the 27th day of September, 2019 the Employment and Labour Relations Court at Nairobi, (ELRC) **Maureen Onyango J.**, delivered the Intended impugned ruling. The applicant was aggrieved and filed a Notice of Appeal dated 7th October, 2019, and lodged on 11th October, 2019 intending to appeal to this court against the entire decision. The applicant then anchored a Notice of Motion on the said notice of appeal brought under Rule 47 of the Court of Appeal Rules (CAR) and all other enabling provisions of the law.

The Notice of Motion is dated 30th October, 2019 and filed on 1st October, 2019. It was brought under a certificate of urgency. It was placed before Nambuye, JA on 1st November, 2019 for certification as urgent. Nambuye, JA declined to certify it urgent. Being aggrieved, the applicant applied informally vide its letter dated 6th November, 2019 under the hand of Wycliffe Sava Mundu, invoking Rule 47 of the (CAR) for an *inter parties* hearing on the certificate of urgency.

Parties appeared before Nambuye, JA on the 21st day of November, 2019 for the inter parties hearing on the certificate of urgency. The same was canvassed by way of oral representations. **Mr. John Simiyu** in his capacity as the D/General Secretary of the applicant appeared in person, while the respondent was represented by learned counsel **Mr. Awa Muhindi** of O&MLAW LLP Advocates.

Supporting the certificate of urgency, **Mr. Simiyu** submitted that the application should be certified urgent because firstly, the respondent intends to wind up its operations by end of 31st January, 2020. He relies on annexure F2. Secondly, the intended appeal is arguable. The same will therefore be rendered nugatory should the respondent wind up its operations before the applicants are heard on their application. Thirdly, the respondent stand to suffer no prejudice if the applicant were to be heard on its application as a matter of urgency.

**Mr. Simiyu** therefore urged for the recall and vacation of the order declining to certify the application as urgent and substitute it with another

certifying the application as urgent to pave the way for the expeditious processing of the application for hearing and disposal preferably before the respondent winds up its operations by 31st January, 2020.

In opposition to having the application certified as urgent, **Mr. Muhindi** conceded that the respondent indeed intends to wind up its operations because it is no longer financially viable to continue with its operations. He however denies that applicants will suffer any prejudice as the respondent is only one such business entity among numerous others being run by the **TSogo** Group around the continent and beyond. In fact, **Mr. Muhindi** put these at one hundred (100) businesses. It was therefore not correct as contended by the applicants that their intended appeal will be rendered nugatory in the event it ultimately succeeds after the respondent would have wound up its operations. In **Mr. Simiyu's** view, the applicants will be adequately compensated by the said **TSogo** Group from finances generated from their other businesses should their intended appeal ultimately succeed.

It was also **Mr. Muhindi's** submissions that the application intended to be certified urgent is a nonstarter as a similar application before the trial court was declined. There was therefore no urgency in the matter as erroneously put by the applicant; that the applicant has been less than candid for the failure to disclose to the court what had transpired as between the parties before the trial court since the making of the intended impugned order. On that account **Mr. Muhindi** urged for the order declining to certify the application as urgent to be affirmed.

In reply to the respondent's submissions, **Mr. Simiyu** submitted that sufficient basis has been made to warrant the vacation of the order declining to certify the application urgent, especially when the respondent has conceded that they intend to wind up operations by 31st January, 2020; that the respondents contention that the applicant stands to suffer no prejudice if they were to wind up business by reasons of the financial viability of the **TSogo Group** carries no water as the said group is not registered in Kenya.

My invitation to intervene on behalf of the applicant has been invoked under Rule 47 (5) of the Court of Appeal Rules. It provides:

***“The refusal by the judge to certify an application urgent under this rule shall not be subject to reference to the full court under rule 55, but the applicant may apply informally for the matter to be placed before a single judge for hearing inter partes.”***

In light of the content of the above subrule, my mandate is limited to the determination as to whether on the basis of the rival submission highlighted above, sufficient basis has been shown to warrant the recall and vacation of the order declining to certify the application urgent. The applicant relies on the contents of annexure F2. I have perused the content of the said extract. It states, explicitly that the respondent is set to shut down its operations effective 31st January 2020, a position confirmed by **Mr. Muhindi**.

In light of the above undisputed position, it is my view that the representation made before me by the applicant during the *inter partes* hearing on the certificate of urgency and which were substantially confirmed by counsel for the respondent, have met the threshold for granting a certificate of urgency in an application of this nature. I therefore;

1. Recall and rescind the orders of 1st of November, 2019 declining to certify the application as urgent and substitute therefor an order certifying the application dated 30th October, 2019 and filed on 31st October, 2019 as urgent).
2. Cost of the *inter partes* hearing in the main application.

***Dated and Delivered at Nairobi this 22nd day of November, 2019.***

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**