



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPEAL APPLICATION NO. 275 of 2017

BETWEEN

REUBEN WARUI MWANGI.....1ST APPLICANT

MERCY WANJIRU WARUI.....2ND APPLICANT

AND

GEOFFREY KURIA GITHAMBU.....1ST RESPONDENT

HOUSING FINANCE COMPANY LIMITED....2ND RESPONDENT

(Being an Application under Rule 5(2)(b) of the court of Appeal Rules, 2010 for stay of proceedings in the High Court pending the hearing and determination of Civil appeal No. 275 of 2017 against the Ruling and Order of the High Court of Kenya, signed in Bungoma on 21st February 2014 by the A. Mabeya, J. and

delivered on his behalf by Havelock, J. on 5th March, 2014

in

Nairobi Civil Case No. 34 of 2006.)

R U L I N G

On the 17th January 2018, I declined to certify this matter as urgent for reasons that no urgent circumstances had arisen to warrant the issuance of a certificate of urgency.

The matter before me relates to a ruling delivered on 21st February 2014, where the High Court (Mabeya, J.) declined to set aside an interlocutory judgment and to grant leave to the applicants, **Reuben Warui Mwangi** and **Mercy Wanjiru Warui** to file a defence to the 1st respondent, **Geoffrey Kuria Githambu's** claim.

The applicants were displeased with the ruling of the High Court and filed a Notice of Appeal on 22nd May 2014, and a Notice of Motion on 16th January 2018 together with a supporting affidavit sworn by **Reuben Warui Mwangi** seeking for orders, that the application be certified urgent and the same be heard ex parte in the first instance; that pending the inter parties hearing and determination of this application and the appeal in this Court, an order of stay of proceedings of *High Court Civil Case No. 34 of 2006*.

The certificate of urgency was premised on the grounds that a case management conference has been scheduled for the 16th March 2018 rendering the application for stay of proceedings most urgent as the applicants are apprehensive that the suit in the High Court may be heard prior to the determination of their appeal against the said ruling and order; that they stand to be locked out from defending their suit in the High Court.

A brief background to the application is appropriate. The 1st respondent instituted a suit against the applicants in the High Court through an amended Plaint dated 2nd February 2006 and 4th December 2006 respectively. The applicants had purchased Title LR No.Ndumberi/Ndumberi/1594 (*the suit property*) at a public auction on 11th August 2006, from the 2nd respondent after the 1st respondent defaulted on the loan payments. The suit property was subsequently sold to a third party in 2010. It was alleged that at the time the property was sold, the 1st applicant was the legal officer and employee of the 2nd respondent causing the applicants to cast aspersions on their bonafides. Dismissing the application, the learned judge found that there was no evidence of the fact of sale, and added, that six years was a long time for the applicants to wait to seek justice.

When the application came before me on the 31st of January 2018, **Mr. Wafula**, learned counsel for the applicants, submitted that the application is urgent as the 1st respondent has moved court to have the suit heard, and a case management conference was scheduled for the 16th January, 2018 which if it were to proceed, would be prejudicial to the applicants, as they will be locked out of the court process following the court order barring them from filing a defence; that the applicants will be unable to participate in the suit and to defend themselves, if they are not heard.

On her part **Ms Kadima**, learned counsel for the 2nd respondent holding brief for Mr. Mbaluto supported the application and adopted the applicant's submissions.

Ms. Sagini, learned counsel for the 1st respondent and holding brief for Mr. Okeyo opposed the application. It was submitted that the suit before the High Court was still pending and that the applicants have not been barred from participating. The applicants would be placed on strict proof to support their claim, and if they were to succeed, the suit may be required to commence afresh.

In a rebuttal, **Mr. Wafula** stated that the delay in filing the defence was occasioned by the firm of advocates previously acting for the applicants, hence an interlocutory judgment was entered against them.

I have carefully considered the arguments urged before me, the history of the entire matter, the applicants' affidavit, as well as the learned judge's ruling.

In *Equip Agencies Limited vs Akber Abdulahi Kassam Esmail & 4 Others [2013] eKLR*, Kiage, J.A. observed that;

“When an applicant whose application is not certified urgent moves the single judge at an inter partes hearing, it behooves him to demonstrate, to the single judge's satisfaction, that there is something about the application that is pressing by reason to risk or peril of harm or loss necessitating immediate and unhesitating action on and attention to the application by the court.”

An applicant must therefore show that there are exigent circumstances that have arisen in respect of the suit that require to be promptly placed before the court for expeditious determination, failing which, he or

she stands to suffer irreparable loss or damage. Justifications for urgency that are inherently farfetched or speculative in nature, will not suffice.

It is apparent that the ruling of the High Court was rendered on 21st February 2014. A notice of appeal was filed on 25th April 2014. This application for urgency in support of the Notice of Motion was filed on 17th January 2018, which would make it some 4 years since the decision was rendered. The reason for urgency advanced, is that the suit will be proceeding for case management on 17th March 2018. Evidently, the applicants have sat on their hands for the last 4 years, and have only been galvanized into action just because the 1st respondent has moved the court to have the suit fixed for case management. Where have they been all this time? If the necessity for a stay of proceedings was not urgent at the time the ruling was rendered, then it is difficult to appreciate how the urgency has arisen 4 years later, just because the suit has been fixed for case management.

Be that as it may, nothing was produced to support the contention that the suit is fixed for case management on 16th March 2018, and even so, a process of case management cannot be equated to a hearing. That a suit is fixed for case management does not mean that it will be heard and determined on the same day. The application is speculative in nature, and does not provide a cogent basis upon which the application should be certified as urgent.

As such, I see no reason to change my mind and I would still decline to certify the matter urgent. The matter shall be listed for hearing in the normal manner.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of February, 2018.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR