



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: M'INOTI, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. 261 OF 2017**

**BETWEEN**

**ROBERT MATOLO MULI.....1ST APPLICANT**

**LAWRENCE KISENGU MATOLO.....2ND APPLICANT**

**AND**

**SUSAN KAVATA MUTUNGWA.....1ST RESPONDENT**

**MARTIN KIOKO.....2ND RESPONDENT**

*(Application for stay of proceedings and stay of execution of the judgment of the High Court of Kenya (Ougo, J.) dated 6th October 2017*

*in*

*HCSC No. 1521 of 2011)*

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**RULING**

Whether or not to certify an application urgent for immediate hearing is a discretionary power. (See *Sahit 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*, it was observed 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.”***

And in *Railways & Allied Workers Union v. Rift Valley Railways Workers Union, CA No. Nai 29 of 2015*, it was emphasized that to justify certify 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*).

Turning to the application before me, on 13th November 2017 I declined to certify urgent the applicants’ application brought under **rule 5(2(b))** of the Rules of this Court. The applicants subsequently invoked **rule 47(5)** and requested for *inter partes* hearing on urgency. This ruling relates to that *inter partes* hearing.

The short background to the application is that after the letters of administration intestate of the estate of **Wallace Mutungwa Matolo**

(deceased) were issued jointly to **Robert Matolo Muli** and **Lawrence Kisengu Matolo (the applicants)** and others, **Susan Kavata Mutungwa** and **Martin Kioko (the respondents)**, among other persons applied for revocation of the grant on the basis that the same was applied for secretly and without disclosure of material facts, and issued without their knowledge. The 1st respondent contended that she was the wife of the deceased and living on his land while the 2nd respondent's claim was that he had purchased a portion of the deceased's land, **LR No. Makueni/Kivani/576** in 2004, which he had taken possession of and built his house thereon, pending completion of the transfer. As of the date of the hearing in the High Court, he was in occupation of the land and was cultivating the same.

**Ougo J.** heard the objections and by a ruling dated 6th October 2017, declined to revoke the grant. She however found that the 1st respondent was a widow and dependant of the deceased and that the 2nd respondent was entitled to the portion of LR No. Makueni/Kivani/576 which he had purchased from the deceased. Accordingly the learned judge directed the parties to file their affidavits on the proposed mode of distribution of the estate of the deceased with 45 days to enable her distribute the estate to the beneficiaries she had identified. That is the ruling that the applicants intend to challenge on appeal and in the meantime they have applied for stay of proceedings and execution. The basis of the urgency is that the respondents have invaded the land and there is a danger that they will destroy developments thereon or alienating it to third parties. The applicants state that the respondents have started tilling the land and building structure thereon. For their part, the respondents contend that the estate of the deceased is yet to be distributed as ordered by the learned judge. They claim to be on the land just as they were before the ruling and that they do not have the intention or capacity to alienate the land to third parties as the applicants claim.

Having carefully considered the respective submissions by the parties, I am convinced, as I was at the first instance, that the applicants have not placed before me material on the basis of which I can justifiably direct this application to be given priority, including over election petition appeals which are currently before the Court with mandatory timelines for conclusion set by the Constitution and the Elections Act. The respondents contend that they occupy the land just as they had done before and are not intent or even capable of alienating the portions they occupy. The claim by the appellant that the respondents have put unknown third parties in possession is too vague and general to justify an order for priority hearing of the application.

In the premises I once again decline to certify this application urgent. I direct the same to be listed in the normal manner, noting as I do that the parties are still before the trial court and can obtain relief from her if indeed there is any imminent threat to the estate, pending distribution. The applicants are at liberty to move this Court again if and when they have genuine material on the basis of which they can satisfy me to certify the application urgent. Costs of this inter partes hearing shall be in the intended appeal.

**Dated and delivered at Nairobi this 20th day of April, 2018**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**