IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 288 OF 2017 (UR 228/17)

BETWEEN

BRYAN YONGO.....APPLICANT

AND

DR JIGISHA P. JANI.....1ST RESPONDENT

JAY SAILESH JANI..... 2ND RESPONDENT

NEPTUNE CREDIT MANAGEMENT LIMITED.....3RD RESPONDENT

(Application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Gacheru, J.) dated 23rd June 2017

in

ELCC No. 13 of 2009)

****

RULING

On 22nd May 2017 I heard the parties in this application *inter partes* under ***rule 47 (5)*** of the Rules of this Court, on the question of urgency. The applicant, ***Bryan Yongo,*** wanted his application certified urgent and heard promptly. In the application he is seeking stay of further proceedings in ***Environment & Land Court Case No. 13 of 2009*** pending the hearing and determination of an intended appeal from the ruling and order of ***Gacheru, J.*** dated 23rd June 2017. Earlier on 18th December 2017, I declined to certify the application urgent, after which the applicant invoked rule 47(5) and prayed for *inter partes* hearing on the question of urgency.

The short background to the application is that ***Dr. Jigisha P. Jani*** and ***Jay Sailesh Jani***, the ***1st*** and ***2nd respondents*** respectively, are the registered owners of the property known as ***LR No. 7471/249 in Kitsuru, Nairobi (the suit property)***. In or about 28th November 2005 the respondents entered into an agreement for the sale of the suit property for ***Kshs. 4,500,000.00*** to the applicant and the ***3rd respondent, Neptune Credit Management Ltd,*** in which the applicant is the Managing Director. The completion of the transaction was delayed and in the meantime, the applicant took possession of the suit property, and agreed to pay to the 1st and 2nd respondents the rent ***Kshs 150,000.00*** per month, pending completion.

Subsequent disputes arose between the parties and the applicant and the 3rd respondent filed ELCC No. 13 of 2009 against the 1st and 2nd respondents in which a consent order was recorded on 19th April 2010 for maintenance of the *status quo* and payment of a monthly rent of ***Kshs 181,500.00*** by the applicant to the 1st and 2nd respondents. Claiming that the applicant was in arrears to the tune of ***Kshs 1,502,850.00,*** the 1st and 2nd respondents attempted to levy distress on 24th July 2014, leading the applicant and the 3rd respondent to file an application on 6th August 2014 for, *inter alia*, an injunction to prohibit the 1st and 2nd respondents from levying distress, an order committing the said respondents for alleged contempt of court, and an order for payment of the Kshs 181,500.00 in court. On 13th July 2015 the applicant and the 3rd respondent filed yet another application to prohibit the 1st and 2nd respondents from interfering with their possession and occupation of the suit property and to commit them for contempt of court for alleged violation of the consent order. That application was prompted by levy of distress on the applicant's goods on 6th July 2015. Lastly on 14th August 2015 the applicant and the 3rd respondent filed a third application for orders to compel the auctioneers instructed by the 1st and 2nd respondents to return his distrained goods.

The 1st and 2nd respondent opposed all the three applications, pointing out, among others, that on 14th February 2011 the court allowed

them to levy distress should the applicant fail to pay the monthly sum of Kshs 181,500.00; that the applications were *res judicata* and that the consent order could only be valid with the consent of all the parties to it. After hearing the parties, the learned judge found that the 1st and 2nd applications were seeking the same orders and stayed the latter. She also found that the court had permitted the 1st and 2nd respondents to levy distress in the event of the applicant's failure to pay the monthly sum and therefore they were not in contempt of court. Lastly the learned judge held that there was no basis upon which the consent order directing the applicant to pay the monthly amount could be validly to direct payment in court. The last application was found to be an abuse of the process of court because the applicant had already obtained from the subordinate court the very orders that he was seeking. It was therefore dismissed with costs.

It is against those findings that the applicant intends to appeal. In the application that he seeks to be certified urgent, he has only prayed for an order of stay of proceedings so as to stop the main suit, which has been pending for the last 9 years, from being heard until his intended appeal has been filed, heard and determined. When ***Mr. Nyangayo***, his learned counsel urged the application for urgency before me, he submitted that the main suit has been fixed for hearing on 28th May 2018 and if the suit is heard and determined, the intended appeal will be rendered nugatory. Counsel did not advert to any threatened or impending levy of distress or eviction of the applicant from the suit property. The 3rd respondent, represented by ***Ms. Wanjiku***, learned counsel, adopted the submissions made by the applicant and urged me to certify the application urgent.

Mr. Savia, learned counsel for the 1st and 2nd respondents, on the other hand, submitted that there was no urgency involved in the application. He contended that the applicant had not applied for an injunction to stop levy of distress or eviction, but only for stay of proceedings. It was his contention that the hearing of the suit will not affect the intended appeal because if the 1st and 2nd respondents are found by this Court to be in contempt of court, they will be punished accordingly. He added that what is scheduled for 28th May 2018 is merely a mention for directions on hearing of the suit. In counsel's view, the applicant was only keen to delay the determination of the suit as he was in arrears to the tune of Kshs 5.5 million.

I have duly considered the application and the submissions by learned counsel. Whether the application for stay of proceedings is merited or not is not an issue I can venture into. That is a matter for the full Court. I'm only called upon to determine whether there is any basis to certify the application urgent and allow it to get preferential or priority hearing over other applications that were first in time.

To certify an application urgent is a matter of discretion, which has to be exercised judiciously. (See ***Sahit Investments Ltd v. Josephine Akoth Onyango, CA. No. 27 of 2015***). Applications are not certified urgent as of right or as a matter of course. In ***Jared Okello v. Charles Otieno Opiyo & 3 Others, CA No. 151 of 2017***, the Court state the rationale of certifying applications urgent 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."***

For an application to be certified urgent, the applicant must satisfy the Court that there are circumstances in the application showing that if it is not heard promptly, both the application and the intended appeal may be rendered nugatory. (See ***Railways & Allied Workers Union v. Rift Valley Railways Workers Union, CA No. Nai. 29 of 2015*** and ***New Kenya Co-operative Creameries Ltd v. Olga Ouma Adede, CA No. Nai. 316 of 2014.***

Neither in the supporting affidavit nor in the oral submissions have I been informed of any impending action or threat that would justify certifying this application urgent. The ruling complained of was delivered almost one year ago and nothing has happened. As the 1st and 2nd respondent point out, the application under rule 5(2) (b) seeks only stay of proceedings and not any form of injunction. Moreover, on 28th May 2017, what is scheduled in the trial court is only a mention, not a hearing of the suit as the applicant misrepresent. The suit in question was filed by the applicant and the 3rd respondent and it is certainly odd that they do not want to get on with their own suit which will resolve the dispute between the parties once and for all. The suit has already been pending in court for 9 years.

In these circumstances, I am not satisfied that the applicant has placed before me any material on the basis of which I can certify his application urgent and deserving of preferential treatment. I accordingly decline, once again, to certify the application urgent. Costs shall be in the application for stay of proceedings. It is so ordered.

Dated and delivered at Nairobi this 25th day of May, 2018

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR