



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KANTAI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 40 OF 2018 (UR 30/18)

BETWEEN

HASSAN ABDI ADAN.....APPLICANT

AND

AHMED ABASS EDIN.....1<sup>ST</sup> RESPONDENT

ABDINASIR ADAN EDIN.....2<sup>ND</sup> RESPONDENT

*(Being an application for Stay of Execution pending the hearing and determination of an Intended Appeal from the entire Judgment, Decision and Decree of the High Court of Kenya at Marsabit (Chitembwe, J.) dated 18<sup>th</sup> April, 2018*

in

*H.C.C.A. No. 4 of 2016)*

\*\*\*\*\*

RULING

The notice of motion dated 23<sup>rd</sup> April, 2018 filed in Court on 27<sup>th</sup> April, 2018 was accompanied by a Certificate of Urgency dated 23<sup>rd</sup> April, 2018. The matter came before me for certification on 4<sup>th</sup> May, 2018 but when I perused the motion, the affidavit in support and the judgment intended to be appealed, I declined to certify the motion as urgent and ordered it to be listed at the Registry for hearing in the usual way.

By a letter dated 7<sup>th</sup> May, 2018 *M/s Wesonga, Mutembei & Kigen Advocates* for the applicants wrote to the Deputy Registrar of this Court requesting an inter-partes hearing pursuant to **Rules 47 (5)** of the rules of this court. That rule permits an applicant whose application has not been certified urgent to request informally that the matter be placed before a single Judge for hearing inter-partes on the question of urgency.

The file came to me on 22<sup>nd</sup> May, 2018 when I ordered that the parties be served for hearing on 4<sup>th</sup> June, 2018 at 2.30 p.m. That having been done learned counsel **Mr. Mutembei Marete** appearing with **Ms Nyabenge** appeared for the applicant while **Mr. Kennedy Ochieng'** appeared for the respondent.

**Mr. Marete** gave a history of the matter and submitted that the tenor and import of the judgment of the High Court was to reverse orders issued by the Kadhi Court. According to him, tenants in the premises subject to the dispute were paying rent to the applicant.

**Mr. Ochieng'** submitted that the Kadhi's Court had allocated 27% of rental income to the respondent but that no money had ever been paid to the respondent and that the applicant was holding a sum of about 1.9 million which he should have released to the respondent. According to learned counsel judgment of the High Court takes care of all the beneficiaries of the estate who were ordered to share the property equally.

When the matter came for hearing on 4<sup>th</sup> May, 2018 on the issue of urgency, I considered the ruling of the Kadhi and the judgment on appeal to the High of Kenya at Marsabit. I noted that the High Court had ordered distribution of rental income amongst family members. I did not see what was urgent to entitle the applicant to, as it were, jump the queue when there are other applications filed before this motion. There is an established procedure where applications are filed and listed on a first come first out basis. The purpose of certifying an application as urgent is to ensure that where there are compelling reasons an applicant does not wait for an allocation of a date by the Court Registry but gets precedence over applications already in the queue. That should be done where sufficient reason is shown for a particular application to

get priority and disturb the established order on hearing of applications which are listed according to when they are filed. This established order is, in my view, desirous in public administration as it ensures that parties get equal treatment when they come to court. No party should be accorded preferential treatment over other parties except where, as **rule 47** of our rules contemplate, an applicant is able to show that, absent certification and an urgent hearing, there is real danger of damage occurring which damage may not be undone and thus the need for a hearing without delay.

The applicant here has not shown any compelling reason why the motion should be given priority. I declined to certify the motion as urgent on 4<sup>th</sup> May, 2018. Even after hearing learned counsel for the parties on 4<sup>th</sup> June, 2018 I have not found any compelling reason why the motion here cannot wait to be allocated a date at the Court Registry.

In the event, the motion will be listed for hearing on a date to be allocated by the Court Registry in the usual way.

Costs will be in the motion.

***Dated and delivered at Nyeri this 6<sup>th</sup> day of June, 2018.***

***S. ole KANTAI***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**