



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J.A. (In Chambers))

CIVIL APPLICATION NO. NAI 316 OF 2014 (UR 238/2014)

BETWEEN

NEW KENYA CO-OPERATIVE CREAMERIES LTD.....APPLICANT

AND

OLGA OUMA ADEDERESPONDENT

(Being an application under Sections 3A and 3B of the Appellate Jurisdiction Act, and Rule 5(2)(b) of the Court of Appeal Rules as amended for stay of execution pending the hearing and determination of an intended Appeal against the judgment and decree of the Industrial Court at

Nairobi (Onyango, J.) delivered on 9th May, 2014

in

INDUSTRIAL COURT OF KENYA CASE NO.37 OF 2011)

RULING

1. The applicant's notice of motion dated 9th December 2014 seeking stay of execution under Rule 5(2) (b) of this court's Rules was not certified urgent when it was initially placed before me on 9th December 2014 pursuant to Rule 47 of this court's rules under which I examined it ex parte. I declined then to certify it urgent because, ostensibly there appeared to be no danger of execution of the decree. The applicant, **New Co-operative Creameries Limited**, through its learned counsel, **Miss V.M. Wambua** has, pursuant to Rule 47(5) of the rules of this court applied informally for the motion to be placed before a single judge for hearing *inter partes*. It came before me again under that rule on 9th December 2015. Miss Wambua, appeared before me as did Mr. Ataka, learned counsel for Mr. Olga Auma Odede, the respondent. Miss Wambua urged me to certify the motion urgent because the respondent is intent on taxing the Party & Party Bill of Costs and thereafter proceeding to execute the monetary decree issued by the Industrial Court against her client. She drew my attention to the record and submitted that the motion by her client seeking stay was not filed inordinately. Rather, she said, it was presented as soon as the judgment had been released after correction of typos and receipt of instructions from the applicant cooperation. Miss Wambua indicated, albeit obliquely, that her client would be willing to deposit the decretal sum pending the hearing and determination of the motion. But that is a decision that relates to and may be made in the motion by the Bench that shall hear it. On my part, the decision which I am

called upon to make in this *inter partes* hearing under Rule 47(5) of this Court's Rules is whether to vary my decision and certify the motion urgent. The effect of certification of the motion as urgent is that under Rule 47(2) of this Court's Rules, the motion shall be set down for hearing as a matter of urgency and shall not have to take its place in the queue.

2. The respondent's learned counsel, **Mr. Ataka**, urged me not to certify the motion urgent. He drew my attention to the fact that the applicant had made an application for stay in the Industrial Court which declined to grant it. He pointed out that the applicant had omitted in the motion inclusion of a copy of the ruling of the Industrial Court (declining to grant stay to the applicant). However, I observe that the applicant has in paragraphs 4 and 5 of the affidavit in support of the motion alluded to the said application and the fact that it was dismissed on 26.11.2014. It was Mr. Ataka's further submission that the applicant by its conduct has not shown that there is urgency in the hearing and determination of the motion. He pointed out to me the date of the judgment (on 9th May 2014) and the date on which proceedings were sought (on 2.7.2014) and submitted that from 9th May 2014 to 15th July 2014 the applicant could have applied for stay but did not although the impugned judgment delivered on 9.5.2014 ordered stay for only 30 days without the applicant seeking it. The applicant subsequently made an application for stay to the Industrial Court which was dismissed on 26.11.2014.

3. Mr. Ataka further submitted that a party cannot execute decree before the Party and Party Bill of costs has been taxed or unless taxation has been dispensed with. He indicated that the respondent had neither taxed the Party and Party Bill of Costs nor dispensed with its taxation. Accordingly, he contended, there was nothing to render the hearing of the motion urgent. He urged me to adopt the reasoning in the case of **Dr. Wilfrida Itolondo and 4 Others versus The President and 7 Others** (Civil Application No.122 of 2014) where the question of urgency was "fiercely contested". In that case, Dr. Wilfrida Itolondo & 4 Others filed a notice of appeal and sought stay of execution under Rule 5(2)(b) of this court's rules after their suit was dismissed with costs. As the learned Judge noted, the applicants after losing the suit were apprehensive that taxation of the Bill of Costs was due on 10th January 2014 and once the costs were taxed and awarded, they would immediately be required to settle the taxed costs. The respondents took the view that no sufficient reasons had been advanced to warrant issuance of a certificate of urgency under Rule 47 (supra). The learned Judge found that "*no incidents or circumstances were advanced to warrant the issuance of a certificate of urgency*" and that the application for the certificate of urgency "*was speculative in nature as the Bill of Costs had yet to be taxed...*" Mr. Ataka urged me adopt that reasoning.

4. I have had a second look at the matter and given due consideration to the submissions made by Miss Wambua on behalf of the applicant and Mr. Ataka on behalf of the respondent.

5. I take the view that the basis on which a certificate of urgency ought to issue is simply this; that if the motion will be rendered futile by imminent execution resulting in prejudice to the applicant in the appeal, then a certificate of urgency ought to issue. It is irrelevant in considering that threshold whether, on the face of it, the motion may appear rickety. That is a matter for the Bench that shall hear it to decide. All that a single Judge has to satisfy himself is whether there are circumstances that might render the unheard motion an exercise in futility if it is not heard urgently and thus prejudice the applicant in the appeal. Where the motion seeks stay of execution of a monetary decree and there is evidence that costs are within an ace of being taxed, the prospect of execution, if not stayed, becomes very real. What is of paramount importance however is whether pending the determination of the appeal, execution, if carried out, would render the appeal, if successful, Pyrrhic victory. If the Court is satisfied that the motion ought to be heard urgently to determine whether stay should be granted to obviate the prospect of the success of the appeal being turned into Pyrrhic victory, then the threshold for issuing the certificate of urgency is, in my view, attained.

6. In the instant application, Miss Wambua urges me to issue the certificate because the respondents have manifested their intention to execute once the Bill of Costs is taxed, a view that is not shared by Mr. Ataka. I have carefully considered the application and the rival submissions of counsel for the parties. It seems to me that there is nothing to stop the respondent from taxing the party and party Bill of Costs and once this is done, the respondent will be at liberty to execute. In terms of time, there is no evidence that

the hearing of the appeal will or is bound to precede the taxation of the Bill of Costs. If the taxation precedes the hearing of the appeal, execution may ensue and thus render futile the motion that seeks to forestall it before determination of the appeal. For this reason, I am persuaded that the application ought be certified urgent.

7. Accordingly, pursuant to Rule 47 of this court's rules, I certify the motion dated 9th

December 2014 urgent. It shall be set down for hearing as a matter of urgency.

Dated and made at Nairobi this 13th day of February 2015.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR