IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA. (IN CHAMBERS)

CIVIL APPLICATION SUP. NO. 13 OF 2014

BETWEEN

EQUIP AGENCIES LIMITED.....APPLICANT

AND

AKBER ABDULLAHI KASSAM ESMAIL.....1ST RESPONDENT

PHOENIX PROPERTIES LIMITED.....2ND RESPONDENT

KAMALJEET SINGH MATHARU.....3RD RESPONDENT

STEPHEN KIMANI KARUU.....4TH RESPONDENT

DIVYESH INDUBHAI PATEL.....5TH RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya against part of the judgment and/or decree of the Court of Appeal at Nairobi (Justice R. N. Nambuye, D. K. Musinga and K.M'Inoti JJA) delivered on the 4th day of April 2014

in

Civil Appeal No. 267 of 2004

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RULING OF THE COURT

By their letter dated 10th July 2014, the firm of Odera Obaz & Co. Advocates on record for the applicants in the Motion dated 26th June 2014 requested that this matter be placed before me pursuant to **Rule 47(5)** of the **Court of Appeal Rules**. This was to afford counsel an opportunity to persuade me, at an inter parte as urgent having declined to do so summarily on 1st July 2014.

At the said *inter partes* hearing on the question of urgency Mr Odera, learned counsel for the applicant submitted that his client seeks by the motion sought to be certified urgent, a certification by a regular

bench of the Court to enable it to appeal to the Supreme Court against a judgment of this Court. The judgment on question was delivered on 4th April 2014 by R. N. Nambuye, D. K. Musinga and K. M'Inoti JJA. The part of that judgment that particularly aggrieves the applicant is the one by which the learned Judges of Appeal declared that an order of injunction granted *ex-parte* is excess of Fourteen days is a nullity and void. Counsel contends that by that finding the applicant was left without protection. He urge that the issue sought to be interrogated before The Supreme Court entails a substantial point of public importance. He conceded, however, that the respondents have not moved to attach or advertise the applicant's goods but was quick to add that the client was nevertheless literally living at the mercy of the respondents.

Mr. Ouma learned counsel holding brief for Mr. Ochieng Oduol for the 1st Respondent and Mr. Karanja, learned counsel for the 2nd and 3rd respondents were both decidedly opposed to the applicant's plea that the motion be certified urgent. Going first, Mr. Ouma first pointed out what he perceived as the applicants' dilatoriness; it filed its application on 30th June 2014 yet the judgment sought to be appealed against was rendered on 4th April, 2014 nearly three months previously. That delay, in Mr. Ouma's submission, was clear proof that there is no urgency in the application. He also did not take kindly the applicant's service of the application nearly three weeks after the delayed filing.

Further, argued counsel, the Judgment sought to be appealed against merely declared the legal invalidity of the orders that had been issued by the High Court. It was merely declaratory and did not grant orders capable of execution or enforcement by the respondents, and indeed, no execution of any kind had ensued. Mr. Ouma was emphatic that the court should not act on mere possibilities, by which he must mean suppositions or speculation, to certify an application urgent, but must be satisfied as to the existence of an imminent threat. The goods subject to the order declared null and void by this Court having already been sold at any rate, counsel concluded, the applicant's motion should be listed for hearing in the normal manner.

These submissions were endorsed and echoed by Mr. Karanja who reiterated that there is no imminent threat to the applicant's interests. The original suit before the parties, being **HCCC No. 1227** of **2004**, is still under pursuit before the High Court, counsel submitted, and the applicant is not in any way threatened before the said suit is heard and concluded.

Responding to these submissions, Mr. Odera submitted that the respondents were 'missing a crucial point' in blaming the applicant of delay in service of the application being that the application could not be served before it was filed and directions given on urgency by a single Judge under **Rule 47**. He contended that the question intended to be taken up on appeal to the Supreme Court was urgent not because of any threat of execution, but rather because there is need for finality from the highest court in the land on the legal force of *exparte* injunctive orders granted for longer than fourteen days.

Having passed the certificate of urgency and the affidavit in its support and heard the rival submissions on this question, I am unmoved from my earlier position that the Motion is undeserving of the tag of urgency. When an applicant whose application is not certified urgent moves the single judge at an *inter partes* hearing, it behoves him to demonstrate, to the single judge's satisfaction, that there is something about the application that is pressing by reason of risk or peril of harm or loss necessitating immediate and unhesitating action on and attention to the application by the court.

An application will not be certified urgent on an applicant's or his advocates' say – so, without more. This is the reason for the requirement not only of a certificate of urgency by the applicant or his advocate, but evidence as well by way of a sworn affidavit in proof of the imminence of the threat and risk apprehended. Such risk must be real and immediate. It must portend a present danger to rights and interests.

Without a clear demonstration of real, clear and present peril of harm, I apprehended that it would be a misuse and abuse of the **Rule 47** mechanism to certify an application as urgent and thereby have it leap-frog other application previously filed or have the equally deserving business of the Court placed aside or

otherwise re-organized to pave way for its hearing. Such queer – jumping, in my way of thinking, must be in the most deserving of cases.

I do not think the application before me fits the bill. There is no threat of execution. There is no discernible risk or danger to the applicant's rights or interests of any kind. There is no prejudice to be suffered were the application to be given a date for hearing in accordance with the point of its entry into our system. What is more, the delay in the filing of the application, running into nearly three months after the judgment was delivered, itself speaks volumes, and eloquently so, as to the ordinary speed at which the application should move.

For all these reasons I decline, again, to certify the motion dated 26th June 2014 as urgent with costs to the respondents.

Dated and delivered this 31st day of July 2014.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR