



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 119 OF 2014 (UR.97/2014)

BETWEEN

PRISCA WANJIKU KABERENGE.....APPLICANT

AND

NANAK HOSPITAL MANAGEMENT SERVICESRESPONDENT

(Application for stay of any further proceedings from the judgment of the High court of Kenya at Nairobi (Gacheru, J) dated 16th May, 2014

in

H.C.ELEC. PET. NO. 546 OF 2013)

RULING

On the 3rd June 2014, I declined to certify this matter as urgent having taken the view that there were no urgent circumstances to warrant the issuance of a certificate of urgency.

The matter before me relates to a Preliminary Objection filed on 17th March 2014 by the applicant and raised in an Originating Summons which was filed by the respondent on 16th February 2012. In the Preliminary Objection the applicant contended that LR No. 209/2763/19 (**“the Property”**) was sold to Nanak Hospital Management Services Limited on 14th December 1995, but in the suit the respondent is named as **NANAK HOSPITAL MANAGEMENT SERVICES** and not **Nanak Hospital Management Services Limited**; that the Vesting order issued and /or amended on 15th October 1996 was issued four months after the Property was registered to Nanak Hospital Management Services Limited, and that the Property was valued differently, as the Vesting Order to the Nanak Hospital Management Services Ltd specified the value as Kshs. 4,800,000/- whereas the title to Nanak Hospital Management Services, specified the value as Kshs. 3,000,000/-; that the affidavit of Janardhan D. Patel, who has sworn the affidavit in support of the Originating Summons is

incompetent as he cannot be a director of the respondent, which is not a limited liability company; that the applicant is still in occupation of the Property and cannot be illegally dispossessed; and that the irregularities in the pleadings cannot be cured by any amendment.

The Environment and Land Court dismissed the Preliminary Objection and observed that the names on the title documentation were the same save that, the word "Limited" had been omitted, and that as the application filed by the applicant did not dispose of the suit in limine, it did not qualify as a Preliminary Objection.

The applicant was aggrieved with the Environment and Land Court's Ruling (Gacheru J) and filed a Notice of Appeal dated 19th May 2014. The applicant also filed Notice of Motion dated 28th May 2014, together with an affidavit sworn by **Prisca Wanjiku Kiberenge** and a Certificate of Urgency of the same date.

In the urgency certificate the applicant contended that the learned judge dismissed the application on 9th May 2014 on grounds inter alia that parties to the Originating Summons could always be amended instead of striking out the Preliminary Objection; that when the Originating Summons came up before the learned judge on 16th May 2014, the respondent declined to amend the pleadings and instead the learned judge ordered the parties to file written submissions so that a date for delivery of the judgment could be fixed; that the applicant will suffer irreparable prejudice should she continue to litigate with a stranger to the suit namely: **Nanak Hospital Management Services**, as the respondent has refused to amend the pleadings. It is this certificate that I declined to certify as urgent.

The application was referred back to me under **rule 55** of this Court's rules for hearing inter partes. Learned counsel for the applicant, **Mr. Kariuki** submitted that the respondent had refused to amend its pleadings in defiance of a court Order and as a consequence, the urgency of the application was that the applicant was litigating with a stranger. There was the possibility of the suit being dismissed to the applicant's prejudice, or conversely, if a ruling was delivered in her favour, she would be unable to execute the order against a stranger. Counsel submitted, that the issue was not one of joinder or non-joinder, but of capacity or locus standi of the respondent. Counsel continued that the High Court suit was to be mentioned on 7th July, 2014, when the date for delivery of the judgment would be fixed. The urgency was that Court must not deliver its ruling on the Originating Summons, until the respondent complies with the court Order of 16th May 2014.

Learned counsel for the respondent, **Mr. Randere** opposed the application and submitted that the applicant had not specified any reason to warrant the issuance of a certificate of urgency. A Judicial Review application by the applicant had since been dismissed by Sitati, J on 20th May 2010 in respect of a judgment entered in favour of the Resident Magistrate's Nairobi City Council Court for the recovery of rates over the Property, which property was subsequently sold to the respondent. The Originating Summons related to an application for vacant possession by the legal owner, where Janardhan D. Patel, had sworn an affidavit in support of the Originating Summons averring that he was a director of the respondent, which inferred that the respondent is a limited company. In counsel's view the omission of the word "Limited" did not negate the respondent's ownership of the Property. Counsel confirmed that the applicant is in possession of the property, and there was no intention to evict her while the suit was pending. Counsel reiterated that the respondent was unwilling to amend the name of the respondent as the exclusion of the word "Limited" was not fatal, and was of the view that since the High Court was yet to rule on the Originating Summons, this Court was being asked to make an order in vain. Counsel concluded that and in the event the High Court ruled against her, the applicant still had a right of appeal to this Court.

I have considered the pleadings and heard the rival submissions of counsel, but I am unable to establish from whence the urgency in this application arises. My understanding of the issue is that the applicant is unwilling to proceed unless the respondent amends its pleadings to incorporate the word "Limited" supposedly, in terms of the Order of 16th May 2014. Their contention is that the High Court should not deliver a ruling on the Originating Summons, because one of the parties is a stranger to the suit. On the other hand, Mr. Randere has submitted that the respondent does not

intend to amend its pleadings, or to evict the applicant whilst the suit is pending. Where does the urgency arise? In my view, the pendency of a ruling from the High Court or any other competent court without other cogent reasons is not a satisfactory reason to issue a certificate of urgency. Having said that, I am of the view that given this Court's current expeditious rate of disposal of similar applications, I have no doubt that the applicant will have an opportunity to argue the merits of the stay of execution application within a reasonable period of time.

For these reasons, I decline to alter my decision made on 3rd June 2014. The costs of this application for urgency to be in the main application.

Dated and delivered at Nairobi this 11th day of JULY, 2014.

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR