



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 274 OF 2014

BETWEEN

DIAMOND HASHAM LALJI.....1ST APPELLANT/APPLICANT

AHMED HASHAM LALJI2ND APPELLANT/APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

COMMISSIONER OF POLICE.....3RD RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

BAHADURALI HASHAM LALJI.....5TH RESPONDENT

(An application for injunction and or stay pending the hearing and determination of CA NO. 274 of 2014, being an appeal from the judgment and orders of the High Court of Kenya at Nairobi (Odunga, J) dated 28th July, 2014

in

HC MISC. APPLN. NO. 153 OF 2012)

RULING

Before me is an application under **Rule 47(5) of the Court of Appeal Rules (the Rules)**. The applicants filed a Notice of Motion application dated 3rd November, 2014, brought pursuant to **Rule 5 (2) (b) of the Rules**.

The applicants applied for certification of urgency of their Notice of Motion application dated 3rd November, 2014 under Rule 47. On 5th November, 2014, I declined to certify the said motion, urgent. The applicants have now filed the current application for certification under Rule 47(5). The grounds upon which the applicants rely on in support of their application for urgency are that, the learned Judge of the High Court granted them temporary orders in the nature of conservatory relief for a period of thirty [30] days from 28th October, 2014 and in the absence of an order of injunction and or conservatory order, they will be exposed to the possibility of being arrested, charged and prosecuted by the 2nd, 3rd and 4th respondents herein; that the applicants have serious health challenges and they may not be able to withstand the rigours of incarceration; that the applicants have an arguable appeal and the same, if successful, will be rendered nugatory if an injunction or stay pending the hearing and determination of CA No 274 of 2014 is not granted.

At the hearing of this application, learned counsel, Mr Waweru Gatonye, Oyieno Omusa and Martin Bett appeared for the applicants, while learned counsel Mr Victor Mule, Assistant Director of Public Prosecution (ADPP) appeared for the 2nd respondent, Mrs Judith Shamalla holding brief for D. Ruto, learned counsel for the 4th respondent and Ahmednasir Abdullahi learned Senior Counsel appeared for the 5th respondent. There was no appearance for the 1st respondent.

Mr Waweru relied on the contents of the certificate of urgency application and his affidavit in support of the urgency both dated 3rd November, 2014. He submitted that the applicants were aggrieved by the dismissal of their application for judicial review by the High Court and filed a notice of appeal on 7th August, 2014. Counsel argued that the current application is urgent since the applicants were granted temporary orders in the nature of conservatory relief restraining the respondents from arresting, charging or prosecuting the applicants for a period of thirty [30] days to enable them invoke this Court's jurisdiction under **Rule 5 (2) (b)** from 28th October, 2014; and that medical reports clearly indicate that both applicants have serious medical challenges and may not withstand the rigours of incarceration and trial and that without an order for injunction and or a conservatory order to restrain the arrest, charge or prosecution of the applicants, the application and the appeal will be rendered nugatory. Counsel pointed out that the learned Judge in granting the temporary orders stated:

“I am also cognizant of the fact that the jurisdiction to grant stay in matters of these kind of matters in light of what appeal (sic) to be conflicting view points from the Court of Appeal is far from settled and this may afford an opportunity to the Court of Appeal to consider the apparent conflict of views.”;

counsel prayed that this application be certified urgent to facilitate the hearing of the application for injunctive stay orders before 28th November, 2014.

In response Ahmednasir Abdullahi, SC, opposed the application for certification of urgency on the ground that there is no single issue of urgency that has been proved by the applicants in their application. He argued that a right of appeal does not guarantee a party certification of urgency.

Mr Mule conceded the application for certification to enable the parties to canvass their application under **Rule 5 (2) (b)**.

Mrs Shamalla opposed the application on the ground that the law on urgency is settled. Counsel admitted that it is at the court's discretion to certify a matter urgent but the discretion should be based on sound reason not on whim, caprice or sympathy. She stated that the reasons given by applicants for certification seeks the court's sympathy and no justifiable reason has been demonstrated for the application to be certified urgent.

I have considered the application, the grounds in support of the application, the affidavits, the submissions by learned counsel and the law.

Rule 47 (5) of this Court's rules provides:

“The refusal by the Judge to certify an application as urgent under this rule shall not be subject to a reference to the court under rule 55, but the applicant may apply informally for the matter to be placed before a single Judge for hearing inter partes.”

All that I have been called upon to do after hearing the rival arguments is to determine whether the pending application is urgent or not. I have thus been called upon to exercise my judicial discretion in favour of either side. The principles that guide me in the exercise of my judicial discretion have now been crystallized by case law. These are that the exercise of judicial discretion is wide and unfettered, with the only fetter to it being that I have to exercise it judiciously and upon reason. See the case of **CMC HOLDINGS LIMITED V NZIOKI, (2004) 1 KLR 173**. There is also a requirement that such discretion be exercised based on sound reason rather than whim, caprice or sympathy. See the case of **BAGALLO V CHRISTIAN CHILDRENS FUND, (2004), 2 KLR 73**. The discretion must also be exercised in the interests of justice for both parties to the litigation. See the case of **GUTHIACA V NDURURU, (2004) 2 KLR 67**.

I have borne in mind all the above principles and applied them to the rival arguments herein.

I am called upon to balance between competing rights and interests of different parties to ensure that the ends of justice are met. I note from the record that the learned Judge of the High Court granted the applicants' temporary orders in the nature of conservatory relief restraining the respondent from arresting, charging or prosecuting the applicants for a period of thirty [30] days' to enable them invoke this Court's jurisdiction under **Rule 5 (2) (b)** and that the 30 days lapse on **28th November, 2014**. I further note that failure to grant the orders sought herein will render the appeal, if successful, nugatory. I also take cognizance of the fact that no substantial prejudice will be suffered by the respondents if the application herein is allowed.

In the premises, and in the circumstances of this application, I am satisfied that a case has been made out by the applicants to warrant that the application by way of Notice of Motion dated 3rd November, 2014, be heard as a matter of urgency. It is so ordered. Costs in the application.

Dated and delivered at Nairobi this 21st day of November, 2014.

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR