



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: R. N. NAMBUYE, J.A. (In Chambers))

CIVIL APPLICATION NO. NAI 313 OF 2014 (UR 235/2014)

BETWEEN

NEPTUNE CREDIT MANAGEMENT LIMITED.....1ST APPLICANT

BYRAN YONGI.....2ND APPLICANT

AND

EQUITY BANK LIMITED.....RESPONDENT

(Being an application for stay of execution of the ruling and order of the High Court of Kenya at Nairobi (Gikonyo, J.) delivered 180th October, 2013

in

H.C.MISC. C. NO. 105 OF 2012)

RULING

This matter was placed before me Nambuye JA on 9th December 2014 for certification as urgent. I declined to certify the matter as urgent. The applicant in obedience to Rule 47 (5) of this court's Rules vide his letter dated the 16th day of December 2014 requested for interpartes hearing on the issue of certification of the application as urgent. On 18th December 2014 Mr. Ondieki A. Anyegah and Duncan A. Akhulia appeared for the applicant and the respondent respectively. In support of the certificate of urgency, Mr. Ondieki urges that they had been given a temporary reprieve by the High Court which reprieve has lapsed. There is a threat of attachment of the applicants' property on the one hand and the threat of incarceration of the applicant for possible contempt of Court orders on the other hand.

Mr. Duncan for the respondent has opposed the certificate of urgency on the ground that there is no proof of imminent danger in any way for the attachment of the applicants' property or threat of incarceration. Mr. Duncan further urged that the applicant is undeserving of this court's indulgence as the applicant has failed to disclose that there is a similar application pending disposal before the High Court. The applicant is therefore guilty of nondisclosure and is disentitled to the relief it seeks from me.

In response thereto Mr. Ondieki concedes a similar application was presented to the High Court, it has not been disposed of because the learned Judge seized of the matter raised issues about certain

correspondences on the file regarding the matter and declined to proceed further until the applicant put in an application to explain as to why the correspondences were filed and on that account adjourned the matter generally.

The applicant relied on the decision in the case of Rev. Jackson Kipkemboi Koskey and 7 Others versus Rev. Samuel Muriithi Njogu [2007] eKLR for the proposition that where there is demonstration that the applicant was likely to have served a six month civil jail before the disposal of the intended appeal, the Court should not withhold the exercise of its discretion in favour of such a party; the decision in the case of Diamond Husham Lalji and Another versus Attorney General and 4 Others [2014] eKLR for the proposition that where the High Court has granted an applicant a temporary reprieve to enable such an applicant access relief in this Court under Rule 5(2)(b) and where failure to intervene may lead to the arrest, charging and prosecution of the applicant thereby rendering the intended appeal nugatory, the Court should not withhold the exercise of its discretion in favour of such an applicant.

The respondent on the other hand relied on the decision in Nishith Yogendra Patel (the legal representative of the deceased) Yogendra Purshottam Patel versus Pascale Mireille Baksh (nee Patel) and Another CA Nai 264 of 2007 (UR) wherein the Court declined to exercise its discretion in favour of the applicant on account of the applicants' conduct of abusing the due process of the Court by pursuing same remedies in two parallel courts with competent jurisdiction to hear the matter.

I have given due consideration to the above rival arguments as to whether I should grant or withhold the reliefs sought. Both sides have drawn my attention to case law which relate to exercise of this court's jurisdiction under Rule 5 (2) (b) of this court's rules a stage not yet reached herein. Matters of abuse of process will be considered at the merit hearing of the application sought to be certified. It is however clear that the interim reprieve granted by the High Court has lapsed. There is therefore danger of the applicant being exposed to what the interim reprieve had shielded him from. I now find that the applicant has a genuine concern. Cause has been shown for me to reverse my order of 10th December 2014 declining to certify the application as urgent, which I hereby do, and substitute thereto an order that the applicants' application pending hearing be and is hereby certified as urgent.

Dated and delivered at Nairobi this 19th day of December, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRA