



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 65 OF 2013 (UR 43/2013)

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

MRS. NANCY WANJA GATABAKIAPPLICANT

AND

ASHFORD MURIUKI MUGWUKU t/a ASHFORD & CO. ADVOCATESRESPONDENT

***(Being an application for stay of execution from the Ruling and or Order of the High Court at Nairobi
by (Havelock J.) dated 28th February 2013***

in

H.C. Milimani Commercial & Admiralty Division Civil Suit NO. 146 of 2012)

RULING OF THE COURT

This matter was placed before me pursuant to **Rule 47(5)** of this Court's Rules. This was after the applicant's advocates applied informally by their letter dated 27th March 2013 for a hearing *inter partes* on the question of urgency.

Appearing for the applicant were Mr. Ndegwa Wokabi led by Mr. Mbuti Gathenji learned counsel. For the respondent, learned counsel Mr. Nganga Mbugua placed himself on record and expressed himself as ready to proceed.

Before I could hear counsel on urgency, however, Mr. Gathenji raised a two pronged objection to Mr. Mbugua's presence and participation namely;

- a. ***That Mr. Mbugua's firm having been served with a Notice of Appeal on 6th March 2013, he was obligated under Rule 79 of this Court's Rules to file and serve a notice of address for service within 14 days of being so served but had not done so;***
- b. ***That having filed nothing in response to the certificate of urgency and the affidavit in its support, Mr. Mbugua ought not to be heard as it is unknown what he intends to say.***

Mr. Gathenji accordingly urged me to proceed to hear him on urgency without hearing his counterpart.

Responding to this objection, Mr. Mbugua first indicated his surprise as Mr. Gathenji had not forewarned him of his intention to object to his appearance and participation. He then proceeded to meet the objection raised against him as follows;

- i. ***That in so far as he was not coming before me pursuant to a change of advocates as envisioned by “Rules 22 and 23” of our Rules, he was under no obligation to file any document in signification of his appearance for the respondent. He went on to say that there was a presumption that the address of service subsisting at the High Court continues.***
- ii. ***That this court has ceased to be a court of technicalities by virtue of Section 3A and 3B of the Appellate Jurisdiction Act and that I should not accede to the invitation to be fettered by technicalities of procedure.***
- iii. ***That the applicant had not shown what prejudice she would suffer by his appearance and participation as counsel for the respondent, in the urgency hearing.***
- iv. ***That his firm was served with the record of the application by the applicant on 12th April 2013 and with a notice of hearing on the question of urgency by the registry only on 15th April 2013 so there was no time to file any affidavits or other kind of reply to the certificate of urgency.***

In short, Mr. Mbugua declared himself properly before me and averred further that for purposes of responding to the certificate of urgency there was nothing in the Rules that mandated him to file any kind of pleading. Moreover, said counsel, his response would be founded on and limited to material that has been placed on record by the applicant.

Having heard the rival submissions before me, my first reaction is one of puzzlement that the applicant, who is seeking to have her application dated 25th March 2013 certified urgent, chose by her counsel to consume time that she would have employed in urging urgency on what may be termed, without any disrespect to counsel, as a peripheral issue of technicality. The effect of the objection argued before me is that *inter partes* hearing on urgency has inevitably and regrettably been delayed.

On the question of whether Mr. Mbugua is properly before me, I find without hesitation that he is. Even though neither counsel appearing cited it, there is an express rule of Court that is right on point although its principle was only alluded to by Mr. Mbugua namely **Rule 49 (2)**.

It provides as follows;

“Where any person required to be served with a notice of motion gave an address of service in or in connection with the proceedings of the superior court and has given no subsequent address for service, the notice may be served on him at that address notwithstanding that it may be that of an advocate who may have been retained for the purpose of any subsequent proceedings.”

It is a curious thing that the applicant should object to Mr. Mbugua’s appearance and participation herein having served him with the application and the certificate of urgency. This service was long after the expiry of the 14 days reckoned from service of the notice of appeal within which, by the applicant’s own argument, a notice of address of service should have been filed under Rule 79, and was not.

Having found that Mr. Mbugua is properly before me, the next issue is whether he needed to have filed any papers in reply before being allowed to speak on the issue of urgency. I respectfully do not think so. Affidavits in reply are provided for under Rule 50 of the Rules which provides that any person served with a notice of motion under Rule 49 may lodge one or more affidavits in reply. My reading of

this provision is that it is permissive and not mandatory. It cannot be the law that a party who is opposed to an urgency certification would be barred from responding to it on account only of not having filed a replying affidavit. Had that been the case, the rule maker would have stated so expressly.

More pertinent to the issue before me is the fact that Rule 50 relates to affidavits in reply to a notice of motion. What is coming before me is not the notice of motion dated 25th March 2013 itself, but the certificate of urgency. What I need to decide is whether the motion filed herein should be certified urgent and, the application for *inter partes* hearing having been made informally, I am comfortable in my own mind to hear the respondent on an informal basis on the basis of the record's content.

That a respondent may be heard before this court on the question of urgency without filing pleadings in reply or opposition can also be surmised from the fact that even in the case of substantive appeals, there is no requirement for the filing of responsive pleadings of any kind.

The upshot is that the objections raised by the applicant are devoid of merit and are accordingly dismissed with costs to the respondent.

I direct that the parties do take a date for *inter-partes* hearing on the question of urgency. The date shall be given by the registry on priority basis.

Dated and delivered at Nairobi this 19th day of April 2013.

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR