



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 47 OF 2013 (UR 21/2013)

BETWEEN

SAMMY BRIAN ONGANGAAPPLICANT

AND

ECOBANK LIMITED1st RESPONDENT

VALLEY AUCTIONEERS2nd RESPONDENT

(An application for stay of execution from the Ruling and orders of the High Court of Kenya at Kisumu (Hon. Mr. Justice A. K. Kaniaru) dated the 28th day of October 2013)

in

KISUMU E & LC No. 127 OF 2013)

RULING

The Applicant, Sammy Brian Onganga, filed an application by Notice of Motion on 22nd November, 2013 accompanied by a Certificate of Urgency. The file reached me on 25th November, 2013. I perused the Certificate of Urgency signed by the Applicants Advocates and the Affidavit in Support of Urgency deponed by the Applicant on 21st November, 2013. I was not persuaded that the application was urgent and I accordingly refused to certify it as urgent. This was on 25th November, 2013. On the same day 25th November, 2013 the Applicant through his Advocates wrote to the Registrar of this Court asking that the file be placed before a Judge under Rule 47 (5) of this Courts' Rules. So the file reached me again yesterday 26th November, 2013 when I directed that it be placed for hearing today 27th November, 2013 for hearing.

Learned counsel Mr. Onyango for the Applicant and learned counsel for the Respondent Mr. Otieno appeared before me this morning to urge the issue of urgency under the said Rule.

Learned counsel for the applicant submitted that the respondent had breached terms of a contract subject of the suit at the High Court and the applicant was accordingly aggrieved. Counsel submitted further that the respondent and the principal borrower had breached terms of contract even more because

the respondent offered more loan facilities to the principal borrower without reference to the applicant and without his knowledge or consent. Counsel therefore urged that I grant orders otherwise the application and the intended appeal would be rendered nugatory.

Learned counsel for the respondent submitted that the application was not urgent and that in any event no useful purpose would be served by certification because the proposed sale is set for today. Counsel reminded me that I have no jurisdiction as single judge to grant injunction or stay of execution. Counsel wondered why the application was filed nearly one month after the High Court Ruling and nearly three (3) weeks after an advertisement for sale of the property appeared in the Daily Nation newspaper of 4th November, 2013.

Those were the rival positions taken in the matter.

When the file was first placed before me on 25th November, 2013 I noted that Ruling intended to be appealed was delivered by the High Court on 28th October 2013. Although a Notice of Appeal was lodged timeously the application was not filed until 22nd November, 2013, over 3 weeks later. The certificate of urgency and the Affidavit in support thereof showed that the proposed sale of the suit property was scheduled for 27th November, 2013. I did not see any explanation why the application was being presented only five (5) days before the proposed sale and over three (3) weeks after the Ruling by the High Court.

There is, of course, the added reason, as submitted by learned counsel for the respondent, that I have no jurisdiction as single Judge to entertain a plea for injunction or stay of execution.

I was persuaded on 25th November, 2013 that the application was not urgent because of the reasons I have stated. I can see nothing new to enable me change that position. The net effect is that I confirm the position I took on 25th November, 2013 by stating again that the application is not urgent at all.

The file will be dealt with by the Court Registry in the normal way and process of getting a hearing date for the application .

Dated and delivered at Kisumu this 27th day of November, 2013

S. ole Kantai

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR