



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: WAKI, J.A (IN CHAMBERS))  
CIVIL APPLICATION NO. NAI. 57 OF 2011 (UR. 38/2011)

BETWEEN

JOYCE AKINYI ACHIENG.....APPLICANT

AND

AHMED NOORANI.....RESPONDENT

*(An application for stay of execution of the ruling and order of the high Court of Kenya at Nairobi  
(Msagha, J.) dated 20<sup>th</sup> July, 2010*

in

H.C.C.S. NO. 319 OF 2008)

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RULING

This is a certificate of urgency referred to me under **rule 47 (5)** of the rules of this Court for hearing *inter partes* after rejecting certification on 11<sup>th</sup> March, 2011. I found no compelling reason at the time to stop all other scheduled business of this Court in order to hear the matter, as this in my view is the essence of urgency.

The dispute between the parties relates to a written sale transaction made between the parties in the year 2007, which is still raging before the superior court. The applicant, **Joyce Akinyi Achieng**, was developing some six residential units on LR. No. 3734/223 situate along Owashika Road in Lavington Nairobi. She offered for sale, and the offer was accepted, one of the residential units identified as Villa No. 5 to the respondent, **Ahmed Noorani** for Shs.17 million. Noorani paid the required deposit of Shs.4.4 million, and awaited completion when he would pay the balance and obtain execution and the transfer. One year later, and contrary to their agreement, Akinyi commenced construction of two more units and threatened to sell the Villa Unit 5 reserved for Noorani. He also learned that Akinyi and her estranged husband were fighting over their properties including the villa unit. In July, 2008, he went to seek relevant injunctory relief to protect his interest or in the alternative to recover the deposit of Shs.4.4 million with interest thereon. Akinyi filed a defence denying that there ever was a written contract between the two for sale of Villa Unit 5 but admitting that a payment of Shs. 4.4 million was made by

Noorani pursuant to a letter of offer. An interlocutory injunction appears to have been granted by Visram J (as he then was) on 25<sup>th</sup> July, 2008, and has been extended from time to time, but the main suit and the application are still pending hearing and determination on their merits before the superior court.

On 2<sup>nd</sup> December, 2009, Noorani filed another application seeking to compel Akinyi to deposit the sum of Shs. 4.4 million in an interest earning account to be held in escrow by his advocates, pending the hearing of the suit. In the alternative he sought to compel her to accept the balance of the purchase price of Villa Unit 5 for completion of the transaction. He saw no fairness or justice in Akinyi holding the sum of Shs.4.4 million and also the property which she was refusing to transfer even if she was paid the balance of the purchase price. That application was heard by Mbogholi J who acceded to the main prayer that the sum of Shs.4.4 million be deposited in an interest earning account held by the advocates then on record for Noorani and the interest be capitalized towards the balance of the purchase price, after determination of the suit. The deposit was to be made within 30 days, that is on or before 27<sup>th</sup> August, 2010.

It is common ground that Akinyi did not comply with that order nor did she go before the superior court to seek extension of time for compliance. Indeed there is now before that court an application to have her committed to civil jail for contempt of the order, and I am told it has been adjourned for hearing in May, 2011. In the meantime Akinyi had proposed to Noorani's advocate that the deposit be made by instalments, but nothing appears to have been paid. Instead Akinyi came before this Court on 10<sup>th</sup> March, 2010 and sought an order for stay of execution of the order of Mbogholi J made on 28<sup>th</sup> July, 2011. This is the matter sought to be certified urgent.

The basis of the urgency as urged by learned counsel Mr. Kabiru, is that there are several orders issued before other courts which have made compliance with the court order impossible. There was also an application for contempt which may result in the incarceration of the applicant thus rendering the application for stay nugatory. Responding to those submissions, Mr. Apopo for the respondent contended that the application was merely diversionary as it was tailored to avoiding compliance with a court order whose validity was neither challenged or extension sought.

I think for my part that the fact of the pendency of the contempt application is not a compelling reason for certification of the matter as urgent. That application is before a competent court and the applicant has an opportunity of responding to it and show why she is not in contempt. She concedes that she did not seek extension of time for compliance with the court order and perhaps there was a good reason why she did not do so. Whether or not there ought to be a stay of the order of 28<sup>th</sup> July, 2010 will of course be considered on its merits, hopefully without undue delay, in the normal course. The apparent delay of 8 months before the application was filed, does not endear itself to a court of equity.

For those reasons I still decline to certify the motion as urgent. The costs occasioned by this reference shall be in the motion.

***Dated and delivered at Nairobi this 1<sup>st</sup> day of April, 2011.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**