



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 325 OF 2003 (165/2003 UR)

BETWEEN

SIMON MBUCHO WA KARIUKI ..... APPLICANT

AND

DAVID WAIHUMBU ..... RESPONDENT

**(Application for stay of execution pending the determination of the intended appeal against the Ruling and Order of the High**

**Court of Kenya at Nairobi (Lady Justice Aluoch) dated 27<sup>th</sup> day of November, 2003**

**in**

**H.C.C.C. NO. 549 OF 1996)**

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R U L I N G

This matter was placed before me pursuant to rule 47(1) of the Court of Appeal Rules which provides:-

*“Any application which the applicant desires to set down for hearing as a matter of urgency shall be accompanied by a certificate of urgency signed by the applicant or his advocate, supported by an affidavit setting forth the matters upon which the applicant relies as showing that his application should be heard without delay.”*

Having perused the file I was of the opinion that there was no urgency in the matter.

The applicant was aggrieved by my order of refusal and now comes before me pursuant to rule 47(5) of the Rules which 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 54 but the applicant may apply informally for the matter to be placed before a single judge for hearing inter partes.”**

When the application came up for hearing before me, Mrs. Matata urged me to certify the application as urgent since the amount involved was Shs.2.4 million and yet the applicant was not served with the pleadings. She was of the view that the issue of service needs to be investigated.

Mr. Gitonga, for the respondent, opposed the application on the ground that the applicant had been served with the notice to show cause when a temporary stay was granted pending settlement

I have considered the history of this matter and it would appear that the applicant has not been candid in this application. The applicant was served with the summons and passed the same over to his insurance company which in turn instructed its lawyers to defend the suit. Judgment was entered and it was after the judgment that the applicant was faced with a judgment to satisfy. This was so because the applicants insurance company went under liquidation. The applicant has difficulties in satisfying the decretal amount. He tried an application for review which was unsuccessful. He now seeks to file an

application for stay of execution.

Since the applicant deliberately concealed material particulars (receiving summons and passing the same to the insurance company which then instructed its lawyers to defend the suit), I do not think he is entitled to this Court's discretion.

That being my view of this matter I still hold that there is no merit in seeking an order that this application be heard without delay. The intended application for stay should be listed for hearing in the normal way. Hence the application for certificate of urgency is dismissed with costs to the respondent in any event.

**Dated and delivered at Nairobi this 19th day of December, 2003.**

**E.O. O'KUBASU**

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**