



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: O'KUBASU J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 174 OF 2001 (UR 93/2001)**

**BETWEEN**

**UNITED INSURANCE CO LTD ..... APPLICANT**

**AND**

**MERCEDES SANCHEZ RAU TUSSEL .....RESPONDENT**

(Application for stay of execution from the order of the Hon. Commissioner for Assize Gacheche Ms dated

30/5/2001 in the High Court of Kenya at Nairobi

in

H.C.C.C NO. 4231 to 4234 OF 1992)

\*\*\*\*\*

**RULING**

This matter is before me pursuant to Rule 47(5) of the Court of Appeal Rules on the issue of urgency. Mr. Kasamani for the applicant urged me to certify the matter as urgent on the ground that the sum involved was large (shs.2.7 million) and that the respondent was a foreign national. Mr. Magan for the respondent, in opposing this application pointed out that the order sought has been overtaken by events since execution has already taken place.

What the applicant wants to be certified as urgent is an application for stay of execution of an order in which the applicant was ordered to pay Shs.2,666,659/60 to the respondent. It must be pointed out that this amount has already been paid to the respondent.

In his replying affidavit Mr. Magan depones inter alia:-

"4.As at the time when the Application was filed, the Applicant had given to Shapley Barret & Co. Advocates two cheques in total sum of Kshs.2,666,659.60 cts towards payment of the decretal sum.

5.The said cheques were presented for payment and dishonoured .....

6.Thereafter the Respondent's Advocates instructed the Auctioneers to execute the Decree whereupon the Applicant paid the said sum. In the circumstances, the allegation made by the

Applicant in its Application that it had already paid the decretal sum as at the time of filing the Application is false.

7.The said sum has already been paid to the Respondent".

In answer to the foregoing, Mr. Kasamani in his submission before me stated that there has been partial execution. But that appears to contradict what Mr. Kasamani states in his affidavit sworn on 4th June, 2001 in which he

s"4a.yTsH:A-T on the 31/05/2001 the applicant paid Kshs.2,666,659.60 to the decree holder to avert an execution. Hereto annexed and marked "CLK - 3" is a copy of a letter forwarding payment".

Having considered this matter and the arguments advanced herein, I find that whichever way we look at it there can be no denial that execution has taken place. Mr. Kasamani wanted to call it partial execution but Mr. Magan's affidavit is very clear in that the decretal amount has been paid. What is to be certified is an application for stay of execution under rule 5(2) (b) of the Court of Appeal Rules. Since execution has already taken place, there can be no urgency in hearing the application under Rule 5(2) (b). I would even go further and state that there would be no need for such an application since even assuming that this Court would grant such an application, it would indeed be a futile order incapable of enforcing. I agree with Mr. Magan's submission to the effect that this application has been overtaken by events.

In view of the foregoing, I find no merit in this application and hence decline to certify the matter as urgent.

The application is therefore, dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of June, 2001.

**E.**

**O.**

**O'KUBASU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**