



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: LAKHA, J.A. (IN CHAMBERS))  
CIVIL APPLICATIONS NOS. NAI. 381, 382, 385 & 386 OF 2001**

**In the Matter of an Intended Appeal**

**TEXT BOOK CENTRE LIMITED .....APPLICANT**

**AND**

**KIPYATOR NICHOLAS KIPRONO BIWOTT .....RESPONDENT**

**(Application for leave to appeal and stay from the decision of  
the High Court of Kenya at Nairobi (Hon. Justice Kuloba)  
dated the 1st and 5th days of November, 2001 respectively**

**in**

**H.C.C.C. NO. 1272 OF 2001)**

\*\*\*\*\*

**R U L I N G**

These proceedings arise as a result of applications, four in all, pursuant to **rule 47(5)** of the Court of Appeal Rules (the Rules) and are placed before me for their hearing interpartes on the issue of urgency. They are well-known as the respondent is a Member of Parliament and a Member of the Cabinet in the Kenya Government in his capacity as Minister for Trade and Industry.

He filed a suit against the applicant for defamation claiming, inter alia, general damages for libel contained in the book "**ROGUE AMBASSADOR**" authored by one Smith Hempstone and sold and distributed by the applicant. They are by way of an application by the applicant from two decisions of the superior court (Kuloba, J.) given on 1 November, 2001 and 5 November, 2001 respectively whereby the learned judge dismissed the applicant's application for stay of proceedings and for leave to appeal. It is agreed by the advocates that I should deliver one ruling only but deal with each of the four applications separately.

**APPLICATION NO. NAI. 381 OF 2001.** By this application, the applicant sought a stay of proceedings pending the determination of an intended appeal from the decision dated 5 November, 2001 whereby the learned judge granted the respondent's application to amend the Chamber Summons under **section 100** of the **Civil Procedure Act**. An application for a certificate of urgency for hearing of the stay application was declined by me to be certified as urgent on 9 November, 2001.

The respondent opposed this application on the ground that there was no urgency involved. There was no error on the part of the learned judge in amending the chamber summons and no miscarriage of justice had been shown. It was contended that judicial discretion had been exercised and there was nothing to

stay. I am in full agreement with Mr. Oyatsi for the respondent. He does not agree that an appeal from the decision of the learned judge lies as of right but any error on the part of the learned judge can be dealt with in an appeal against the final decree. I am satisfied that there is no urgency involved and the application should be dismissed, as I hereby do, with costs.

### **CIVIL APPLICATION NO. NAI. 382 OF 2001**

This application arises from the direction given by the learned judge as to the sequence in which the two applications before him should be heard. It was freely and frankly conceded by the advocate for the applicant that it was an order. It was, however, said that it was no more. The learned judge in the ruling referred to his decisions as a "**direction and order**". The choice of words shows that he never intended this to mean a judicial order or decision except to direct the sequence in which the applications were to be heard. Those directions remain no more than administrative ones, however, widely framed.

As was said by Omolo, J.A. in MARY ANNE NJUGUNA VS. JOSEPH NJUGUNA NGAE Civil Application NO. NAI. 195 of 1997 (unreported):-

*"There cannot be an appeal against an administrative*

*directive and if no appeal lies to this Court, it would be futile and a waste of everybody's time to grant to the applicant leave to appeal or order a stay of proceedings as sought in the motion. I must repeat that it is regrettable the learned judge found it necessary to disqualify himself for the flimsy reason contained in the file and it is more regrettable that having disqualified himself, he again found it necessary to reverse that order without giving the parties a chance to address him on the issue.*

*Having held that no appeal lies from the written "DIRECTIONS" of the Chief Justice, my logical conclusion must be that this motion must fail in its entirety and must be dismissed."*

What is more, I am not persuaded that the application .... for stay if withheld will cause prejudice. Nor am I persuaded that there is any urgency involved. Accordingly, this application fails and is dismissed with costs. CIVIL APPLICATION NO. NAI. 385 OF 2001 I have no material before me nor am I persuaded of any urgency in the application for leave.

Accordingly, the application fails and is dismissed with costs.

### **CIVIL APPLICATION NO. NAI. 386 OF 2001**

This application for urgency is against the "**direction**" of the learned judge. Having held that no appeal lies therefrom, this application must also fail. I think it would be of assistance if I remind myself of what Sir. Charles Newbold, P. said on the general position in AGGARWAL V. OFFICIAL RECEIVER 1967 E.A. 585 at 589:-

*"This is an application for leave to appeal against the exercise of the discretion of a judge of the High Court on an interlocutory application.*

*The judge exercised his discretion in a particular way; and when leave to appeal against the exercise of that discretion on a purely interlocutory proceeding was asked for it was refused. The application for leave to appeal has now come afresh to this Court. This application, it is true, is not an appeal from the decision of the judge of the High Court refusing leave to appeal. It is a fresh application. Nevertheless in determining this application, this court cannot but have regard to the fact that leave has already been refused and that what is sought to be the subject of the appeal is the exercise of the discretion of a judge in purely interlocutory proceedings which will not in any way whatsoever determine any matter between the parties. In the circumstances it seems to me that the applicant faces a very difficult task.*

For these reasons, all the four applications are dismissed with costs.

**Dated and delivered at Nairobi this 16th day of November, 2001.**

**A.A. LAKHA**

.....

**JUDGE OF APPEAL**