IN THE COURT OF APPEAL

AT NAIROBI

CORAM: M'INOTI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 40 OF 2018

BETWEEN

BENJOH AMALGAMATED LIMITED.....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

BIDII KENYA LIMITED.....2ND RESPONDENT

(Application for review of the judgment of the Court of Appeal (Nambuye, Makhandia & M'Inoti, JJA) or in the alternative certification to the Supreme Court that a matter of general public importance is involved in the said judgment dated 15th December 2017

in

CA Nos. 107, 137 & 174 of 2010 (Consolidated))

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RULING

This ruling arises from an *inter partes* hearing, pursuant to ***rule 47 (5)*** of the ***Court of Appeal Rules***, on whether I should certify urgent an application for review of the judgment of this Court dated 15th December 2017 and by extension another judgment of the Court dated 10th March 1998. Although the ***applicant, Benjoh Amalgamated Ltd***, had in that application sought an alternative prayer for certification of the matter as one raising issues of general public importance within the meaning of ***Article 163(4) (b)*** of the ***Constitution*** and therefore fit to be heard by the Supreme Court, its advocates, vide a letter dated 12th March 2018, abandoned the alternative prayer.

The application was placed before me on 20th February 2018 for purposes of determining whether or not to certify the same urgent. After perusing the application I was not persuaded that the application was urgent to warrant preferential hearing over other matters pending before the court, including election petition appeals. I accordingly declined to certify the application urgent and directed that it be listed for hearing in the normal manner. By a letter dated 22nd March 2018, the applicant applied for *inter partes* hearing on urgency which was scheduled for 7th May 2018.

The dispute leading to the judgment of this Court that the applicant seeks to review has a convoluted history, going back to 1992. The dispute has been to all the levels of the superior courts, including the Supreme Court, and it is therefore relevant to bear in mind the history of the dispute in determining the issue of urgency of the application.

At the heart of the dispute is a contested consent order that was recorded by the parties on 4th May 1992, in which the applicant acknowledged indebtedness to the ***1st respondent, Kenya Commercial Bank Limited,*** and undertook to settle the same by 31st July 1992. That did not come to pass and subsequently the applicant challenged the consent order and by a ruling dated 31st October 1997 the High Court set the same aside. The 1st respondent successfully appealed to this Court in ***Civil Appeal No. 276 of 1997*** and by a judgment dated 10th March 1998, the Court restored the consent order. Thereafter there has been about 14 suits and myriad of applications between the parties, including an application to the Supreme Court where that Court declined to entertain an application by the applicant, holding that the question of the legality of the consent order was settled way back in 1998. (See ***Kenya Commercial Bank Ltd v. Muiri Coffee Estate Ltd & Another [2016] eKLR).***

The judgment of this Court that the applicant seeks to review allowed ***Civil Appeals Nos. 107, 137*** and ***174*** all of ***2010***, which were brought by the respondents, after the Court found that the applicant's suits that the High Court had entertained were *res judicata*. The Court also dismissed a cross-appeal by the appellant in which it sought an order to strike out the 1st respondent's defence in the first appeal.

The grounds upon which the applicant asks me to certify its application for review urgent are expressed as follows:

1. The application seeks to re-open, review and set aside the judgment of this Court delivered on 15th December 2017 and by extension the judgment of this Court delivered on 10th March 1998 which has been use to continually subjugate and defeat the applicant's rights on one hand and /or certification that a matter of general public importance is involved on the other hand.

2. That in the said judgment (10th March 1998), this very Honourable Court propounded that the easiest way to rest the underlying dispute was by having a clarification by way of affidavit.

3. That the applicant has since come across new and material evidence and the same ought to be considered by this Honourable Court at the earliest as the same shall certainly alleviate the immense injustice occasioned to the appellant over the years.

4. That whereas the application has been brought as soon as practicable upon discovery of new and material evidence, any further delay in moving this Honourable Court may be misconstrued as inordinate.

5. That in view of the foregoing, there is good reason and sufficient cause for review of the said ruling (sic) a sprayed in the application filed herewith.

6. That the applicant has been driven from the seat of justice on numerous occasions as a result f the impugned proceedings before this Court, it is in the interests of justice that its present application be heard and determined as the earliest to forestall the continued subjugation of the applicant's rights."

The affidavit is support of urgency sworn by ***Mr. Kung'u Muigai***, a director of the applicant, repeats the above reasons and adds that the new evidence is an affidavit sworn by ***Gideon Kaumbuthu Meenye***, the advocate who recorded the consent on the applicant's behalf. The applicant's learned counsel, ***Mr. Kyalo Mbobu*** added further that the applicant could not have made the application earlier due to other litigation that it was pursuing and that the age of the litigation itself was sufficient reason for certifying the application urgent.

Mr. Nyachoti, learned counsel for the 1st respondent urged me not to certify the application urgent because the applicant had not adduced any reason to justify certification of the application urgent. He contended that the issue of the consent order has been in existence since 1992 and that Mr. Meenya has been around all that time. He added that the judgment of this Court dated 10th March 1998 that the applicant was relying on and at the same time seeking to review, has been in existence for 20 years. ***Mr. Issa,*** learned counsel for the 2nd respondent agreed with Mr. Nyachoti's submissions and added that even the Supreme Court had declined to re-open the consent order that the applicant is now seeking to reopen.

I have carefully considered the certificate of urgency, the affidavit in support, and submissions by learned counsel. Whether or not to certify an application urgent for immediate hearing is a discretionary power. (See ***Sahit Investments Ltd v. Josephine Akoth Onyango, CA. No. 27 of 2015***). The Court does not certify applications urgent as a matter of course. However, like all judicial discretionary power, that power has to be exercised, not arbitrarily, whimsically or capriciously, but rather on the basis of evidence and reason.

In ***Jared Okello v. Charles Otieno Opiyo & 3 Others, CA No. 151 of 2017***, the basis and effect of certifying a matter urgent was expressed as follows:

"Certifying a matter urgent means that the same is to be set down for hearing and determination immediately. It gets priority over other matters, even though they were filed earlier in time and the parties have been waiting patiently for their turn. Before a matter can be allowed to jump the queue, it must be shown to deserve priority hearing. That approach is deliberate and dictated by the principles and values of fairness to all litigants and case management considerations, to the end that deserving applications filed first in time, are not relegated to the periphery while later applications of equal or less urgency get fast-tracked and given preferential treatment."

I have also set out in detail the grounds upon which the urgency is based. I'm afraid that most of the issues that counsel on both sides addressed me on are the matters that the full Court is supposed to consider and determine when hearing the application for review. My jurisdiction as a single judge does not extend to delving or forming an opinion on those issues at this stage. All that I am supposed to determine is whether there is any material before me on the basis of which I can allow this application to jump the queue and get priority hearing, including over election petition appeals that have constitutional and statutorily set timelines for determination. In ***Railways & Allied Workers Union v. Rift Valley Railways Workers Union, CA No. Nai 29 of 2015***, it was held that to justify certifying an application urgent, the applicant must satisfy the Court that there are circumstances in the application tending to show that if the matter is not heard promptly, the application and the intended appeal may be rendered nugatory. (See also ***New Kenya Co-operative Creameries Ltd v. Olga Ouma Adede, CA No. Nai 316 of 2014*** and ***Kenya Oil Co. Ltd v Jayantilal Dharamshi Gosrani, CA No. 117 of 2010).***

With respect, the grounds put forth by the applicant to support urgency are actually the grounds why the judgments should be reviewed, not why the review must be immediate. Accordingly, I am still not persuaded, as I was not, on 20th February 2018, that there are any compelling grounds upon which I can certify this application urgent. Accordingly, I once again decline to certify it urgent and direct that the same be listed for hearing in the ordinary manner. Costs of this hearing shall abide the outcome of the application for review.

Dated and delivered at Nairobi this 11th day of May, 2018

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR