



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, TUNOI & OWUOR, J.J.A.)
CIVIL APPLICATION NO. 132 OF 1998 ON PROPOSED APPEAL
BETWEEN

JAMES MWASHORI MWAKIO APPLICANT

AND

HONOURABLE ATTORNEY GENERAL AND TWO OTHERS RESPONDENTS

**(Notice of motion to seek extension of time and leave to
appeal out of time under Rules 112 for waiver
emanating from the judgment of the High Court of
Kenya (Mr. Justice D. K. S. Aganyanya) of 21st
September, 1995
in
H.C.C.C. NO. 2613 OF 1990)**

DRAFT RULING OF THE COURT

By a notice of motion dated and lodged in the Court's registry on 8th June, 1998, James Mwashori Mwakio, the applicant to the reference before us, had sought leave to lodge a notice of appeal out of time so as to enable him to prefer an appeal against the judgment and decree of the superior court (Aganyanya J) dated 21st September, 1995. The leave was sought under rule 4 of the Rules of this Court (the Rules). The application, which was opposed by the respondents, eventually came for hearing before, the learned single Judge of this Court (Shah, J.A.) on 28th September, 1998 it was fully argued. In a reserved ruling the learned single Judge declined to grant the application and dismissed it with costs.

The applicant had instituted suit against the respondents contending that he was prematurely retired as a senior servant and claimed, inter alia, loss of salary, pension and damages. In a judgment that at a glance appeared perfectly favourable and acceptable to him, Aganyanya J made the following awards in favour of the applicant:-

- (1) 2 year's salary at the rate of Ksh.10,990 per month, less tax deductions,***
- (2) An allowance of Ksh.2,034/95 per month for 2 years if it was a constant monthly allowance,***
- (3) Ksh.150,000/= general damages.***
- (4) Adjustment of monthly pension payment if it was affected by premature retirement;***
- (5) 2 costs of the suit***

(6)interest.

It would appear that soon after the judgment the parties embarked on the computation process with the Deputy Registrar as direct in the judgment. It is now common knowledge that the exercise was protracted, inconclusive and generally unacceptable to the applicant. He avers that Aganyanya J. erred in delegating the computation of his entitlement to the Deputy Registrar who was unable to make any conclusive judgment. However, the respondents contend that the applicant has been paid on diverse dates the decretal sum plus interest in full and final settlement all amounting to Shs.520,813.45 less the statutory tax deductions.

The applicant realising that he was out of time for appeal purposes, and; yet, the matter was far from being concluded to his satisfaction did on 12th September, 1997, file a notice of appeal and also sought its validation by the learned single Judge of this Court.

But, as observed by the learned single Judge of this Court the judgment was actually in favour of the applicant. If he was dissatisfied with the manner of computation by the Deputy Registrar he could have appealed to Aganyanya, J. who, no doubt, would have looked into the complaint. The procedure he embarked on to is erroneous.

Further, the applicant being by all standards a very experienced litigant is unable to explain why it took him 2 years to lodge such an informal and simple a document like a notice of appeal. The filing of it does not necessarily mean that an appeal must eventually be preferred and neither does it require the skills of a spine doctor to produce one. The delay involved is simply too inordinate and inexcusable.

The applicant in the same breath attacked and supported the learned single Judge's refusal to grant the application so that he could canvass his application "in order to seek justice and to fight oppression by top civil servants". This is hardly a sound procedure of prosecuting a suit or an application and we will not comment further.

It is clear to us that the learned single Judge exercised his undoubted and unfettered discretion conferred by rule 4 of the

Rules only after a very careful and painstaking consideration of the issues which were raised before him and after plodding along two bulky and clumsy records. We dismiss the reference. As the respondents, though duly served, did not appear and the reference was heard in their absence, we will make no order as to costs.

Dated and delivered at Nairobi this 4th day of december, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL