



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: NYARANGI, PLATT & APALOO, JJ A)

CIVIL APPLICATION NO NAI 59 OF 1986
(In the matter of an intended appeal)

BETWEEN

JAMES MWASHORI MWAKIO APPLICANT

AND

KENYA COMMERCIAL BANK LTD RESPONDENT

(An application to extend the undertaking given on December 14, 1982 by the respondent not to sell his house LR 874707/7 and to allow him to pay a reduced fees of Kshs 600.00 for the appeal which he intends to take against the decision of the High Court of Kenya at Nairobi (Porter, j) dated April 14, 1986

IN

High Court Civil Case NO 2815 of 1980)

RULING OF THE COURT

The appellant, Mr Mwakio applied to the court, and at the hearing he clarified the orders which he was asking as follows:-

- (1) To extend the undertaking given on December 14, 1982 by the respondents not to sell his house LR 874707/7;
- (2) to allow him to pay reduced fees of Kshs 600.00 for the appeal which he intends to take against the decision of Porter, J since the fess estimated by the Registry amount to Kshs 20,000.00 which he cannot afford;
- (3) to obtain directions on –
 - (a) his arrest for non-payment of costs which this court stayed pending the hearing of the application inter partes on October 6, 1986;

(b) an order that he be supplied with a copy of the decree of Porter, J emanating from the latter's judgment of April 14, 1986.

With regard to the first point, we may repeat what was said at the end of the order of this court given on January 28, 1986.

“After the determination of the High Court, the respondents are to be at liberty to apply to us for the discharge of the undertaking of December 14, 1982.”

In that ruling we have already explained that it is not possible to extend the undertaking unilaterally, and therefore we await the application, which should be made on notice to Mr Mwakio.

With regard to the second matter, we accede to the request of Mr Mwakio. Under rule 112(1) of the court of Appeal Rules, we are satisfied that the appellant lacks the means to pay more than Kshs 600.00. We have noted the amount of his salary and the considerable debts which he has final with. Mr Mwakio has offered to pay Kshs 600.00 and in the circumstances as we think that the appeal is arguable either way and therefore not without a possibility of success, we accept that that is what he is able to pay. We waive the balance of the fees and security for costs fixed at Kshs 2,000.00 under rule 112 of the Court of Appeal Rules. But we order that the record of appeal shall be prepared by the Registrar of the High Court on payment of Kshs 600.00, conditionally upon Mr Mwakio undertaking to pay the balance of the fees out of any money or property he may recover or in consequence of the appeal. We shall expect that undertaking to be given in writing at the end of this ruling. We have also spoken to the Registrar of this court who did not wish to be heard. Perhaps the applicant would be well advised to assist the Registrar in preparing his record.

3(a) with regard to the warrant of arrest issued against the appellant, which we have stayed, it is necessary to be clear on what account execution was prayed. Mr Mwakio appears to be dismayed at the attitude of the Deputy Registrar in thinking that Mr Mwakio had refused to pay the costs, and it would appear that Mr Mwakio himself may not be quite clear what this procedure was about.

(i) There are other cost which presumably arise from the completion of High Court suit No 2815 of 1980.

(ii) There are the costs awarded by this court in Court of Appeal Civil Application No Nai 60 of 1984. The court held-

“ We are however, satisfied that the present so-called application is incompetent and must be dismissed with costs..”

(iii) There are the costs in Court of Appeal Civil Application No Nai 14 of 1985. This court held that –

“We dismiss the purported application with costs to the bank, to be taxed and paid forthwith”

It would appear that the costs in one and three above have not yet been taxed but that the costs in application Nai 60 of 1984 in two above have been taxed at Kshs 9,788.50. As a result of this taxation the bank executive for these costs by applying for the applicant's arrest and detention. The procedure adopted was in accordance with rule 105(2) of the Court of Appeal Rules. Attached to this application was the order of this court given on November 5, 1984 and the certificate of taxation dated July 27, 1985, and issued on November 13, 1985. The order and certificate made up a decree as provided by rule 105, the bank was at liberty to execute, under order 21 of the Civil Procedure Rules.

The proceedings before the Deputy Registrar have been put before us and it is clear that the Deputy Registrar thought that the matter was concluded because the applicant gave the impression that he refused to pay the costs. What should have happened was that under order 21 rule 35(1), the court should have

satisfied itself by an inquiry into the applicant's means whether he was unable to satisfy the decree because of poverty or other sufficient cause. An alternative inquiry should have been made as to whether the decree was payable by installments. In either two of these cases, the debtor should be released. There are further considerations in rule 35(2) and (4). The Deputy Registrar, however, assumed that Mr Mwakio could pay which appears to us to be uncertain from the inquiry we have made above with regard to the waiver of appellate fees. On the other hand, Mr Mwakio must have been misunderstood. He was not saying that he would never pay costs but rather that in view of the intended appeal he was not yet obliged to pay the costs. We can understand how the confusion arose, moreover clearly perhaps because this court has been following the chain of events rather than the Registrar. Mr Mwakio rightly or wrongly thought he was entitled to have matters clarified in this Court which he thought the High Court had either not followed or not appreciated. The applications he made in this Court were connected with his effort to obtain redress in the High Court. No doubt Mr. Mwakio thought that the applications in this Court were all part of the process ordered by this Court of a retrial, which was not going ahead very speedily. It seems therefore that Mr. Mwakio thought that the costs in the applications were all part of the costs of the suit against which he was intending to appeal. At any rate that is what he explained as being the reason why he said

that he was not yet bound to pay the decretal sum or the costs of litigation, because of the ruling of this Court on 28th January 1986. This ruling was one of the matters on which Mr. Mwakio was successful and it concerned the steps to be taken to speed up the rehearing. The Deputy Registrar is quite right in point of fact, when he says that that the ruling does not specifically state that costs awarded in the earlier applications of 1984 and 1985 were to abide the event of the appeal, or at least the outcome of the trial. But in the more general sense which we have explained above that Mr. Mwakio was addressing the Deputy Registrar.

We are satisfied that there was both lack of procedure and misunderstanding during the proceedings which led to the arrest of the Appellant and are happy to say that the order staying the arrest was justified on the merits. There is no doubt that the Deputy registrar should re-open the matter and consider the Appellant's means and whether he would be able to pay at least by instalments. We shall maintain the stay until the Deputy Registrar has done so.

3(b) The procedure with regard to the Applicant obtaining decree under Order 20 Rule 7 of the Civil Procedure Rules was explained to Mr Mwakio. There was as usual a misunderstanding between the bank and the applicant whether a draft decree had been submitted to the Registrar. It was pointed out that either party to the suit might apply for the decree, so Mr Mwakio can go ahead himself. We also pointed out rule 85(2)A which provides for a certified copy of the decree being included in a supplementary record of appeal so that the main record of appeal can be lodged within time.

We hope these directions will aid the parties to limit the area of constant friction between them. We have no doubt that in the matter of the arrest the bank would rather have installments paid to it instead of itself paying for the applicant's subsistence. There will be no order as to costs of this application.

Dated at Nairobi this 12th day of November, 1986.

J.O. NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

F.K . APALLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR