



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P.N. WAKI, JA (IN CHAMBERS))

CIVIL APPLICATION NAI. NO. 126 OF 2011

BETWEEN

ALI MOHAMMED MWANZIA APPLICANT

AND

NATIONAL BANK OF KENYA RESPONDENT

(Application to reinstate an application to sue as a pauper which was dismissed on 1st February, 2012 in an intended appeal from the ruling and order of the High Court of Kenya at Milimani commercial Courts Nairobi (Koome, J.) dated 12th March, 2010

in

H.C.C.C. NO. 1705 OF 1997)

RULING

1. This Ruling was due for delivery on 26th September 2014 but for several reasons, it was not possible to do so. First was the pressure and priority given to Election petition judgments which had Constitutional deadlines. The attention of the parties was drawn to this possibility for delay. Second, in the month of November 2014, the Hon. The Chief Justice approved my annual leave and my official engagement as President of the Residual Special Court for Sierra Leone, which took me outside the country throughout the month. Barely two days after my return to Kenya on 30th November 2014, my father who had been hospitalized for cancer treatment passed on and the Court President allowed me to concentrate on funeral arrangements until the end of term. The Ruling was prepared during the Christmas vacation and delivered at the first opportunity in the new year.

2. The Motion that falls for my consideration was filed by Ali Mohamed Mwanzia (the applicant) on 25 May 2011. As he was acting in person, it is not surprising that the Motion is not elegantly drawn. It appears from the record that as at 9th August 2010, he had some Advocates on record, M/s Jackson Omwenga & Co who, on 16th August 2010, filed an application on his behalf seeking a prayer under Rule 4 of the Rules of this court for extension of time to file and serve a record of appeal out of time. It is unclear whether that application was heard and determined, but on 25th May 2011, the applicant filed the

Motion now before me. The Motion is expressly brought under Rule 115 of the Court of Appeal Rules 2010 seeking the order that:

“..the Honourable court be pleased to exempt the applicant from paying court fees and depositing security for costs”.

3. There is also another prayer made in the same application for **“..leave to file memorandum and record of appeal out of time”**. It is a prayer that cannot obviously be made under Rule 115 and in any event, it was the same prayer made in the previous application alluded to earlier. This Ruling will therefore be restricted to the prayer made under Rule 115 of the court’s Rules.

4. **Rule 115 (1)** of the Court of Appeal Rules makes provision for ‘relief from fees and security in civil appeals’ in the following terms:-

“If in any appeal from a superior court, in its original or appellate jurisdiction in any civil case the Court is satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the Court may by order direct that the appeal may be lodged –

a. Without prior payment of fees of Court, or on payment of any specified amount less than the required fees;

b. Without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 107, and may order that the record of appeal be prepared by the registrar of the superior court without payment therefore or on payment of any specified sum less than the fee set out in the Second Schedule, conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property he may recover in or consequence of the appeal.”

There are three other sub-rules however, which are couched in mandatory tone as follows:-

(2) The Registrar shall be entitled to be heard on any such application.

(3) No fee shall be payable on the lodging of any such application.

(4) The Registrar shall have power to take such action as he may think necessary to enforce any undertaking given in accordance with sub-rule (1).

The application before me was neither served on the Registrar of this court nor was the Registrar heard in accordance with the mandatory requirement of Sub-rule (2).

5. The same situation arose in a reference made to the full court from a decision of a single judge in relation to an application under Rule 115 and the reference was allowed by the full court, because the single judge did not give the registrar an opportunity to be heard in the matter. The case was **Benson Mbuchu Gichuki v Norwegian Peoples Aid [2012] eKLR** which was decided on 17th day of February, 2012. In that case the court stated thus:-

“..the learned single Judge heard the application that was before him and decided on it without the input of the Deputy Registrar of this Court as is required by the provision of rule 115(2) of this Courts Rules. In our view, the hearing could only proceed after the Deputy Registrar’s report was received on the status of the applicant. Perhaps that input of the Deputy Registrar would have included his investigation as regards the position as of now as opposed to the position as obtained when the applicant was granted leave to proceed as a pauper earlier on.”

6. As a result, the court made the following order:

“..we order that the applicant appears before the Deputy Registrar for purposes of the latter investigating his status and preparing a report which should be availed before a single Judge of this Court who would hear the matter *de novo*. We so order. We make no order as to costs.”

7. I have considered the application before me in the light of that decision which I defer to and make a similar finding and order. Consequently, I order that the applicant shall appear before the Deputy Registrar of this court in the next fourteen days for purposes of further investigations on his status. Thereafter the Deputy registrar shall prepare and file a report within fourteen days and place the matter before any single judge of this court (other than Waki JA) for hearing *de novo*.

I make no order as to costs.

Dated and delivered at Nairobi this 16th day of January, 2015.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR