



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 126 OF 2011

BETWEEN

ALI MOHAMMED MWANZIA.....APPLICANT

AND

NATIONAL BANK OF KENYA..... RESPONDENT

(Application for relief from fees and security in an intended appeal from the ruling and order of the High Court at Nairobi (Koome, J.) dated 12<sup>th</sup> March, 2010

in

HCCC NO.1705 OF 1997)

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RULING

By a Motion on Notice dated 24<sup>th</sup> May 2011, and taken out under **Rule 115 of the Court of Appeal Rules**, the applicant, **Ali Mohammed Mwanzia** applied to be exempted from paying fees and security for costs to enable him appeal the ruling and order of the High Court dated **12<sup>th</sup> March 2010** in **High Court Civil Suit No 1705 of 1997**.

The short background to the application is that the respondent, **National Bank of Kenya**, filed HCCC No. 1705 of 1997 against the applicant and another contending that they were indebted to it on account of letters of credit and overdraft facilities extended to them. **Ransley, J.** took evidence from the bank and adjourned the hearing to another date for the hearing of the applicant's defence. On the date scheduled for the resumed hearing, neither the applicant nor his advocate turned up in court, with the consequence that judgment was ultimately entered for the respondent against the applicant.

Subsequently the applicant filed an application seeking to set aside the judgment and praying for an opportunity to be heard. That application was heard and dismissed by **Koome, J.** (as she then was) on 12<sup>th</sup> March 2010. Aggrieved by the dismissal, the applicant intends to appeal to this Court, but in the meantime he has filed the application now before me in which he seeks relief from fees and security for costs. He also seeks leave to file the memorandum and record of appeal out of time.

For good order, the application for relief from fees and security must be heard and determined first.

Accordingly, in this ruling, I shall restrict myself to the prayer for relief from fees and security for costs and leave the other limb of the application to be determined subsequently.

When the parties appeared before my brother, **Waki, JA**, he directed, in a ruling dated **16<sup>th</sup> January 2015**, that the applicant should appear before the Deputy Registrar within fourteen days of that ruling for the necessary interview and investigation as required by **rule 115(2)** of the Rules of this Court. The record indicates that the applicant duly appeared before the Deputy Registrar who has now submitted a report on the applicant and his circumstances.

When he appeared before me in *propriapersona*, the applicant relied on his affidavit sworn on **25<sup>th</sup> May 2011** in support of the application. There was no appearance for the respondent although its advocates, **Messrs. Rachuonyo & Rachuonyo Advocates** were served with the hearing notice on **29<sup>th</sup> January 2015**. The applicant informed me that **Mr. Adundo**, Advocate, had alerted him that he would be late to court. After waiting for the advocate for 15 minutes, I heard the applicant in the absence of the advocate for the respondent.

The grounds upon which the application for relief from fees and security for costs is based is that the applicant is unable to raise money for court fees and security for costs because he has no source of income. The applicant has deponed that he survives on small, irregular and intermittent contracts for repair of motor vehicles. More details on the applicant's present circumstances are provided in the report of the Deputy Registrar. From that report, it emerges that the appellant holds a higher diploma in mechanical engineer from Japan. For sometime he used to run his own company, importing and repairing vehicles. The applicant was one of the victims of the 1998 bombing of the American Embassy in Nairobi, where he sustained severe injuries including loss of sight in one of his eyes. His fortunes took a turn for the worst after spending all his savings on treatment, including in the United States of America. He has a young family with two sons aged 6 and 4 years old, which depends on his meager and unreliable income.

Regarding the prospects of his intended appeal, the applicant contends that the same is arguable, as he was never afforded an opportunity to be heard on merit in the High Court.

The respondent filed a replying affidavit sworn on **26<sup>th</sup> September 2011** by its Manager, Legal Services, **Damaris Wanjiku Gitonga**. There is a further affidavit sworn by the said Ms. Gitonga on **6<sup>th</sup> May 2013**. As far as the present application for relief from fees and costs is concerned, the respondent opposes the same on the ground that it is an abuse of the process of the court as the applicant has failed to demonstrate that he is a pauper. In a bid to demonstrate the applicant's financial ability, the respondent argues that the applicant has another suit in the High Court, being **Civil Suit No 3459 of 1995, Fuji Auto Trading v National Bank of Kenya Ltd** in which he has not sought any relief from fees.

It is also contended that the judgment entered against the applicant is a regular judgment, which ought not to be interfered with. The respondent further argues that the applicant's intended appeal is devoid of merit and stands no chance of success because the applicant's advocates had been duly notified of the resumed hearing date.

I have carefully and anxiously considered this application. The applicant in an application for relief from fees and costs bears the burden of satisfying the Court that he lacks the means to pay the required fees or to deposit security for costs. See **APONDI V. CANUALD METAL PACKAGING, [2005] 1 EA 12** and **MANDEVIA V. RONGWE AFRICAN CO-OPERATIVE UNION LTD [1958] EA 524**.

Other additional and relevant considerations to be borne in mind in an application under rule 115 is whether the intended appeal has reasonable prospects of success and whether the applicant stands to recover more than nominal amounts or damages. In determining an application for relief, the Court has to weigh the interests of an applicant who, but for lack of means has a right of appeal which ought to be vindicated, as well as the respondent who risks incurring costs defending an appeal, which costs he might never recover from the applicant.

In ***JASON NYABUTO KEMBERO V SINGH SHEIKH MUSDAF, CA NO NAI 152 OF 2012 (UR 113 /2012)*** I observed as follows regarding the balancing of these competing interests:

***As much as possible, this Court will accommodate an applicant who has a reasonable claim and a genuine grievance, but is otherwise handicapped by lack of means, to ventilate his grievance. That is what access to justice guaranteed by the Constitution is all about. However, rule 115 is clearly not intended to be used either for academic or theoretical pursuits or as a license to vex and harass a perceived opponent. The Court has to balance the host of competing interests, namely the genuine grievance of a financially handicapped applicant, the costs and expense likely to be incurred by the respondent in defending the appeal, the chances of the respondent recovering such costs from the applicant, the available judicial time and resources and the legitimate demands and expectations of other litigants to judicial time.***

In this application, the applicant's circumstances, confirmed in the Deputy Registrar's report, are clearly dire not the least on account of the misfortune that befell him after the terrorist attack in Nairobi in 1998. I do not think, merely because the applicant has another suit against the respondent in the High Court in which he has not applied for relief, is proof that indeed he has the financial means to sustain his intended appeal. It is plain that the suit pending in the High Court was filed in 1995 before the calamity that befell him in 1998.

I do not feel confident to state at this stage that the applicant's intended appeal is utterly useless. What bears heavily on my mind is the fact that *prima facie* the applicant was not heard before judgment was entered against him. Whether his non-attendance in court on the scheduled day and time was his fault or that of the advocate or both, or whether such failure was excusable or not, is an issue for the appeal itself, if and when it is filed, which I cannot prejudge or preempt.

Having carefully considered this application and weighing the contentions by the respective parties, I am inclined to allow the same and exempt the applicant from paying court fees and deposit of security for costs in his intended appeal from the ruling and order of the High Court dated 12<sup>th</sup> March 2010. However, should the applicant proceed with his intended appeal and recover sufficient costs from the respondent, he shall pay the requisite fees. I make no orders on costs of this application. Orders accordingly.

**Dated and delivered at Nairobi this 20<sup>TH</sup> day of FEBRUARY, 2015.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**