



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO NAI 24 OF 2013 (UR 14/2013)

BETWEEN

THEODORE OTIENO KAMBOGO.....APPLICANT

AND

NORWEGIAN PEOPLES AID.....RESPONDENT

(an application for leave to appeal as a pauper in an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ogola, J.) made on 2nd February 2012

in

Civil Case No 774 of 2000)

RULING

Theodore Otieno Kambogo (hereinafter referred to as the applicant) has approached this Court by way of a motion dated 6th February 2013. In that motion he seeks orders inter alia, that he be allowed to lodge his appeal without the prior payment of fees or security for costs, and that time be extended for lodging his appeal.

The applicant had filed a cause against the Norwegian Peoples Aid, who is his former employer and the respondent herein. In that suit, he claimed the sum of Kshs 15,833,910 being outstanding benefits payable to him by the respondent upon termination of his employment. The court, after a full hearing, dismissed the respondents claim, holding that the applicant had not produced any evidence to support his claim. The applicant elected to appeal, and applied for certified copies of the proceedings on the 8th February 2012 and a certificate of delay was issued on 6th December 2012.

The applicant prepared a record of appeal which was assessed at the amount of Kshs 100,800.00. This

assessment was done on 5th February 2013. He states that he lacks the means to pay the assessed fees because he is over 60 years of age and therefore past the age of employment, he is unable to get the benefits from his employment and the person on whom he could have relied to support him passed on in August 2012. He further urged this Court to extend his time to file the record of appeal since the present application had been brought without delay, and that the respondents would not be prejudiced should the orders sought herein are granted.

These are the grounds that he presented before be during hearing of the application. Mr Ochieng, learned counsel for the respondent opposed the application on behalf of the respondent. Counsel submitted that the intended appeal is not arguable. He faulted the applicant for failing to annex a draft memorandum of appeal so that the court would be able to ascertain whether the intended appeal was arguable or not.

Mr Ochieng further argues that there was delay, as since the certificate of delay was issued on the 6th December 2012, and as such the record ought to have been filed on or before 4th February 2012. Counsel submitted that if the record was not ready, then the applicant ought to have brought an application for extension on that date. He however filed this application on 7th February 2013 and as such is guilty of delay. He has not given any explanation why he ought to benefit from the discretion of the Court.

Mr Ochieng also submitted that the court should not grant this application as to do so would greatly prejudice the respondent seeing as the original cause of action arose in 1997 and has been litigated since 2000 and that since then the applicant has already been paid his terminal dues.

On whether the applicant should be allowed to appeal as a pauper, Mr Ochieng argued that the applicant is required to show that he lacks the means to pay the required court fees and secondly, that his appeal would have a reasonable chance of appeal. Counsel urged that he had failed to do so and thus the court could not grant the orders he sought. **Rule 115 (1)** of the Court of Appeal Rules makes provision for the 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.”***

In an application of this nature, the onus falls upon the applicant to satisfy the Court that he does not have the means to pay the fees required or to deposit security for costs. See ***Apondi v Canuald Metal Packaging [2005] 1 EA 12***

As is required by Rule 115 (2) of the Rules, the Registrar of this Court investigated the claims of the applicant and filed a report on the 24th April 2014. The report indicates that the applicant is a 64 year old who has been abandoned by his three surviving children. In addition, since he lost his job that is the subject of the appellant, he has been unable to get any employment or access any of his benefits. The Registrar therefore recommends that the applicant be allowed to appeal as a pauper. It is therefore clear that the applicant has a genuine request.

In ***Jason Nyabuto Kembero V Singh Sheikh Musdaf [2013] eKLR (Civil Application No Nai 152 of 2012 (UR 113 /2012)*** M’Inoti JA

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.”

After balancing the competing claims for the parties, I am convinced that the applicant has made out a case to be deserving of this Court’s discretion under Rule 115 of the Court rules. To this end, I therefore grant his prayer to appeal as a pauper.

I now turn to deal with the applicant’s second prayer, that is, for an extension of time to file and serve his record of appeal. In doing so, I remind myself that when seeking an extension of time under Rule 4 of this Court’s rules, an applicant asks the Court to exercise its unfettered jurisdiction, and that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider to long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors. See Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04))

In his submissions, the applicant simply stated that he feels he has a strong case with good prospects of success. He did not make any submissions with regard to the delay, and rightly so in my view. This is why: the applicant filed his notice of appeal on the 6th February 2012. By this time, only four days had passed. He applied for the certified proceedings and a certificate of delay was issued on 6th December 2013. As such, by dint of rule 81 of the Rules, time continued to run on 7th December 2013. At this point, it is apt to point out that Rule 3 (e) of the Rules provides that:

“unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”

In 2012, the Christmas vacation of this Court, as appeared in the ***Kenya Gazette Vol. CXIV – No. 119 dated November 30, 2012 Gazette Notice No. 17058*** commenced on Friday, 21st December, 2012 and terminated on Sunday, 13th January, 2013. As such, the time between 21st December, 2012 and 13th January 2013 is excluded from the computation of time. This means that as at the time of bringing this application, the applicant was not out of time as was submitted by Mr Ochieng.

It is true as contended by Mr Ochieng, learned counsel for the respondent that the applicant did not attach or annex a draft memorandum of appeal that he intends to file in the intended appeal. I agree that the significance of filing a draft memorandum of appeal is to enable the court assess whether or not the intended appeal is arguable. However, it is my view that the applicant, being a layman, may not be aware of such requirements; in any event, I do not find the lack of a memorandum of appeal to be fatal to the application under my determination. I have taken a preliminary view of the pleadings and the documents filed and it is my humble view that the intended appeal raises issues that deserve interrogation by this Court, to wit, the rights of an employee as against his employer, especially where the employee has worked for the employer over a considerably long period of time; and what benefits would accrue from such an employment relationship.

The upshot of my analysis of this application is that it has merit and is therefore allowed in the following terms:

- a. Leave is hereby granted to the applicant to file his appeal without the payment of court fees or security for costs;
- b. The time within which the applicant is allowed to file and serve his record of appeal is hereby extended;
- c. The applicant shall file and serve a record of appeal within 21 days of the date of this ruling.
- d. Each party to bear its own costs.

Dated and Delivered at Nairobi this 30th day of March, 2015

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR