REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G. B. M. KARIUKI & GATEMBU, JJ.A)

CIVIL APPLICATION NO. NAI 147 OF 2013 (ur 100/2013)

BETWEEN

PETER ONDITI OGUGU ……..……..APPLICANT

AND

ALLPACK INDUSTRIES LIMITED ……...…….1ST RESPONDENT

INDUSTRIAL PROMOTION SERVICES (K) LTD…….….2ND RESPONDENT

(*Being an Application for relief for security costs for the intended Appeal from the Ruling of the Industrial Court of Kenya (James Rika, J) dated 26th March, 2013*

in

CAUSE NO. 773 OF 2011)

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RULING OF THE COURT

1. This Ruling relates to a reference to the full Court of the decision of a single judge of the Court (K. M'Inoti JA) given on 4th October 2013 rejecting an application by **PETER ONDITI OGUGU** the applicant dated 3rd July 2013 by which the applicant sought relief under rule 115 of the rules of the Court from depositing of security for costs in an intended appeal from the ruling and order of the Industrial Court (Rika J) given on 26th March 2013.

Background

2. The applicant was an employee of the 1st respondent until August 2010 when he was summarily dismissed. He challenged his dismissal in the Industrial Court where he sought relief including a claim for loss of pension and exemplary damages. His claim was heard ex parte and dismissed on 2nd August 2012.

3. By an application dated 19th November 2012 he applied to the Industrial Court to review its decision dismissing his claim. That application was allowed vide a ruling of the Industrial Court dated

26th March 2013 on the grounds that the Industrial Court had not understood the applicant's evidence with the result that the order dismissing his claim made on 2nd August 2012 was set aside. The Industrial Court directed the matter to be heard afresh. That is the order that surprisingly aggrieved the applicant and from which he intends to appeal. We say surprising because the order was in our view favourable to the applicant.

4. In order to lodge his appeal, the applicant was then required to deposit security for costs. Citing rule 115 of the Court of Appeal Rules, Articles 48 and 159(2)(d) of the Constitution, the applicant in his notice of motion dated 3rd July 2013 supported by his affidavit applied to be relieved from depositing security for costs with respect to the intended appeal. The grounds on which that application was based are that he lacks the means to pay the security for costs; that he has been unable to secure employment by reason of the court proceedings and has been adversely listed in the credit reference bureaus; that he has duly filed a notice of appeal and applied for typed proceedings with respect to the decision of the Industrial Court he intends to appeal from and that the intended appeal is strong and will succeed.

5. M'Inoti JA, as a single judge, heard the application in accordance with the rules of the Court. The learned single judge held that while he was prepared to hold that the applicant lacks the means to pay the required deposit for security for costs, he was not persuaded "*that the intended appeal has reasonable possibility of success*". Being of that view, the learned single judge declined the applicant's request and dismissed the application. The applicant was dissatisfied with that outcome hence the present reference to the full Court.

Submissions by Counsel

6. At the hearing of the reference before us, the applicant appeared in person while learned counsel Mr. Isinta represented the respondents.

7. The applicant argued that his statement of claim in superior court was not disputed; that his application before the single judge of this Court was presented under rule 115 of the rules of this Court seeking relief from security for costs; that the learned single judge erred in addressing himself on the merits of the intended appeal instead of dealing with the application; that he has been denied a chance to file an appeal in this Court and that Article 48 of the Constitution which supersedes the rules relied upon by the learned judge were violated; that having found that the applicant was financially handicapped, that was a sufficient ground to find that the applicant was not able to pay the security deposit in order to lodge the intended appeal; that the judge also erred in failing to consider a report of the registrar of the Court submitted pursuant to rule 115(2) of the rules of the Court; that the cases cited by the learned single judge on which he based his decision namely, **Apondi vs. Canuald Metal Packaging[2005] 1 EA 12** and **Mandevia vs. Rongwe African Co-operative Union Ltd [1958]EA 524** predate the promulgation of the Constitution and have been overtaken by reason of Article 80 and that we should therefore grant his application and not shut the doors of justice to him.

8. Opposing the application, Mr. Isinta for the respondent submitted that it is not enough for an applicant seeking relief under rule 115 of the rules of this Court to allege, without more, that he is poor; he must prove and demonstrate what his means are; that in the instant case the applicant did not do so and that the principles advanced in **Apondi vs. Canuald Metal Packaging[2005] 1 EA 12** and **Mandevia vs. Rongwe African Co-operative Union Ltd [1958]EA 524** remain sound principles; that the intended appeal has no reasonable grounds of success and that Article 80 of the Constitution does not operate in isolation of prevailing circumstances. With that Mr. Isinta urged us to dismiss the application.

9. In reply, the applicant urged that he filed his application immediately he was asked to deposit the security for costs. He reiterated that Article 48 of the Constitution supersedes rule 115 and his access to justice should not be impeded.

10. He concluded by stating that he is not a pauper and that given time, he would have been able to raise the deposit required in order to file his appeal which he submitted is arguable.

Analysis and decision

11. Under rule 53(1) of the rules of the Court, the single judge exercised his discretionary power in considering the application under rule 115 of the rules of this Court on behalf of the whole Court. Whilst that discretion is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously and neither should it be exercised on the basis of sentiment or sympathy.

12. We, as a full Court, can interfere with the single judge's exercise of discretion if we are satisfied that in coming to his decision the single Judge took into account some irrelevant factor, or that he failed to take into account a relevant factor, or that he failed to apply a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong.

13. In **Thuita Mwangi v. Kenya Airways Limited [2003] KLR 486** this Court stated: ***"The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary powers by the single Judge are similar to those under which an appellate court would be entitled to interfere with the exercise of a discretion by a trial Judge. Those circumstances were specified by the Court of Appeal for East Africa in MBOGO & ANOTHER vs. SHAH [1968] EA 93… All we need to say is that before we could ever think of interfering with the exercise of a discretion by a single Judge, and which discretion as we have already stated, is exercised on behalf of the whole court, we would have to be positively satisfied that in coming to this decision the single Judge has taken into account some irrelevant factor, or that he has failed to take into account a relevant factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong."***

14. What then are the circumstances in this case and should we interfere with the decision of the single judge? Article 48 of the Constitution provides that:

"***The State shall ensure access to justice for all persons and, if any fee is required, it shall* be reasonable and shall not impede access to justice**."

15. Implicit in Article 48 of the Constitution is an acknowledgment that fees may be required in order to access justice. In our view there is no inconsistency between Article 48 of the Constitution and the requirement under rule 115 of the rules of this Court for an applicant to satisfy the court that he lacks the means and that the appeal is not without reasonable possibility of success. There is a duty and a burden on a person contending that their right to access to justice is being impeded by the requirement of payment of fees to demonstrate, by evidence, that they do not have the means. We are therefore fully in agreement with the learned single judge when he stated that "*in an application under rule 115, the onus is on the applicant to satisfy the court that he lacks the means to pay the required fees or to deposit the security for costs and that his intended appeal is not without reasonable possibility of success.*" Until such time that access to courts will be open to all without the requirement for payment of fees and costs, a party seeking dispensation from the responsibility to pay court fees must demonstrate by evidence that they are deserving, by reason of their indigence or other circumstances, to be relieved from that responsibility.

16. A consideration by the learned single judge of the means of the applicant and whether the intended appeal has reasonable prospects of success are relevant factors and circumstances that weighed in the judge's mind when exercising his discretion. The learned single judge gave the applicant the benefit of doubt on the question of whether the applicant had the necessary means. Before us however, the applicant was categorical that he is not a pauper and is in a position to pay the required security for costs.

17. Regarding the question whether the intended appeal has prospects of success, we have already noted that the decision the applicant intends to appeal from was favourable to him based on the application he made before the Industrial Court. It is not clear why the applicant does not wish to avail himself of the fruits of that order and have the matter substantively disposed off after a full hearing before the Industrial Court. For purposes of the present application, we are not persuaded that the learned single judge took into account some irrelevant factor, or that he failed to take into account a relevant factor, or

that he did not apply a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong**.**

18. For those reasons, we uphold the decision of the learned single judge and confirm the order dismissing the applicant's application for relief from deposit of security for costs with no order as to costs.

Dated and delivered at Nairobi this 14th day of March, 2014.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

……..

JUDGE OF APPEAL

S. GATEMBU KAIRU

…….

JUDGE OF APPEAL

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

REGISTRAR