



IN THE COURT OF APPEAL

AT NAIROBI

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

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

BETWEEN

PETER ONDITI OGUGU APPLICANT

AND

ALLPACK INDUSTRIES LIMITED

INDUSTRIAL PROMOTION SERVICES (K) LTD. RESPONDENTS

(Application for relief from deposit of security for costs in an intended appeal from the ruling and order of the Industrial Court of Kenya at Nairobi (Rika, J) dated 26th March, 2013

in

ICC NO. 773 OF 2011)

RULING

By a Motion on Notice dated 3rd July, 2013, the applicant *PETER ONDITI OGUGU* applied under *Rule 115 of the rules of this Court* for relief from deposit of security for costs in an intended appeal from the ruling and order of the Industrial Court (Rika, J) dated 26th June, 2013. The grounds upon which the application was based, as disclosed in the motion and in the applicant's supporting affidavit sworn on 3rd July, 2013, were that the applicant is unemployed and lacks the means to pay security for costs to enable him lodge his intended appeal. The applicant further deposed in his supporting affidavit that he was financially handicapped to the extent that Equity Bank had adversely listed him with credit reference bureaus. He contended that his intended appeal was well founded in law and facts and it had very good chances of success.

The background to the intended appeal, as far as I can deduce from the dearth of documents presented, is that the applicant was employed by the respondents as a dye-maker. His salary was KShs.15,300/= per month with house allowance of KShs.2,700/=. He was also a member of a contribution scheme to which he contributed 5% and the employer 5%. Following allegations of theft against him, the applicant, was summarily dismissed on 13th August, 2010.

Upon dismissal, the applicant filed a claim in the Industrial Court for KShs.3,113,372/=, loss of pension and exemplary damages. The applicant has not exhibited the claim or the reply thereto, if any. The applicant subsequently filed other supplementary claims which too are not exhibited, and whose prayers are not readily apparent. The claim was heard *ex parte*, in the absence of the respondents and on 2nd August, 2012, the Court dismissed the same. Again the applicant has not exhibited this award.

By an application dated 19th November, 2012, the applicant applied to the Industrial Court for review of the award. This application too is not exhibited, and I cannot tell the specific orders that he was seeking. In a ruling dated 26th March, 2013, the Industrial Court allowed the application for review, set aside the award of 2nd August, 2012 and directed the hearing to commence *de novo*. The grounds upon which the application was allowed were primarily that the Court had not fully understood the evidence adduced by the applicant or his multiple claims which could have clouded other grievances.

That is the decision in respect of which the applicant seeks relief from deposit of security to appeal to this Court. When he appeared before me on 26th September, 2013, the applicant did not have a memorandum of appeal to indicate the grounds he intends to rely on to challenge the ruling. I understood him though, to complain that the court should not have ordered the trial to start *de novo*, but that it should instead have granted his multiple claims because the hearing was *ex parte*. So he expects the appellate court to set aside the Industrial Court's order of review and substitute therefor an order allowing his claims and awarding him the sums of money he had claimed or to order the respondents to reinstate him without loss of benefits and status. Due to the size of the claim and the award he expects to receive from this Court, he has been requested to deposit KShs.100,000/=. I gather that applicant's real objection to the case being heard *de novo* is because the respondents may get an opportunity to be heard whilst the first hearing had proceeded *ex parte*.

Mr Saenda for the respondents, opposed the application on the grounds that the intended appeal did not have reasonable prospects of success. The order of review, he submitted, was in the applicant's favour and taking into account all the circumstances of the case it was fair and just that the claim be heard *de novo* by the industrial court. Mr Saenda further submitted that all the time the applicant was litigating before the Industrial Court, he had never adverted that he was a pauper or a person unable to raise court fees and costs.

He was, therefore, raising the issue too late in the day and did not deserve relief.

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. See *APONDI V CANUALD METAL PACKAGING, (2005) 1 EA 12*. In that case, Waki JA, who was dealing with the *former rule 112 of the rules of this court (which is materially similar to the current rule 115)*, stated in addition, where the applicant's allegations do not disclose a cause of action, or where if they do, the court is nevertheless satisfied that the appellant can recover only nominal damages, the court will be justified in refusing leave because it would be unjust to the respondent who would have to incur substantial costs which might not be recoverable. In that case the learned judge dismissed the application because the applicant had not shown that he

had a cause of action that was likely to succeed. See also *MANDEVIA V RONGWE AFRICAN CO-OPERATIVE UNION LTD, (1958) EA 524*.

The applicant avers that he does not seek relief from payment of court fees. He only seeks relief from

security for costs. I am prepared to hold that the applicant lacks the means to pay the required deposit for security for costs in the intended appeal, which he informs me runs to a minimum of KShs.100,000/=. However, I am far from convinced, as required by *rule 115(1)*, that the intended appeal has reasonable possibility of success. Under *section 16 of the Industrial Court Act, 2011*, the court has jurisdiction to review its judgments, awards, orders or decrees in accordance with the rules. Under *Rule 32 of the Industrial Court Procedure Rules*, the Industrial Court is allowed to exercise its review jurisdiction on far much broader grounds than the High Court is allowed. These grounds in addition to discovery of new and important matter and error on the face of the record include where the award is in breach of any written law or where it requires clarification, or for any other sufficient cause. Under *rule 36 (6)*, if the court allows an application for review, the court is empowered to review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

In this case, the Industrial Court has ordered the trial to start de novo so that the applicant can articulate his multiple claims clearly. Under the Constitution, the Industrial Court is the Court designated to hear industrial claims on merit. The jurisdiction of this court in relation to the industrial court is purely appellate and limited to issues of law only. As of now, the Industrial Court, the constitutionally designated body is yet to make a merit- determination on the appellant's claim and has in fact afforded the applicant another opportunity to be heard. The respondents, who had not been heard in the first instance, too have been afforded an opportunity to be heard. Under the Constitution, it is the rule, not the exception, that a judicial determination follows a fair opportunity and hearing of both parties. This is what the Industrial Court has presented to the parties.

In my view, the Industrial Court had jurisdiction to proceed as it did and I have serious doubts whether the applicant's intended appeal, which in reality is a shortcut to judgment, stands any serious chance of success. As I observed in JASON NYABUTO KEMBERO V SIRAJ SHEIKH MUSDAE, (CIVIL APPLICATION NO NAI 152 OF 2012 (UR 113/2012):

“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 a 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 available judicial time and resources and the legitimate demands and expectations of other litigants to judicial time.”

I find no merit in this application for relief from deposit of security costs and accordingly dismiss the same with no order on costs.

Dated and delivered at Nairobi this 4th day of October, 2013.

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR