



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION 288 OF 2004

JOSEPH ODHIAMBO APONDI APPELLANT

AND

CANUALD METAL PACKAGING (K) LTDRESPONDENT

(Application for leave to appeal as a pauper and extension of time to file a judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice Aganyanya) dated 10th July, 2002

in

H.C.C.C.A. NO. 291 OF 1997)

RULING OF THE COURT

This is a reference to the full Court under **rule 54(1)(b)** of the Court of Appeal Rules (the Rules) from the decision of Waki JA sitting as a single Judge in a ruling dated and delivered at Nairobi on 11th May, 2005 in Civil Application No. NAI. 288 of 2004.

The application was by Notice of Motion dated 18th November, 2004, seeking the following orders:-

- 1) ***THAT the applicant herein be given leave to appeal as a pauper.***
- 2) ***THAT this Honourable Court do allow the applicant to file his appeal against the judgment in the High Court of Kenya Civil Appeal No. 291 of 1997 out of time.***
- 3) ***THAT the costs of this application be in the cause.***

The grounds for the application were stated to be:-

- a) ***THAT since the applicant sustained the injuries which gave rise to the suit the subject matter of the proposed, (sic) he has constantly been under medical care and all the little money he had has been exhausted in medical and hospital expenses.***
- b) ***THAT since the appeal was dismissed in the High Court I became sick and could not afford to***

proceed with the appeal.

c) THAT I believe I have sufficient grounds to warrant my appeal to succeed.

The learned single Judge's ruling, the subject of the present reference to the full Court, was thorough and lengthy and we set out that ruling *in extenso* as it both correctly sets out the material facts and reasons of the Judge for his refusal to grant the orders sought in the Motion set out above.

*“By his Notice of Motion dated 18th November, 2004 Joseph Odhiambo Apondi (Apondi) seeks two substantive orders: - firstly under Rule 112(1) of the Court of Appeal Rules (the Rules) for leave to appeal as a pauper; secondly under **Rule 4** of the Rules, for extension of time to file an appeal against the judgment of the superior court in HCCA 291/1997.*

What is the background to the application?

It emerges from the few annexures to the application, as supplemented by a comprehensive reply from the respondent, that some twenty years ago, Apondi was an employee (machine operator) of the respondent company which was formerly known as Metal Box Kenya Ltd, changed its name to CMB Packaging Kenya Ltd or Canuald Metal Packaging (K) Ltd., and is now Nampok Kenya Ltd. Nothing turns on the name of the company, which will henceforth be referred to as “the respondent”. But on 02.08.1985, whilst Apondi was alighting from the respondent's vehicle, he fell on hard surface, a culvert block, and sustained blunt injuries to the lumbar spine. He also sprained his wrist but that healed quickly. It would appear that as a result of the back injury, Apondi was not very effective in his work and it was recommended by doctors that he should be retired on medical grounds. He was aged 33 years at the time. Some 4 years thereafter on 10.10.89, the respondent terminated Apondi's services summarily but he was aggrieved by that termination. In October 1990 he filed suit in Sheria House, being SRMCC 7599/90 pleading that he was wrongfully laid off and seeking a declaration that he was entitled to retirement on medical grounds with full benefits. He also sought payment of general damages and terminal benefits in accordance with his contract of service. That matter was heard and determined on 8.6.1993 when the learned magistrate, B. Rashid (Mrs) SRM (as she then was) awarded some Shs. 30,910/= as general damages for extreme mental anguish and torture over the summary dismissal plus one month's salary in lieu of notice, Shs.3,091/=. The respondent was not happy with that award and was in the process of querying the basis and quantum of it when a decree was issued for execution in the sum of Shs. 50,302/75. Auctioneers pounced on them and the respondent had to pay the full decretal sum plus auctioneers' charges of Shs. 5,504.75. It appeared to the respondent that it would not be cost-effective to pursue the matter further and so they let it lie. That was in August 1993.

*Three months later, Apondi was back in the same court and in the same matter claiming that his full entitlement had not been calculated. He sought a further sum of Shs. 831,474/=. The subordinate court had no jurisdiction to award such a sum and so Apondi attempted to have the matter transferred to the High Court but the application was successfully resisted. However, the attempt by the respondent to resist the revisiting of the same matter in which a decree had been issued and executed on the ground that the trial magistrate was **functus officio** was unsuccessful. The magistrate, despite protests by the respondent, proceeded to hear the matter again and in a second judgment made on 14.10.94 awarded some Shs.169,090/= which together with the earlier award amounted to the upper limit of her civil jurisdiction of Shs. 200,000/=. Once again, the respondent protested and manifested the intention to appeal against both decisions in High Court Civil Appeal No. 256/95. Before that process could be put underway, the second decree was issued and attachment was levied, forcing the respondent to deposit in court the decretal sum Shs. 184,845.80 plus auctioneers charges of Shs. 24,298/=. A stay order put in place pending the appeal was subsequently vacated on application by Apondi, and the money was released to him. That was in November 1995. Once again the respondent found little commercial sense in proceeding with the appeal and it was withdrawn hoping the matter would rest where it lay. But not so. One year later in November 1996 Apondi applied before the same subordinate court for review of the judgment relating to the computation of his retirement benefits. That application was however dismissed on 19th March 1997 by Okwengu SPM (as she then was).*

Apondi was not satisfied with that Ruling and so filed an appeal to the High Court, being HCCA 291/97 on 29.10.97. It is that appeal that was heard before Aganyanya, J. and was dismissed on 10.07.02. A Notice of Appeal to this Court was filed on 22.07.02 but no record of appeal was filed for the next 2 ½ years or so until the application now before me was filed on 18.11.04. Until the filing of the application by Apondi in person, he has always been represented in court by different advocates since 1989.

The prayers sought herein call for the exercise of the court's discretion which is in terms unfettered. But as in all cases where the court has to exercise its discretion, there must be some reasonable basis in fact or in law to warrant the orders made or as it is sometimes put, it has to be exercised judicially and not whimsically or capriciously. In considering the prayer for extension of time under rule 4, for one, the parameters are well set on authority:-

“It is also well settled that in general the matters which this court takes into account in deciding whether to grant extension of time are first the length of the delay, secondly the reason given for the delay, thirdly (possibly) the chances of the appeal succeeding, and fourthly the degree of prejudice to the respondent if the application is granted.”

-See John Onger Mariaria & Others vs. Paul Matundura (C.Appl. No. NAI.301/03)(ur) and Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (C.Appl. No. NAI. 251/97 (ur). Whether the matter is of public importance is also a relevant consideration, see Murai vs. Wainaina (No.4) [1982] KLR 38.

As for applications for institution of the appeal as a pauper, Rule 112 requires that the court be:-

“.....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.”

As was held by Spry Ag. J. (as he then was) in Ali Suleman Mandevia vs. Rongwe African Co-operative Union Ltd. (1958) EA 524, a Tanzanian case considering a similar rule, the court is entitled to reject such application where the allegations do not show a cause of action and, even if the applicant had a cause of action but the court was satisfied that he could not recover more than nominal damages, the court might well be justified in refusing permission because it would be unjust to the other party who would have to incur substantial costs which might not be recoverable.

The onus is thus on the applicant to satisfy me on the requirements of Rule 112 as a basis for exercise of my discretion.

With those principles in mind, I now approach the application before me. Apondi cites three grounds for seeking the two prayers, namely:-

- a) THAT since the applicant sustained the injuries which gave rise to the suit the subject matter of the proposed (sic), he has constantly been under medical care and all the little money he had has been exhausted in medical hospital (sic) expenses.
- b) THAT since the appeal was dismissed by the High Court, I became sick and could not afford to proceed with appeal.
- c) THAT I believe I have sufficient grounds to warrant my appeal to succeed. (sic)”

He expounds those grounds in his affidavit in support, and further affidavit filed with leave of the court, that he fell sick soon after the ruling of Aganyanya J on 10.07.02 and he could not follow up the matter until 27.05.03 when he applied for copies of the proceedings and judgment. The uncertified proceedings and judgment were ready for collection on 8.07.03 but he did not collect them. The certified copies of decree, judgment and proceedings were ready for collection on 07.04.04 but again he did not collect them. The reason for not collecting them, he explains, is because he had no income since he lost his job with the respondent and the amount he was paid was spent in medical treatment. He has tried to borrow money to no avail and has sought assistance from his Member of Parliament without success. Only the

Thika Clerk assisted him in November 2004 when he paid for and collected the proceedings and judgment. In support of the delay he produced a medical report from one Dr. Kirtee B. Patel dated 12.04.04 to confirm that the said doctor had seen him three times since 1985 and that he was advised to have bed rest. He also produced three other medical reports made in 1986 and 1989 to confirm his back injury.

As for his appeal being meritorious, Apondi annexed a draft memorandum which blames the learned Judge of the superior court for failing to consider the judgments of B. Rashid (Mrs) SRM (not Okwengu SPM) and for failure to consider some instructions purportedly given to the parties by Amin J (retired) on an application for leave to appeal out of time, which instructions are nowhere exhibited on record.

With all those explanations however, learned counsel for the respondent Mr. Kiragu did not think either the delay of 2½ years since the judgment of the superior court was delivered on 10.07.02 or the impecuniosity of the applicant, were sufficiently explained. The Notice of Appeal filed on 22.07.02 was deemed to have been withdrawn by dint of Rule 82(a) of the Court of Appeal Rules. That meant the final disposal of the litigation which had persisted for about 15 years and it would be prejudicial to the respondent if the matter was reopened. As a matter of public policy, he submitted, there must be an end to litigation and in any event, the matter is purely personal to the applicant and raises no issues of public importance. Mr. Kiragu further submitted that the applicant did not fall under the category of a pauper. He has already been paid a considerable amount of money in two decrees, and has lost several applications whose costs he has not settled. Finally, there were no prospects of the intended appeal succeeding.

I have carefully considered the application and the submissions put forth before me. I am skeptical about the manner in which the applicant expended the considerable amount of money paid to him in settlement of two decrees issued by the subordinate court. He has nothing to show that all the money went into medical expenses and nothing remained for pursuit of the appeal he intended to file. The medical reports produced were issued in 1986 and 1989 and only one was issued in April 2004 merely confirming the earlier injuries in 1985 and the advice on bed rest in the two years proceeding(sic) the report. Surely the applicant did not stay in bed for 2 ½ years! It is not apparent that his disability curtailed his mobility. I am willing nevertheless to give him the benefit of doubt that he was financially unable to pay court fees. Does the applicant show that the intended appeal is reasonably meritorious or that there will be no prejudice to the respondent? On both counts he fails to persuade me.

Without expressing definite views on the intended appeal, which is the province of the full court, I think the applicant is unduly optimistic about its success. From the records available, it would appear that indeed it is the respondent who had better reasons to complain about the evident irregularities committed by the subordinate court than the applicant's quarrel with the High Court's dismissal of his matter. That the respondent's appeal was withdrawn in the interests of mitigating losses cannot be held against them. The subordinate court could only award claims that were within its jurisdiction and it will be difficult, in my view, to reverse the finding of the superior court in that respect. A party is at liberty to choose the forum which has the jurisdiction to adjudicate his claim, or choose to forgo part of his claim, and he cannot be heard to complain about that choice after the event. It would otherwise be oppressive and prejudicial to other parties and an abuse of court process to allow litigation by installments. The respondent here has settled two decrees emanating from the same court. The matter has hovered around the courts for the last 15 years and in the interests of justice it must be brought to an end.

In the result I am not inclined to exercise my discretion in favour of the applicant. I dismiss the application with no order as to costs."

It is clear from that ruling that the learned single Judge exercised his unfettered discretion in declining to grant the application in a judicious manner such that there is no basis upon which the full Court should interfere with the exercise of that discretion. See Mbogo v. Shah (1968) EA 93 cited with approval in African Airlines International Ltd v. Eastern and Southern African Trade & Development Bank [2003] KLR 14.

The learned single Judge declined to grant the orders numbered (1) and (2) in the Motion.

The letter from the applicant to the Deputy Registrar dated 16th May, 2005 applying under *rule 54(1)* of the Rules for the reference to the full Court confined the applicant's expressed dissatisfaction with the Ruling to the refusal to allow him to appeal as a pauper. There was no expressed dissatisfaction in the letter with the decision not to extend time so that even if we were otherwise minded to grant him leave to appeal as a pauper, which we are not, to do so would be acting in vain since without such extension there could not be any appeal.

For all the above reasons the applicant's application is hereby dismissed with costs.

Dated and delivered at Nairobi this 9th day of March, 2007.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR