



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civ Appli 79 of 2004**

**BENSON MBUCHU GICHUKI ..... APPLICANT**

**AND**

**1. EVANS KAMENDE MUNJUA**

**2. JAMES BUTI KUNGU**

**3. TERESIA T. MBUTI .....RESPONDENTS**

**(Reference on application for leave to appeal as pauper from a judgment and order of the High Court of Kenya at Nairobi (Ang'awa J) dated 10<sup>th</sup> March 2004**

**in**

**H.C.C.C. No. 16 of 1998)**

**\*\*\*\*\***

**RULING OF THE COURT**

The first and second respondents, **Evans Kamende Munjua** and **James Mbuti Kungu**, were partners in a business under the name Uplands Agencies. They entered into a contract with an organization then known as Norwegians Peoples Aid. A dispute arose and the two respondents filed suit against Norwegian Peoples Aid in the superior court at Kakamega – *High Court Civil Case No. 178 of 1996*. The contract they entered into had an arbitration clause. The advocates for the two respondents appointed the applicant in this matter before us **Benson Mbuchu Gichuki** to act as an arbitrator in the matter. It is not clear, (as details are not available) as to what actually transpired, but the applicant accepted to arbitrate and did deliver an award. One of the parties failed to honour the award and the two respondents filed *Miscellaneous Application No. 775 of 1997* at Nairobi High Court for purposes of enforcing the award. Later the parties consented to a lower figure and it seems that that figure was paid to the two respondents directly. However, the applicants' fee as demanded by the applicant was not paid in full. He had claimed Ksh.4,184,761/= but part of the amount was paid leaving an amount of Ksh.3,639,761/= unpaid. The applicant declined to release the award till that amount was paid. As the respondents wanted the award to be released, they purposely issued a cheque dated 3<sup>rd</sup> July 1997 to the applicant which was dishonoured. Another cheque was issued on 6<sup>th</sup> October 1997 and that too was dishonoured. The third respondent, Teresia T. Mbuti, is the wife of the second respondent and was a signatory to the first cheque issued on 3<sup>rd</sup> July 1997. After the two cheques had been dishonoured on presentation to the Bank, the applicant

moved to the superior court on 7<sup>th</sup> January 1998 and filed High Court Civil Case No. 16 of 1998 in which he sued the three respondents for his fee of Ksh.3,639,761/=. The respondents filed defence to that suit. The applicant applied for summary judgment but that was dismissed on 18<sup>th</sup> March 1998. The applicant applied for review of that order dismissing the application for summary judgment. On 29<sup>th</sup> March 1999, the superior court (Osiemo, J) set aside his orders dismissing the application for summary judgment so that that application was reinstated vide that ruling. The reinstated application came up for hearing before the superior court (Ang'awa, J) on 20<sup>th</sup> January 1998 and in a ruling delivered on 30<sup>th</sup> June 1999, she also dismissed that application for summary judgment. On the same day, the parties entered a consent order in which the claim against the third respondent was withdrawn; the applicant's claim against the first two respondents was compromised at the sum of Ksh.700,000/= all inclusive. That sum of Ksh.700,000/= was to be paid in two equal instalments, the first payment being on or before 15<sup>th</sup> August 1999 and the second payment was to be on 30<sup>th</sup> September 1999. In default of any instalment on its due date the whole amount outstanding was to become due and payable forthwith and the applicant was to be at liberty to execute. The applicant made attempts to execute when the instalments became due and were according to him not paid. He says he never succeeded in his attempts to execute the order, while the respondents say he had been paid some money and had also seized a vehicle through his auctioneers. Whichever is the truth, the applicant returned to the superior court under an application seeking to have the consent judgment set aside and/or reviewed. That application was heard by the superior court (Ang'awa J) and on 10<sup>th</sup> March 2004, it was dismissed. In dismissing it, the superior court stated, *inter alia*:

**“I hereby find that the application to set aside and or review the court’s consent judgment has no merits. No hearing of the application for summary judgment can be reheard as it is spent. No trial can be conducted as the suit had been finalized through the consent order and execution done.**

**The application itself has no merits and is defective. I nonetheless heard the parties on their merits.**

**The application dated 10<sup>th</sup> December, 2003 and filed on 24:12:03 be and is hereby dismissed with costs to the defendants”.**

The applicant felt aggrieved by that decision of the superior court and decided to appeal against it. He filed “Notice of Intention” to Appeal on 22<sup>nd</sup> March 2004. Thereafter, on 14<sup>th</sup> April 2004, he filed in this Court a notice of motion seeking two orders namely:

**“1. That this Honourable Court does order that the appeal herein be lodged without the prior payments of fees of the Court and or the security for costs.**

**2. That the costs of this application be provided for”.**

That application came up for hearing before a single Judge of this Court on 14<sup>th</sup> July 2004. On 21<sup>st</sup> July 2004, a ruling was delivered by the single Judge and the application was dismissed. In dismissing the application, the single Judge in a detailed ruling, considered the effects of **Rule 112 (1)** of the Court of Appeal Rules, the effects of **Section 67 (2)** of the Civil Procedure Act, the legal authorities dealing with circumstances under which a consent order can be set aside and whether or not there was satisfactory evidence that the applicant was a pauper. Having considered all those, he stated as follows:

**“I am therefore satisfied that Lady Justice Ang’awa correctly dealt with the application for review of the consent judgment and I do not consider that the applicant has a reasonable possibility of success in his intended appeal.**

**Having reached this conclusion, I need not consider the other requirement for a successful application namely proof of the applicant’s lack of means to pay. His claim in this respect is reasonably convincing and the affidavits on behalf of the respondents’ do not touch upon the applicant’s present financial state so much or his part, which is of little assistance.**

**Since it is clear from the wording of Rule 112 that a reasonable possibility of success is an essential precondition to the granting of exemption from fees and the provision of security for costs, I am unable to make the orders sought in the application which is dismissed but I make no order as to costs of this application”.**

That is the ruling which the applicant sought to be, and was placed before us by way of a reference. We have heard the applicant and all the respondents all of whom were unrepresented before us. The learned single Judge, in making the ruling was doing so on behalf of the full Court but the full court has the power under **Rule 54 (1) (b)** of this Court’s Rules (the Rules) to vary, discharge or reverse the decision. However, in doing so, the full court must consider that the single Judge was exercising an unfettered discretion though he was enjoined to exercise it judicially. The applicant must demonstrate in a reference such as this that the single Judge took into account some irrelevant factor or that he had failed to take into account a relevant fact or that taking into account all the circumstances of the case, his decision is plainly wrong. (See **Mwangi v. Kenya Airways Ltd** (2003) KLR 486 and **Mbogo v. Shah** (1968) EA 93).

When a single Judge is considering an application brought under **Rule 112 (1)** of the Court of Appeal Rules, the same Rule guides him on what to consider in the exercise of his discretion. The Rule states:

**“112 (1) 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**

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**(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, or on lodging of any specified sum less than the amount fixed by rule 104, ………”.**

The learned single Judge found it unnecessary to consider the requirement of **Rule 112 (1)** that the applicant shows that he lacks means to pay court fees although he was of a view that the applicant’s claim in that respect was reasonably convincing and was not rebutted by the respondent’s affidavits. He however, did not consider that aspect fully because having fully considered the second aspect namely the reasonable possibility of success of the intended appeal, he found that the applicant had no reasonable possibility of success in his intended appeal and that being his view, he dismissed the appeal. In coming to that conclusion, the learned single Judge considered fully the decision of the superior court which is the subject of the intended appeal, as well as the authorities on the conditions under which a consent order can be reviewed and/or set aside. Thus, the learned single Judge, considered fully the strength of the intended appeal. In our view, whereas the provisions of **Rule 112 (1)** of the Rules clearly enjoins a single judge considering an application under that Rule to consider that the intended appeal “*is not without reasonable possibility of success*”, it does not however permit the single Judge to decide the intended appeal to its finality nor to decide it to an extent that an indication of the outcome of the intended appeal is made. All the single Judge needs to do is to see if, *prima facie*, the intended appeal has chances of success, very much like in the case of granting injunction when a court looks into whether the case before it has chances of success but without appearing to hear and determine the case itself. In the case of **Geoffrey Makana Asanyo & Another vs. National Bank of Kenya Limited** Civil Application No. Nai. 132 of 1999, this Court stated:

**“If it is assumed for a moment that an aspect to be taken into account by a single Judge in an application for enlargement of time, is whether an intended appeal was frivolous, then in our judgment the learned single Judge with respect, had erred because his holding to the effect that he saw nothing of substance which the 1<sup>st</sup> applicant could argue on appeal, is not supported by the material before him. However, it is clear to us that a learned single Judge has no power to reject an application on the basis that it lacked merit or substance”.** (underlining supplied).

That decision was followed in the case of **Samuel Kinyua Mutungi vs. Eutyclus Muthui**, *Civil Application No. Nai. 334 of 2004* in which this Court having quoted with approval its decision in the case of **African Airlines International Ltd vs. Eastern Southern Africa Trade & Development Bank (PTA Bank)** (2003) KLR 140 stated.

**“That is why the single Judge is entitled to examine whether there was any material on record which may be judicially considered. The process of analysis of such material however and the pronouncement with finality that the intended appeal has no substance, lacked merit or was frivolous, remains within the province of the full court”.**

The Court then proceeded to quote the case of **Geoffrey Asanyo** (supra).

In our view, whereas the learned single Judge was correct in considering the possibility of the success of the intended appeal as **Rule 112 (1)** clearly required him to do so, he did, with respect, “*go over board*” in treating the application before him as an appeal and in pronouncing that the intended appeal had no reasonable probabilities of success and dismissing the application before him on that ground. Thus, the learned single Judge in arriving at his decision took into account an irrelevant factor, namely, that the intended appeal had no possibility of success.

In the circumstances, we are bound to interfere with the exercise of discretion by the learned single Judge. The reference is allowed. The applicant may lodge his appeal without prior payment of fees of Court. Costs of this application will be in the intended appeal.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of October, 2006.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**