



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, OMOLO & LAKHA, JJ.A.)

CIVIL APPLICATION NO. NAI. 433 OF 2001

BETWEEN

J. P. MACHIRA t/a MACHIRA & COMPANY ADVOCATES APPLICANT

AND

1. WANGETHI MWANGI

2. NATION NEWSPAPERS LIMITED RESPONDENTS

(Application for leave to file an Appeal from the Decision of the High Court of Kenya at Nairobi (The Hon. Mr. Justice Aganyanga) dated 26th November, 2001

in

H.C.C.C. NO. 1709 OF 1996)

RULING OF THE COURT

This is an application by the plaintiff, under rule 39(b) of the Rules of this Court, for leave to appeal to this Court from an order of the superior court, (Aganyanya, J.) given on 26 November 2001, by which he granted an unconditional stay of execution to the respondents against the applicant under Order XLI Rule 4 of the Civil Procedure Rules Cap. 21, Laws of Kenya which provoked the present application by the applicant for leave to appeal.

The suit was originally filed by the applicant against the two respondents. By the plaint the plaintiff alleges that the defendants falsely and maliciously printed and published and/or caused to be published material defamatory to the plaintiff and claimed damages.

The considerations for the grant or refusal of an application for leave to appeal (*a matter for the discretion of the Court*) are few but familiar and we consider it desirable and useful to have them briefly stated.

The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “*realistic*” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied.

There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.

When leave is granted, the applicant does not need to know more than that that he has the leave which he needs and therefore that he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application which is usually made ex parte.

Where, as is the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case would have to be made. It was so held in SANGO BAY ESTATES LTD & OTHERS VS. DRESDNER BANK A.G. 1971 EA 17 at 20:

“... leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as is the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out ...”.

It is impossible to be certain what considerations influenced Aganyanya, J. who refused to grant leave. On our part, we are satisfied on the material before us that no stronger case has been made out. Nor is there any difficulty present or a new point of law involved.

In addition, it should be borne in mind prior to making such an application that this Court is likely to be very unsympathetic to it being made if it will in effect involve the parties in exactly the same expense as determining the appeal itself, and will not necessarily save the time of the Court but risk the Court having to have two hearings when only one would be necessary if, for example, the defendants were to file their appeal after the hearing of this application.

For the reasons above stated and in the exercise of our judicial discretion having regard to all the circumstances of the case, the application for leave to appeal fails and is dismissed. We would add that we have not referred to the decision of the judge refusing leave to appeal, because this is an original application to this Court, not an appeal from the decision of the judge.

As regards costs, we have a complete discretion. In our view, the fairest order would be that the question of costs be reserved until the hearing of the appeal, with leave to either party to move the Court if any step in the appeal is not taken within the due or reasonable time.

Dated and delivered at Nairobi this 24th day of May, 2002.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR