**Apondi v Canuald Metal Packaging**

**Division:** Court of Appeal of Kenya at Nairobi

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**Date of ruling:** 11 May 2005

**Case Number:** 288/04

**Before:** Waki JA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Appeal – Leave to appeal as pauper – Extension of time to file appeal – Principles in determining*

*whether to allow pauper appeal – Rules 4 and 112 – Court of Appeal Rules.*

*[2] Civil procedure – Pauper litigation – Principles to consider.*

**RULING**

**Waki J:** By his notice of motion dated 18 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 High Court civil application number 291 of 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 Limited, changed its name to CMB Packaging Kenya Limited or Canuald Metal Packaging (K) Limited, and is now Nampok Kenya Limited.

Nothing turns on the name of the company, which will henceforth be referred to as “the respondent.” But on 2 August 1985, whilst Apondi was alighting from the respondent’s vehicle, he fell on hard surface, a culvert block, and sustained blunt injuries to the lumber 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 four years thereafter on 10 October 1989, the respondent terminated Apondi’s services summarily but he was aggrieved by that termination. In October 1990 he filed suit in Sheria House, being

Senior Resident Magistrates Court case number 7599 of 1990 pleading that he was wrongly 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 June 1993 when the learned Magistrate B Rashid (Mrs) senior Resident Magistrate (as she then was) awarded some KShs30 910 as general damages for extreme mental anguish and torture over the summary dismissal plus one month’s salary in lieu of notice, KShs3 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 KShs50 302-75. Auctioneers pounced on them and the respondent had to pay the full decretal sum plus auctioneers’ charges of KShs5 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 KShs831 474. The subordinate Court had no jurisdiction to award such a sum and so Apondi attempted to have the matter translated 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 October 1994 awarded some KShs169 090 which together with the earlier award amounted to the upper limit of her civil jurisdiction of KShs200 000. Once again, the respondent protested and manifested the intention to appeal against both decisions in High Court civil appeal number 256 of 1995. 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 KShs184 845-80 plus auctioneer’s charges of KShs24 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 19 March 1997 by Okwengu Senior Principal Magistrate (as she then was). Apondi was not satisfied with that ruling and so filed an appeal to the High Court, being High Court civil application 291 of 1997 on 29 October 1997. It is that appeal that was heard before Aganyanya J and was dismissed on 10 July 2002. A notice of appeal to this Court was filed on 22 July 2002 but no record of appeal was filed for the next two years or so until the application now before me was filed on 18 November 2004. 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 exercise of the Court’s discretion which is in terms unlettered. 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 delay, thirdly (possibly) the chances of the appeal succeeding, and fourthly the degree of prejudice to the respondent if the applicationis granted.”

See *Mariaria and others v Matundura* [2004] 2 EA and *Mutiso v Mwangi* [1999] 2 EA. Whether the matter is of public importance is also a relevant consideration, see *Murai v Wainaina (No. 1)* [1982] KLR 38. As for application 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 Acting J (as he then was) in *Mandevia v Rongwe African Co-operative Union Limited* [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 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 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 should not afford to proceed with appeal.

(*c*) That I believe I have sufficient grounds to warrant my appeal to succeed (*sic*).”

He expounds 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 July 2002 and he could not follow up the matter until 27 May 2003 when he applied for copies of the proceedings and judgment. The uncertified proceedings and judgment were ready for collection on 8 July 2003 but he did not collect them. The certified copies of decree, judgment and proceedings were ready for collection by 7 April 2004 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 Town 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 April 2004 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 judgment of B Rashid (Mrs) Senior Resident Magistrate (not Okwengu Senior Principal Magistrate) 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 two and a half years since the judgment of the superior Court was delivered on 10 July 2002 or the impecuniosity of the applicant, were sufficiently explained. The notice of the appeal filed on 22 July 2002 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 to be 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 the report. Surely the applicant did not stay in bed for two-and-a-half 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 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 his success. From the records available, it would appear that indeed it is the respondent who has 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 a 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 instalments. The respondent here has settled two decrees emanating from the same Court. The matter has hovered around the Court 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.

For the applicant:

*Information not available*

For the respondent:

*Mr Kiragu*