



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. 213 OF 2019**

**JASON NYABUTO KEMBERO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SAFARICOM COMPANY LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COMMUNICATION AUTHORITY OF KENYA..2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Through the amended Notice of Motion dated 10<sup>th</sup> October 2019, the plaintiff/applicant seeks orders for leave to file suit as a pauper.
2. The application is supported by the applicant's affidavit and is premised on the grounds that:
  - a) That the applicant/plaintiff is a poor person making his ends meet by doing odd, manual and petty errand jobs.*
  - b) That the applicant/plaintiff does not possess sufficient means to enable him to pay the fee prescribed by law for the institution of the intended suit.*
  - c) That the plaintiff/applicant intends to seek compensation for damages against the respondents/defendants in the sum of kshs 20,691,519.*
  - d) That the plaintiff/applicant undertakes to pay the entire court fees if the suit is decreed in his favour.*
3. The respondent opposed the application through the Grounds of Opposition dated 28th August 2019 wherein it states that: -
  - 1. Application does not meet the test set out under Order 33 of the Civil Procedure Rules 2010.*
  - 2. The applicant has not shown that he is not possessed of sufficient means to enable him to pay the fees prescribed by law.*
  - 3. The application does not contain particulars required in regard to pleadings.*
  - 4. The application lacks a statement that the applicant is unable to pay the fee prescribed in the suit.*
  - 5. The allegations do not show a cause of action against the respondents.*
  - 6. The application has not met the criteria for seeking the orders sought thus it is ripe for dismissal with costs.*
4. On 20<sup>th</sup> July 2019, the 2<sup>nd</sup> respondent also filed Grounds of Opposition to the application wherein it raised similar grounds as those of the 1<sup>st</sup> respondent.
5. The parties canvassed the application through written submissions which I have considered.
6. The question that arises is whether the applicant has made out a case for the granting of leave to file suit as a pauper. Order 33 Rules 1,2 and 3 of the Civil Procedure Rules stipulates as follows:

*([Order 33, rule 1.] Suits may be instituted by a pauper.*

**1. (1) Subject to the following rules, any suit may be instituted by a pauper.**

**(2) For the purposes of this Order a person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the institutions of such suit.**

*[Order 33, rule 2.] Contents of application.*

**2. Every application for permission to sue as a pauper shall contain the particulars required in regard pleadings, together with a statement that the pauper is unable to pay the fee prescribed in such suit, and the whole shall be signed in the manner prescribed for the signing of pleadings.**

*[Order 33, rule 3.] Presentation of application.*

**3. Notwithstanding anything contained in these Rules, the application shall be presented to the court by the applicant in person unless the applicant is exempted from appearance in court by section 82 of the Act, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.”**

7. Order 33 Civil Procedure Rules mirrors the fundamental right to access justice the is enshrined under Article 48 of the Constitution which stipulates that; *The state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice.* Under Order 33 Rule2, every application for leave to sue as a pauper shall contain the particulars required in regard to the pleadings together with the statement that the applicant is not able to pay the fee prescribed in such suit and the same shall be signed in the manner prescribed for the signature in pleadings.

8. The applicant attached a statement outlining his alleged pauperism to the pleadings. I have carefully considered the said statement alongside the intended plaint and other pleadings in the applicant’s affidavit of means, he states that he is a father of six school-going children and that two of his children dropped out of college due to lack of school fees. He further states that he is an accountant holding Bachelors and Masters’ degrees in Commerce.

9. He further states that he does business and manual odd jobs. He further states that he holds two bank accounts in Kenya Commercial Bank and Equity Bank. He avers that he lives in Kibra Slums in a state of abject poverty.

10. I have considered the nature of the applicant’s claim against the prospective defendants as narrated in the intended amended plaint. The applicant claims special damages of to the tune of Kshs 191,519 together with damages for breach of contract.

11. My finding is that the applicant’s claim under special damages does not correspond with his alleged pauper status. I say so because while the applicant claims that he is a pauper, he in the same breath alleges that he spent huge sums of money to the tune of Kshs 191,519 money in telephone conversations, printing, email communications, fare and accommodation. My take is that this level of spending exhibited by the applicant does not qualify him to be classified as pauper within the meaning of Order 33 of the Civil Procedure Rules.

12. Furthermore, even though the applicant sates that he holds two bank account in Kenya Commercial Bank and Equity Bank, he did not furnish this court with the bank statement in respect to the two accounts so as to confirm his true financial status to the court.

13. Having regard to the above findings and the fact that the applicant was able to pay court fees for this application, I am not persuaded that the applicant falls within the category of a pauper as defined under Order 33 Rule 1(2) of the Civil Procedure Rules. I therefore find that the instant application lacks merit and I hereby dismiss it with no orders as to costs.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 20<sup>th</sup> day of August 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kenneth Wilson for the 1<sup>st</sup> respondent

Miss Wamuyu for Miss Mwangi for 2<sup>nd</sup> respondent

Court Assistant: Sylvia