



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**MISC APPLICATION NO.38 OF 2014**

*In the Matter of:*

*Application by a Pauper under Order 33 of the Civil Procedure Rules*

**KALAIN KACHIUKI.....APPLICANT**

**VERSUS**

**MISHECK ITHALII.....1<sup>ST</sup> RESPONDENT**

**JAPHET NKONGE T/A JAPHET NKONGE AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] In my initial Ruling dated 4<sup>th</sup> February 2016, I made these observations:-

*“Parties filed submissions as directed by the court on 2<sup>nd</sup> October 2015. I have considered all of the rival submissions and I take the following view of the matter. The basis of this application is Order 33 of the Civil Procedure Rules which is a perfect exemplar of the right to access to justice by all. I will view it as such. From the onset, I must state that this application is aptly filed; accordingly, I see no reason of rejecting it. However, the important question to ask would be whether the Applicant is of sufficient means to pay the fee assessed for the filing of the intended suit. The facts that the Applicant was an accident victim and that he suffered from diabetes are uncontroverted. He has annexed a letter from Kenyatta National Hospital to support his claims. I cannot also doubt his averments that he was previously in good health and owned a welding workshop and hardware; but was closed down by his former landlord. Another thing which is not in dispute: That his properties were carted away and sold illegally by the auctioneer. Indeed the Auctioneers Board found the 2<sup>nd</sup> Respondent guilty and fined him Kshs 50,000. He took other steps, especially by seeking legal aid from Kituo Cha Sheria. Kituo Cha Sheria then requested the firm of Gikunda Anampiu Advocates to represent him on pro bono basis. He annexed a letter from Kituo Cha Sheria in which it is requesting the firm of Gikunda Anampiu Advocates to represent him. All these things are weighty and relevant material to the court. Nonetheless, I will not grant it straight away because the Respondent has claimed in their submissions that they had deposed in some affidavit that the applicant was a man of means, is a practicing pastor and that there are a myriad of cases against the Respondent in the Tribunal. Although I cannot see any such affidavit on record for the court’s benefit, the issues raised are important. I*

*see no reason of rejecting this application. Nonetheless, I will give the Respondent an opportunity to file the affidavit they alluded to within seven (7) days. I will treat the affidavit as evidence in disproof of pauperism by the Respondent. If need be, I will decide whether further examination of the Applicant or any other person or persons shall be necessary. A final decision will ensue soon thereafter. This way, the court will be properly grounded to gauge whether the Applicant should be allowed to sue as a pauper. It is so ordered.*

[2] In obedience to the above order of the court, the Respondents filed the affidavit sworn on 16<sup>th</sup> February 2016. I must admit that the affidavit filed could not have been the affidavit that was referred to in the submissions by the Respondent filed on 10<sup>th</sup> December 2015 because the submissions predate the affidavit sworn on 16<sup>th</sup> February 2016. The Respondent has not taken these proceedings seriously and has provided an affidavit which was not the one he had alluded to in his submissions. I will, nonetheless consider the information therein. The major argument is that the Applicant is a practicing pastor, has prime built up plot at Muthara Market where he works and leases it out to tenants, and he has filed a number of court cases against the Respondents. According to the Respondents, these things show that he is a man of means to pay court fee. The mega question in such proceedings is whether the Applicant is of sufficient means to pay the fee assessed for the filing of the intended suit.

[3] I examined the Applicant under oath on the information contained in the affidavit sworn on 16<sup>th</sup> February 2016. He stated that the allegations therein were not true and in particular of paragraph 5 thereof he said that he only has one dwelling house on the said plot consisting in one bedroom and one kitchen. He does not have houses for rental as alleged. He suggested that the court should send an officer to check on the status of the house on the plot.

[4] I have considered all the arguments presented by the Respondent as well as the substance of my examination of the Applicant had on 7<sup>th</sup> April 2016. I take this view of the matter. There is no doubt that the Applicant owns a plot and a dwelling house erected thereon. He is also a practicing pastor but he did not disclose his earnings or any stipend that he could be getting from his pastoral institution. Whereas I sympathize with the condition of the applicant; that he is suffering from diabetes and was an accident victim. And, whereas the Applicant may have a good cause of action; but taking all the above factors together, he has not proved his pauperism. Accordingly, he is caught up by the restrictions in rule 5 of Order 33 of the Civil Procedure Rules. In the upshot, I refuse to allow the Applicant to sue as a pauper. It is so ordered. There will be no order as to costs.

**Dated, signed and delivered in court at Meru this 18<sup>th</sup> day of April 2016**

-----

**F. GIKONYO**

**JUDGE**

**in the presence of:**

Mr. Wamacha advocate for Mr.Mbogo advocate for respondent

Applicant in person - absent

-----

**F. GIKONYO**

**JUDGE**

