



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 341 OF 2007

BETHWEL ALLAN OMONDI OKAL.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES.....DEFENDANT

RULING

1. The Plaintiff brought a notice of motion dated 18th October, 2016 seeking an order that the requirement to pay the requisite court fees amounting to KShs. 70,000/- and any other statutory taxation pertaining to this case be waived and stood over until his financial status balances. The motion is brought under Rule 18 and 35 of the Chief Justice Practice and Procedure Rules, 2013, Order 53 Rule 4(3) of the Civil Procedure Rules and Article 22 (3) (2) of the Constitution of Kenya.

2. The motion is supported by the affidavit of the Plaintiff sworn on 21st October, 2016. He stated that his financial inability was accepted and approved by the Court of Appeal in the year 2013 and that this court should so acknowledge. That if this court acknowledges his financial standing, his rights to fair trial, access to justice and fair administrative action shall be safeguarded pursuant to Article 50 (1), 48 and 47 (1) of the Constitution.

3. In response to this motion, Njenga Njihia, the legal officer to the Defendant swore a replying affidavit filed on 3rd November, 2016. He contended as follows; that the motion as framed is bad in law and if granted will amount to declaring the Plaintiff a perpetual pauper since it's not known when his financial status will improve. That he has not attempted to suggest when he is likely to be financially stable; that he has not demonstrated that he is a pauper. That had he been a pauper, he would have brought this application at the point of institution of this suit; that although the Plaintiff claims to be a pauper since 1997, he was able to retain a firm of advocates to conduct his case for 5 years until September, 2012 when he filed a notice to act in person. That the said firm conducted his case faithfully, a clear indication that he was able to put it on funds. That the Plaintiff is misleading the court when he says that he has been a pauper since 1997 when he took early retirement. That it can be inferred from the pleadings that the Plaintiff was Babadogo's ward representative between the year 2003 and 2007 and was so earning a salary. That at the hearing of the case, the Plaintiff informed this court that after serving a full term as a Ward Representative, he relocated to Bondo Siaya County. That had he been as poor as he wants the court to believe, he would not have money to facilitate his attendance in court in Nairobi. That awarding the orders sought by the Plaintiff will amount to robbing the state of its revenue.

4. The motion was dispensed with by way of oral submissions which were a reiteration of the averments in the affidavits. I have considered the depositions herein. For such an application to succeed, the plaintiff must establish that he has no resources to enable him file and or sustain a suit. See the decision of **Paul Tswala Ambeyi v. Southern Cross Safaris (2010) eKLR** where Judge Bosire (as he then was) had this

to say.

“The applicant was required to show not only that he lacks the resources to file an appeal but also that his intended appeal is not without merit or differently put that he has an arguable appeal.”

5. A definition of a pauper was given in **Benson Mbuchu Gichuhi Vs. Nowegian Peoples Aid (2012) eKLR** as follows:

‘A pauper in legal terms is not necessarily a person who is poor because poverty is relative. A pauper is essentially a person who cannot raise fees to file a suit or to mount an appeal. To bring oneself within that definition an applicant has to fully explain circumstances and show that, indeed he cannot raise the fees necessary. That, the applicant failed to do. Besides, in view of the history of the case, I cannot possibly grant permission to the applicant to file an appeal at public expense...’

6. Applying the test above, I note that the plaintiff herein managed to sustain this suit through an advocate until the year 2012 although he claims that he has been a pauper since the year 1997. Secondly, I have taken the liberty to peruse court record and it reveals that the plaintiff was as alleged by the defendant a ward representative for Babadogo between the years 2003 and 2007. A fact which the plaintiff has not rebutted. In the circumstances the plaintiff does not qualify as a pauper within the meaning of Order 33 rule 2 which states:

“(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.”

7. I further note that although the plaintiff alleges that the Court of Appeal certified him as a pauper, he has tendered no evidence to that effect.

8. In the result, I decline to grant the Applicant the relief sought and dismiss his application dated 18th October, 2006. I make no order as to costs.

Dated, signed and delivered at Nairobi this 2nd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff***

..... ***for the Defendant***