



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 562 OF 2016

PETER NJUGUNA MBUTHIA T/A PENEEM

COMMUNICATION SERVICES.....APPELLANT

VERSUS

THE CHIEF MAGISTRATE (COMMERCIAL)

COURT MILIMANI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This is an application under **Order 33** of the **Civil Procedure Rules**, whereby the applicant, Mr Mbutia, seeks leave to appeal in *forma pauperis*. He also seeks that his memorandum of appeal be deemed as duly filed and served. He contends that he is of lowly financial status and that his disposable income is inadequate to enable him to pay court fees.

2. In his supporting affidavit, Mr Mbutia says his income is erratic and as such, he can only afford bare necessities for his survival. He further avers that he is currently in debt and servicing a loan with the Safaricom mobile money (Mpesa) and as such, the aforesaid circumstances impair his ability to afford the court filing fee for the memorandum of appeal.

3. In his statement of pauperism, he avers that he is a postgraduate degree holder seeking to be a student of the Kenya School of Law, but his application there was rejected.

4. Order 33 Rules 1 and 5 make provision for pauper appeals. Rule 1 provides that:

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

(2) For the purposes of this Order a person is a ‘pauper’ when he is not possessed o sufficient means to enable him to pay for the fee prescribed by law for the institution of such suit.

.....

.....

5 the Court shall reject an application for permission to sue as a pauper –

(a)...

(e)Where his allegations do not show a cause of action; ...”

5. The only questions for determination therefore are:

a. whether the appellant has satisfied the requirements of lack of sufficient means to enable him to pay court fees, for admission as a

pauper under **Order 33** of the **Civil Procedure Rules, 2010** and,

b. whether the suit herein discloses a cause of action.

6. **Order 44** on pauper appeals provides as follows:

Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject in all matters, including the presentation of such application, to the provisions relating to suits by paupers in so far as those provisions are applicable.

Provided that the court shall dismiss the application unless upon a perusal of the memorandum of appeal and of the record of the lower court, it sees reason to think that the decree is contrary to law, or against the weight of the evidence.

7. A perusal of the applicant's pleadings show that he has enjoined the **Chief Magistrate (Commercial) Court Milimani as the 1st Respondent and the Hon. Attorney General as the 2nd Respondent**. The parties herein were not parties in the original suit at the lower court. Suing the Chief Magistrate and the Hon Attorney General at appeal stage is rather unusual. It is now for this court to determine whether a cause of action as against the parties so sued accrues.

8. From the Ruling attached dated 13th July, 2016, the suit at the lower court in Misc Civil Application No 448 of 2016 was between the Applicant versus Mamuka Valuers Ltd (1st Respondent) and Nairobi City Council (2nd Respondent). There is also a second Ruling attached, being a review of the dated 20th September, 2016. It is between the same parties.

9. **Order 2 Rule 15 (1)** provides that;

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(a) it discloses no reasonable cause of action or defence in law; or

(b) ...

(c) ...

(d) it is otherwise an abuse of the process of the court,

any may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

10. I am aware that in considering whether to strike out a suit where no reasonable cause of action has been disclosed, the court in **Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 others [2015] e KLR** cited with approval the case of **DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR**. There Madan JA (as he then was) adopted the finding of **Sellers LJ** in **Wenlock vs. Moloney (1965) 1 WLR 1238** where the learned Judge, while considered the principles to be adopted in striking out a pleading and stated:

This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Further and in the same case, **Danckwerts LJ** detailed:

The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading".

Madan JA (as he then was) in the **DT Dobie** case (as above) added his own view as to the matter with striking out of suits:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."

11. In this case, however, there is no appeal in respect of the parties to the original suit. As such, there cannot be an application in *forma pauperis* thereon. I think this is a fundamental error going to the root of the appeal and also to the root of the pauper application.

12. In my view, the suit herein does not disclose a reasonable cause of action and is incurably defective. The same cannot be allowed to go forward. It ought to be dismissed. The application to be admitted as a pauper is therefore hereby rejected in terms of **Order 33 Rule 5**.

13. Orders accordingly.

Dated and Delivered at Nairobi this 15th Day of June, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1.Applicant
2. Court Clerk.....