



**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] I have before me a Notice of Motion Application expressed to be brought pursuant to Order 33 Rule 1 and 2 of the Civil Procedure Rules in which the Applicant has applied for ***permission to institute a suit as a pauper. He has also sought that cost of the application to be at the discretion of the court.*** The major grounds for applying are:

- 1. That the applicant is not possessed of sufficient means to enable him pay the court fees prescribed by the law for the institution of suit.***
- 2. That the applicant has a good claim with overwhelming chances of success as evidenced by the plaint.***
- 3. That the applicant is also suffering from diabetes and an accident victim and ready to be examined to prove he is a pauper.***

[2] 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 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 7 (seven) 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.

**Dated, signed and delivered in open court at Meru this 4<sup>th</sup> day of**

**February 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Applicant in person

No appearance for respondent

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**F. GIKONYO**

**JUDGE**