



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 166 OF 2012

GIBSON GATHUTHU KARURU.....APPELLANT

VERSUS

THE EXECUTIVE OFFICER

TEACHERS SERVICE COMMISSION RESPONDENT

(An Appeal from the ruling of Hon. James N. Mwaniki, PM Nakuru Chief Magistrate Court's Misc. Application No.50 of 2012 delivered on 8th August, 2012)

JUDGMENT

By a notice of motion dated 28th March, 2012 the Appellant, Gibson Gathuku Karuru, moved the lower court seeking leave to institute a suit against the respondent as a pauper.

The application was premised on the grounds that the applicant has been out of gainful employment for the past 20 years, is in bad health, has a huge family burden; and that escalating costs of life and inflation have rendered him incapable of affording legal and other attendant costs.

Upon considering the application and the opposition thereto, the trial magistrate held:-

“The parties herein never concentrated on the financial status of the applicant or reasons for his inability to fund his own litigation but on the validity or otherwise of the intended claim.

The applicant curiously stated reasons for his inability to meet such legal costs. There was no proof of those assertions.

A pauper is not a person in bad health, unemployed or affected by escalating cost of life and inflation. If this state of affairs were taken on their face value to amount to pauperism, then pauperism would to unwholesome degree depend on the applicant's views or prejudices and standards set by the applicant. That would widen the scope of pauperism to unacceptable fields. No court would countenance that.

....

.....

The application for pauperism is rejected.”

Being dissatisfied with the decision of the lower court, the appellant filed this appeal challenging the said decision on ten (10) grounds which can be summarized as follows:-

1. **That the ruling is contradictory, unenforceable and contrary to law;**
2. **That the learned trial magistrate erred by holding that there was no proof of pauperism;**
3. **That the learned trial magistrate did not consider the appellant's evidence;**
4. **That the appellant is unable to hire an advocate;**
5. **That the appellant has sought assistance from various institutions over the subject matter;**
6. **That the appellant was not given an opportunity to prove his pauperism;**
7. **That there was no reason for putting the appellant in defence of his application for pauperism;**
8. **That the decision has occasioned miscarriage of justice.**

This being a first appeal, it is my duty to consider and re-evaluate the evidence presented before the lower court in order to arrive at my own independent conclusion, bearing in mind that I neither heard nor saw the witnesses.

It is common ground that the appellant was an employee of the respondent from May 1978 to 8th February, 2007.

Sometime in 1991 the respondent, through its agent, the District Education Officer Nakuru, transferred the Appellant from Mianzini Primary School to Kokwomoi primary school. The appellant refused to proceed on transfer. For that reason disciplinary proceedings were initiated against him. The proceedings culminated in his suspension for two (2) months.

Although the Appellant was expected to report to the DEO for redeployment before the end of the suspension period, apparently he failed to do so. Thereafter, fresh disciplinary proceedings were initiated against him culminating in his dismissal for desertion of duty.

When the respondent's decision was communicated to the appellant, the appellant sought the help of various government and non-governmental entities to assist him get what he called justice from the respondent.

After he failed to succeed in his quest for justice, he filed this application seeking leave to institute a suit against the respondent as a pauper.

Upon considering the appellant's application the trial court directed that the same be served upon the respondent before it was set down for hearing.

Upon service, the respondent filed a replying affidavit opposing the application. It also filed written submissions.

In its submissions, the respondent maintained that it followed the law and the applicable procedure in dismissing the Appellant; that the appellant's application was time barred; and that the appellant had not supplied any verifiable basis upon which the reliefs sought could be grounded.

Before me, the appellant reiterated the contention that the trial magistrate erred in dismissing the application. He explained that he has been unemployed for many years and that there was evidence of his inability to pay legal fees (letter from the chief).

Counsel for the respondent, Mrs. Mambo, opposed the appeal arguing that the appellant is not a pauper. He explained that a pauper is a person who receives aid from charity; and contended that the chief's letter is not proof of pauperism but request for assistance.

I have read and considered the arguments by the respective parties. I have also read and considered the sentiments of the trial magistrate. The issues for consideration are:-

1. **Who is a pauper in law?**
2. **Did the trial court err by subjecting the appellant's application to hearing?**
3. **Did the appellant prove pauperism? If yes, was the trial court obligated to allow the application merely because pauperism had been proved?**
4. **What orders should this court make?**

(1)Who is a pauper in law?

A person is a pauper, for the purposes of the law, when he is not possessed of sufficient means to enable him pay the fee prescribed by law for the institution of such suit. (see **Order 33 Rule 2**).

(2) Did the trial court err by subjecting the appellant's application to hearing?

My answer is negative. This is because under **Order 33 Rule 4** of the **Civil Procedure Rules**, once seized of an application for pauperism, a court may, if it deems it fit, examine the applicant or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and **the property of the applicant.** (Emphasis supplied).

3. Did the appellant prove pauperism? If yes, was the trial court obligated to allow the application merely because pauperism had been proved?

In support of his claim, the applicant filed a letter from his area chief confirming that he was not in gainful employment and recommending that he be assisted with legal aid.

Persuaded that the appellant had made a *prima facie* case for granting the order sought, in accordance with the provisions of **Order 33 Rule 6**, the trial magistrate fixed a day for receiving evidence of pauperism and/or hearing any evidence in disproof of the application.

Although the record does not bear any evidence of the hearing contemplated under **Rule 6**, in its ruling the trial court observed that the parties did not lead evidence on the financial status of the applicant or reasons for his inability to fund his own litigation but dwelt on the validity or otherwise of the intended claim.

In my view, the applicant being a layman, he could not be expected to know the knitty gritties of the law. I also find the trial court's observation to the effect that no reasons were given for the appellant's inability to fund his own litigation to be unsupported by the evidence on record. For instance, it is deposed that the appellant has been out of gainful employment since 1991. I find unemployment, in the circumstances, to be a factor worth consideration by the trial court. Unemployment alone does not make one a pauper because one can be in business or farming and the court should have made more enquiries into these more than it did. However, success of the appellants' application on account of unemployment would depend on the evidence of the impact of the unemployment on his financial status. In my view, the chief's letter, the Chief's letter should have been considered along with other factors.

Under **Order 33 rule 4**, the trial court in addition to examining the applicant on his financial status could also examine him **regarding the merits of the claim.**

Although the trial magistrate did not delve into this limb, I note that the respondent had challenged the appellant's claim on the ground that it was time barred.

Through its notice of grounds affirming the decision of the lower court, the respondent has contended that, even if the trial magistrate had determined that the applicant was a pauper, the application was bound to fail, the same having been filed five (5) years after the impugned decision of the respondent. Reference is made to **Section 3(2)** of the **Public Authorities Limitations Act** and **Section 90** of the **Employment Act, Laws of Kenya.**

Sections 3 subsection 2 of the **Public Authorities Limitation Act** provides:-

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date from which the cause of action accrued.”

Similarly, **Section 90** of the **Employment Act, 2007** provides:-

“Notwithstanding the provisions of [section 4\(1\)](#) of the Limitation of Actions Act ([Cap. 22](#)), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

The cause of action hereto accrued on 8th February, 2007. Instead of moving the court for redress, the appellant engaged other agencies who did not avail him the justice he sought.

From the record before me, there is no doubt that the appellant’s application and the intended suit is bad in law for offending the aforementioned provisions of the law. I also note that the aforementioned statutes do not provide for extension of time within which to file a suit that is time barred. Without such a window, granting the orders sought would serve no useful purpose. Courts do not make orders in vain.

The court has also noted that the appellant has slept on his legal rights. From the averments of the respondent, the appellant deserted duty a second time in 1991 only to resurface in 2006. In my view, he waited for more than twenty years before moving to court. Even if, there was an avenue for granting the orders sought, this court would nevertheless be unwilling to exercise its discretion in the appellant's favour. I say this because, equity only aids the vigilant. The appellant was indolent. He slept on his rights for more than ten years before the respondent communicated its intention to reinstate him. After the respondent communicated its decision terminating his services, yet again, he slept on his rights for another five years or so. Although there is evidence that he belatedly engaged other government agencies to assist him access justice, his overall conduct is not of a person worthy granting an equitable remedy.

For the foregoing reasons, I find the appellants' appeal to be unmerited and dismiss it with each party bearing their own costs.

Dated, and Delivered this 7th day of March, 2014.

RPV WENDOH

JUDGE

PRESENT:

The appellant - in person

Mr. Anyuor holding brief for Ms Kipsenei for the respondent

Kenney – Court Assistant