



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox, J A (In Chambers))

CIVIL APPLICATION NO NAI 82 OF 1986

BETWEEN

**JOB ASAMBA KAMULLA ..... APPELLANT**

**AND**

**ZAKAYO KAGULUKA ASAMBA & 2 OTHERS ..... RESPONDENTS**

(Application to review the ruling of the High Court of Kenya at Kakamega

(Mr Justice Aganyanya)

dated September 25, 1985

IN

High Court Case No 71 of 1984

**RULING**

This application is in some respect peculiar. It purports to a notice of motion to review the judgment of Aganyanya J of September 25, 1985. I am bound to say that the ruling does seem to me to have been delivered after a submission by only the second plaintiff, who is the present applicant before this court, but no witnesses were called. The first plaintiff was not heard.

There was a plaint filed by both the appellant and the first plaintiff so I have ascertained from the High Court files ) on the August 30, 1984. A defence was then filed by each of the three respondents, who were then defendants to the action in the High Court.

There was then an application by the first plaintiff, Lazaro A Asamba to have the name of the second plaintiff ( the present applicant ) struck out from the action, and this was refused by Aganyanya J on January 8, 1985. Lazaro then applied to have the ruling reviewed, but so far as I can discover from the file, it has not yet been dealt with.

On January 22, 1985, so it would appear, all the parties were present before Aganyanya J at Kakamega, where Lazaro, the first plaintiff, sought an adjournment to enable him to engage an advocate. The applicant and the three respondent opposed this, but it was granted by the judge upon terms that Lazaro

should pay the travelling costs of all the order parties, which he assessed at Kshs 148.00 to them before the next hearing date.

It appears from the record that these costs were not paid as ordered, and on February 23, 1985, the respondents asked for the case to be dismissed ( as the learned judge had ordered in default on January 22 ). Lazaro did not appear and the judge made an inconclusive order reciting that there was some suggestion that the case be transferred to Kisumu, but repeating that the first plaintiff should pay the Kshs 148.00 to the applicant and to the respondents as previously ordered. This time there was no order on default of payment.

On June 25, 1985, the case was fixed by consent for hearing on September 25, 1985. Lazaro was not present on that occasion and neither were the second and third respondents. On September 25, 1985, the case proceeded in the absence of Lazaro and apparently the judge felt that this case should be dismissed because he had not paid the Kshs 148.00. At the same time he ordered that Lazaro's purported application for transfer of the case to Kisumu should be dismissed. The case then proceeded in the manner I have stated, and the judge there upon delivered a ruling in which he referred to hold that the applicant had not made out a case against the respondent and dismissed it with costs.

It is evident from that which I have said that there are some unsatisfactory features about the manner of conducting the proceedings on September 25, 1985, but the remedy, if any, is not by way of an application for review to this court. It must be by way of appeal, for which, as I said yesterday, the applicant filed a valid notice of appeal on October 7, 1985, within the fourteen day period laid down by rule 74.

In addition to this the applicant seeks leave to appeal as a pauper, that is to say that the court fees should be waived under rule 112. The requirements of this rule are less stringent than those of Order 32 of the Civil Procedure Rules, and the applicant has set out in his handwritten letter of October 14, 1985, received here on April 29, 1986, the circumstances from which it would appear that he is in truth a person without sufficient means to pay the prescribed court fees.

I have demonstrated that the appeal is not without a reasonable possibility of success, as rule 112 requires. The only respondent present yesterday did not object to the part of the application. I therefore grant to the applicant leave to lodge an appeal without prior payment of the courts fees, without security for costs being lodged, and that the record of appeal shall be prepared by the Registrar, on condition that the applicant pays the fees if he recovers anything in the entered appeal.

The only matter left is on extension of time. There is no application for such extension before me. But I give leave to the applicant to apply to the court within 30 days for an extension of time to institute his appeal under rules 4 & 81, such an application to be served personally on each respondent. The costs are reserved for decision in due course, and may well depend on whether the applicant pursues his appeal. The application for review filed on April 28, 1986 being incompetent, is dismissed. Copies of this ruling to be given to each party without payment after typing.

Orders accordingly.

Dated at Kisumu this 20th day of June, 1986.

**ARW Hancox**

**Judge of Appeal**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

