



**Rimui v Heritage Investment Limited (Civil Application
E14 of 2020) [2022] KECA 1297 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1297 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E14 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 2, 2022**

BETWEEN

GEORGE MUCHAI RIMUI APPLICANT

AND

HERITAGE INVESTMENT LIMITED RESPONDENT

*(Being an application for leave to appeal as pauper in accordance with
Rule 115(1) of the Court of Appeal Rules 2010 in an intended appeal from
a judgment of the Employment and Labour Relations Court at Mombasa
delivered by L. Ndolo, J. on 21st May 2020 in ELRC Civil Appeal No 11 of 2018)*

RULING

1. The applicant, who is the intended appellant in the second appeal, filed the notice of motion application dated November 16, 2020, brought pursuant to rule 115(1) of the 2010 Rules of this court [now rule 120(1) of the 2022 Rule].; sections 3A (1) and 3B(1)(c) of the Appellate Jurisdiction Act. He seeks 3 orders;
 1. That the court be pleased to make an order that the appellant be allowed to file his appeal without paying the court fees of Kshs 106,900/- as assessed by the court *vide* invoice customer reference number EXLGNQ7H annexed hereto;
 2. That any court fees due, including any other charges be recovered from any award due to the appellant/applicant;
 3. That in the event the application is heard after the time of filing the appeal has lapsed then this court be pleased to grant the applicant/appellant leave to file the appeal out of time.
 4. That the costs be in the cause.



2. The background to the application is that there was a road traffic accident on February 24, 2013, involving the applicant, who worked for the respondent as a driver. The applicant sued the respondent in Mombasa SPMCC 1485 of 2013 where he sought compensation for injuries he sustained. The suit was dismissed *vide* judgment rendered on September 7, 2018 by Hon F Kyambia. He was dissatisfied with the judgment and appealed to the ELRC in Civil Appeal No 11 of 2018. The learned ELRC Judge (L Ndolo J) in her judgment rendered on May 21, 2020 found no merit in the appeal and dismissed it.
3. The applicant was dissatisfied with the decision and approached this court on second appeal by filing notice of appeal dated May 26, 2020.
4. The grounds of the application, which are reiterated in the affidavit in support of the application, are that the applicant was crippled after he lost his lower limb as a result of the accident; and, that he is currently indigent, jobless and completely unable to raise legal or court fees. The applicant avers that the advocates on record have without pay conducted the case and have prepared a record of appeal and obtained a certificate of delay dated October 12, 2020. He avers that when the appeal was lodged, the fees were assessed at Kshs 106,900/-, and that the he, together with his extended family are unable to raise the same.
5. The respondent company has through its director Mr George Githinji, sworn a replying affidavit in response to the application opposing it. The reasons given for opposing the application is that the applicant has not placed any medical evidence indicating that he is disabled, neither has he filed an affidavit showing he is a pauper and lacks means; further that the applicant had not placed any evidence to show that he had lost his job and had no means of earning at all. The deponent has opposed the prayer for extension of time to lodge the appeal contending that on advice from his counsel, the prayer for extension of time cannot be made simultaneously with an application under rule 115 of the *Court of Appeal Rules* (2010).
6. The application was heard virtually on the July 20, 2022.
Learned counsel Mr Njoroge Mwangi for the applicant and learned counsel Mr Jengo were both present for their respective clients.
7. Mr Mwangi relied on his written submissions dated April 25, 2022 and his list of authorities of even date together with the affidavit in support of the application dated November 11, 2020. Counsel urged that the applicant was a driver and unskilled in any other field. That he lost his right leg through amputation following an accident, that he and his family as well as his neighbours exhausted all their earnings in his treatment. That as a result he had become an invalid, dependent, incapable of generating any income and is virtually indigent. He urged that the applicant is totally unable to pay the requisite fees for his appeal. Counsel urged that the application was lodged within the time the appeal was to be filed and under certificate of urgency.
8. Counsel relied on the case of *Francis Egosangwa Kaguli v Barusi Kaguli* (2014) eKLR where a single judge sitting at Kisumu, faced with a similar application made by one who was unable to pay for having lost his sight was granted. He urged the court to make an order deeming the appeal to have been filed on October 16, 2020, the date when the invoice on court filing fees was issued, or in the alternative an order extending time within which the applicant may file the appeal.
9. Mr Jengo for the respondent relied on the filed written submissions dated July 1, 2022. Counsel, while placing reliance on the case of *Benson Muchu Gichuki v Norwegian Peoples Aid* (2012) eKLR emphasized the need to demonstrate the inability to afford the assessed fees. Mr Jengo relied on paragraph 3 of the replying affidavit and emphasized that the main reason why the application is



opposed is the fact the applicant had not filed a medical record to support his application. He however admitted that the applicant had an amputation of his right lower limb.

10. We have considered the application, the rival arguments of counsel to the parties and the cases relied upon. The application is pegged on rule 115 of the [Court of Appeal Rules, 2010](#) which provides:

“ 115. Relief from fees and security in civil appeals

- (1) If in any appeal from a superior court, in its original or appellate jurisdiction in any civil case the court is satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the court may by order direct that the appeal may be lodged—
- (a) without prior payment of fees of court, or on payment of any specified amount less than the required fees;
- (b) without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 107, and may order that the record of appeal be prepared by the registrar of the superior court without payment therefor or on payment of any specified sum less than the fee set out in the second schedule, conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or properly he may recover in or consequence of the appeal.”
11. Rule 115(1) of the 2010 [Court of Appeal Rules](#) requires that the court be satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success. The grounds upon which the applicant claims that he lacks the means to pay the required fees is the fact he lost his right leg after the accident the subject matter of the appeal. He has stated that as a result of being unskilled and uneducated and being crippled he has remained jobless due to inability to perform any work. In short, the accident has caused him to become indigent.
12. The respondent does not contest the fact stated that the applicant lost his right leg. Their only quarrel is failure by the applicant to attach a medical record to support his claim. The question is what is the purpose of a medical report in an application of this nature? The application is for leave to appeal without paying the court fees. At this stage the only thing the medical report would have confirmed is that the applicant does not have a right leg. It is our view that since the respondent acknowledges that the applicant has an amputation of the lower limb, the medical record will not add any value to the application but will be a mere formality. For that reason, it is our view that the report is unnecessary.
13. The respondent has relied on the case of [Benson Mbubhu Gichuki v Norwegian Peoples Aid](#) [2012] eKLR where it defines a pauper in the following terms:

“ 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 his circumstances and show that, indeed he cannot raise the court fees necessary...”

14. The [Constitution](#) requires that the state ensures that a party has access to justice. article 48 of the [Constitution](#) identifies one of the impediments to access to justice as being fees. It provides:

The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.



15. The applicant has shown that he lost his lower right limb which has exhausted his life savings; that since the only skill he was trained in and the one he depended on for his sustenance was driving, he has been rendered indigent as he can no longer engage in that kind of employment. We are satisfied that the applicant has shown that he is unable to raise fees requisite to filing his appeal. As the Constitution places a duty on the state not to impede a party from accessing justice on grounds of fees, we are persuaded that applicant is deserving of the exercise of our discretion in his favour.
16. The second order sought by the applicant is leave to file his appeal out of time in case the application is heard after the time of filing the appeal has lapsed. The applicant in the affidavit in support of the application has averred that he obtained a certificate of delay from the deputy registrar which is dated October 12, 2020. Pursuant to rule 84 (1) of the Court of Appeal Rules, the applicant was expected to file his appeal within 60 days from the date of lodgment of the notice of appeal; and where he relies on a certificate of delay, compute the 60 days excluding the period it took for the proceedings to be availed to him as per that certificate. Whether from the date of lodging the notice of appeal or from date excluding the period used to prepare the proceedings, the applicant is out of time for purposes of lodging the record of appeal within the prescribed time. We are satisfied that he filed the notice of appeal within time. The delay in lodging the record of appeal has sufficiently been explained. He is deserving of the leave sought.
17. The respondent raised issue with the application urging that the records of the lower courts should have been annexed to the application. We are minded to give the applicant an opportunity to ventilate his appeal, given his personal circumstances. We are of the view that article 159 of the Constitution comes to the applicant's aid.
18. We have come to the conclusion that the applicant should be granted the orders sought in the application. The application dated November 16, 2022 is accordingly allowed in the following terms:
 1. That an order is hereby made that the appellant be allowed to file his appeal without paying the court fees of Kshs 106,900/- as assessed by the court vide invoice customer reference number EXLGNQ7H;
 2. That the applicant is granted leave to file his appeal out of time.
 3. That the costs be in the cause.

DATED AND DELIVERED IN MOMBASA THIS 2ND DAY OF DECEMBER, 2022

S. GATEMBU KAIRU (FCI Arb)

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



DEPUTY REGISTRAR

