



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. 75 OF 2020

BETWEEN

JANE NJOKI GICHURU.....APPLICANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

THE DEPUTY REGISTRAR, COURT. OF

APPEAL OF KENYA.....INTERESTED PARTY

*(Being an application for extension of time and leave to appeal as a pauper against the judgment and Decree of the Honorable Justice J. Mulwa delivered on 20<sup>th</sup> April 2017)*

in

NAKURU HCC NO. 94 OF 2010

\*\*\*\*\*

RULING

The Notice of Motion dated 5<sup>th</sup> August, 2020 before me is brought under the provisions of Article 159(2) (9) of the constitution of Kenya, Rules 4,39,42, 43 and 115 of the Court of Appeal Rules and Order 44 of the Civil Procedure Rules.

The application which is an omnibus application seeks several prayers which include:

***“ a) That the honorable court to order the deputy registrar of the court to conduct an inquiry into the pauperism of the applicant and file a report over the inquiry***

***b) That the court be pleased to grant leave to the applicant to appeal as a pauper***

***c) That the court do extend the period within which the appellant ought to file and serve her memorandum of appeal, record of appeal against the judgement and decree of Hon J. Mulwa delivered on 29<sup>th</sup> April 2017 in Nakuru HCC No. 94 of 2010’***

The application is premised on the grounds that being aggrieved by the judgment and decree of **Hon. J. Mulwa** in dismissing the suit, she wishes to appeal against the said decision. That on 10<sup>th</sup> July, 2020 the applicant was granted leave to file and serve her memorandum and record of appeal out of time vide Nakuru Civil application No. 11 of 2019 ***Jane Njoki Gichuru v Republic***. The Honorable Attorney General and as such, the same ought to be filed by 9<sup>th</sup> August, 2020. That although the memorandum and record of appeal had been prepared sent to the court registry and assessed at Kshs. 90,450, the applicant is not able to pay the said court fees as she is unemployed and the little funds she gets go to settle her medical bills as she is under continuous treatment. As a result of her inability to pay the assessed fees, leave granted to file her memorandum and record of appeal will lapse before filing the appeal. That the respondent will not suffer any prejudice.

The application is further supported by the affidavit of the applicant sworn on the 5<sup>th</sup> August 2020 in which she depones that she had filed a suit in **Nakuru**

**High Court being Civil Suit No. 94 of 2010, *Jane Njoki Gichuru v Republic*,**

**The Hon. Attorney General** seeking compensation from the 1<sup>st</sup> respondent for loss and harm suffered as a result of medical negligence at one of the Government medical facility, which suit was dismissed. The applicant thereafter instructed her counsel to pursue an appeal. However, by then the time for lodging the appeal, had lapsed. The applicant's counsel thus filed an application for extension of time within which to file an appeal; which application was allowed **Hon. Justice Gatembu Kairu FC Arb**. The applicant prepared the necessary documentation only to find out that the required filing fees was Kshs. 90,450/- which she was unable to raise as she is unemployed.

That the intended appeal has very high chances of success as per the memorandum of appeal and that the application is made in good faith with the sole interest of justice. The respondent did not file any response to the application or submissions.

The applicant filed submissions dated 3<sup>rd</sup> May, 2021 in which she the applicant submits that she has made substantial steps to show that she was complying with the ruling of **Hon. Justice Gatembu Kairu FC Arb**, in which as can be evidenced by an email communication of 5<sup>th</sup> August, 2020 between the court and her where she was required to pay the above stated amount which amount then she could not be able to raise hence the application to be considered under pauperism rule.

This application has several prayers which cannot be considered by this court at the same time. The preliminary prayer is the pauper prayer which I shall consider for it sets in motion all other prayers when determined thus I will restrict myself to the determination of the said prayer.

On the prayer that honorable court to order the deputy registrar of the court to conduct an inquiry into the pauperism of the applicant and file a report over the inquiry, **Rule 115 (1)** of the Court of Appeal Rules makes provision for 'relief from fees and security in civil appeals' in the following terms:-

***“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 therefore 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 property he may recover in or consequence of the appeal.”***

There are three other sub-rules subsequent to that however, which are couched in mandatory tone as follows:-

***(1) The Registrar shall be entitled to be heard on any such application.***

***(2) No fee shall be payable on the lodging of any such application.***

***(3) The Registrar shall have power to take such action as he may think necessary to enforce any undertaking given in accordance with sub-rule (1).***

The application before me was neither served on the Registrar of this court nor was the Registrar heard in accordance with the mandatory requirement of Sub-rule (2) as there is nothing on record to suggest otherwise.

The same situation arose in a reference made to the full court from a decision of a single judge in relation to an application under Rule 115 and the reference was allowed by the full court, because the single judge did not give the registrar an opportunity to be heard in the matter. The case was ***Benson Mbuchu Gichuki v Norwegian Peoples Aid [2012] eKLR*** which was decided on 17<sup>th</sup> day of February, 2012. In that case the Court stated thus:-

***“..the learned single Judge heard the application that was before him and decided on it without the input of the Deputy Registrar of this Court as is required by the provision of rule 115(2) of this Courts Rules. In our view, the hearing could only proceed after the Deputy Registrar's report was received on the status of the applicant. Perhaps that input of the Deputy Registrar would have included his investigation as regards the position as of now as opposed to the position as obtained when the applicant was granted leave to proceed as a pauper earlier on.”***

As a result, the court made the following order:

***“..we order that the applicant appears before the Deputy Registrar for purposes of the latter investigating his status and preparing a report which should be availed before a single Judge of this Court who would hear the matter de novo. We so order. We make no order as to costs.”***

I have considered the application before me in the light of that decision which I refer to and make a similar finding and order. Consequently, I order that the applicant shall appear before the Deputy Registrar of this court in the next fourteen days for purposes of further investigations

on his status. Thereafter the Deputy registrar shall prepare and file a report within fourteen days and place the matter before any single judge of this court for further directions.

The other prayers in the application as earlier stated shall await the outcome of the report by the registrar of this Court in line with the rules.

**Dated & delivered at Nairobi this 9<sup>th</sup> day of July, 2021.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**Signed**

**DEPUTY REGISTRAR**