



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SICHALE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 73 OF 2018 (U.R 64/2018)

BETWEEN

THOMAS MAKONGO CHAGOCHE.....APPLICANT

AND

KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT

(An application for relief from fees and security for costs in the applicant's intended appeal arising from the judgment and decree of the High Court of Kenya at Nairobi (Mativo J) delivered on 17th January, 2018

In H.C Petition No. 102 of 2016)

RULING

By a motion dated 16th March, 2017, Thomas Makongo Chagoche (the applicant) is seeking leave of this court to lodge his intended appeal “*in forma pauperis*”. In other words, he is seeking: a waiver of the payment of court filing fees and deposit of security for costs; as well as the preparation of the record of appeal by the Registrar of the High Court. The application is brought under Rule 115 of the Court of Appeal Rules which places upon the applicant the onus of proving 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.

On the first limb, this court has, on previous occasions, stated that it is not sufficient for an applicant to make a dry assertion that he has no means of paying the requisite fees, see **Benjamin Barasa Wafula v Moses Chetame Sikanga & 22 others** [2015] eKLR. The burden is placed squarely upon the applicant's shoulders to demonstrate, by way of evidence, that while he is genuinely aggrieved by the decision he intends to appeal against, he lacks the means to do so. In **Peter Onditi Ogugu v Allpack Industries Limited & another** [2014] eKLR the full court, in upholding the decision of the single judge, added that:

“Until such time that access to courts will be open to all without the requirement for payment of fees and costs, a party seeking dispensation from the responsibility to pay court fees must demonstrate by evidence that they are deserving, by reason of their indigence or other circumstances, to be relieved from that responsibility.”

On the second limb, whether the intended appeal is not without reasonable possibility of success, I am persuaded by the sentiments of M’Inoti J.A in **Jason Nyabuto Kembero v Siraj Sheikh Musdaf** [2013] eKLR that Rule 115 was not intended to be used for “*academic or theoretical pursuits or as a license to vex and harass a perceived opponent*”. In as much as Article 48 of the Constitution guarantees that a party has access to justice without impediment in the form of court fees, justice must also be visited upon the other disputing party. Justice is justice to both parties. Therefore in exercise of its discretionary power, this court will accommodate a genuine applicant handicapped in pursuit of his appeal by reason of his paucity once it has conversely been satisfied that the intended appeal has a possibility of success. M’Inoti J.A further observed that:

“The Court has to balance the [sic] a host of competing interests, namely the genuine grievance of a financially handicapped applicant, the costs and expense likely to be incurred by the respondent in defending the appeal, the chances of the respondent recovering such costs from the applicant, the available judicial time and resources and the legitimate demands and expectations of other litigants to judicial time.”

That being the basis upon which a single judge can exercise her judicial discretion, I turn to look at the application presented by Thomas, the applicant. The genesis of the applicant's problem with the respondent, **Kenya National Examination Council**, (KNEC) began when

Thomas, realised that his name had been misspelt on his KCSE result slip. He applied to KNEC to make the correction. He had been wrongly identified as ‘CHACHOGE MAKONGO THOMAS’ instead of ‘CHAGOCHE MAKONGO THOMAS’. When he went to collect the result slip, he complained that the corrected result slip did not reflect the correct results as contained in the previous result slip. Despite his insistence that the corrected slip bore the wrong results, KNEC felt differently and in fact had Thomas arrested and charged with the offences of making a document contrary to Section 357(a) of the Penal Code; and uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code. He was later acquitted of the criminal charges against him.

Still seeking a re-issue of his KCSE result slip with his correct results, he filed an amended petition on 14th June, 2016 before the Constitutional Court on the basis that KNEC’s refusal to issue him with the correct result slip bearing his name was degrading, dehumanising and a breach of his constitutional rights to dignity, equality, freedom from torture, discrimination and right to education. Mativo J heard and dismissed the petition with no orders as to costs. It is this decision delivered on 17th January, 2018 that Thomas seeks to appeal against. He filed his notice of appeal on 24th January, 2018.

Attached to his application is a letter from his local chief dated 16th July, 2015 indicating that he comes from a humble background and as a consequence he is unable to continue with his education. It is on the basis of this letter that he was granted relief from payment of court fees before the High Court. Thomas has also attached to his application a draft memorandum of appeal containing 5 grounds of appeal.

The applicant, appearing in person before me, reiterated his inability to raise the requisite fees; and that his financial inability was further constrained due to the fact that he supports his other siblings. The application was opposed by learned counsel Mr. I. Ochieng’ appearing for KNEC, who urged for the dismissal of the application on the grounds that: the applicant had failed to show that he lacks the means to lodge the appeal; that the appeal was without merit and had no chance of success; that the application is frivolous; and that the intended appeal will be lodged outside of the statutory 60 days. In brief reply, the applicant explained the delay was due to his lack of means.

Before determining whether the applicant has succeeded in convincing the court of the two indispensable limbs, a look at Rule 115(2) reveals that the Registrar is a necessary party to the application. The rule, couched in mandatory terms, provides that the Registrar **shall** be entitled to be heard on such applications. Waki J.A in **Thomas Joseph O. Onyango & another v Teachers Service Commission [2016] eKLR** and **Thomas Joseph O. Onyango v Attorney General & another [2016] eKLR** struck out the two applications before him brought under Rule 115 for the reason that an investigation by the Registrar ought to have preceded the hearing of the application. In my view therefore, the involvement of the Registrar in such an application is crucial. Not only is it mandated under Rule 115(2) of the Rules, but it would provide a well needed input on the status of the applicant in regard to his lack of means. Apart from his oral submissions, the applicant has only relied on a letter from his Chief dated 16th July, 2015 to convince the court of his lack of means.

In a world where nothing is assured or definite, the applicant’s circumstances may have changed. It is upon him to convince the court that he lacks the means to pay the requisite fees to see the appeal through to its logical conclusion. For the application to succeed it should be based on circumstances as they currently exist. I find support in my argument from the decision of the full court in **Benson Mbuchu Gichuki v Norwegian Peoples Aid [2012] eKLR** which overturned Bosire JA’s decision on the basis that the single Judge made a determination on the application before him without the input of the Deputy Registrar of the Court as required by Rule 115(2). In their view:

“... the hearing could only proceed after the Deputy Registrar’s report was received on the status of the applicant. Perhaps the 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.”

It is on this basis that I dismiss the application with no orders as to costs.

Dated and delivered at Nairobi this 5th day of April, 2019.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR