



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: WAKI, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 124 OF 2015**

**BETWEEN**

**THOMAS JOSEPH O. ONYANGO.....APPLICANT**

**AND**

**THE HON. THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**REUBEN OCHAKO.....2<sup>ND</sup> RESPONDENT**

***(An application for pauper appeal arising from the judgment of the Industrial***

***Court of Kenya at Nakuru (Radido, J.) dated 18<sup>th</sup> December, 2014***

**in**

***Industrial Cause No. 509 of 2014***

**RULING**

1. On the 24<sup>th</sup> February 2016, I heard the motion dated 13<sup>th</sup> March 2015 and filed on 17<sup>th</sup> April 2015 which the applicant presented in person. The two respondents had been duly served with hearing notices but never showed up. It is not clear what the application seeks since the legal provisions relied on do not support the prayers sought. But I invoked **Article 159(2)(d)** of the Constitution and overlooked the technicality of citing the legal provisions. The substance of the application, according to the applicant, is to seek leave of the Court to file an intended appeal as a pauper. That would be an application predicated on **Rule 115** of the Rules of this Court.

2. The intended appeal emanates from the ruling of the Industrial Court (**Radido Stephen J.**) made on 19<sup>th</sup> December 2014 in which the learned Judge struck out an interlocutory application filed by the applicant as incompetent and an abuse of court process. The application was filed in a claim before that court by the applicant seeking “*punitive damages of Ksh. 5 million, salaries and allowances, implementation of the judgment of Court in Nakuru Cause No. 407 of 2013, contempt of court against the Chief Executive Officer of TSC and other reliefs.*” The main claim is presumably still pending before the Industrial Court. After the application was struck out, the applicant filed a notice of appeal to this Court on 24<sup>th</sup> December 2014 and subsequently the application before me 14 months later.

3. **Rule 115** provides as follows:

*"(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 property he may recover in or consequence of the appeal.*

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

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

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

4. The applicant thus seeks leave to pursue an intended appeal without paying any fees and security for costs or even the costs of preparation of the record of appeal, amongst other costs and fees. It is a discretionary matter for the court which may grant the order if the applicant satisfies it, firstly, that there is indeed an intended appeal which has reasonable chances of success, and secondly, that he lacks the financial means to mount such appeal.

5. At the hearing of the application, I noticed that the application barely addresses the core requirements under **Rule 115** and gave leave to the applicant to file a supplementary record before the ruling is delivered. As I write the Ruling now, no further records have been brought to my attention. At all events **Rule 115(2)** which requires the involvement of the Registrar of this Court has not been complied with. In a similar application by the same applicant, **Nai. 50 of 2015**, I stated as follows:

*"I have examined the provisions of Rule 115(2) of this Court's Rules and it is evident that the Registrar of this Court is a necessary party to the application. But he was neither enjoined in or served with the motion, nor served with a hearing notice. In a reference made to the full Court in the Gichuki case (supra), the Court had this to say:*

*"....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."*

*In line with that pronouncement, it is my view that an investigation by the Registrar ought to precede the hearing of the application before me, particularly because the applicant has not filed any affidavit to facilitate consideration of his financial means. He was merely content to submit orally before me that he has been made poor by TSC.*

***Being of that view, I hold that the application before me is incompetent and I order that it be and is hereby struck out. There will be no order as to costs”.***

6. I am of similar view in this matter and I order that the application be and is hereby struck out. No order as to costs.

***Dated and delivered at Nakuru this 14<sup>th</sup> day of April, 2016***

***P. N. WAKI***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**