



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

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

**CIVIL APPLICATION NO. NAI. 50 OF 2015**

**BETWEEN**

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

**AND**

**THE STATE.....RESPONDENT**

**VERSUS**

**THE TEACHERS SERVICE COMMISSION.....INTERESTED PARTY**

*(An application for pauper appeal arising from the judgment of the Industrial Court of Kenya at Nakuru (Ongaya, J.) dated 13<sup>th</sup> June, 2014*

in

***Industrial Cause No. 407 of 2013***

**RULING**

1. The notice of motion dated 9<sup>th</sup> February 2015 and filed on 24<sup>th</sup> February 2015 seeks the following orders:

***"1. That this court certifies this application as urgent and is heard ex parte.***

***2. That this court be pleased to find and declare the proposed appellant's application genuine for the purpose of filing of the intended appeal pursuant to the above provisions of rules and regulations.***

***3. That the matter be heard and dispensed with on a priority basis.***

***4. That this court be further pleased to grant order for filing the intended appeal as it has reasonable possibility of success on the following grounds."***

2. It was predicated on several provisions of the law including **Order 33 Rules 1, 2 &3** of the *Civil*

**Procedure Rules** (CPR), which relates to ‘suits by paupers’; **Order 44 Rule 1** of CPR, which relates to ‘pauper appeals’; and **Section (sic) 115 (1)(2) & (3) of the Kenya Subsidiary Legislation (sic)**. The citing of such hotchpotch of legal provisions is a reflection of the handicap the applicant, who acts in person, finds himself in. At the hearing of the application, I allowed him in the interest of eschewing technicalities, to amend the legal provisions and he deleted the provisions relating to the High Court under the CPR, leaving **Rule 115** of the Court of appeal Rules as the relevant rule for consideration.

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. Essentially the applicant seeks leave of the court 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. As **Bosire JA** stated in the case of **Benson Mbuchu Gichuki v Norwegian Peoples Aid [2012] eKLR:**

***"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. That, the applicant failed to do. Besides, in view of the history of the case, I cannot possibly grant permission to the applicant to file an appeal at public expense. Such permission may only be granted where the applicant, shows on a prima facie basis, that he had a good case and that it is as a result of financial limitation that he is unable to get legal redress, which the appellant has failed to do."***

6. In this matter, the applicant who is a senior teacher has had a long running battle with his employer, the Teachers Service Commission (TSC). He sued the Government through the Attorney General, and the TSC was joined in as an interested party, before the Industrial Court in November 2013 seeking a raft of more than 13 declarations and orders on account of various

violations on his constitutional rights. After hearing the matter, the Industrial Court (**Ongaya J.**) on 13<sup>th</sup> June 2014, dismissed several prayers for being legally time barred but granted several others including an order for payment to the applicant herein, of damages and costs in excess of Ksh. 1.4 million. The TSC thereafter filed a Notice of Appeal to challenge the decision but there was no indication by the applicant that he would challenge the decision. It is after 20 months that he now manifests his intention by filing the motion before me, without seeking extension of time to file and serve a notice of appeal.

7. 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."***

8. 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.
9. 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.

***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**