



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 275 OF 2014(UR 206/2014)

BETWEEN

BENJAMIN BARASA WAFULA.....APPLICANT

AND

MOSES CHETAME SIKANGA & 22 OTHERS....RESPONDENTS

(An application to appeal as a pauper and for stay of execution

arising from the dismissal and the decree of the High Court of

Kenya at Bungoma Land & Environment Case No. 87 of 2012

formerly Civil Suit No. 58 of 2011, read and delivered by Hon.

Judge Ann Amollo on 3rd July 2014 from the open court. Then

taxed by the D.R. Madam D.C. Mutai from Chambers on 24th

September, 2014 pending hearing and determination of Eldoret

Court of Appeal, Civil Appeal No. of 2014).

RULING

1. In this application entitled “**APPLICATION FOR PAUPERISM**” and brought under the Appellate Jurisdiction Act as well as “**Rule 112(1)(a) and (b)** of the Court of Appeal Rules, **Benjamin Barasa Wafula** (the applicant) seeks two prayers. The first prayer is for leave to prosecute his intended appeal as a pauper and that the costs of the appeal, which I suppose relate to the filing fees, the deposit for security of costs and the costs for preparing the record of appeal, be paid at the conclusion of the appeal. The second prayer is for stay of execution of the decree the applicant intends to appeal against.

2. At the hearing of the application, I informed the applicant that, as a single Judge, I have no jurisdiction to hear the prayer for stay of execution. He convinced me to deal with the first prayer alone and that he will file a separate application for stay of execution.

3. Relief from payment of fees and deposit for security of costs in civil appeals, previously provided for

by **Rule 112** is now provided for by **Rule 115** of the Court of Appeals which states as follows:-

“115 (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

(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 given in accordance with sub-rule (1)

4. It is clear from this Rule that for one to succeed in an application to file and prosecute one's appeal as a pauper, one has to satisfy the court that one *“lacks the means to pay the required fees or to deposit the security for costs”* and that one's appeal *“is not without reasonable possibility of success.”*

5. With regard to the first of these requirements, as this Court stated in **Peter Onditi Ogugu v Allpack Industries Ltd & Another, Civil Application No. NAI 147 of 2013**, it is not enough for an applicant to make a dry assertion that he has no means of paying the requisite filing fees or make the requisite security for costs. Whereas the court should bear in mind the provisions of **Article 48** of the Constitution and ensure fees or costs should *“not impede access to justice”*, as was further stated in **Apondi v. Canuald Metal Packaging [2005] 1 EA (CAK)**, the interests of the opposite party should also be born in mind. *“...it would be unjust to the other party who would have to incur substantial costs which might not be recoverable”* to be taken through litigation which is doomed to fail. Rule 115 *“is clearly not intended to be used either for academic or theoretical pursuits or as a license to vex and harass a perceived opponent.”* These observations were made in the case of **Jason Nyabuto Kembero v. Siraj Sheikh Musdat, Civil Application No. NAI 152 of 2012**

6. In this application, other than alleging that having lost his job with Pan African Paper Mills (EA) Ltd. in 2003 he has no means of raising the filing fees and deposit for security of costs, the applicant has not placed before court anything to demonstrate that he is incapable of engaging in any other economic activity. He is not physically incapacitated.

7. The second requirement under Rule 115, as stated, is a demonstration by the applicant that he has an arguable appeal. In this application, the applicant has not exhibited in his application the pleadings in the lower court and/or the judgment he intends to appeal against. He only told me in his oral submissions that the respondents in the intended appeal claim, without any sale agreements or other documentation, that they bought portions of **Title No. Ndirisi/Muchi/2366** from his late father that is not enough to show me that he has an arguable appeal.

8. For these reason I find that the applicant has failed to satisfy me on the twin criteria in Rule 115 of the Court of Appeal Rule, that is that, although he has an arguable appeal, he lacks means of filing and

prosecuting it. In the circumstances, I find no merit in this application and I accordingly dismiss it with no order as to costs, the application having been made ex-parte.

DATED and delivered at Eldoret this 23rd day of June, 2015

D.K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR