



IN THE COURT OF APPEAL

AT KISUMU

(CORAM:MUSINGA, JA.)

CIVIL APPLICATION NO. 40 OF 2012

BETWEEN

FRANCIS EGOSANGWA KAGULI.....APPELLANT/APPLICANT

VERSUS

BARUSI KAGULI RESPONDENT

(Being an application for leave to appeal as a pauper)

in

H.C.C. A. No. 80 of 2008)

RULING

By an application dated 18th October, 2012, the applicant sought the following orders:

"1. That leave be hereby granted to the appellant/applicant to sue in formal pauperis in terms of the annexed statement and affidavit.

2. That the applicant/appellant (sic) proposed record of appeal be deemed as duly filed upon granting leave to sue as a pauper."

The application was brought under Order LI rule 1 and XXXIII rules 1, 2 and 8 of the Civil Procedure Rules, 2010.

When the application first came up for hearing on 23rd October, 2013, Otieno, JA, rightly pointed out that under rule 115 (2) of the Court of Appeal Rules, the Registrar is required to be heard on such an application, which ought to have been brought under rule 115 (1) of this Court's Rules. He therefore directed that the application be placed before the Deputy Registrar to state his position on the same.

The record shows that on the same day the applicant appeared before Mr. H. Adika, Deputy Registrar, who heard the applicant and perused the application. He was satisfied that the applicant, being a blind man with no means of survival, genuinely deserved to benefit from the

provisions of **rule 115 (1)** of this **Court's Rules**. The rules 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."

When the applicant appeared before this Court for the hearing of the application, he told the Court that the respondent's advocates, **M/S Musiega & Company**, had been served with a hearing notice but they had not attended Court. The respondent had however filed a replying affidavit on 17th October, 2013. The respondent stated, inter alia, that the applicant is not a pauper as he has previously engaged the firm of **D.C. Chitwa & Company Advocates** who represented him at the High Court during the hearing of the first appeal. The respondent further stated that the intended appeal had no chance of success because the judgment that is sought to be challenged was delivered on 21st March, 2012 and the notice of appeal was filed on 4th May, 2012, which was outside the prescribed period of filing such a notice.

Having considered the application, I am satisfied that the applicant, being a poor blind man, lacks the means to pay the required court fees. He is also not able to prepare the record of appeal on his own. The advocate who had acted for him in the High Court matter did so pro bono and he does not seem to be interested in representing the applicant any further. The applicant is also unable to deposit the security for costs that is ordinarily required to be deposited under rule 107 of this Court's Rules.

Consequently, i direct that the appeal be lodged without prior payment of Court fees and security for costs. The record of appeal shall be prepared by the Deputy Registrar of the High Court free of charge.

However, the applicant having filed his notice of appeal out of time and without leave of the Court, must make the appropriate application within twenty one days from the date of delivery of this ruling for court's consideration and determination, one way or the other. Each party shall bear its own costs of this application.

Dated and Delivered at Kisumu this 17th day of January 2014

D.K. MUSINGA

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JUDGE OF APPEAL