



IN THE COURT OF APPEAL AT NAIROBI
(CORAM: P. KIHARA KARIUKI, PCA (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 114 OF 2014 (UR 92/2014)

BETWEEN

PETER MWAURA KAMAU APPLICANT

AND

KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS (KUPPET) 1ST RESPONDENT

SECRETARY GENERAL KUPPET 2ND RESPONDENT

NATIONAL CHAIRMAN OF KUPPET 3RD RESPONDENT

NATIONAL TREASURER OF KUPPET 4TH RESPONDENT

(An application under Rule 115 of the Court of Appeal Rules 2010 for leave to lodge an appeal without prior payment of the fees of Court

in Industrial Cause No. 980 of 2012)

RULING OF THE COURT

(1) This notice of motion was filed on 21st May, 2014 by Mr. Peter Mwaura Kamau (the applicant) under **Rules 47** and **115** of the Court of Appeal Rules, 2010. The prayers sought in the application were among others, that:

(a) The applicant be granted leave to lodge an appeal without paying the court fees and security for costs prior to the filing of the appeal.

(b) The intended appeal once filed be heard on priority basis at any station or sub-station of the Court of Appeal.

(2) The application is supported by grounds stated in the notice of motion and further grounds stated in the applicant's supporting affidavit sworn on 20th May, 2014, and the annexures thereto. The ruling against which the applicant intends to appeal was made by the Industrial Court (Maureen Onyango, J) on the 27th August, 2013, on an application for review made by the respondents. The respondents had applied for review of a ruling given by (Hellen Wasilwa, J) on 21st November, 2012. By that ruling, the learned Judge had ordered the respondents to pay the applicant arrears of salary totaling

Kshs.1,656,400/=. The Judge also held that the applicant was an employee of KUPPET and was entitled to be paid his salary and allowances.

(3) The respondents filed a notice of appeal signifying their intention to appeal against the decision of Hellen Wasilwa, J. They subsequently withdrew the notice of appeal and instead filed an application for review. The application was based on the following, among other grounds:

(a) That there was new evidence that all money owing to the applicant had been paid to the applicant following an Audit Report produced in court on 10th December, 2012 by the Registrar of Trade Unions in Cause No. 1325 of 2011.

(b) That the applicant had inflated the number of members of the Kiambu County Branch.

(c) That there was an error apparent on the face of the record that the applicant became an official through a consent order of 26th January, 2011, while the actual date was 26th January, 2012.

(4) Although this application should have been heard by Wasilwa, J being the Judge who gave the ruling which was to be reviewed, it was not possible for her to do so because at the time the application came for hearing, Wasilwa, J had been transferred to Kisumu and was not longer attached to the Industrial Court in Nairobi. It was for that reason that the application was heard by a different Judge (Maureen Onyango). She clearly had jurisdiction to do so. The Judge also found that there was an error apparent on the face of the record to the effect that the applicant became an official of Kiambu Branch through a consent order filed in court on 26th January, 2011, when in fact the correct date was 26th January, 2012.

(5) The respondent's application for review was allowed and the ruling of Wasilwa, J was set aside. The applicant now wishes to appeal against the decision of Maureen Onyango, J. He says he has good grounds of appeal but lacks the funds to pay the required security for costs and the court fees. Hence his application to this Court to allow him to file an appeal as a pauper. In order to be granted an order to that effect, **Rule 115** of the Rules of this Court, the Court must be 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”.

(6) As for lack of means, the applicant deponed in his supporting affidavit dated the 20th May, 2014:

“(14) That I owe Equity Bank a loan facility which I have defaulted as I am unable to pay for lack of funds and the loan continues to accrue interest.

(15) That I am struggling to put my children through school a fact that has really destabilised their education as the fees are always in arrears and they now face imminent danger of discontinuation from school.

(16) That I am very sickly having been diagnosed with an abdominal disease and I urgently need money to pay for medical costs.

(17) That my niece is also very ill and she requires a lot of medical treatment and she already owes Kenyatta National Hospital an amount exceeding Kshs.120,000/=”.

(7) In the replying affidavit dated 27th July, 2014 sworn by Mr. Akello Misori on behalf of the respondents, he challenges the applicant's claim that he is impecunious. Paragraphs 14 and 15 are worth repeating:

“(14) That the applicant is a man of means running a number of businesses in Kiambu town

and he is also a prominent coffee and dairy farmer and his net worth is approximately Kenya Kshs.10 million and that is why he has not disclosed his current Bank Statements.

(15) That the applicant has all through been able to hire a number of advocates, namely, Nyambena Nyakundi & Company Advocates, Gakoi Maina & Company Advocates, Oduor Henry John Adocates, S S Malonza & Company Advocates and now Mwangi Mwaura & Partners.”

If these averments were false or incorrect or untrue, the applicant should have sought leave of the Court to file a supplementary affidavit to answer these allegations. As it is, no leave was sought and no supplementary affidavit has been filed. So the averments must be taken to be true and to have been admitted. In my judgment, the applicant has failed to show that he lacks the means to pay court fees and security for costs. As for prospects of success of the intended appeal, all I need say at this point is that Maureen Onyango, J had jurisdiction to hear the application for review and that there were grounds for doing so.

(8) I have seen the report filed by Mr. M. K. K. Serem, the Registrar of this Court, in which he says he interviewed the applicant and found him to be destitute and without means. He recommended that the applicant be allowed to file an appeal without paying court fees and security for costs. I cannot accept the Registrar’s report in view of what I have said about his failure to respond to the serious allegations made in the affidavit of Mr. Akello Misori, which amount to concealment of material facts or lack of candour. In the final analysis, the applicant has failed to place before me material which would enable me to exercise my discretion in his favour.

My conclusion is that the applicant is not a pauper.

(9) For the reasons I have given, there is no merit in this application and it is accordingly dismissed but with no order as to costs.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR