



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM KOOME J. A. IN CHAMBERS)

CIVIL APPLICATION NO. 240 OF 2014

BETWEEN

RICHARD KIOSI..... 1st APPLICANT

BENEDICT MULWA..... 2nd APPLICANT

JULIUS MUTUKU..... 3rd APPLICANT

JOSEPH MUTHINI..... 4th APPLICANT

TITUS NDETO..... 5th APPLICANT

CHARLES OTIENO OLOGI..... 6th APPLICANT

COSMAS MULWA MUEMA..... 7th APPLICANT

AND

ALPHARAMA LTD..... RESPONDENT

(Application for leave to file Appeal as a Pauper against the order of the High Court of Kenya at Nairobi (Nduma, J) dated 11th February, 2014

in

Industrial Court No. 1185 of 2012)

RULING

The 7 applicants intend to appeal against an order of the Industrial Court (Mathews Nduma P.J.,) dated the 11th February 2014 in Industrial Court at Nairobi Cause No. 1185 of 2012. They claim they have no resources to file an appeal, and seek leave to do so as

paupers. In that suit the 7 applicants sued the respondent claiming that they were on diverse dates employed as casuals for a considerable period of time, ranging from 6 to 18 months in a construction site to build lagoons. They alleged that they each worked as masons being paid a sum of Ksh 335/= a day except the 2nd applicant who was employed as a carpenter at Ksh 550/= a day. They alleged that their

services were unfairly terminated without due regard to the law and the laid down procedure. Thus they were entitled to terminal dues such as; notice pay, severance, and payment in lieu of leave, overtime, and house allowance.

The applicants claim was dismissed after the trial Judge heard all the parties, and this is what the learned trial Judge posited in conclusion;

"The claimants have failed to establish that they were entitled to any of the reliefs sought in that the evidence before court does not establish that they were continuously in the employment of the respondent for the alleged periods. Section 40 of the Employment Act, governing retrenchment is not applicable in the circumstances of this case...The reason advanced for the termination of the services of the claimants is a valid reason in terms of Section 45 of the Employment Act 2007 and the Wage Order in the construction industry. The claimants were at liberty to seek work again from the respondent as and when it was available in future and/ or seek employment from the sub-contractor who was building the lagoons."

The applicants are aggrieved and state in their respective supporting affidavits that they have no money to file an appeal. They seek for leave to file an appeal forma pauperis without paying any court fees because they are poor people who derived their livelihood from casual labor. Under the provisions of Rule 115 (1)

"If any appeal from the 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".

According to the aforementioned provisions, the onus is on the applicants to satisfy me not only do they lack the resources to file an appeal, but also the intended appeal is arguable as a basis for exercise of my discretion.

As was held by; -Spry Ag. J. (as he then was) in *Ali Suleman Mandevia vs. Rongwe African Co-operative Union Ltd.* (1958) EA 524, a Tanzanian case considering a similar rule, the court is entitled to reject such application where the allegations do not show a cause of action and, even if the applicant had a cause of action but the court was satisfied that he could not recover more than nominal damages, the court might well be justified in refusing permission because it would be unjust to the other party who would have to incur substantial costs which might not be recoverable.

The application was opposed by Mrs. Lugunya learned counsel for the respondent while relying on the replying affidavit sworn on behalf of the respondent by Paul Wango'mbe Kanyi. Counsel for the respondent submitted that the applicants failed to file the pleadings, proceedings and the evidence that was before the trial court to enable the single Judge sitting on the instant application appreciate fully the basis of the judgment the applicants intend to appeal against. Fearing to be prejudiced by this omission on the part of the applicants, the respondent annexed copies of the omitted documents which in their view show the claim by the applicants was a frivolous one. Further on the alleged impecuniosity of the applicants, counsel argued that throughout the proceedings before the High Court, the applicants were represented by two firms of advocates. At no time did they indicate that they were doing so on pro bono basis. Besides the applicants failed to invoke the provisions of the order 33 and 42 of the Civil Procedure Act so that they could be subjected to an inquiry into their pauperism.

Having heard the submissions of both parties, it is quite clear and it was also appreciated by the Judge of

the Industrial Court that the applicants are persons of meager means. Although the suit was dismissed, the Judge found it was brought in good faith thus the applicants were not condemned to pay the costs. It is for this reason; I did not deem it necessary to refer the matter to the Deputy Registrar to conduct an inquiry over their pauperism.

The next aspect for the applicants to fulfill is that the intended appeal has reasonable possibility of success. Without determining the merit of the intended appeal, the record of proceedings shows that the applicants did not produce cogent evidence to support their claim that they were in continuous employment. Their allegations were displaced by the daily records that were produced by the respondent to show that they were paid daily rates as casual workers. They were not able to prove to the required standards that they were engaged on full time basis. The evidence showed that they were hired for the work of constructing lagoons which was not the respondent's core business but work of a sub-contractor. If the documents to show the applicants were in continuous employment were not available on record, I, prima facie, find no basis for holding that the applicant's intended appeal has merit.

Having come to that conclusion, even though the applicants cannot afford the court fees, they have not satisfied the second condition. In the result I decline to grant the applicants the relief sought and dismiss the Notice of Motion dated 9th September 2014. For the sake of clarity, the applicants are not precluded from appealing if they can obtain the resources for doing so. For the same reasons that the applicants were not ordered to pay costs in the High Court, I am not inclined to condemn them to pay the costs of this application.

Dated and delivered at Nairobi this 14th day of November, 2014.

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR