



IN THE COURT OF APPEAL AT NAIROBI

CORAM: M'INOTI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 152 OF 2012 (UR 113/2012)

BETWEEN

JASON NYABUTO KEMBERO APPLICANT AND

SIRAJ SHEIKH MUSDAF RESPONDENT

(Application for relief from fees and security in an intended appeal from the ruling and order of the High Court at Nairobi (Mwera, J) dated 6th June, 2011

in

HC MISC CA NO. 163 OF 2011)

RULING

The applicant, *JASON NYABUTO KEMBERO*, has applied under *Rule 115 of the Court of Appeal rules* for relief from fees and security to enable him appeal the ruling and order of the High Court dated 6th June, 2011, in Miscellaneous Civil Application No. 163 of 2011. By the order sought to be appealed, Mwera, J [*as he then was*] dismissed the applicant's application for committal of the respondent to jail for alleged contempt of court.

The background to this application is a tenancy relationship, between the applicant and the respondent, gone sour. Sometime in 2010 the applicant filed Business Premises Rent Tribunal Case No. 750 of 2010 against the

respondent and on 16th February, 2011, obtained an order from the tribunal that read:

"The landlord (respondent) is ordered to return the tenant's goods immediately to enable him to vacate the premises."

Subsequently, a member of the tribunal, Mr S. P. Oyuga visited the premises, the subject of the case, and discovered that the premises were in fact residential rather than business premises, therefore forcing the tribunal to dismiss the case for want of jurisdiction on 22nd March, 2011.

The dismissal notwithstanding, the applicant on 1st April, 2011 filed the Miscellaneous Civil Application No 163 of 2011 seeking committal of the respondent to jail for contempt of court for failure to return his goods. Mwera J, [*as he then was*], found the application misconceived and dismissed the same with costs.

Undaunted, the applicant filed High Court Miscellaneous Civil Application No. 498 of 2011, seeking leave to appeal as a pauper against the ruling and order of Mwera, J. On 30th November, 2011, Rawal

J, [as she then was], granted the applicant leave as prayed. By a further Miscellaneous Application (No. 19 of

2012), the applicant, on 8th May 2012, obtained leave from Onyancha, J to file his appeal within 30 days. On 18th May, 2012, the applicant filed a notice of appeal in this court and followed it up with the present application seeking relief from fees and security in respect of his intended appeal.

The application is supported by a short affidavit in which the respondent depones that he has no means of income and therefore he cannot afford to pay the required court filing fees. To the affidavit is attached a “*To Whom it May Concern*” letter from the Assistant Chief, Laini Saba Sub-Location, Kibera Division stating that the applicant “*lives below the poverty line*” and is not in formal employment. He was said to have school-going children and other dependants to take care of. The applicant was also interviewed by the Registrar of this Court on 15th July, 2013, pursuant to *rule 115(2)*, and the Registrar submitted a report indicating that the applicant was unemployed and eked out his living from small scale peasant farming.

On 13th June, 2013, and with the leave of the Court, the applicant filed a further affidavit in which he sought to show that the orders issued by the tribunal on 16th February, 2011, were still in force. He annexed to the further affidavit an order made on 2nd December, 2010, by the Chairman of the Tribunal for maintenance of the status quo.

When the applicant appeared before me on 26th September, 2013, he adopted the contents of his application and the supporting affidavits and prayed for relief from fees and security so as to file his intended appeal.

The onus is on the applicant to satisfy the Court on the requirements of *rule 115* as the basis for the exercise of discretion in his favour. In *APONDI V CANUALD METAL PACKAGING, (2005) 1 EA 12*, Waki, JA, while applying the former *rule 112 of the rules of this Court*, which is similar to the current *rule*

115, stated that for an application to appeal as a pauper to succeed, the applicant must satisfy the Court that he lacks the means to pay the required fees or deposit the security for costs and that the appeal is not without reasonable possibility of success. The learned Judge further stated that where the applicant’s allegations do not disclose a cause of action, or where if they do, the court is nevertheless satisfied that the appellant can recover only nominal damages, the court will be justified in refusing leave because it would be unjust to the respondent who would have to incur substantial costs which might not be recoverable. In that case the learned judge dismissed the application because the applicant had not shown that he had a cause of action that was likely to succeed.

See also *MANDEVIA V RONGWE AFRICAN CO-OPERATIVE UNION LTD, (1958)EA 524*).

I am prepared to hold that the applicant lacks the means to pay the required fees or to deposit the security for costs in the intended appeal. However, I am not satisfied, as required by *rule 115(1)*, that the intended appeal has reasonable possibility of success. The applicant does not dispute that his suit before the Business Premises Rent Tribunal was dismissed on 22nd March, 2011, and that the premises, the subject of the dispute were found to be residential rather than business premises. If the premises were residential, then clearly the tribunal had no jurisdiction to entertain the suit, let alone to issue the orders that the applicant seeks to enforce by committal to jail of the respondent. Once the suit was dismissed for want of jurisdiction, the purported orders could not have survived to be enforced by the applicant.

In the further affidavit, the applicant has attempted to show that the order of 16th February, 2011, is still valid and in force. However, the order of the chairman of the tribunal that he has annexed does not support his assertions.

The order was made on 3rd December, 2010, before the order of 16th February, 2011, that he seeks to enforce and the dismissal of the suit on 22nd March, 2011. That order of 3rd December, 2010, does not

affect the latter two orders.

As much as possible, this Court will accommodate an applicant who has a reasonable claim and a genuine grievance, but is otherwise handicapped by lack of means, to ventilate his grievance. That is what access to justice guaranteed by the Constitution is all about. However, *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. The Court has to balance the a host of competing interests, namely the genuine grievance of a financially handicapped applicant, the costs and expense likely to be incurred by the respondent in defending the appeal, the chances of the respondent recovering such costs from the applicant, the available judicial time and resources and the legitimate demands and expectations of other litigants to judicial time.

Upon being satisfied that the intended appeal has no reasonable possibility of success, I decline to grant leave to the applicant to appeal as a pauper and dismiss the application dated 5th June, 2012, with no orders on costs.

Dated and delivered at Nairobi this 4th day of October, 2013.

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

DEPUTY REGISTRAR

K. M'INOTI

JUDGE OF APPEAL