



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: O’KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.)**

**CIVIL APPLICATION NO. NAI. 233 OF 2010 (UR 167/2010)**

**BETWEEN**

**BENSON MBUCHU GICHUKI ..... APPLICANT**

**AND**

**NORWEGIAN PEOPLES AID ..... RESPONDENT**

*(Application to appeal as a pauper in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Sitati, J) dated the 17<sup>th</sup> September, 2010*

*in*

***H.C. Misc. Appln. No. 8 of 2010)***

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**RULING ON REFERENCE TO COURT**

This is a reference to the full Court from the ruling of a single member of the Court in which the learned Judge (Bosire, J.A.) declined to grant permission to the applicant to lodge an appeal as a pauper.

This matter has a long history but we shall give only a brief history of the dispute. The order against which an appeal is intended was made on 17<sup>th</sup> September, 2010 by Sitati, J. In that decision, the learned Judge declined to review her earlier ruling given on 9<sup>th</sup> June, 2010. In that ruling the learned Judge declined among other things, to allow the applicant to sue as a pauper, on among other grounds that the applicant’s intended suit was res judicata.

In her ruling of 9<sup>th</sup> June, 2010, Sitati, J rendered herself thus:-

***“The applicant is not a pauper especially so in view of his high and colourful qualifications as an arbitrator of international repute.”***

Being dissatisfied with the decision of Sitati, J. the applicant applied before the single Judge of this Court to be allowed to lodge an appeal as a pauper.

What are the grounds on which one may be allowed to lodge an appeal as a pauper? **Rule 115 (1)** of the Court of Appeal Rules provides:-

***“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 property he may recover in or consequence of the appeal.”***

The learned single Judge of this Court considered the matter before him bearing in mind the foregoing and in his ruling delivered on 14<sup>th</sup> July, 2011 stated inter alia:-

***“In the application before me, I am obliged to look at the applicant’s case to see if the applicant indeed lacks sufficient means to lodge an appeal. The applicant told me that he lives in a slum, that only poor people live in slums. He told me that his appeal is strong and pursuant to the provisions of Article 159 (2) of The Constitution 2010, he deserves an urgent hearing and also the right to urge his appeal notwithstanding his poverty, and that the respondent owes him money for services rendered to them by him as an arbitrator.***

***The applicant has not however, explained why he did not appeal against the ruling of the superior court dated 9<sup>th</sup> June, 2010. If he did those reasons are not apparent on the record before me. Miss Gulenywa, for the respondent, and the applicant himself submitted before me, that the applicant was before this Court some time back in an appeal and was, pursuant to a notice of motion filed on 14<sup>th</sup> April, 2004 allowed to file an appeal as a pauper. That appeal was against a decision made in Nairobi High Court Civil Case No. 16 of 1998 in which the applicant was claiming a sum of Kshs.3,639,761/- against three parties, for services rendered. That claim, I was informed, arose from the same transaction as the matter giving rise to the application before me. He had allegedly provided arbitration services but was either not paid at all or was not fully paid. That claim of Kshs.3,639,761/- was compromised at Kshs.700,000/- which sum was to be paid in two instalments. For some reason, which was not stated to me, the money was not paid, and attempts by the applicant to execute the decision failed. Thereafter an application to review the compromise was unsuccessful and so was the appeal against it. It was thereafter that the applicant turned to the respondent.***

***In view of the foregoing, there are a number of matters the applicant should have, but failed to explain. First, the applicant who described himself, at some stage as an arbitrator of international reputation, should have explained why he is not able to make money to enable him mount an appeal. Secondly, the applicant has not explained why he is litigating piecemeal, i.e. first against third parties and later against the respondents in view of the fact that the respective claim arose from the same transaction. Thirdly, the applicant had not explained why he did not execute the decree relating to Kshs.700,000/- in good time, if indeed his claim was compromised in that sum. Fourthly, the applicant has not explained his delay in taking essential steps to appeal in time against that decision denying him leave to appeal as a pauper.***

***A pauper in legal terms is not necessarily a person who is poor because poverty is relative.***

***A pauper is essentially a person who cannot raise fees to file a suit or to mount an appeal. To bring oneself within that definition an applicant has to fully explain his circumstances and show that, indeed he cannot raise the court fees necessary. That, the applicant failed to do. Besides, in view of the history of the case, I cannot possibly grant permission to the applicant to file an appeal at public expense. Such permission may only be granted where the applicant, shows on a prima facie basis, that he had a good case and that it is as a result of financial limitation that he is unable to get legal redress, which the appellant has failed to do.***

It is the foregoing that has given rise to this reference before us. The matter came up before us on 13<sup>th</sup> December, 2011 when the applicant Benson Mbuchi Gichuki appeared in person, while Mrs. Kashindi appeared for the respondent.

The applicant stated that he had been given pauper status in *Civil Application No. 79 of 2004* and that since then his position or condition has not changed as he continues living in slums. He went on to complain how the respondent denied him his fees and instead paid third parties.

On her part, Mrs. Kashindi opposed the reference submitting that no material was placed before the single Judge to demonstrate that the applicant was a pauper. She went on to submit that the proposed grounds of appeal did not constitute any appeal. It was also urged that any claim had been extinguished by Limitation of Actions Act; as the claim arose in 1997.

We have carefully considered the history of this matter and the submissions made for and against this reference. We remind ourselves that the full Court can only interfere with the exercise of a discretion by a single judge if, and only if, it be shown that in coming to the decision the single judge took into account an irrelevant matter or failed to take into account a relevant matter, or misapprehended the evidence or the law or short of these that the decision under consideration is plainly wrong. The issue raised before us is whether the applicant came within **Rule 115 (1)** of this Court's Rules.

It is to be noted that the applicant had been allowed to file an appeal as a pauper in an earlier application but apparently, in a different matter. The applicant told us that since he was allowed to act as a pauper, his position had never changed. With due respect to the learned single Judge, we think this issue of the applicant having been allowed to appeal as a pauper should have been investigated before declining to grant him permission to lodge an appeal as a pauper.

The above notwithstanding, we note that the learned single Judge heard the application that was before him and decided on it without the input of the Deputy Registrar of this Court as is required by the provision of **rule 115(2)** of this Courts Rules. In our view, the hearing could only proceed after the Deputy Registrar's report was received on the status of the applicant. Perhaps that input of the Deputy Registrar would have included his investigation as regards the position as of now as opposed to the position as obtained when the applicant was granted leave to proceed as a pauper earlier on.

In the circumstances, what commends itself to us is to allow reference but order that the applicant appears before the Deputy Registrar for purposes of the latter investigating his status and preparing a report which should be availed before a single Judge of this Court who would hear the matter **de novo**. We so order. We make no order as to costs.

***Dated and delivered at NAIROBI this 17<sup>th</sup> day of February, 2012.***

***E.O. O'KUBASU***

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***JUDGE OF APPEAL***

***E.M. GITHINJI***

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

*I certify that this*

*is a true copy of the original*

**DEPUTY REGISTRAR**