



**Mbugua & another v Attorney General & 21 others (Petition
3 of 2013) [2013] KESC 10 (KLR) (20 March 2013) (Ruling)**

JOHN MBUGUA & another v ATTORNEY-GENERAL & 16 others [2013] eKLR

Neutral citation: [2013] KESC 10 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 3 OF 2013

LUCY NJORA, DR

MARCH 20, 2013

**IN THE MATTER OF ARTICLE 140,(1) OF THE SUPREME COURT
PRESIDENTIAL ELECTION PETITION RULES, 2013 RULE 6**

**IN THE MATTER OF ARTICLE 1, 22, 23, 83, 85, 86, AND 99
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF ELECTIONS ACT, 2012

ARTICLE 24, AND 32, 78

IN THE MATTER OF DISABILITY ACT, 2003

AND

CONSUMER PROTECTION ACT, 2012

AND

IN THE MATTER OF PREVENTION OF INTERNALLY DISPLACED PERSONS ACT, 2012

**IN THE MATTER OF CONTRAVENTIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS
ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION BILL OF RIGHTS ARTICLES
22, 27, 28, 29, 32, 33, 34, 35, 37, 38, 42, 47, 48, 54, 70 AND OTHER ENABLING LAWS**

BETWEEN

JOHN MBUGUA 1ST PETITIONER

STEPEN OMODIA 2ND PETITIONER

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF JUSTICE 2ND RESPONDENT



IEBC	3 RD RESPONDENT
ISAACK HASSAN	4 TH RESPONDENT
REGISTRAR POLITICAL PARTIES	5 TH RESPONDENT
UHURU KENYATTA	6 TH RESPONDENT
WILLIAM RUTO - DEPUTY PRESIDENT	7 TH RESPONDENT
RAILA ODINGA	8 TH RESPONDENT
KALONZO MUSYOKA	9 TH RESPONDENT
MUSALIA MUDAVIDI	10 TH RESPONDENT
JEREMIA KIONI	11 TH RESPONDENT
PETER KENNETH	12 TH RESPONDENT
MR. ONSUMBA	13 TH RESPONDENT
MARTHA KARUA	14 TH RESPONDENT
MR. LOTODO	15 TH RESPONDENT
MR. DIDA	16 TH RESPONDENT
PAUL MUTE	17 TH RESPONDENT
SHEM OCHUODHO	18 TH RESPONDENT
INSPECTOR GENERAL OF POLICE	19 TH RESPONDENT
TRUTH JUSTICE AND RECONCILIATION (TJRC)	20 TH RESPONDENT
MINISTRY OF SPECIAL PROGRAMS	21 ST RESPONDENT
KERAIKO TOBIKO	22 ND RESPONDENT

Matters that the registrar of the Supreme Court should consider in an application for leave to institute a pauper brief.

Reported by Njeri Githang'a Kamau

Civil Practice and Procedure - pauper briefs - application for leave to file petition as a pauper in the Supreme Court – matters which the registrar of the supreme court should consider in such an application – Supreme Court Rules, rule 50.

Brief facts

The applicants in the application sought to be allowed to file the petition challenging the swearing in of the President-elect as paupers.

Issues

Supreme Court Rules

Proceedings in forma pauperis



50. (1) A party may apply in any proceedings in the court to proceed *in forma pauperis*. (2) Where the Registrar of the court is satisfied in any proceedings that a party lacks the means to pay the required fees, the Registrar may by order direct that the matter be lodged

(a) Without prior payment of fees of Court, or on payment of any specified amount less than the required fees; and
(b) On condition that the applicant undertakes to pay the fees or the balance of the fees out of any money or property that may be recovered in or as a consequence of the proceedings.

(3) In considering an application under sub-rule (2), the Registrar shall consider—

(a) whether the person has the capacity to pay the costs;

(b) whether the suit in the court below was instituted *in forma pauperis*.

(c) the affidavit of means deposed by the party;

(d) the objective merit of the case; and

(e) any practice directions made by the Chief Justice.

(4) No fee shall be payable on the lodging of an application under sub-rule (1).

(5) Any expenses arising from waiver of fees under this Rule shall be charged on the Judiciary Fund.

Held

1. The threshold of proving that an applicant deserved the leave of the court to be pronounced as one capable of filing *in forma pauperis* was extremely high.
2. The prayers sought called for the exercise of the court's discretion which was in terms unfettered. But as in all cases where the court had to exercise its discretion, there must be some reasonable basis in fact or in law to warrant the orders made. The court's discretion had to be exercised judiciously at all times under any given circumstances.
3. The applicants had failed to;
 - a. provide the court with sufficient evidence to persuade the court to find in their favour.
 - b. meet the threshold of proving and providing full disclosure
 - c. provide an inventory of their assets and liabilities by merely stating that they have none.
4. The onus in pauper briefs lay squarely on the applicant to candidly and in extreme openness reveal all about his status to the court. Failure to provide disclosure in its strict sense would knock out the matter and would render a matter as uncreditworthy.
5. The court must be satisfied on the application of an applicant that he lacked the means to pay the required fees or to deposit the security for costs and that the matter is not without reasonable possibility of success. *Court of Appeal Civil Application number 228 of 2004*
6. A court was entitled to reject such an application where the court was satisfied that the applicant 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. *Ali Suleman Mandevias Rongwe African Co-operative Union Ltd. (1958) EA 524,*

Application dismissed.

Citations

Cases

Kenya

Aluochier v Independent Electoral and Boundaries Commission (IEBC) & 19 others Petition 2 of 2013; [2013] KESC 13 (KLR) - (Explained)

Regional Court

Ali Suleman Mandevias Rongwe African Co-operative Union Ltd [1958] EA 524 - (Explained)

Statutes



None referred to
Advocates
None mentioned

RULING

1. The application before me is the one dated March 16, 2013. The applicants in this application state that they are without means; they sought orders to be allowed to file the petition challenging the swearing in of the President-elect.
2. The prayers sought herein call for the exercise of the courts discretion which is in terms unfettered. But as in all cases where the court has to exercise its discretion, there must be some reasonable basis in fact or in law to warrant the orders made. The courts discretion has to be exercised judiciously at all times under any given circumstances.
3. The threshold of proving that an applicant deserves the leave of the court to be pronounced as one capable of filing *in forma* paupers is extremely high. The court has seen a lot of paper work, volumes of paperwork that has mentioned that the applicants are internally displaced persons. I have also seen a court order from the High Court granting leave to the applicants to file matters in the High Court in forma paupers status.
4. The court has looked at the applicants' affidavit as well as the voluminous bundle of exhibits that the applicants have presented to this court in support of their application. The court, having so critically applied its mind to this matter, finds as follows:
 1. That the applicants have failed to provide this court with sufficient evidence to persuade this court to find in their favour.
 2. The applicants failed to meet the threshold of proving and providing full disclosure. The applicants failed to provide an inventory of their assets and liabilities by merely stating that they have none.
 3. The applicants stated that they rely on well wishers for their daily upkeep. To what extent, they did not show the court. To whom they depended on was also not disclosed. The duty falls squarely on the applicants to provide all pertinent and material information to the court.
 4. The onus in briefs such as this, is as held by this court in *Isaack Aluochier v IEBC & 19 others* lies squarely on the applicant to candidly and in extreme openness reveal all about his status to the court. Failure to provide disclosure in its strict sense would knock out the matter. It would and does render a matter as uncreditworthy.

The court is fortified in its arriving at this decision by the following authorities –

- a) In the Court of Appeal Civil Application Number 228 of 2004, the Court of Appeal held that.....

“the court must be satisfied on the application of an applicant that he lacks the means to pay the required fees or to deposit the security for costs and that the matter is not without reasonable possibility of success”



- b) In the case of *Ali Suleman Mandevia v Rungwe African Co-operative Union Ltd* [1958] EA 524, it was held that

“a court was entitled to reject such an application where...the court was satisfied that the applicant 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.”

5. Reasons wherefore this court is not satisfied that the applicants have demonstrated that they are worthy of this court exercising its discretion in their favour.
6. In the result, I decline to grant the applicants the relief sought. The upshot therefore is that the applicants' application dated the March 16, 2013 does fail in its entirety and is hereby dismissed. I make no orders as to costs.
7. For the purposes of clarity and for the avoidance of doubt, this order does not preclude the applicants from appealing if they can obtain resources for doing so.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2013.

In the presence of:

1st Applicant

2nd Applicant

Court clerk, Ismael.

HON. LUCY NJORA

SUPREME COURT OF KENYA

