

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO 28 OF 2014

BETWEEN

MULINDWA GEORGE WILLIAM:.....:APPLICANT

AND

KISUBIKA JOSEPH:.....: RESPONDENT

RULING

The application before me was lodged in this Court on the 23rd of March, 2015 by the applicant, Mulindwa George William. He states in the application and supporting affidavit that he has no job or a reliable source of income and he prays for leave to appeal as a pauper. He based his application on Rule 109 of the Supreme Court Rules which provides that:

“If in any appeal from the Court of Appeal in any civil case *the court is satisfied on the application of an appellant that he or she lacks the means to pay the required fees or to deposit the security for costs and that the appeal has a reasonable possibility of success, the court may, by order, direct that the appeal may be lodged---*

- (a) Without prior payment of fees or on payment of a specific amount less than the required fees; or***
- (b) Without security for costs being lodged...”*** (underlining is for emphasis)

The registrar of this court did not have any objections to the applicant’s application. He was even advised and he duly amended the original application which he had lodged on the 23rd October, 2013.

The application proceeded ex parte after being satisfied that the Respondent was effectively served with the hearing notice. This was confirmed by the affidavit of service filed on record. My attention was also drawn by the court clerk to a letter dated 17th April, 2015 addressed to the Registrar of this Court by Mr. Mutaawe, learned counsel for the respondent informing court that the respondent had instructed him to inform court that since 1991, he has been in various courts defending himself against the same applicant over the same case again and again. That his age, health and financial standing do not allow him to come to court or to instruct advocates any more. That the respondent prays to be executed and the court handles the matter in his absence and that he will abide by whatever decision the Court will make.

The case has long checkered history. It began in 1991 in the High Court, when the applicant instituted HCCS No. 689 of 1991 against the respondent. Justice Berko (R.I.P) heard that suit inter parties and dismissed it with costs on the 20th June 1995. The applicant sought to appeal to

the Supreme Court, but Justice Odoki dismissed the appeal because it was out of time. He then applied for a review in the High Court but Justice Mukanza (R.I.P) dismissed the application.

In 2004, he filed a fresh suit HCCS NO. 827 OF 2004, in the High Court on the same facts. Counsel for the respondent applied for security for costs and the Registrar of the High Court Her Worship Anglin, as she then was, granted the application and ordered the applicant to deposit shs. 2.5 million as security for costs. He refused to deposit that money. Consequently the suit was dismissed. Then the applicant applied to the Registrar to review her decision, but the Registrar declined saying she had no jurisdiction. He then complained to the Principal Judge, Justice Bamwine. The Principal Judge heard him but upheld the decision by the Registrar.

The applicant was dissatisfied and sought to the Court of Appeal out of time. As a result, he filed Civil Application No. 010 of 2009 for extension of time, but the Registrar Court of Appeal, Asaph Ntengye, as he then was, dismissed the application on the 2nd June 2009, for failure to furnish sufficient reasons as the law requires. The applicant made a reference to a single judge against the learned Registrar's decision. Justice Kavuma, as he then was, upheld the Registrar's decision and dismissed the reference on the 18th April, 2013. He appealed to a full bench against the decision and the full bench upheld the decision of the single Justice. Their Lordships concluded as follows, in their Ruling:

“We are alive to the fact the applicant being a lay man, may be was not aware of Rule 4 of the Judicature (Court of Appeal) Rules which provides for computation of time.

However, bearing in mind the checkered background of this case as recorded in this Ruling, particularly the fact that the applicant has refused to deposit security for costs ordered by Court and there is no plausible explanation, the chances of him succeeding on appeal even if we were to grant the reference is very limited to say the least.”

On the 22nd July, 2013, the applicant filed Supreme Court Civil Appeal No. 67 of 2013 in this Court against the decision of the Court of Appeal. Arising out of that appeal, he filed the instant application on the 23rd October, 2014 which he amended on the 9th November, 2014 and finally on the 23rd March 2015, respectively, but repeating the same thing.

I have carefully perused through all documents on the Court record. Let me start by stating that the prayer sought herein is not a simple one. It calls for the exercise of the court's 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 order made. The court's discretion has to be exercised judiciously at all times under any given circumstances.

According to decided cases, not any person may apply for leave to prosecute or defend an appeal in *forma pauperis*; only poor persons. The rationale is that poverty should not be a bar to justice. It should not be allowed to deprive indigent persons with just causes or defences the opportunity of having them adjudicated. But given the constitutional right to equality and right of all persons

to a fair trial, the courts seek to strike a fair balance between measures set to accommodate poor litigants and the equally important rights of opposing parties to a just and fair adjudication of their cases. (see: **In the Matter between Alex Mabuka and Hannelie Duvenhage and Another, case No. SA 22/2008, Supreme Court of Namibia**).

Blacks Law Dictionary at page 1243 of the ninth edition defines a pauper as:

“A very poor person, esp. one who receives aid from charity or public funds;”

Thus onus 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 lead to dismissal of the application.

The threshold for proving that an applicant deserves the leave of the Court to be pronounced as one capable of filing in *forma pauperis* is extremely high. In **Alex Mabuku** case cited above, the Supreme Court stated that:

“Given these measures and the imposing or potentially prejudicial impact it may have on the court’s resources, on counsel and on other litigants, relief under pauper provisions is extended only within a narrow scope: to poor persons (as defined) whose causes or defences entertain a reasonable prospects of success.”

Here in our Supreme Court, the test was succinctly enunciated by the learned Justice L.E.M Kikonyogo, JSC (as she then was), in the case of **Milly Masembe v Sugar Corporation (U) Ltd & Anor, Civil Application No. 22 of 1999 (SC)** as follows:

“ For the application to succeed, the applicant must establish that:

- 1. He or she lacks the means to pay the required fees and to deposit security for costs into court; and*
- 2. That the above appeal is not without reasonable possibility of success.”*

Applying the above principles to the instant application, below are my findings and conclusions.

With regard to the first requirement, I have read the applicant’s affidavit as well as its attachments that the applicant has presented to this Court in support of his application. My finding is that, apart from merely stating that he has no job or reliable source of income, the applicant has not made any effort to substantiate his statement by making a full disclosure of his financial position. He may well have no job or business, but that does not in itself mean that he is a pauper going by the above definition. He could have assets such as real estate or vehicles.

Further, and from what I observed in Court at the hearing of the application, he appeared a well nourished decent looking old gentleman, who was well dressed in an expensive looking jacket, tie and trousers. He also wore a neat well polished pair of shoes. He even said in a jocular manner while presenting his application that he owns a car, although he had not driven it to

court. He also informed court that he is looked after by his children and that some carry on businesses while others work in various institutions.

In summary, I was not presented with any independent evidence that the applicant is a very poor person who lives on charity and cannot afford court fees of shs. 100,000 plus security for costs of shs. 400,000 to prosecute his appeal before this Court. He has, accordingly, in my view, not brought himself within the definition of a poor person.

This case is clearly distinguishable from the case of Milly Masembe v Sugar Corporation (U) Ltd & Anor. In that case Milly Masembe was injured when the motor vehicle she was travelling in got involved in a road accident with a tractor belonging to Sugar Corporation of Uganda Ltd on Jinja Road. Evidence was adduced that she had been hospitalized for over two months as a result of the accident; she was a widow, a mother, unemployed and had lost money and income which was coming from the business she was running. She was actually assisted by the Legal Aid Project of the Law Society at the High Court. On the basis of that evidence, the court believed her when she stated that she had no means of paying fees and security for costs. The court also found that she had an arguable case and granted her application.

In the **Alex Mabuku** case, the application was struck out because the applicant had failed to provide sufficient evidence, the same decision was taken by the Supreme Court of Kenya in a similar application in petition **No. 3 of 2013, in the Matter of Article 140(1) of the Supreme Court Presidential Election Petition Rules, 2013** for the same reason.

As for the second requirement, I would not wish to preempt the applicant's chances of appealing to this Court by prejudicing his appeal. However upon careful perusal of the record of proceedings filed in this Court and the history of the case as I have clearly summarised above, I am of the considered view that the applicant is simply seeking to use this pauper proceedings as a means to avoid his obligation to deposit security for costs, an act which this Court cannot condone. Most importantly, I believe he will have an uphill task of persuading this Court that Article 126 of the Constitution has done away with the Rule of Procedure. In other words, the possibility of success of his appeal is slim, according to my honest assessment of his case.

For the reasons stated herein, therefore, I am of the view that the applicant has failed to establish any basis upon which the court, in exercise of its discretion under Rule 109, may allow him to prosecute his appeal in *forma pauperis*.

I accordingly decline to grant the prayer sought. The application is hereby dismissed. I make no order as to costs.

For the purpose of clarity and for avoidance of doubt, this order does not preclude the applicant from pursuing his appeal if he insists provided that he can obtain resources for so doing.

Dated and delivered at Kampala this 23rd day of April, 2015

In the presence of:

The applicant

Court clerk, Mugoya Henry

HON. M.S. ARACH-AMOKO

JUSTICE OF THE SUPREME COURT.