



**RM & another (Suing through parents and next friend NCM) v Kenya Motorsport Federation Limited (Judicial Review Miscellaneous Application E143 of 2021) [2023] KEHC 258 (KLR) (Judicial Review) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E143 OF 2021  
AK NDUNG'U, J  
JANUARY 19, 2023**

**BETWEEN**

**RM ..... 1<sup>ST</sup> APPLICANT**

**JM ..... 2<sup>ND</sup> APPLICANT**

**SUING THROUGH PARENTS AND NEXT FRIEND NCM**

**AND**

**KENYA MOTORSPORT FEDERATION LIMITED ..... RESPONDENT**

**RULING**

1. The application before this court is the Applicants' Notice of Motion dated August 3, 2022. The application seeks the following prayers;
  - 1) Spent.
  - 2) Spent
  - 3) This Honourable Court grants leave to the Applicant to appeal to the Court of Appeal Nairobi against the whole of the Ruling/Order dated 21<sup>st</sup> of July 2022 in this matter.
  - 4) Upon hearing and determination of the Application herein, this Honourable Court extend time for filing a Notice of Appeal.
  - 5) That the Notice of Appeal filed with this application be deemed as properly filed upon grant of the leave.
  - 6) Costs of the Application be provided for.



2. The application is supported by a Supporting Affidavit sworn by Mercy Waliaula, an Advocate of the High of Kenya, on August 3, 2022.
3. The Applicants' case is that being aggrieved by the Court's Ruling of July 21, 2022 they seek to appeal the said decision to the Court of Appeal and further that pursuant to Rule 11 (3) of the [Advocates Remuneration Order](#), appealing of the said decision can only be done with the leave of this Honourable Court.
4. The Applicants argue that they seek further interpretation of Schedule 6A (1)(j)(ii) of the [Advocates Remuneration Order](#) from the Court of Appeal as in its Ruling this Honourable Court set aside the Taxing Master's Ruling as she failed to employ some degree of specificity on the complexity of the matter.
5. The Respondent in response filed Grounds of Opposition dated August 17, 2022. The grounds have been raised in the following fashion;
  - 1) The Application is fatally defective and ought to be dismissed in limine as it is not filed in compliance with Rule 17 (1) of the [High Court \(Organisation and Administration\) \(General\) Rules, 2016](#) having been filed without leave of Court during the High Court (the Court) recess.
  - 2) The Application is supported by an affidavit (the Supporting Affidavit) of an advocate who is not the Applicant, and who has deposed to contested matters of fact contrary to the well-established principle of law prohibiting advocates from swearing affidavits on behalf of their clients in contested matters.
  - 3) The Applicant has neither attached to the Supporting Affidavit the notice of appeal sought to be filed out of time nor the impugned Ruling and Order of the Court sought to be appealed against.
  - 4) The Applicant has not met the threshold for this Honourable Court to exercise its discretion to grant the Applicant leave to appeal and to extend time for filing a notice of appeal out of time.
  - 5) The deponent of the Supporting Affidavit has not given any reason whatsoever for the failure by the Applicant to seek leave of the Court to appeal on time.
  - 6) The Applicant has not considered the prejudice that the delay in appealing has occasioned on the Respondents in light of the order directing that the Bill of Costs the subject of the reference be submitted to a different taxing officer for reassessment. The intended appeal is therefore an afterthought meant to delay taxation proceedings at the expense of the Respondents.
  - 7) The Applicant will not suffer any prejudice if the Application is denied as parties still have an avenue of ventilating their issues before a different taxing officer of the Court, the Court having already ordered that the Bill of Costs the subject of the reference be retaxed by a different taxing officer and therefore the Applicant should not waste scarce judicial time and resources by delaying assessment of costs before the proper forum designated by law.
  - 8) The intended appeal and the matter in general does not raise any issue of public importance to warrant the Court's discretion in allowing an appeal out of time



as it relates to assessment of costs which is the realm of the taxing officer of the Court.

- 9) Issues of delay in seeking leave to appeal and filing notices of appeal out of time are not mere procedural issues which can be cured by mere reliance on the provisions of Article 159 (2) (d) of the Constitution as they go to the substance of the dispute between the parties.
  - 10) The Application in its entirety is an afterthought, a non-starter, an abuse of the Court process and a misuse of scarce judicial time and resources.
  - 11) Considering the above, the Application is unmeritorious, vexatious, has been made in bad faith and therefore ought to be dismissed with costs.”
6. I have had due regard to the Notice of Motion and the affidavit in support. I have also put into account the response on record and the learned written submissions by counsel. The issue for determination is: Whether the application before this court is in compliance with the requisite provisions of the law and whether this court should grant the Applicant leave to appeal and also extend time for filing the notice of appeal out of time.
  7. On the 1<sup>st</sup> issue the Applicants in their written submissions dated October 3, 2022 contend that it is provided under Rule 11 (3) of the Advocates Remuneration Order and the decision in Wambugu Kariuki & Associates v Invesco Assurance Company Limited [2018] eKLR that a Party must first seek leave from court where it seeks to challenge a decision of a reference filed against the decision of Taxing Master.
  8. Further that the Ruling on the reference was delivered on July 21, 2022 and the Application herein filed on August 3, 2022 thus within the 14-day period of filing an appeal/ Application. The Applicants also urge that contrary to the Respondent’s assertions the issues raised are facts which are clearly in the court record and therefore cannot be defective as was provided in the case of Regina Waitbira Mwangi Gitau v Boniface Nthenge [2015] eKLR.
  9. It is learned counsel’s submission that the Application herein was filed under a Certificate of Urgency, the said application sought for orders for the matter to be certified urgent. Further that it was the courts view that the matter was indeed urgent and was to be heard on priority basis. The Respondent, it is argued, suffered no prejudice from the Applicant failing to seek for leave to be heard during recess.
  10. On the Applicant’s failure to file a Notice of Appeal, it is contended that the same was intentional and pursuant to the provisions of Rule 11(3) of the Advocates Remuneration Order. It is also urged that a perusal of the e-portal confirms that the Applicant filed a Notice of Appeal on the July 30, 2022 and it is only that counsel mistakenly did not attach a copy herein, however a copy of the Notice of Appeal was indeed filed.
  11. On the second issue learned counsel argues that the nature of the arguability of the intended appeal has been clearly provided under the grounds of the Application. In addition, that the Application herein was brought without undue delay and pursuant to the provisions of Rule 11 (3) of the Remuneration Order and that the time to file the Appeal has indeed lapsed as the Application is yet to be heard and determined. Therefore, if the court is inclined to allow the Application it would indeed be important for the time to file the appeal to be extended.
  12. The Respondent in response in its written submissions urges that the Applicants’ advocate has contrary to the law deponed, through the Supporting Affidavit, on contested matters of fact rather than points of law. Further that this is contrary to the principle of law prohibiting advocates from swearing



- affidavits on behalf of their clients in contentious matters. The Supreme Court case of *Raila Odinga and 16 others v William Ruto and 10 others* [2022] eKLR has been cited in support of this position.
13. Further that Rule 75 (2) of the *Court of Appeal Rules, 2010*, stipulates that a notice of appeal shall be lodged within fourteen days of the date of the decision against which it is desired to appeal. Since the Applicant has not obtained leave to appeal, no notice of appeal has been lodged within the timelines set under Rule 75 (2) of the *Court of Appeal Rules, 2010*.
  14. The Respondent also contends that section 7 of the *Appellate Jurisdiction Act* stipulates that this Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired. The Court of Appeal case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR is cited on conditions to be considered when determining if an extension of time should be granted.
  15. The requirement to seek leave by a person aggrieved by the decision of a judge upon any objection referred to such judge is couched under Rule 11 (3) of the *Advocates Remuneration Order* which states thus;
    - “(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”
  16. The Applicant’s application is one such application seeking leave to file an Appeal against this Honourable Court’s decision of July 1, 2022 setting aside the Taxing Master’s Ruling dated September 27, 2021 and directing that the same be remitted to a Taxing Master other than Hon CA Muchoki for taxation.
  17. It is obvious from the above proviso that for the Applicants to appeal to the Court of Appeal from the decision of the High Court they can only do so with the leave of this Honourable Court. It is clear that the applicant does not have an automatic right of appeal.
  18. The application is however, challenged by the Respondent for having been supported by an affidavit sworn by the Applicants counsel and also having been filed during recess without the leave of the Court. The Respondent argues that counsel ought not to have sworn the Supporting Affidavit as it raises contentious issues.
  19. The Court of Appeal in the case of *Sichuan Huasbi Enterprises Corporation East Africa (EA) Limited v Stauslaus Lumwachi Mateya & another* [2019] eKLR held as follows on the issue of a Supporting Affidavit having been sworn by Counsel;
    - “On the legality of the supporting affidavit on account of it having been sworn by an Advocate, the court agrees with the holding in the case of Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR in which the court cited with approval the case of Kamlesh M A Patni v Najir Ibrahim Ali & 2 Others CA 354/2004 where the court held;
      - “There is no law expressly prohibiting an Advocate from swearing an affidavit on behalf of his client in a client’s cause on matters which he as an Advocate has personal knowledge of whether informed by his client or arising from the proceedings in the cause’



The court has noted that the facts deponed to in the supporting affidavit, arose from the proceedings and most of them form part of the record and the Advocate did not have to disclose the source”.

20. I have had due regard to the supporting affidavit in issue and I note that it does not raise any contentious issues as contended by the Respondent. On the issue of the Applicants having failed to seek leave I note that the Application herein was filed under a Certificate of Urgency, the said application sought for orders for the matter to be certified urgent. It was the courts view that the matter was indeed urgent and was to be heard on priority basis. Furthermore, no prejudice has been shown to be occasioned to the Respondent, the Applicant having failed to seek for leave to be heard during recess.
21. The Respondent also contends that the Applicants have failed to attach their Notice of Appeal but I note from the CTS that on July 30, 2022 a Notice of Appeal was lodged by the firm of Murangasia & Associates Advocates although the same could not be considered as duly filed as the Applicants required the leave of this Court so as to lodge an appeal.
22. The decision whether or not to grant leave to appeal is discretionary and must be exercised fairly and judiciously in the interest of justice and the key consideration that the court should have is whether the adverse party would be prejudiced and whether a just cause has been shown by the applicant to deserve the exercise of the court’s discretion. The Court of Appeal in [Kenya Shell Limited v Kobil Petroleum Limited](#) [2006] eKLR that: -

Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered. Some guidance in that regard was given by this Court in [Machira t/a Machira & Company Advocates v Mwangi & Anor](#) [2002] 2 KLR 391 as follows: -

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”

23. Learned Counsel for the Applicants contends that this Court erred in setting aside the Taxing Master’s Ruling on the ground that on a determination of the complexity of a matter the same must be precise and as such the Applicants seek a further interpretation of Schedule 6A (1) (j)(ii) of the [Advocates Remuneration Order](#).
24. I am not convinced that issue the Applicants before this Court seek to be interpreted by the Court of Appeal are novel issues. The Court of Appeal has in its decision in [University of Nairobi & another v Moses](#) (Civil Appeal 119 of 2020) [2022] KECA 45 (KLR) (4 February 2022) (Judgment) upheld the Court’s reasoning in Nairobi JR Misc Application No 226 of 2016 that where complexity of the proceedings is a relevant factor, the specific elements of the same should be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge where factors of the nature of the responsibility borne by an advocate and novelty of matters are taken into account, its nature is to be clarified; where account is taken of time spent, research done, skill deployed by counsel, the



pertinent details are to be set out in summarized form and taken into account; and lastly, the Taxing Master must first recognize the basic instruction fee payable before venturing into consideration as to whether to reduce or increase the instruction fees.

25. In light of the above I find that this Court is not satisfied that it ought to grant the Orders sought in the instant application. In any case the Applicant will not suffer any prejudice as the parties still have an avenue of ventilating their issues before a different taxing officer. The Applicants' application dated August 3, 2022 is therefore dismissed with no orders as to costs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2023.**

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**A. K. NDUNG'U**

**JUDGE**

