



**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 116 OF 2015**

**BETWEEN**

**KENYA PIPELINE COMPANY LIMITED.....PLAINTIFF**

**AND**

**ALS LIMITED.....DEFENDANT**

**RULING NO. 2**

1. On 2<sup>nd</sup> December 2020, the court allowed the Defendant's Notice of Motion dated 30<sup>th</sup> July 2020 seeking to dismiss the suit for want of prosecution. The Plaintiff has now filed the Notice of Motion dated 11<sup>th</sup> December 2020 seeking leave to appeal against the said ruling and order as it has now evinced its intention to appeal against the decision.

2. The application is supported by the affidavit of the Plaintiff's advocate, William Muthee, sworn on 11<sup>th</sup> December 2020. When the matter came up for hearing, I permitted the Defendant's advocate to oppose the application without filing a replying affidavit or grounds of opposition on the ground that he intended to raise matters of law only.

3. The grounds of the application are summarized on the face of the application and in the deposition. The material part of the deposition states as follows:

*[5] I confirm that I attended Court on 2<sup>nd</sup> December 2020 when Honourable Lady Justice M. Thande delivered the said ruling and orders thereon but did not seek leave of this Honourable (court) to appeal the ruling and orders.*

*[6] The Applicant is obliged to obtain the leave of this Honourable Court to appeal either orally at the time when the order is made in the first instance or within (14) days from the date of such order.*

*[7] This application is made within a reasonable time and it is in the interest of justice that the Applicant is granted leave to appeal the said ruling and orders, and the Notice of Appeal dated 8<sup>th</sup> December 2020 and filed on 11<sup>th</sup> December 2020 and filed on 11<sup>th</sup> December 2020 be deemed as properly filed.*

*[8] It is in the interests of justice for the Court to grant the orders sought in the application.*

4. In response to the application, Counsel for the Defendant submitted that the Plaintiff had not shown or demonstrated that the intended appeal has any realistic prospect of success. In the Defendant's view, the application was essentially unopposed since the Plaintiff neither filed grounds of opposition nor replying affidavit.

5. Since the right to appeal is circumscribed by the requirement for leave under **Order 43 rule 2** of the **Civil Procedure Rules**, leave is not granted as a matter of right. In **Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Application No. 57 of 2006 [2006] eKLR**, the Court of Appeal held 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." This means that an application has to present a factual or legal basis for the grant of such leave.

6. In **Machira T/A Machira & Company Advocates vs. Mwangi & Another [2002] 2 KLR 391**, the Court of Appeal outlined the principles applicable in considering an application for leave to appeal. It stated 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 prospects 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 maybe one which the Court considers should be 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 is clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.*

7. With the above principles in mind, I hold that from the contents of the deposition I have set out above, the Plaintiff has not shown what, if any, are the grounds of appeal that would enable the court assess whether the intended appeal has a realistic prospect of success. In his submissions and in response to the Defendant’s submissions, Counsel for the Plaintiff stated that the court did not exercise its discretion properly as it ought to have considered the nature of the proceedings notwithstanding the matter was not opposed as provided under **Order 50 rule 14** of the **Civil Procedure Rules** which require a party opposing an application either file Grounds of Opposition or a Replying Affidavit or both.

8. Having reflected on the matter, I cannot say that the Plaintiff has no realistic prospect of succeeding on appeal as the points raised by counsel for the Plaintiff are arguable.

9. In the application, the Plaintiff also seeks an order that the Notice of Appeal dated 8<sup>th</sup> August 2020 and filed on 11<sup>th</sup> December 2020 be deemed as properly filed. There is no reason for the court to grant this order as the Plaintiff’s plea is answered by **Rule 75(4)** of the **Court of Appeal Rules** which states that, “*When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.*”

10. I allow the application dated 11<sup>th</sup> December 2020 to the extent that I grant leave to the Plaintiff to appeal against the ruling and order of Thande J., dated 2<sup>nd</sup> December 2020. The Plaintiff shall bear the costs of the application.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of JANUARY 2021.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Muthee instructed by TripleOKLaw LLP Advocates for the Plaintiff.

Mr Waiyaki with instructed by Mboya Wangong’u and Waiyaki Advocates for Defendant.