



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO.631 OF 2016

ROBINSON ONYANGO MALOMBO T/A M. ROBINSON & COMPANY ADVOCATES.....APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF KILIFI.....RESPONDENT

RULING

1. The application before court is the **Chamber Summons** application dated **18th February, 2021** filed by **Robinson Onyango Malombo**, the Applicant herein. It is brought under **Rule 11(3)** of the **Advocates (Remuneration) Order** and seeks the following orders:-

a. Spent;

b. That leave be granted to the applicant to appeal the decision of this Honourable Court (Hon. Lady Justice D. Chepkwony) delivered on 9th February, 2021;

c. That the cost of this Application be provided for.

2. The application is based on the ground that the **Rule 11(3)** of the **Advocates (Remuneration) Order** dictates that before appealing against the decision of the High Court in a taxation matter, leave has to be sought first before filing the intended appeal. In that connection, the Applicant is aggrieved with the decision of this court delivered on **9th February, 2021** and wishes to appeal against the same hence the need to seek leave.

3. The application is supported by the **affidavit of Robinson Onyango Malombo** wherein he reiterates the grounds on its face and with an addition that he has already prepared a Notice of Appeal which cannot be lodged without the leave of this court. According to him, the orders being sought will not, in any way prejudice the Respondent and has sought the court to grant the leave which is the only avenue for him to exercise the right of appeal.

4. On the other hand, the Respondent opposed the application by filing **Grounds of Opposition** dated **19th March, 2021** which in summary are that the application before the court is vexatious and an abuse of the court process hence should be dismissed in limine for among other reasons, there are no reasons that have been adduced upon which the intended appeal will be based; and even if they were adduced they cannot justify the taxing master's deviation from the principle of *stare decisis*; that even the Court of Appeal cannot change those principles it has pronounced itself on hence the intended appeal has no chances of success.

5. Directions were given in presence of counsel for both parties to have the application dispensed with by way of written submissions. The record shows that only the Applicant filed his submissions on **6th April, 2021**. At the time of writing this Ruling, the Respondent's submissions were not on record.

Analysis and Determination

6. To determine the application dated **18th February, 2021**, I have read through the grounds on its face, and **Supporting Affidavit** and **Reply of Affidavit** together with the Applicant's submissions and find the main issue is whether the Applicant should be granted the leave to appeal against the Ruling delivered on **9th February, 2021** as sought.

7. In answering that question I have considered the said application, the grounds in support and opposition of the same and the submission filed by the Applicant on **6th April, 2021**. I have as well considered the persuasive case of **Wambugu Kariuki & Associates –vs- Invesco Assurance Company Limited [2018]eKLR** cited by the Applicant.

8. Relatively, I have also considered the provision of **Rule 11(3)** of the **Advocates Remuneration Order** upon which the instant application is premised and it provides as follows:-

“Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”

9. From the provision above, it follows that there is no right of appeal to the Court of Appeal from a decision of a Judge arising from a reference. Therefore, a party seeking to file an appeal against the decision of a Judge in respect of a decision of a reference filed against the decision of a Taxing Master, that party has to first seek leave of the court. However, that decision to grant or deny the leave is discretionary, and just as in all discretions exercisable by courts, it has to be judicially considered.

10. The Court of Appeal in the case of **Machira T/A Machira & Company Advocates –vs- Mwangi & Anor [2002]2 KLR 391** held that:-

“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 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 clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.”

11. In this case, the Applicant seems to be aggrieved by the decision of the court directing that where a matter has been decided and an award made, then the Taxing Master has to base the instruction fee on the figure awarded as opposed to a case where there is no award made. And in such a case, instruction fees has to be based on the amounts in the pleadings. Although the Applicant has not adduced other grounds for the intended appeal, it cannot be certainly said that the intended appeal is fictitious with no realistic prospects of succeeding. Similarly I see no prejudice that can be served on the Respondent other than inconvenience of defending the intended appeal which can be compensated with costs. In the premises, the Applicant is hereby granted leave to appeal to the Court of Appeal.

12. Consequently, the **Chamber Summon** dated **18th February** is hereby allowed and the costs thereto shall lie in the outcome of the intended appeal.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Mr. Gitonga – Court Assistant