



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 436 OF 2017

BETWEEN

JOHN MUGAMBI T/A

MUGAMBI & COMPANY ADVOCATES.....1ST PLAINTIFF

BEATRICE KARIUKI T/A

BEATRICE KARIUKI & ASSOCIATES..... 2ND PLAINTIFF

AND

SHOWCASE PROPERTIES LIMITED.....DEFENDANT

RULING NO. 5

1. This is Ruling No. 5 in this matter. On 17th March 2021 I dismissed the Defendant's Chamber Summons dated 17th February 2021 seeking, inter alia, an order setting aside the Decree issued on 13th November 2020 ("the Decree"). That application was made under **Order 22 rule 22**, **Order 21 rule 8** and **Order 51 rule 1** of the *Civil Procedure Rules* ("the **Rules**") and **sections 1A, 1B** and **3A** of the *Civil Procedure Act* ("the **Act**"). The Defendant has now filed the Chamber Summons dated 17th March 2021 under **section 11(3)** of the *Advocates Remuneration Order* and **section 3A** of the *Act* seeking leave to appeal.

2. The application is supported by the deposition of the defendant's director, Francis Muhoro Gachanja, sworn on 17th March 2021. In the grounds on the face of the application and in the deposition, the Defendant states that it intends to appeal against the decision in the Court of Appeal and that it requires leave to appeal. It further states that the appeal to the Court of Appeal should be filed within 14 days from the date of the ruling and that the Defendant now, "*seeks leave to be formally granted by this Honourable Court.*"

3. The Plaintiffs oppose the application through the Grounds of Opposition dated 18th March 2021 on several grounds. First, that the application is bad in law, misguided and a waste of judicial time. Second, that the appeal is a matter of right under **section 75** of the *Act* as read with **Order 43 rule 1** of the *Rules* and last, that **Rule 11(3)** of the *Advocates Remuneration Order* is only applicable in instances where there is a ruling on a Reference.

4. The two questions I have to determine are whether the appeal against the ruling and order of 17th February 2021 is a matter of right and if not, whether the court should grant leave to appeal.

5. At this stage I would agree with Counsel for the Plaintiffs that the decision appealed from is not under **Para. 11** of the *Advocates Remuneration Order* as this provision deals with a Reference from the decision from a Deputy Registrar in a taxation which is not the position here. The application subject of the ruling in question was in the course of interlocutory proceedings within a suit hence the provisions of the *Rules* apply. In this case therefore, the proper provision to invoke, as the Plaintiffs submit, is **section 75** of the *Act* as read with **Order 43** of the *Rules*. Although the Defendant has cited the wrong provision, I will deal with the substance of the application.

6. **Order 43 rule 1** of the *Rules* enumerates the Orders, made under the *Rules*, from which an appeal is as of right. Under **rule 2** thereof, the right of appeal is with leave from the Orders not set out in **rule 1**. In the application now subject of the ruling from which leave is sought, the

Defendant invoked **Order 22 rule 22**, **Order 21 rule 8** and **Order 51 rule 1** of the **Rules** and **sections 1A, 1B** and **3A** of the **Act**. All these provisions do not fall within **Order 43 rule 1** of the **Rules** therefore leave is necessary in order for the Defendant to exercise its right of appeal.

7. Turning to the issue whether the court should grant leave to appeal, it is to be noted that since leave is not granted as matter of right, the applicant has to present a factual or legal basis for grant of such leave. 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.” The principles applicable for grant of such leave were summarized by the Court of Appeal in **Machira T/A Machira & Company Advocates vs. Mwangi & Another [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 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.

8. The Defendant’s deposition does not set out any basis upon which this court may exercise discretion in its favour. It does not set out or disclose the intended grounds of appeal upon which this court would exercise its discretion in its favour. The Defendant merely asserts that the court ought to grant leave because leave should be granted yet the appeal from the order is not a matter of right.

9. As the Defendant has failed to provide sufficient material for this court to favour it, leave to appeal is accordingly refused. Consequently, the application dated 17th March 2021 is now dismissed.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiffs.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.