



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 6 OF 2017

WAMBUGU KARIUKI & ASSOCIATES APPLICANT

-VERSUS-

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

RULING

The applicant Wambugu Kariuki and Associates Advocates filed an application under Rule 11(3) of the Advocates (Remuneration) Order seeking orders that he be granted leave to appeal to the Court of Appeal Nyeri against the whole of the Ruling/Order dated 1/3/2018 in this matter. That the Notice of Appeal filed with this application be deemed as property filed upon grant of the leave.

The application is supported by the affidavit of the applicant P. W. Kariuki and various grounds on the face of the application which are as follows:-

a) Under Rule 11(3) Advocates Remuneration Order appealing the Ruling dated 1/3/2018 to the Court of Appeal is not as of right but with leave of this Hon. Court.

b) We seek the leave of this Hon. Court so that the Court of Appeal may further interpret Rules 11(1) & (2) of the Advocates remuneration order because by upholding the Respondents P/OBJECTION dated 5/10/2017 & filed in court on 9/11/2017 therefore striking out the reference dated & filed in court on 26/9/2017 it effectively means:-

(i) The taxing officer could and was judiciously justified to strike out the entire bill of costs without stating the law the Bill offended when in actual fact a Taxing Officer has no jurisdiction at all Judiciary to strike out a Bill before him/her.

(ii) There is no formal legally provided procedure through which a party has to strictly follow under Rule 11(1), neither does the section envisage objection must be indicated to be for some items or all items in a Bill of costs. By virtue of seeking to overturn a Ruling of the Taxing Officer vide Rule 11(1) and the Taxing Officer gives the proceedings & Ruling in question that suffices, minor deviations from the form would not by itself be sufficient to warrant striking out of the objection reference as filed as in the Ruling dated 1/3/2018.

(iii) A party who is aggrieved by any decision of the Taxing Officer whether interlocutory or final and whether it be on the quantum awarded on the Bill as a whole or any items thereof has recourse to the High Court by way of reference under paragraph 11 of the Advocates Remuneration Order.

(iv) In view of the foregoing, the applicant seeks favourable exercise of Judicial discretion in granting leave to appeal since the applicants letter dated and filed in court on 24/7/2017 was an indicated therein grounded on rule 11(1) in seeking the proceedings & Ruling of the Taxing Officer dated 14/7/2017. Indeed the letter clearly indicated the applicant was desirous to file a reference as he did after being supplied with the proceedings & Ruling in satisfying Rule 11(2).

(v) The intended Appeal before the Court of Appeal is intended to achieve substantive justice, this application has been made without any reasonable delay and its in good faith particularly on the legal aspect that a Taxing Officer has no jurisdiction on any legal basis to strike out an entire Bill of costs at all which issue may not be ventilated without leave to appeal.

The application was duly served on the respondent Invesco Assurance Company Ltd. They however did not file papers to oppose the application.

I have considered the application. **Leave to appeal to the Court of Appeal.**

The ruling of this Court dated 1/3/2018 held that the applicant did not comply with Rules 11(1) & (2) of the Advocates (Remuneration) Order. This is because the applicant did not seek reasons for the taxing officer's ruling.

Under **Rule 11(3) of the Advocates Remuneration Order** it is provided

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

The applicant relied on various persuasive decisions of the High Court in urging the Court to allow his application. In **Muriru Mungai & Co. Advocates –v- New KCC Limited HCCC 284/07** where Judge M. K. Koome (as she then was) stated:

“In all matters involving the exercise of the Court’s discretion, it must be exercised judiciously for furtherance of substantive Justice. ----- It is necessary for a party to seek leave of the court file an appeal against the decision of a Judge in respect of a decision of a reference filed against the decision of the Taxing Master ----- consequently a party seeking leave must demonstrate good faith and the application must be done without undue delay.”

Next he relies on the case of **Havelock, Muriuki & Rawal Advocates –v- Tayantilal Sharmashi Dosrani Misc. Cause No. 60/2007** where the Judge allowed an application challenging the decision of the taxing master to strike out the entire bill of costs on the ground one item offended the provisions of Paragraph 69(3) of the Advocates (Remuneration) Order and remitted the bill for taxation by the taxing master.

Counsel also relied on **Jacto Transporters & Tours Agency Ltd & Another –v- Jason Njiru Kithinji & Another C.C. 197/03 H.C Milimani.**

- **Winding up Cause. No. 28/1996.**

I have considered the application **Rule 11(3) of the Advocates (Remuneration) Orders** requires a party to obtain leave from the Judge to appeal against the ruling on the taxation of the bill of costs. The court is called upon to exercise discretion. The discretion of the Court must be exercised fairly and judiciously in the interest of justice. This is more so because a party is at the mercy of the court as what he seeks from the court is not available as of right. One of the considerations a court has 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. In my opinion the other party would not be prejudiced by the exercise of the discretion to grant leave. Any prejudice would be compensated by an award of costs. Such should not bar the court from exercising discretion considering that the party did not oppose the application. The applicant filed the Notice of Appeal and the application with expenditure and without any delays. The ruling was delivered on 1/3/18 and the Notice of Appeal and the application was filed on 8/3/18. I find that since he can only take further steps with the leave of the court, I find that I should grant him leave in the interest of justice.

I did grant leave to the applicant on 25/09/2018 and reserved the reasons for the ruling.

In Conclusion:

The application is allowed as prayed.

- 1) Leave is granted to the applicant to file the appeal.
- 2) The Notice of Appeal be deemed as properly filed.
- 3) The Appeal be filed within fourteen (14) days.
- 4) I make no orders as to costs.

Dated at Kerugoya this 28th day of September 2018.

L. W. GITARI

JUDGE