



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. APPLICATION NO. 184 OF 2014

NJUGUNA MATIRI & CO. ADVOCATES.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. **National Bank of Kenya Limited**, the Respondent in its application dated 11th December 2015 seeks orders that:

1. That leave to appeal against the Ruling of 30th November 2015 be granted.
2. That there be stay of proceedings or taxation in the matter until the intended appeal is heard and determined.

The application is based on the grounds that the law is silent on the application in the Insurance industry? (Banking industry) is involved.

2. In support of the application the head of Security Documentation in the applicants Legal Department one Elisha O. Nyikuli swore an affidavit on the 11th December 2015 where his depositions are that it is the practice in the banking industry that Bank lawyers' legal fees is always paid by the bank customers and that the bank never has to absorb the lawyers fees, and in view of a contrary opinion in this courts ruling dated 30th November 2015, it is the banks desire to appeal to the Court of Appeal, hence the application for leave to file the intended appeal.

3. In his submissions, Mr. Kiburi advocate for the Bank stated that it is not clear whether leave to appeal against the ruling dated 30th November 2015 is necessary or not as the applicable law is silent. Together with the application for leave, he sought an order to stay taxation of costs – between the Respondent Law firm and the Bank scheduled for the 29th March 2016.

4. Mr. Njuguna advocate for the Respondent agreed that part payment of the Advocates fees was paid and urged that for determination of the legal fees payable to the Advocates is necessary. It was his submission that if the bank customer/borrower does not pay, the fees ought to be loaded onto the borrowers loan for payment by the bank to the Advocates after the costs are certified.

It was his submission that the ruling dated 30th November 2015 was a decree, not an order

5. I have considered the application, grounds upon which it is based and arguments by both counsel.

The ruling intended to be appealed from is dated 30th November 2015 and was issued by this court. The court made a determination that in banking transaction in drawing mortgages, charges and all other documents in perfection of the chargees documents, the Bank is the client to the Advocates and that the borrower is not the Advocate's client as there is no privity of contract between the Advocate and the Bank, and that the Advocate's fees ought to be charged to the borrower and loaded onto the borrowers loan, and payable to the Advocates by the Bank.

6. In my considered view, the above ruling is a ruling for all purposes and intent, and is appealable, like any other ruling or order. The only question is whether an appeal is as of right or by leave of court in terms of **Order 43 Rule 1 of Civil Procedure Rules**. The court's ruling dated 30th November 2015 is an order not a decree. It was issued in pursuant to an objection filed by the bank to the taxation of the Advocates–Client Bill of Costs, on grounds that the bank was not a client to the Advocates and therefore the Bill as drawn against the Bank was incompetent.

7. **Order 43 Rule 1 of the Civil Procedure Rules** itemises the orders that are appealable as of right. An order as envisaged under the present application is not among the ones stated in **Order 43 Rule 1 of Civil Procedure Rules**. I have also considered **Order 53** that governs proceedings between Advocates and their clients. I see no relevance there.

In the absence of an express provision as to whether the order sought to be appealed from lies as of right or not, it is save to grant leave to the applicant Bank to appeal therefrom subject to other provision as to limitation of time upon which an appeal may be lodged.

8. On the second limb of the application, the applicant has not persuaded the court why stay of taxation of the Advocates-client Bill of costs ought to be granted. Taxation of costs will determine what fees ought to be paid to the advocates, credit being given to what may have been paid by the time of taxation. To that extent then, the question that the Court of Appeal would determine, (among others) is whether the applicant Bank is a client of the Advocates and if so, whether it is under an obligation to pay the Advocates taxed costs as its client. For purposes of certernity as to the amount owing to the Advocates in legal fees, I find that an order for stay of taxation of the bill of costs slated for the 29th March 2015 not merited. The application dated 11th December 2015 is allowed in terms of Prayer 3, that leave to appeal against the ruling of 30th November 2015 is granted. An order for stay of proceedings and/or taxation is denied.

Costs of the application shall be in the cause.

Dated, signed and delivered in open court this 29th day of January 2016.

JANET MULWA

JUDGE