



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS SUIT NO. 395 OF 2009

PATRICK KIMATHI MUCHENA T/A

ARIMI KIMATHI & CO. ADVOCATES.....APPLICANT

VERSUS

KENYA POST OFFICE SAVINGS BANK.....RESPONDENT

RULING

1. This is an application for leave to lodge an appeal before the Court of Appeal.
2. The application was made in respect to a decision dated 26th February 2010.
3. The applicant had filed Civil Appeal No. 176 of 2011. However, before filing that appeal, the applicant did not seek the leave of the court to file the said appeal.
4. On 23rd March 2015, when the appeal came up for hearing, the Respondent challenged the competence of the appeal on the grounds that it had failed to comply with the provisions of Rule 11 (3) of the Advocates Remuneration Order.
5. According to the applicant, he withdrew the appeal so that he could then seek the leave of the court to bring another appeal.
6. The applicant's position was that his earlier failure to seek leave before filing the appeal was due to an oversight. The applicant regretted the said oversight.
7. As far as the applicant was concerned, the grant of leave to appeal would not cause any significant prejudice to the respondent, considering that the respondent had not yet paid the taxed costs.
8. The taxed costs in issue were in relation to fees which the applicant charged after he had rendered legal services to the respondent.
9. When the advocate and his client failed to reach a consensus on the fees, the advocate (*who is the applicant in this case*), filed his Advocate/Client Bill of Costs.
10. The Taxing Officer taxed the costs in the sum of Kshs. 7,790,672/-.
11. The respondent felt aggrieved with the results of the taxation and therefore filed a Reference. The said reference was determined by Kimaru J. who set aside the costs relating to Instruction Fees, (*of Kshs. 4,500,000/-*) and the *Getting-Up Fees*, (*of Kshs. 1,740,000/-*).
12. The learned Judge assessed the Instruction Fees in the sum of Kshs. 350,655/-, and the *Getting-Up Fees* in the sum of Kshs. 116,885/-.
13. It is the decision of Kimaru J. which prompted the advocate to file an appeal at the Court of Appeal.
14. The applicant considers his failure to obtain leave to appeal as a technicality. Therefore, the applicant invoked the provisions of Article 159 (2) (d) of the Constitution, asking this court to administer justice without undue regard to procedural technicalities.
15. If anything, I was reminded that pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, I

- should take into account the Overriding Objectives which include the Just, Expeditious, Proportionate, Efficient and Affordable resolution of civil disputes.
16. The applicant cited **KAMAMI Vs KENYA ANTI-CORRUPTION COMMISSION & 3 OTHERS, CIVIL APPEAL No. 152 of 2009** as authority for the proposition that under the new rules, the application of the “Oxygen Principle” led to the grant of orders which brought about substantive justice, as opposed to draconian orders, such as the striking out of the case.
17. In this case, the applicant submitted that Justice and Fairness would be attained by granting him leave to appeal.
18. The respondent’s position was the very opposite.
19. First, the respondent said that the applicant had failed to demonstrate his seriousness. He could have done that by filing a Notice of Appeal, said the respondent.
20. Citing **SHAH & PAREKH ADVOCATES Vs APOLLO INSURANCE COMPANY LIMITED Misc. APPLICATION No. 264 of 2003**, the respondent submitted that the application for leave to appeal out of time should be preceded with the filing of a Notice of Appeal. This is what Ojwang J. (*as he then was*) said;

***“If the applicant were to act promptly to give a Notice of Appeal, this would be an indication of a serious intent to contest the judgement of the High Court on the merits, as would also be the case if he had promptly applied to Court of Appeal for enlargement of time for filing an appeal. The applicant did not pursue any of those channels to facilitate the intended appeal, but instead filed before this Court the Notice of Motion of 14th April 2005, contending that it was for the free choice of the applicant whether to place its litigious intentions early before the Court of Appeal, or return to the High Court belatedly pleading for leave, to come up to the Court of Appeal?.*”**

21. In this case, the applicant had originally taken prompt action, by filing the appeal at the Court of Appeal. His shortcoming was the failure to seek leave of the court before lodging the appeal.
22. In the case of **SHAH & PAREKH ADVOCATES Vs APOLLO INSURANCE COMPANY LIMITED**, (*above-cited*), the court held as follows, concerning judicial discretion, such as that which the court is expected to exercise in an application for leave to appeal;

***“Judicial discretion, by nature, is the exercise of a power that is not at all available as of right; there must be just cause weighing in the mind of a Judge, to move him or her to exercise this power. It is a residual power always held in reserve, and will only be exercised where just cause is shown, in tandem with equitable and responsible conduct on the part of the applicant?.*”**

23. In that case the court declined the application because the;

***“....conflict between the premise of the application and the supporting evidence which I have already remarked, must nullify the basis upon which this court can exercise a discretion to grant leave belatedly for an appeal...?.*”**

24. In this case, the applicant’s application was supported by the affidavit of Mr. Katwa Kigen, the learned advocate who had the conduct of the application. In the affidavit he said he was constrained to withdraw the appeal after the respondent had challenged its competence.
25. When the respondent filed its response, through the replying affidavit of Mr. Edwin Abuya, the learned advocate who had the conduct of the respondent’s case, it said that the appeal was not withdrawn, as Mr. Kigen had stated.
26. The respondent provided this court with a copy of the Order made by the Court of Appeal on 23rd March 2015. In the said Order, it is clear that the appellant’s advocate had asked the court to allow him withdraw the appeal. However, the court did not accept the said request. Instead, the Court of Appeal struck out the appeal.
27. Therefore, it was inaccurate for the applicant to tell this court that he is the person who had withdrawn the appeal.
28. In the case of **KAMAMI & ANOTHER Vs KENYA ANTI-CORRUPTION COMMISSION & 3 OTHERS, CIVIL APPLICATION No. 152 OF 2009**, the Court of Appeal had an in-depth discussion on the Overriding Objective, which is said to embolden the court to be guided by a

broad sense of justice and fairness.
29. In the case of **BIGUZZI Vs RANK LEISURE PLC 1 WLR 1926**, Lord Woolf MR said;

“Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives in part 1 of the CPR?.

30. Those overriding objectives, as summarized by the applicant, include the Just, Expeditious, Proportionate, Efficient and Affordable ways and means of resolving civil disputes.

31. Sloppiness has no place in an efficient and expeditious process.

32. Lord Woolf MR went on to say;

“Under the court’s duty to manage cases, delays such as has occurred in this case, should, it is hoped, no longer happen. The court’s management powers should ensure that this does not occur. But if the court exercises its powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant?.

33. In this case, the applicant’s earlier appeal was struck out on 23rd March 2015.

34. The applicant waited for more than 3 months before filing the application for leave to appeal.

35. The delay of 3 months was not explained at all.

36. Considering that the Ruling in respect to which the applicant hoped to appeal was dated 26th February 2010, it would have been expected that the applicant’s overriding objective would have been to move swiftly to seek the leave of this court for leave to appeal.

37. The un-explained delay by the applicant could not and did not enhance the efficiency of the case. That fact, coupled with the inaccurate deposition concerning the fate of the applicant’s appeal persuade me that I should not exercise my discretion in favour of the applicant. Therefore, the application dated 7th July 2015 is dismissed. The costs of the application are awarded to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of January 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Muchama for the Applicant

Opiyo for the Respondent

Collins Odhiambo – Court clerk.