REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. CIVIL APP. NO. 12 OF 2017

(CONSOLIDATED WITH ELC MISC. APP. NO. 11 OF 2017)

IN THE MATTER OF

LEAVE TO APPEAL TO THE COURT OF APPEAL

BETWEEN

ONINDO ONINDO & ASSOCIATES ADVOCATES.....APPELLANT

AND

GATATHA FARMERS CO. LIMITED.....1ST RESPONDENT

KAITET TEA ESTATE (1977) LIMITED.....2ND RESPONDENT

RULING

(On leave to appeal to the Court of Appeal against the Ruling of this Court delivered at Kitale on 18th July, 2019)

The application

1. The Applicant filed a is a Notice of Motion dated **27/5/2021** seeking leave to appeal to the Court of Appeal, and costs of the Application. The Application was pursuant a ruling delivered by my brother Judge on the **18/7/2019** in this matter.

2. The Application was brought under **Order 50** and **51** of the **Civil Procedure Rules**, **Sections 63 (e)**, **1B** and **3A** of the **Civil Procedure Act**, **Rule 11** of the **Advocates Remuneration Order,** the Constitution of Kenya and all enabling provisions of the law. The Applicant prayed specifically for the following orders:-

> **1. That the Applicant herein be granted leave to Appeal against the Ruling of Hon. Mwangi Njoroge [J] delivered at Kitale on 18th July, 2019 in this case.**
>
> **2. That the costs of this Application be in the course (*sic*).**

3. It was premised on the following grounds that: the ruling on objection to taxation proceedings was dismissed on **18/7/2019**. Being aggrieved by the said ruling the Applicants sought leave to appeal to the Court of Appeal; that in upholding the taxing master's finding the judge failed to consider the unique facts of the case besides the spirit of the law and principles of natural justice; the taxing master had agreed with the Applicant in Misc. Application No**. 11** of **2017** that the value of the suit land was over half a billion and in **ELC Misc. Application No. 12 of 2017** the value of **LR. 6137** measuring about **300 acres** was **Kshs. 90,000,000/=**; the value of the entire subject matter was introduced in **Kitale HCC Case No. 57** of **2011** and was easily discernible from the pleadings; and leave to appeal out of time was granted on the **18/5/2021** in respect of an Application dated **11/3/2020**.

4. The Application was supported by the Affidavit sworn on the **27/5/2021** by **Apollo Ambutsi Shikanga,** learned counsel in conduct of the matter on behalf of the Applicant. In it, he reiterated virtually all the contents of the grounds of the Application save that he then Annexed respective pleadings the bills of costs and rulings in the two Miscellaneous files the Notice of Appeal and Draft Memorandum of Appeal and Certificates of Delay and Ruling in the consolidated **ELC Misc. Application No. 12** of **2017**.

The Response

5. The Application was opposed. **Peter M. Kiura**, learned counsel for the Respondents, filed thereto his Replying Affidavit sworn on **30/6/2021**. His response was that the taxed costs amounting to **Kshs. 774,800/=** arising from the taxation done on **1/8/2018** and a ruling thereon delivered on **18/07/2019** were paid in **November 2018**. He deponed further that the payment was received unconditionally by the Applicant thereby discharging fully the Respondent from his obligation to the Applicant, and the Respondent had "moved on". He deponed that if the Application was allowed, the Respondents would be prejudiced. His further deposition was that from **Kitale ELC No. 57** of **2011** the subject therein was trespass over a portion of the suit land while in **Kitale ELC No. 36** of **2013** the subject matter was a claim for **38 acres** of land and not the whole parcel of land. He stated that the taxing master arrived at a correct decision by finding as such and the decision was upheld by the reference whose ruling was delivered on **18/7/2019**; and finally that the Applicant had not laid a proper basis for the grant of the orders sought. He prayed that the Application be dismissed with costs to the Respondents.

Submissions

6. On **14/10/2021,** this court directed the parties to file written submissions to dispose the application which the parties filed afterwards.

Analysis, Issues and Determination

7. Upon careful consideration of the Application before me, the affidavits both in support and opposition as well as the Annextures to the Applicant's supporting affidavit, the statutory and case law relied on, together with the written submissions, this court found two issues for determination. These were:

> ***(a) Whether the applicant made a case for granting leave to appeal;***
>
> ***(b) What orders would issue?***

8. I proceed with the determination as here below:

(a) Whether the Applicant made a case for granting leave to appeal

9. In an Application of this nature the applicable law is **Rule 11(3)** of the **Advocates (Remuneration) Order, 1962** as contained in the **Advocates Act, Chapter 16** of the Laws of Kenya. The Rule provides:

"Any person aggrieved by a decision of the judge upon any objection referred to such judge under subsection (2) may with the leave of the judge but not otherwise appeal to the court of appeal."

10. In deciding then application, the Court exercises discretion. That discretion is wide. However, the Court has to bear in mind that the discretion must be exercised judiciously. Again, the relevant law (Rule) is clear that an aggrieved party has to seek leave of the Court and obtain it before filing an intended appeal against the decision of the Judge in a reference. In the case of **Kenya Shell Limited v Kobil Petroleum Limited (2006) e KLR,** the Court of Appeal held:-

> ***"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 judiciously considered."***

11. Further, in the case of **Macharia T/A Macharia & Company Advocates vs. Mwangi & Another (2002) 2KLR 391** which was cited in the case of **Showcase Property Limited v Mugambi & Company Advocates (2020) eKLR**, the Court of Appeal held:-

> ***"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 if the court is not satisfied that the appeal has no prospects of success. For example, the issue may be 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 always be a ground of appeal which merits serious judicial consideration."***

12. An appeal from a decision in a Reference to a judge from a taxation of a taxing master is essentially a second appeal because the Reference is itself an appeal. During the decision on the Reference the judge considers whether or not the taxing master considered all the issues that he/she should have in arriving at the decision. That is why in the preceding paragraphs **(1)** and **(2)**, before the filing of a Reference the aggrieved party writes to the taxing maters specifying the items he or she objects to and seeking reasons from the taxing master for his/her decision thereon and the taxing master is obligation by law to give the reasons within **fourteen (14) days** of receipt of the written objections. These are the reasons which the judge then analyses both in terms of the facts and the law and arrives at his/her decision. Once the Reference is decided on the law contemplates a finality at that point. But it grants chance for a party who is aggrieved from the decision of the judge to seek leave of the Court to more to the Court of Appeal. What the Court ought to consider is the possibility of the success of the intended appeal. That possibility must be real in the mind of the Court granting the leave, as was stated in the Canadian case of ***Ravelston Corporation Limited (Re), 2007 Onca 268 (CanLii)***. In the case, the Court stated thus:

> ***"A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal."***

13. In my view, the reason why the law was specific that leave has to be granted first before filing the Appeal was for the aggrieved party to set before the Judge exceptional circumstances of points that would entitle him or her for leave to appeal. That is why the Court of Appeal stated in the case of ***Macharia T/A Macharia and Co. Advocates*** (cited above) had to explain the term "realistic" in regard to the intended appeal having realistic chances of success. The term realistic moves the parameter the Court should consider in analyzing the chances of success of the appeal from "*high*" and "*arguable*" to a higher pedestal of concreteness: that which a Judge applying his/her mind to the grounds presented is convinced that they have a somewhat definitive success. By so doing the judge is neither being called to sit on appeal over his decision nor lay a stumbling block to or bar a party desirous of appealing from his decision.

14. It is this Court's view that in the instant Application, for the Court to decide whether or not the Applicant had made out a case for grant of the leave to appeal, it had to be satisfied that **1.** *the Applicant has an arguable case with realistic chances of success;* **2.** *the applicant, one the one hand, would suffer loss and prejudice if the Application was denied and the respondent on the other would suffer likewise if the Application was granted;* **3.** *the application has been brought without undue delay; and* **4.** *that there is in existence of sufficient cause such as public interest or a novel point raised to allow the application.*

15. Regarding the first point a demonstration by the appeal of realistic chances of success, I have carefully perused the entire record. Although paragraph **13** of the Supporting Affidavit listed the serial numbers of the Annextures to the Affidavit, the annextures were not marked specifically as listed. Thus, the Court had to painstakingly keep cross-referencing the Affidavit and the specific annextures in order not to arrive at wrong comparison and consequently wrong reasoning. In particular, I analyzed paragraphs **20** and **21** of Annexture **AA1** (Plaint in **Kitale ELC No. 57** of **2011**) and the reliefs sought and the content and prayers in Annexture **AA7** (Originating Summons in **ELC No. 36** of **2013**). I compared them with Annextures **AA6** (taxing master's ruling in **Misc. Appl. No. 11** of **2017**) and **AA11** (taxing master's ruling in **Misc. Appl. No. 12** of **2017**) respectively and Annexture **AA12** (Ruling in the Consolidated **Misc. Applications No. 11** and **12** of **2017**) as well as the Draft Memorandum of Appeal marked as Annexture **AA14**. First, I found that the Notice of Appeal lodged in this Registry on **6/8/2019** was lodged in contravention of the **Rule** being considered herein since no leave had been granted by this Court for the party to appeal to the Court of Appeal. But having been lodged, the Applicant ought to have explained its fate. He did not. The existence of a notice of Appeal meant that there was an Appeal already preferred. On this, the Applicants are referred to the Court of Appeal Rules. As to the competence or otherwise of that Appeal it was upon the Court of Appeal to decide. Assuming that this Court were to find the instant Applicant meritorious and grant the prayer, another Notice of Appeal would be lodged. Thus, what would be the import of the existence of two notices of appeal? I will not discuss that at the moment. But that did not affect my determination of the issue before me.

16. The Applicants annexed the Draft Memorandum of Appeal that he has done in respect of the Appeal he intended to lodge at the Court of Appeal Registry in Kisumu in **2019**. While it is common knowledge that the Court of Appeal has established a Registry in Eldoret to serve the region this Court is in, the Court used the living tree interpretation of issues to infer that by the Applicants annexing the said Draft they intended to demonstrate to the Court the chances of success of the intended appeal they would lodge if this Court granted leave. Thus, irrespective of the date and title of the Draft, the Court considered its content.

17. Having considered all the facts as brought out in the record and documents I compared and analyzed as stated above, I find that the intended appeal does not demonstrate any realistic chances of success. In my respectful view, the Applicant did not demonstrate that the intended appeal is not fanciful as it showed to warrant this court to grant leave for appeal.

18. Secondly, with regard to prejudice the Applicants or the Respondents may suffer, the Applicant failed to show any if leave to appeal was not granted. Apart from arguing that both the taxing master and the Judge did not consider enhancing instructions fees from the figures found due in both briefs, there was no demonstration of how that found due prejudiced the Applicants. Again, the Applicants ought to have demonstrated that the findings of both the taxing master and Judge were prejudicial and wrong. But by comparison, the Respondents having paid fully in **2018** the sum found due by the taxing master and having "closed the chapter' by having "moved on", they would be prejudiced by reopening the issues herein by way of grant of leave to appeal. I say so because, in paragraph **4** of his replying affidavit learned counsel for the Respondent stated that his clients paid the sum of **Kshs. 774,800/=** in November, **2018** being the decretal sum to the Applicant. Although the Respondent did not specify the exact date, that fact was not controverted by the Applicants. Upon careful perusal of the record, this Court found that the payment was made even way before the Application dated **11/3/2020** that sought extension of time to seek leave to appeal was filed. The said Application was allowed by a ruling of this Court delivered on **18/5/2021**.

19. In any event when the Applicants received the sums that were found due from the Respondents, they neither refused to accept it nor protest to being paid it. By their conduct, they represented to the Respondents that issues were fully settled and they made the Respondents to believe and act so. They are estopped from resiling from their position. If a party by his conduct makes another to believe that the position of things is as the party is presenting them to be and that other (party) acts on that representation, then the party who represented the facts to be as he did is estopped from going back on those facts he represented. He can only do so with the attendant consequences. It was upon the Applicant to demonstrate the prejudice he would suffer if the Application was not allowed. His attempt to do so failed. Granting the orders sought would amount to an academic exercise as well as a waste of court's time and an exercise in futility.

20. In regard to the same point, Koome J, as she then was, stated in ***Muriu, Mungai & Co. Advocates V New Kenya Co-operative Creameries Limited [2010] eKLR*** that a party making an application of the nature must demonstrate good faith. In the instant matter, I see no good faith where an Advocate receives unconditionally the sum found due and later turns to ask for leave to get more on the same account.

21. Thirdly, the Application of such nature ought to be brought without undue delay. The ruling permitting the instant Application to be filed was delivered on **18/5/2021** and the Application filed on **27/5/2021.** Although the Application was brought only **nine (9) days** was not unreasonable delay, the Applicant failed to satisfy the other conditions for the grant of leave to appeal.

22. The fourth point regarding the demonstration of existence of sufficient cause or reason such as public importance of the appeal or a novel point which needs a clarification by the Court of Appeal, none of these were shown or even submitted on by the Applicants. All that the Applicants argued was that the taxing master agreed with them that the value in one suit subject was over half a billion and the other over **Kshs. 90,000,000/=** and that that would justify the enhancement of the instructions fees. Both the taxing master and the judge considered these two issues. Of importance to note is that the learned Judge singled out and discussed at length the issue of subject matter in the two parent files, the instructions fees in relation to the findings on the value of the properties and the reasons why he was of the view that the

taxing master was right in the decision reached.

(b) <u>What orders would issue</u>?

23. In the end, the Application dated **27/5/2021** is unmeritorious, an abuse of the court's process, frivolous and vexatious. It is therefore dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JANUARY, 2022.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE