REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 52 OF 2010

RAFIKI SPARES (2003) LIMITED.....PLAINTIFF

VERSUS

THE REGISTRAR TRUSTEES OF MOI UNIVERSITY PENSON SCHEME.....DEFENDANT

RULING

By a Chamber Summons dated 26th April, 2010, the **Registered Trustees of Moi University Pension Scheme** (hereinafter "the applicant") seeks one main order that it be granted leave to appeal against the orders made on 20th April, 2010. The application is brought under Order XLII Rule 1(2) of the Civil Procedure Rules, Section 75 of the Civil Procedure Act (Cap 21 Laws of Kenya) and all other enabling provisions of the Law.

The application is based on the grounds that an appeal from the said order is not automatic and as the applicant is aggrieved, the leave sought should be granted. The application is supported by the affidavit of **Charles S. Nyameino** the applicant's Pension Manager. In the affidavit it is deponed, *inter alia*, that the order intended to be challenged expunged the applicant's replying affidavit with the result that the respondent's application dated 7th April, 2010, was heard exparte; that the applicant desires to appeal against the said order and cannot do so without the leave of this court.

The application is opposed on the basis of Grounds of Opposition filed by the advocates for the respondents. The respondent contends that no useful purpose can be served in granting the said leave; that the orders sought have no basis in law; that the application is fatally defective and that only the Court of Appeal can grant the same.

When the application came up before me for hearing on 19th January, 2011, counsel agreed to file written submissions which were duly in place by 16th March, 2011. The submissions elaborated the stand-points taken by the parties in their respective papers.

The factual position as given by the applicant is not in dispute since the respondent has not challenged the same by affidavit evidence. The Grounds of opposition challenge the application on matters of law

only. As to whether the orders sought will serve any useful purpose is, with respect, not for the respondent to say. It is the applicant which understands its case best and desires the leave. I cannot therefore decline the application merely because, in the respondent's view, the orders sought will serve no useful purpose.

The respondent has also contended that the orders sought have no basis in law. That objection, in my view, is without merit and deserves no further consideration.

Is the application fatally defective and untenable in law? That objection is related to the last objection which is that the orders sought can only be granted by the Court of Appeal. With all due respect to the respondent, the clear provisions of Section 75 of the Civil Procedure Act give this court jurisdiction to determine such an application and Rule 3 of Order XLII puts it beyond peradventure that such leave should, in the first instance, be made in the court making the order.

The intended appeal in my view cannot be described as frivolous. The orders being challenged are orders which, in my judgment, the courts make on a regular basis and guidance from the Court of Appeal will no, doubt, advance the cause of justice.

In the premises, I allow the application in terms of prayer 2 thereof. Costs shall be in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF APRIL, 2011

F. AZANGALALA

JUDGE

Read in the absence of the parties and their advocates.

F. AZANGALALA

JUDGE

13TH APRIL, 2011