



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL NO. 1216 OF 2007

ONGOTO & CO
ADVOCATES.....APPLICANT/
RESPONDENT

VERSUS

KENYA POWER & LIGHTING
CO.LTD.....RESPONDENT/DEFENDANT

RULING

1. The Notice of Motion dated 14th July, 2010 seeks for leave so that the applicant can appeal against the ruling of 30th October, 2009. The respondent intends to file an appeal to the Court of Appeal against the ruling of this court made on 30th October, 2009. The applicant is also seeking for the leave so granted to be deemed to have been granted on the date of the ruling. This application is based on the grounds that on 30th October, 2009 Khaminwa J dismissed the reference after which the applicant filed a Notice of Appeal in the Court of Appeal and also a record of Appeal. Through an inadvertent error, the advocates for the applicants failed to seek for leave when the order of stay was granted.
2. The record of appeal has already been filed therefore no prejudice would be suffered by the respondent if leave is granted. There is already an order of stay of execution pending appeal and also securing the sums payable to the respondent in the event the appeal does not succeed.
3. This application is supported by an affidavit by M/s Michi Kiremi sworn on 14th July, 2010. She has elaborated on the above grounds. It was further argued that all along the advocates were under a mistaken belief that leave had been granted under order 49 Rule 5 of the Civil Procedure Rules and Rule 11(3) of the advocates remuneration order the court can enlarge time which has lapsed. The court was asked to give effect to the overriding objective which is to ensure the ends of justice are met. This was as it was held in the case of **Venonah Margaret Bray Vs Raymond Jack Bray EALR [1957] pg 302** where the court of Appeal held that **“in all circumstances the discretion of the court ought to be exercised in favour of the applicant and accordingly leave to appeal would be given”**
4. This application was opposed; counsel relied on the replying affidavit of Mr Ongoto sworn on 19th July, 2010 . It was submitted that the application was defective for failure to identify what caused the

inadvertence on the part of the plaintiff's advocate. It was further submitted that the application was made after inordinate delay. It is therefore meant to delay the effectual conclusion of a matter that was completed in 2002. The application was also faulted for failure to show how the applicant has a good appeal.

This application is brought under the provisions of order 49 of the civil Procedure Rules as well as rule 11(3) of the advocates remuneration order which provides

“Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but no otherwise, appeal to the Court of Appeal.”

5. It is necessary for a party intending to appeal against a ruling by a Judge in respect of a decision arising out of a reference under the advocates remuneration order to seek leave of the court. In this case counsel for the applicant has ably explained how, through an inadvertence mistake an Appeal was filed before the Court of Appeal without leave of the court. It is further explained that the granting of leave will not prejudice the respondents because the costs awarded is already safe guarded in a joint account.

6. I have carefully considered this application, the affidavit filed in support and in reply as well as the submissions by both counsel. It appears the error by counsel for the applicants when they filed the appeal without the leave of the court is genuine. There is no other explanation as to how the applicants would have sought for an order of stay of execution and failed to seek leave. This is an error which can be excused. This court is called upon to decide whether to grant leave which involve the exercise of this courts discretion. It is trite law that all matters of discretion it must be exercised judiciously for furtherance of substantive justice. The applicant has explained this application was filed immediately the error was discovered. Since the costs awarded is safe guarded, I do not see any prejudice which will be suffered by the respondent apart from costs for defending this application. Accordingly I allow the application, the applicants are granted leave to file an appeal against the ruling made on 30th October, 2009. The respondent shall have the costs of this application.

RULING READ AND SIGNED THIS 22ND DAY OF OCTOBER, 2010

MARTHA KOOME
JUDGE