



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE 284 OF 2007

MURIU, MUNGAI & CO. ADVOCATES ADVOCATE

VERSUS

NEW KENYA CO-OPERATIVE

CREAMERIES LIMITED CLIENT

RULING

1. The notice of motion dated 18th November 2009, is brought by the client/respondent under the provisions of Rule 11(3) of the Advocates Remuneration Order. The client is seeking for leave to appeal against the judgment of the Reference which was delivered on 5th November 2009. The client is alternatively seeking for the notice of appeal which was filed on 18th November 2009, to be deemed to have been properly filed. This application is based on the grounds that the judgment and the reference regarding the order of the Taxing Master were delivered on 5th November 2009. An appeal to the Court of Appeal under rule 11 (3) can only be filed with the leave of the court. Thus it is necessary to obtain the leave so that the client can ventilate their appeal to the Court of Appeal. Secondly, the granting of the leave will not in any way prejudice the advocates. This application is supported by the affidavit of **David Mukiri Mureka** sworn on 18th November 2009 and a supplementary affidavit sworn on 26th March 2010. The matters deposed thereto emphasize the need to allow the client files an appeal and that the appeal has reasonable chances of success.

3. This application was opposed by the client; reliance was placed on the replying affidavit of **Mr. Peter Munge** sworn on 15th January 2010. It is contended that the prayers sought cannot be granted because no appeal has been filed against the ruling of 5th November 2009. Whereas the purported notice of appeal erroneously refers to the ruling of 4th November 2009, the notice of appeal is within the purview of the Court of Appeal because that is where it was filed, thus the client should have applied for leave before the Court of Appeal. Under paragraph 11 (3) of the Advocates Remuneration Order, leave should have been sought before lodging the notice of appeal. The client had proceeded to file a notice of appeal before obtaining the requisite leave. The supporting

affidavit was also faulted because it was sworn by the advocate on contentious issues such as stating that the client is dissatisfied with the ruling of the court without citing the source of information. Counsel urged the court to disregard the affidavit and dismiss the application.

4. This application is brought under the provisions of **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 not otherwise, appeal to the Court of Appeal.”

It is necessary for a party to seek leave of the court to file an appeal against the decision of the Judge in respect of a decision of a reference filed against the decision of the Taxing Master. The client proceeded to file a notice of appeal without the leave of the court. That notice was filed on 18th November 2009. I agree with counsel for the advocate that the notice of appeal is defective because it refers to a ruling delivered on 4th November 2009 and the ruling was delivered on 5th November 2009.

5. This court is called upon to exercise its discretion to decide whether to grant leave or not. In all matters involving the exercise of the courts discretion, it must be exercised judiciously for furtherance of substantive justice. Consequently the party seeking for leave must demonstrate good faith and the application must be done without undue delay. The client had filed a notice of appeal on 18th November 2009 without the leave of the court. This application was filed on 10th November 2009, which is within reasonable time.

6. The other issue I have to consider is whether granting of the leave will cost the Advocate any prejudice. Apart from perhaps the inconvenience of defending this application which can be compensated with costs, I see no other prejudice. Accordingly, I allow the notice of motion. I grant leave to the client to file an appeal and to file a notice of appeal within seven (7) days. The Advocate is awarded the costs of this application.

RULING READ AND SIGNED ON 9TH JULY, 2010 AT NAIROBI.

M.K. KOOME
JUDGE