



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Civil 753 of 2004

AHMEDNASIR, ABDIKADIR, & COMPANY
APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

R U L I N G

A ruling was delivered on 31st May 2006 whose finding has aggrieved the Respondent. The respondent filed a notice of appeal before seeking leave of the court, to appeal.

The Respondent has now filed a Notice of Motion and the only prayer opposed by the applicant is the one seeking leave to appeal. The Respondent submitted that counsel who was present when the ruling was delivered failed to obtain the court's leave, immediately on its delivery. Counsel for the Respondent deponed in the affidavit in support that:

“I verily believe that it is proper, mete and just that the point of Law in question, being the interpretation of the provisions of section 51 (2) of the Advocates Act should be finally determined by the court of appeal in view of the contradictory positions already taken by the High Court on the particular point.”

The applicant's one and only opposition to the application is on the basis that the **“respondent having lodged a Notice of Appeal against the said decision cannot now seek leave of the court after the fact.”** The applicant consequently argued that the superior court did not have jurisdiction to entertain the application that leave could only be granted by the court of appeal. Order XLII Rule 1 (3) provides:

“Application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either informally at the time when the order is made, or within 14 days from the date of such order.”

The respondent did not seek leave at the time the ruling was read but quite rightly has now moved the court by the present application. That application is brought under Order XLII Rule 1 (2), (3) and (4) of the Civil Procedure Rules.

The applicant's objection to the application is adequately met by the court of appeal authorities:

(i) RADING – V – KENYA & LIGHTING CO. LTD [1986] LLR 1337, where Platt J.A. stated: -

“Hence although Mrs Khaminwa considered that the Notice of Appeal until leave to appeal has been granted, that can only be understood to be misunderstanding of Rule 74 (4).”

(ii) KARIGACA – KARIAGACA [1995] LLR 2474, where Shah J.A. **stated**

“the question I posed to counsel was “can Notice of Appeal be filed when no leave to appeal has been sought or obtained? Rule 74 (4) reads:

“4 when an appeal lies only with leave orit shall not be necessary to obtain such leave orbefore lodging the Notice of Appeal”.

It is clear therefore that a Notice of Appeal can be filed before obtaining leave to appeal.”

There lies the answer to the applicant’s opposition that the fact a party has filed a notice of appeal, the same does not bar the filing of an application seeking leave to appeal. Accordingly the respondent’s application is merited.

The respondent is hereby granted leave to appeal against the ruling delivered by this court on 31st May 2006, and the costs of the Notice of Motion dated 12th June 2006 shall abide by the appeal thereof.

MARY KASANGO

JUDGE

Dated and delivered this 5th July 2006

MARY KASANGO

JUDGE