REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 264 OF 2003

SHAH & PAREKH ADVOCATES …….APPLICANT/RESPONDENT

VERSUS

APOLLO INSURANCE CO. LTD ……..…RESPONDENT/APPLICANT

RULING

The applicant, which was originally the respondent in a taxation appeal, took out a Notice of Motion dated 14th April, 2005 and brought under sections 3 and 63(e) of the Civil Procedure Act (Cap.21), Order L, rule 1 of the Civil Procedure Rules, and rule 11(3) of the Advocates (Remuneration) Order.The subject of the application is a judgement which I had given on 28th January, 2005 refusing the prayer by the applicant herein, that the taxing master's decision of 20th November, 2003 be set aside.I had also refused the prayer that the taxation question be referred back to the taxing master with directions on how to carry out the taxation.

The Notice of Motion carries the following prayers:

> (i) that, the applicant herein be and is hereby granted leave to appeal against the decision of 28th January, 2005;
>
> (ii) that the costs of this application be in the cause.

The application is premised on the following grounds:

> (a) that, the ruling of the Court was to be delivered on notice;
>
> (b) that, the applicant herein did not receive prior notice of the date reserved for the ruling;
>
> (c) that, due to lack of notice, neither the applicant nor its advocate was present in Court when the ruling was delivered;
>
> (d) that, the applicant is aggrieved by the ruling and seeks leave to appeal against the same.

David Mukii Mereka, an advocate in the firm of *Mereka & Co. Advocates* which has the conduct of this matter on behalf of the applicant, has sworn a supporting affidavit dated 14th April, 2005.He avers that the taxation reference matter had been fixed for hearing on 5th October, 2004 and was duly heard.He avers further that the decision had not been ready on 19th November, and 3rd December, 2004, and that on the latter occasion the Court advised that the judgement would be given on notice.He deposes that notice

was duly sent and his firm received it on 17th January, 2005 indicating that ruling would be given on 28th January, 2005.He deposes that this date was not, however, entered in the firm's monthly planner, and so was not shown in the advocate's diaries; and that the said omission was inadvertent, un-premeditated and unintentional.Consequently counsel for the applicant herein did not appear in Court when the judgement was given on 28th January, 2005.Only on 9th March, 2005 after a bill of costs was served by the respondent, did the applicant realize that the judgement had been delivered.

The deponent acknowledges that in accordance with statutory provisions, it is mandatory that a party do obtain leave from this Court in order to appeal against a judgement made in a reference.It had not been possible to obtain leave, as judgement was delivered in the absence of the applicant.The applicant believes that the intended appeal has overwhelming chances of success, and so should be heard on the merits.The deponent believes no prejudice will be caused to any of the parties if the prayers in this application are granted.He avers that the applicationhas been made without undue delay, in view of the circumstances obtaining.

A replying affidavit was sworn on 29th April, 2005 by ***Hasmukhrai Manilal Parekh***, an advocate practising as *Shah & Parekh Advocates,* who are the respondent.

The deponent avers correctly, with resect, that grounds 2 and 3 of the application are in conflict with the contents of paragraphs 7, 8, 9 of the supporting affidavit.Those grounds attribute blame to the Court, for the applicant's non-appearance when judgement was delivered; but the supporting affidavit avers that the error was entirely the responsibility of the applicant's advocates.The deponent attaches supporting documentation for the averment that the omission by the applicant's advocates to properly diarise their Court appearance, was likely to have been deliberate and pre-meditated.It is averred that whereas the applicant's advocates were served with the bill of costs for the reference on 9th March, 2005, it was not until over one month and nine days later that the present application was filed.

The deponent averred that the application lacked *bona fides,* because the applicant did not require leave to file a Notice of Appeal which had not been filed; and because no application had been made to extend time within which to lodge an appeal.

Learned counsel for the applicant, ***Mr. Ng'ang'a*** stated that the applicant was aggrieved, and wished to appeal against the Court's judgement of 28th January, 2005.On the most material issue, as to how this application had become necessary, ***Mr. Ng'ang'a*** said:"We did not manage to attend Court, and so we did not make this application.Our reasons are in the [supporting] affidavit."

As already noted, the reason in the supporting affidavit is that the applicant's advocates had by oversight, failed to diarise the Court date; and this differs from the content of the grounds stated in the application.***Mr. Ng'ang'a,*** however, clearly took the position that the application and its annexed documents spoke for themselves and, since in his view, the proposed appeal had clear chances of success, grant of the prayers should be a matter of course.

Mr. Tiego, relying on the replying affidavit, submitted that the prayers being sought were not available under sections 3 and 63(e) of the Civil Procedure Act (Cap.21).He submitted that the Advocates (Remuneration) Orders were in the form of a complete code, and any appeal thereunder must be within the purview of the Advocates Act (Cap.16).It was important under that Act, that the application should state the nature of the arguability of the intended appeal — which had not been done.Learned counsel submitted that a Court order could not be granted in a vacuum, and grounds of merit had to be laid out as part of the application.Counsel noted that the provision for leave to appeal was in rule 11(3) of the Advocates (Remuneration) Orders; and rule 11(4) gave the Court power to enlarge time for a proposed appeal.Counsel noted that the applicant had not even as much as lodged a Notice of Appeal — which by the Court of Appeal Rules should have been filed within 14 days of the High Court decision being delivered; and no application had been made before the Court of Appeal.Counsel submitted that there was no basis upon which the Court was being requested to grant leave for appeal, and urged that the application be dismissed with costs.

In his response, ***Mr. Ng'ang'a*** for the applicant maintained that the application was on its part necessitated not by negligence but by mistake.He urged that the prayer for leave be granted, by virtue of powers conferred upon the Court under rule 11(3) of the Advocates (Remuneration) Order.Counsel contended that, whether or not a Notice of Appeal should first be filed, and the Court of Appeal moved to enlarge time before leave is sought in the High Court, is a matter of choice; and now the applicant had elected to start with the High Court's leave, before taking such other actions in the Court of Appeal.He submitted that there would also be no need for him to persuade the Court that his client had an arguable appeal, because rule 11(3) of the Advocates (Remuneration) Order had no conditions, and the scope for the Court's discretion was unlimited.

I have already noted that there is an inconsistency between the affirmations in the applicant's application, and the material averments in the supporting affidavit.This is significant, because it signals want of clear design and purpose in the application itself.Secondly, the provisions of the law relied upon, namely sections 3 and 63(e) of the Civil Procedure Act (Cap. 21), and rule 11(3) of the Advocates (Remuneration) Order, do underline the primacy of *judicial discretion* as the basis for granting leave to file an appeal against a decision such as the one of 28th January, 2005.

Judicial discretion, by nature, is the exercise of a *power that is not at all available as of right;* there must be *just cause* weighing in the mind of a Judge, to move him or her to exercise this power.It is *a residual power always held in reserve*, and will only be exercised where just cause is shown, in tandem with *equitable and responsible conduct on the part of the applicant.*

I have to ask the question whether the applicant has met these requirements for the exercise of the Court's discretion.If the applicant were to act promptly to give a Notice of Appeal, this would be an indication of a serious intent to contest the judgement of the High Court on the merits, as would also be the case if he had promptly applied to the Court of Appeal for enlargement of time for filing an appeal.The applicant did not pursue any of those channels to facilitate intended appeal, but instead filed before this Court the Notice of Motion of 14th April, 2005, contending that it was for the free choice of the applicant whether to place its litigious intentions early before the Court of Appeal, or return to the High Court belatedly pleading for leave, to come up to the Court of Appeal.The applicant's choice of returning to the High Court, I think, was not well advised, for it could only show a lack of clear purpose.This, taken together with the conflict between the premise of the application and the supporting evidence which I have already remarked, must nullify the basis upon which this Court can exercise a discretion to grant leave belatedly for an appeal to be lodged against the judgement of 28th January, 2005.

I must, therefore, dismiss with costs the applicant's Notice of Motion of 14th April, 2005.

Orders accordingly.

DATEDand**DELIVERED** at Nairobi this 17th day of June, 2005.

J. B. OJWANG

JUDGE

Coram:Ojwang,J.

Court clerk:Mwangi

For the Applicant:Mr. Ng'ang'a, instructed by M/s. Mereka & Co. Advocates

For the Respondent:Mr. Tiego, instructed by M/s. Shah & Parekh,Advocates.