



REPUBLIC OF KENYA



**KENYA LAW**  
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**Majanja Luseno & Co. Advocates v Patani (Miscellaneous Application  
556 of 2016) [2023] KEHC 17580 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
MISCELLANEOUS APPLICATION 556 OF 2016**

**JN MULWA, J**

**MAY 11, 2023**

**BETWEEN**

**MAJANJA LUSENO & CO. ADVOCATES ..... APPLICANT**

**AND**

**DHIRAJLAL VIRPAL PATANI ..... RESPONDENT**

**RULING**

1. There are two applications on record for determination.

The first application is dated November 26, 2021, and is brought by the Respondent Dhirajlal V Patani, the client seeking two main orders;

- i. That the client be granted leave to appeal to the Court of Appeal against the whole of the ruling dated November 15, 2021
- ii. That the notice of appeal filed and annexed to the application be deemed as properly filed upon grant of leave.

2. The second application is dated January 13, 2022. The Applicant is the Advocates, Majanja Luseno & Company Advocates.

They seek an order that judgment be entered in favour of the advocates against the client/respondent for the sum of Kshs 2,451,047.42 together with interest at court rates from May 13, 2021 until payment in full. This amount was certified as the taxed costs by the taxing officer on the May 13, 2021.

3. On the July 14, 2022, upon brief oral hearing of the parties, it was directed and ordered that the application dated November 26, 2021 be heard and determined first, as the outcome may well determine the fate of the said application dated January 13, 2022.

4. Parties filed submissions in respect of the application dated November 26, 2021 as directed.



The court has considered the supporting affidavit sworn by the client/applicant and grounds for the application dated November 26, 2021, as well as the grounds of opposition and replying affidavit sworn by the Applicants Advocate Steve Luseno on the February 16, 2022.

The application is brought under Rule 11 (3) of the [Advocates Remuneration Order](#) Sections 1A, 1B and 3A of the [Civil Procedure Act](#), and a draft Notice of Appeal dated November 26, 2021 is annexed thereto.

5. Reasons for the application as discerned from the above pleadings are that;
  - a. There is no right of appeal on the reference from the decision of the taxing master;
  - b. That the application has been made in good time;
  - c. That reasons for leave are substantial as the taxing master's decision and this court (Chitebwe J) are in conflict with decisions of the court of appeal on subject.
6. In opposition to the application a Replying Affidavit was sworn by the Advocate. It is averred that upon delivery of the decision by the Taxing master on the May 13, 2022, the client sought to set it aside vide on Application dated 2/06/2021 and ruling dated November 15, 2021 wherein the court (Chitebwe J.) dismissed the application (Reference) with costs, and being dissatisfied with the order of dismissal, the Applicant moved this court under Paragraph 11 (3) of the [Advocates Remuneration Order](#) for leave to appeal against the said dismissal, by the instant application now before the court.
7. It is trite law that an appeal to the Court of Appeal from the High Court on a Reference from the Taxing Master's decision is not as of right but upon application for leave under Rule 11(3) of the [Advocates Remuneration Order](#) that states as follows:
  - 3) "Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may with leave of the judge but not otherwise, Appeal to the Court of Appeal."

8. The court's discretion to allow or deny leave is to be judiciously exercised upon facts stated by the parties so as to further substantive justice.

The application too must be filed without undue delay and chances of success of the intended appeal properly demonstrated – [Muriu Mungai & Co Advocates v New Kenya Co-operative Creameries Ltd](#) (2010) eKLR; [Shah & Parek Advocates v Apollo Insurance Company Ltd](#) (2005) eKLR;

The court in the latter case held:

“judicial discretion; by nature, is the exercise of a power that is not at all available as of right. There must be cause weighing in the mind of the judge, to move him or her to exercise the said power it is a residue 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”

Further, in the case cited above, [Shah Parekh Advocates](#) (supra), the court pronounced itself that: -

“..... Rule 11(3) of the advocates (Remuneration) order do underline the primary of Judicial discretion as the basis for granting leave to file an appeal against a decision such as the one of January 28, 2005.



Similar pronouncements were made in the cases *Kenya Shell Ltd v Kobil Petroleum Limited* (2006) eKLR; *Peter Gichuki Kingara v IEBC & 2 others* (2014) eKLR, and *Masore Nyangau & Co Advocates v Supplies & Service Limited* (2019) eKLR among others.

9. It is therefore clear that, to grant or not, of leave to appeal to the court of Appeal is upon the court's discretion.

One of the conditions that the applicant must meet is to demonstrate what the court of appeal in Macharia t/a Macharia and Co. Advocates called "appeal with realistic chances of success", which it explained to mean; in regard to the intended appeal as follows:

"The term realistic moves the parameter the court should consider in analysis the chances of success of the appeal from "high" and "arguable" to a higher pedestal of concreteness: that which a judge applying his/her mind to the grounds presented is convinced that they have a somewhat definitive success. By so doing, the judge is neither being called to sit on appeal over his decision nor lay a stumbling block to or bar a party desirous of appealing from his decision".

10. The Applicant/client with a view to satisfy the court that it has a realistic desire to appeal, with high and arguable success, raises issues touching on the instructions it gave to the Advocates at the onset of the primary suit, more specifically on the value of the subject matter which ordinarily is discerned from the pleadings, a judgment or a settlement between the parties; and in its submissions dated August 19, 2022 describes the scenario at its paragraph 5, 6 and 7 thereof; to demonstrate, in its view that the suit was determined by a mutual consent of the parties, and the apportionment of Kshs 100,000,000/= amongst four (4) owners; upon which the client/applicant received only Kshs 20,000,000/=. The argument by the applicant is therefore that which is stated at paragraph 8, that:

(8) Therefore, under schedule 6 of the Advocates Remuneration Order, the sum that was due to the client once the case was settled by consent was Kshs 20 million not Kshs 100,000/= as found by the taxing master.

11. In my considered view therefore, there exists a very real and realistic issue to be determined as to what constitutes the instructions fees as captured above. This is a matter that this court will not wish away, more so due to the variance of what each party deems to be the instructions fees, that which also is the basis upon which the taxing officer, and thereafter this court upon a reference based its findings. There is therefore a realistic and arguable appeal, with high chances of success.

12. This court is therefore convinced that the prayers sought by the Applicant/client are not frivolous, and that the Applicant ought to be granted leave to ventilate his grievances to the higher court.

There is a Draft Notice of Appeal filed and annexed to the applicant's Supporting Affidavit. It is trite that a court of law will not be moved to legalize or sanitize an illegality. It is expunged from the court record for having been filed without leave of the court.

13. Consequently, the court determines that the Applicant/Respondent's application dated November 26, 2021 is allowed in the following terms: -

- i. The Client/Applicant is granted leave to Appeal to the Court of Appeal against the whole of the ruling of this court dated November 15, 2021
- ii. That the Client/Applicant shall lodge a Notice of Appeal and serve within 10 days of this ruling.



iii. That the costs of the application shall abide the outcome of the intended Appeal.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY, 2023.**

**JANET MULWA**

**JUDGE**

