



Raymond Olendo t/a Ogejo, Olendo Company Advocates & 3 others v Kenindia Assurance Company Limited & another (Miscellaneous Civil Application E078, E074 & E079 of 2021 (Consolidated)) [2023] KEHC 18462 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E078, E074 & E079 OF 2021 (CONSOLIDATED)**

PJO OTIENO, J

JUNE 5, 2023

BETWEEN

**RAYMOND OLENDO T/A OGEJO, OLENDO COMPANY
ADVOCATES 1ST APPLICANT
LUKA SIKOLIA 2ND APPLICANT**

AND

**KENINDIA ASSURANCE COMPANY LIMITED 1ST RESPONDENT
WEST KENYA SUGAR CO. LIMITED 2ND RESPONDENT**

AS CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION E074 OF 2021

BETWEEN

**RAYMOND OLENDO T/A OGEJO, OLENDO COMPANY
ADVOCATES 1ST APPLICANT
JASON BURUDI 2ND APPLICANT**

AND

**KENINDIA ASSURANCE COMPANY LIMITED 1ST RESPONDENT
WEST KENYA SUGAR CO. LIMITED 2ND RESPONDENT**

AS CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION E079 OF 2021



BETWEEN

RAYMOND OLENDO T/A OGEJO, OLENDO COMPANY

ADVOCATES 1ST APPLICANT

JOTHAN S. KENYATTA 2ND APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED 1ST RESPONDENT

WEST KENYA SUGAR CO. LIMITED 2ND RESPONDENT

RULING

1. By dint of Rule 11 (3) of the *Advocate (Remuneration Order) 1962*, a person aggrieved with the decision of a Judge upon reference may appeal to the Court of Appeal with the leave of the Court.
2. By a ruling dated October 6, 2022 the Court allowed a reference to an extent and remitted the bill for taxation by the taxing officer. That decision aggrieved the Client/Applicant who by a Notice of Motion dated October 24, 2022 has approached the Court and sought in the main that it be granted leave to appeal and further that there be stay of execution of the order remitting the bill for taxation pending determination of the intended appeal.
3. It is now trite that an appeal is never of right unless the same is granted by statute. This however is the position of stare decisis and not coded in any legislation. The rationale is that litigation ought to come to an end and that a second appeal/review or a second look at a matter by a higher Court, needs to be weighed on the question whether such would serve the purpose of a justice system. That no right of appeal iners on any litigant was succinctly stated by the Court of Appeal in *Attorney General v Bala* (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment) in the following words.

“Unless a right of appeal is clearly and expressly given by statute, it does not exist. Whereas a litigant has a right to institute any suit of a civil nature in some court or another, no right of appeal can be given except by express words. In other words, a right of appeal iners in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which is a statutory right, can be conditional or qualified. If the statute does not create any right of appeal, no appeal can be filed.”

4. Accordingly, not every grievance needs to be placed at the door steps of the higher judicial bench. It is for that reason that various statutes limit the right of appeal by words like; the decision of the High Court shall be final , appeal to the Court of Appeal shall be on issues of law only{ or on a particular subject isolated by the statute or *the Constitution* .
5. In the intended appeal, the dispute is disclosed to Centre around whether or not there was a retainer. The client denies having retain the Advocate and contends that it was upon the advocate to prove retainer so as to create a pedestal upon which to tax costs against it.
6. That to this Court is not a frivolous point. The Court considers it arguable and even when the Court may take the view that its appreciation of the record on that point may be the correct appreciation, or



even unassailable, the Court must actually reconcile itself with the fact that the Court of Appeal may on its own discretion and appreciation of the matters presented here and those to be presented there, arrive at a different conclusion. In coming to this conclusion, the court is guided by the decision of the supreme court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, where it was held:

“we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration... We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist...”

7. On the basis that the appellate Court ought to get the chance to have its own independent conclusion on the matter retainer, and the finding by the Court that the point taken is arguable, the Court considers it just that leave be granted and the client given the chance to enjoy his right to access justice before the appellate Court. Leave is therefore granted.
8. Having so granted leave, the Court considers it only prudent that judicial time before the taxing officer be saved so that the taxation is only dealt with once the question of retainer is conclusively determined. That would be served by an order for stay pending appeal.
9. In conclusion the Notice of Motion dated October 24, 2022 is allowed in terms of prayer 3 and 4. Let the appeal be lodged within fourteen (14) days from the date hereof.
10. On costs it is ordered that the same go to the successful party, the client, but shall be assessed or agreed upon at the conclusion of the intended appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 5TH DAY OF JUNE 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Applicant/Client

No appearance for the Advocate/Respondent

Court Assistant: Polycap Mukabwa

