



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 232 OF 2019

BETWEEN

SHOWCASE PROPERTY LIMITED.....CLIENT/APPLICANT

AND

MUGAMBI & COMPANY ADVOCATES.....ADVOCATES/RESPONDENT

RULING NO.3

1. On 24th August 2020, I dismissed the applicant's reference under **Rule 11(1)** of the **Advocates Remuneration Order** ("the **Order**"). The applicant now seeks leave of this court to appeal to the Court of Appeal by the Notice of Motion dated 4th September 2020 under **Rule 11(3)** of the **Order** which provides:

11 (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

2. The grounds of the application are set out in the face of the application and the supporting affidavit of Francis Muhoro Gachanja sworn on 4th September 2020. He depones that after the reference was dismissed, I indicated that the appeal was as of right and it appears that no note was made in the file. Thereafter, his advocates applied for certified copies of an order but the respondent's advocates objected to the Deputy Registrar on the ground that leave had not been obtained. His advocate therefore filed the application within the 14 days limited for filing a formal application.

3. The respondent opposed the application through the affidavit of John Mugambi sworn on 16th September 2020. He deponed that the legal fees subject of the bill of costs have been owing for a period of 7 years. He stated that the court had jurisdiction to grant leave to appeal, a mere intention to appeal was insufficient as a basis for granting leave and that the applicant had not established a basis for the grant of such leave. He stated that the court should ensure that the rights of the parties are taken into account and if the court is minded to grant leave, then such leave should be granted on terms that the amount of Kshs. 23,899,854/- certified by the Deputy Registrar should be secured.

4. In his further affidavit sworn on 25th September 2020, he reiterated what he had stated in his supporting affidavit. He deponed that at the time the oral application was made, counsel for the respondent did not object to the application and that the objection was an afterthought. He urged the court to grant unconditional leave to appeal.

5. I have considered the depositions and submissions in this matter and I take the following view. Since the right to appeal is circumscribed by the requirement for leave under **Rule 11(3)** of the **Order**, leave is not granted as a matter of right. In **Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR**, the Court of Appeal held that, "*Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered.*"

6. This means there has to be a factual basis for the grant of such leave. In **Machira T/A Machira & Company Advocates vs. Mwangi & Another [2002] 2 KLR 391**, the Court of Appeal stated that:

The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should be in the public interest, be examined by

this court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law is clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.

7. With the above principles in mind, I would readily hold that no reasons have been given in the deposition for the grant of leave. In fact, the applicant's deposition seems to proceed on the basis that the grant of leave is a matter of right and is available merely because, it intends to file an appeal from the dismissal of the reference. However, I cannot say that the applicant has no realistic prospect of succeeding on appeal on account of the fact that the issue raised concerns the manner of assessment of the instruction fees.

8. I therefore grant leave to appeal against the decision dated 24th August 2020. The applicant shall bear costs of the application.

DATED and DELIVERED at NAIROBI this 2ND day of OCTOBER 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Client/Applicant.

Mr Otenyo with him Mr Mugambi instructed by Mugambi and Company Advocates.