



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL MISC. APPLI. NO. 197 OF 2005**

**RUSTAM HIRA ADVOCATE.....ADVOCATE/APPLICANT**

**- V E R S U S -**

**ORIENTAL BANK LIMITED FORMERLY KNOWN**

**AS DELPHIS BANK LIMITED..... CLIENT/RESPONDENT**

**RULING**

1) Pursuant to the provisions of paragraph 11(3) of the Advocates (Remuneration) Order, the advocate/applicant took out the motion dated 26.9.2016, in which he sought for leave to appeal against the decision of this court delivered on 16.9.2016 plus costs of the motion. The motion is supported by the affidavit of Rustam Hira. When served, Oriental Bank filed grounds of oppositions to resist the motion. When the motion came up for interpartes hearing, learned counsels appearing in this matter made oral submissions.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit. I have also considered the grounds of opposition plus the oral submissions. The applicant has stated that he is aggrieved by the decision of this court hence he requires leave to file an appeal before the court of Appeal. It is argued that one of the grounds to be argued in the Court of Appeal is that this court misdirected itself when it allowed the respondent's reference yet there was no breach of principle BY the taxing OFFICER. It is also argued that the applicant will also argue that the applicant was wrongfully denied an opportunity to cross-examine one Wilfred Kenneth Machuki. It is also stated that this court did not apply the doctrine of estoppel in allowing the reference. In short, the applicant is saying that he has good grounds of appeal.

3) The client/respondent is of the view that there are no tangible grounds shown to warrant this court granting leave to appeal. It is argued that the requisite bundle documents are yet to be furnished and hence the Court of Appeal would be sitting in vain in the absence of records forming the basis of the taxation in various files. It is the opinion of the respondent that the application is premature.

4) On 16.9.2016, this court delivered its ruling over the chamber summons dated 23.2.2016 in which this court set aside the decision of the taxing officer delivered on 30.6.2009 together with the consequential certificate of taxation. This court further remitted the matter to be taxed afresh by a different taxing officer other than Hon. R. Makungu. The advocate/applicant is now seeking for leave to challenge the decision in the Court of Appeal. In my humble view, I think the main ground which should be determined here is whether there are sufficient grounds for the applicant to benefit from this court's discretion. The applicant has pointed out that the appeal has good grounds. I have already outlined some of those grounds. Where a party has shown that he has arguable grounds, then the court is enjoined by law to grant such a party leave to appeal. One of the grounds which the applicant has put forward to argue before the Court of Appeal is that this court erroneously allowed the reference yet the taxing officer did not breach any principle applicable in taxation proceedings.

5) The other issue which may need to be determined by the Court of Appeal is whether or not the order allowing the reference is a kin to setting aside a consent order. On my part, I am satisfied that the advocate/applicant has put forward good grounds to benefit from this court's discretion.

6) In the end, I grant the applicant leave to appeal to the Court of Appeal against this court's ruling

delivered on 16.9.2016. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of February, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent