



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL CAUSE NUMBER 553 OF 2014**

**DOUGLAS ODHIAMBO APEL. .... 1<sup>ST</sup> APPLICANT**

**EMMANUEL OMOLO KHASINO. .... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**TELKOM KENYA LIMITED. .... RESPONDENT**

**RULING**

The Applicant herein has moved this honourable court by way of a chamber summons dated the 6<sup>th</sup> April, 2016 expressed to be brought under paragraph 11(3) and (4) of the Advocates (Remuneration Order and Section 3A of the Civil Procedure Act. They have sought the following orders: -

- 1) That this application be certified urgent and be heard ex parte in the first instance.
- 2) That recovery of costs herein be stayed pending the hearing and determination of this application.
- 3) That this honourable court be pleased to grant leave to the Respondent to appeal to the Court of Appeal against its decision of 31<sup>st</sup> March, 2016 and time for filing the appeal be enlarged.
- 4) That cost and incidentals to this Application be provided for.

The facts in support of the application are that the Applicant is totally aggrieved by the ruling of this honourable dated the 31<sup>st</sup> March, 2016 and wishes to appeal against the same. The Applicant has sought the leave of the court to appeal against the said ruling and has sought stay of execution pending the hearing and determination of the intended appeal. It avers that if stay of execution is not granted, execution is likely to take place as the counsel for the Respondent has already served a notice on the counsel for the Applicant threatening execution. That in the interest of justice it urges the court to grant the application.

The Respondent opposed the application by way of a replying affidavit sworn by Nyamodi Ochieng-Nyamogo on the 19<sup>th</sup> April, 2016. In the said affidavit he avers that the application is hopelessly misconceived, incurably defective, vexatious, scandalous and frivolous and that the court has no jurisdiction to handle it. He averred that there was no valid reference filed in this matter and the court was right in dismissing the chamber summons.

In her submissions, counsel for the Applicants submitted that there has been no inordinate delay in filing the present application. With regard to the leave to appeal she relied on the case of **Muriu Mungai &**

**Co. Advocates Vs New K.C.C Limited**, HCCC No. 284 of 2007 in which Koome J, observed that leave to appeal was necessary and that granting of leave is a discretionary remedy by the Judge which has to be exercised judiciously. She further submitted that there was a reference on record and to that end, she sought to rely on the cases of **Vishisht Talwar Vs Antony Thuo Kanai t/a Thuo Kanai Advocates**, Civil Appeal No. 158 of 2014 and that of **Kenyariri & Associates Vs Salama Beach Hotel Ltd & 4 others**, Misc. Civil Application No. 16 of 2013.

She took issue with the replying affidavit and submitted that it has been sworn by an advocate and not the Respondent though she did not ask the court to expunge it from the record. On the issue of jurisdiction, she maintained that the court has jurisdiction to her the application and made reference to the same authorities that she has relied on. She concluded her submissions by stating that the Applicants are ready to deposit the money in court or in a joint account in the name of both advocates.

In his submissions, counsel for the Respondent, submitted that though the Applicant had filed a Chamber summons, the same did not amount to a reference as stipulated under paragraph 11(2) of the remuneration Oder. That though the counsel for the Applicant sought for reasons, she did not indicate where she disagreed with the decision of the taxing master.

According to him, a party must satisfy the court that there was a reference which the Applicants failed to do and the court having made a ruling that there was no reference, the matter ended there. That they cannot claim a benefit which they could only enjoy if there was valid reference. It was further submitted that the Applicants did not require the leave of the court to appeal as it has undoubted right of appeal. He urged the court to ignore the authorities as they are merely persuasive and prayed for the dismissal of the application.

The court has considered the material before it and the arguments by the learned counsels. The applicants have applied for leave to file appeal out of time but no good reasons have been given why the appeal was not filed on time. They have also sought a stay of execution pending appeal.

In the interest of justice, the court shall grant the orders sought in the application dated 6<sup>th</sup> April, 2016 on condition that the awarded costs are deposited in a joint account in the names of both advocates within 21 days from today. Leave is also granted to the applicants to file the appeal out of time. The costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Nairobi on 1<sup>st</sup> day of December, 2016.

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**L NJUGUNA**

**JUDGE**