



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC MISC. APP NO. 122 OF 2016

MASORE NYANG'AU & CO. ADVOCATES.....ADVOCATE

=VERSUS=

SUPPLIES & SERVICES LIMITED.....CLIENT

RULING

1. On 9/3/2018, Supplies and Services Limited (**the applicant**) brought an application dated 8/3/2018 seeking leave to file an appeal against the ruling of this court rendered on 23/2/2018. The applicant also sought an order staying further proceedings pending the hearing and determination of the intended appeal. The said ruling related to a reference by the client (the applicant in the present application). Through the impugned ruling, this court declined to interfere with the taxing officer's decision save on the item relating to Value Added Tax (VAT). The said application dated 8/3/2018 is the subject of this ruling.

2. The application was supported by an affidavit sworn by Rajendra G. Thakker, the Logistics Manager of the applicant. He deposed that for an appeal to be filed, leave to appeal has to be granted in accordance with Paragraph 11 (3) of the Advocates Remuneration Order. He further deposed that the applicant intended to raise substantive issues of law and fact which merit consideration by the Court of Appeal. He deposed that the said issues relate to the taxing officer's exercise of discretion in taxations where the value of a subject matter cannot be ascertained from pleadings, judgment or settlement and where the substantive matter is still pending hearing and determination. The deponent further deposed that the applicant stood to suffer substantial loss if stay of proceedings was not granted. He added that the court was empowered under Article 159 of the Constitution to do substantive justice.

3. The advocate (respondent in the present application) opposed the application on the following verbatim grounds:

(i) that the application has been made by an advocate who has not sought leave to come on record and who is not properly on record. The application is to that extent incompetent;

(ii) that as the notice of appeal was filed by a stranger to this suit, there is no appeal in respect of which this Honourable Court can stay further proceedings before the taxing officer;

(iii) that leave to appeal can only be applied for either informally at the time the ruling sought to be appealed against is made or within fourteen days from the time the said order was made. As the application has been made by a stranger, there is no application that was made within the required time;

(iv) that the application is premature in view of the directions given by the judge in the ruling sought to be appealed against;

(v) that the application is muddled up and the same is an abuse of the process of the court;

(vi) that the application is made in bad faith and the same is an attempt to deny paying an advocate his fees.

4. The application was canvassed through written submissions. The applicant submitted that under paragraph 11(3) of the Advocates Remuneration Order, an appeal to the Court of Appeal on a reference under paragraph 11 (1) can only be mounted with leave of the court. It was further submitted that the applicant intended to raise the issue of advocate-client fees since the value of the subject matter could be ascertained from pleadings, judgment or settlement. It was further submitted that grant of leave would not prejudice the advocate's rights in any manner since he would have an opportunity to contest the appeal. The applicant submitted that they were willing to deposit the amount taxed in an interest earning account in the joint names of the advocates.

5. The applicant further submitted that there was a consent on record filed on 5/3/2018 allowing the client's present advocates to come on record in place of the former advocates, hence the application was properly filed. The applicant added that the application for leave to file an appeal was filed on 9/3/2018 which was within the 14 days stipulated by the rules.

6. On the plea for stay of proceedings, the applicant relied on the case of **Labh Singh Harman Singh Limited v Attorney General & 2 Others [2015]eKLR** where it was held that a court making a determination on a reference has power to grant a stay order. Reliance was also placed on **Afritrack Investments (E.A Limited) v Wambua & Maseno Advocates [2016]eKLR** where it was stated that:-

“if the applicant’s appeal ultimately succeeds either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money if paid and if it has to institute other civil proceedings to recover money. Such an eventuality should be in the interests of justice be taken into account.”

7. Finally, the applicant submitted that the question as to whether the notice of appeal was properly filed was not a consideration in the present application because an application seeking to strike out the notice of appeal had been filed at the Court of Appeal.

8. The respondent filed their submissions on 11/1/2019. They submitted that Rule 11 (3) of the Advocates Remuneration Order provided that any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) ought to appeal to the Court of Appeal with the leave of the judge. They added that an appeal against a decision on a reference must be with the leave of the court that made the decision either orally when the order is made or within 14 days from the date the order was made. The respondent’s case was that the present application was time barred because it was filed on the 15th day after the ruling was delivered. The respondent further submitted that this court did not have jurisdiction to handle this matter because there was Civil Application Number 69 of 2018 filed in the Court of Appeal to strike out the applicant’s Notice of Appeal.

9. It was further submitted that the current advocate was a stranger in the proceedings because he was not properly on record. Reliance was placed on **William Charles Fryda & another v Assumption Sisters of Nairobi Registered Trustees & another [2017] eKLR** where the court held that the notice of appeal before court was incompetent because it was filed by a stranger to the proceedings. It was also submitted that an order of stay of execution can only be made if the court is satisfied that substantial loss may result to the applicant. Lastly, it was submitted that the applicant’s application sought to stay further proceedings yet there were no pending proceedings.

Determination

10. I have considered the application together with the supporting affidavit, the grounds of opposition, the parties’ rival submissions, the relevant legal frameworks and the relevant jurisprudential principles. Four key issues fall for determination in this application. The first issue is whether the present application is incompetent by dint of the fact that the advocates who presented it did not obtain formal leave to come on record. The second issue is whether the present application was filed outside the 14 days period prescribed by the rule 39 of the Court of Appeal Rules. The third issue is whether this court can properly entertain the plea for leave to appeal in light of the fact that an appeal has already been lodged and an application challenging the competency of the said appeal is pending determination by the Court of Appeal. The fourth issue is whether the applicant has satisfied the criteria for grant of leave to appeal against a decision where the law requires leave to be granted before an appeal is lodged.

11. The first issue is whether the present application is incompetent by dint of the fact that the advocates presenting it did not obtain formal leave to come on record. From the court record, on 5/3/2018, the firm of Makori & Karimi Advocates together with the firm of Boniface Masinde & Co. Advocates filed a consent allowing the latter to come on record. In my view, a consent duly executed and filed by both the outgoing and incoming law firms properly accords with the requirements of Order 9 rule 9 of the Civil Procedure Rules which provide as follows:

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

12. Without saying much, my finding on this issue is that the firm of Boniface Masinde & Co Advocates properly came on record on 5/3/2019 because a consent was filed on the same day permitting change of advocates. The present application is therefore not incompetent on account of non-compliance with the requirements of Order 9 rule 9 of the Civil Procedure Rules.

13. The second issue is whether the present application was filed outside the 14 days period prescribed by rule 39 of the Court of Appeal Rules. The impugned ruling was rendered on 23/2/2018. The present application was filed on 9/3/2018. Computation of time is guided by Section 57 of the Interpretation and General Provisions Act which provides as follows:-

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

14. Suffice to observe that in computing the 14 days period, the day when the ruling was rendered is excluded. Secondly, it is noted that February of 2018 had 28 days. It therefore follows that 9/3/2018 was the 14th day from the date of delivery of the impugned ruling. Consequently, the present application was properly filed within the prescribed period of 14 days. I so find.

15. The third issue is whether this court can properly exercise jurisdiction on an application for leave to file an appeal when the applicant has already filed the appeal and a determination of the Court of Appeal is awaited on the competency of the said appeal. There is no doubt that Rule 74(4) allows the filing of a notice of appeal before formal leave is granted. There is however common ground in this matter that the applicant lodged an appeal on 5/5/2018. The respondent promptly moved the Court of Appeal to strike out the appeal on ground of incompetency. In my view, if this court were to entertain the present application, its decision will pre-empt the Court of Appeal's determination on the pending application. My position on this issue would have been different were it not for the fact that this court is in essence invited to pre-empt the Court of Appeal's decision on the competency of the appeal already lodged. For this reason, this court declines to entertain the applicant's pre-emptive application.

16. The fourth issue is whether the applicant has satisfied the criteria for grant of leave to appeal. This court's jurisdiction to grant leave to appeal is discretionary. That discretion is, however, to be exercised judiciously and the applicant must demonstrate a ground of appeal which merits serious judicial consideration (see **Machira t/a Machira & Co Advocates v Machira & Co Advocates v Mwangi & Another (2002) 2 KLR 391**). I have carefully evaluated the arguments presented in support of the application. The applicant does not point out any specific novel issue or point of law of general public importance which falls for consideration by the Court of Appeal. My view is that in the absence of disclosure of a specific novel issue or point of law of general public importance meriting consideration by the Court of Appeal, there is no proper basis for grant of leave.

Disposal Order

17. In the light of the above findings, the client's notice of motion dated 5/3/2018 is rejected for lack of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MARCH 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Mutabori holding brief for Mr Masore for the Advocate

Mr Masinde for the client

June Nafula - Court Clerk