



REPUBLIC OF KENYA



KENYA LAW

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**Kenya County Government Workers Union v Mbuvi t/a Katunga Mbuvi & Co Advocates
(Civil Application E059 of 2023) [2023] KECA 525 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 525 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E059 OF 2023
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

**LEONARD KATUNGA MBUVI T/A KATUNGA MBUVI & CO
ADVOCATES RESPONDENT**

(Application for stay of execution and further proceedings pending the hearing and determination of an appeal from the ruling and order of the Employment & Labour Relations Court at Nairobi (Dr. Gakeri, J.) dated 13th February 2023 in ERLC MISC. No. E209 of 2021)

RULING

1. When the motion on notice dated February 24, 2023 and taken out by the applicant, Kenya County Government Workers Union, came up for hearing on April 4, 2023, the applicant's learned counsel, Mr Peter Oginga, insisted on prosecuting the application even though he conceded that the applicant had a pending application before the Employment and Labour Relations Court (ELRC) for leave to appeal to this Court, which is yet to be heard and determined. The applicant's motion is taken out under rule 5(2) (b) of the [Court of Appeal Rules](#) and seeks, stay of execution of the ruling of the ELRC dated February 13, 2023 pursuant to which the court remitted a bill of costs by Katunga Mbuvi & Company Advocates (the respondent) for re-taxation by a different taxing master.
2. After the applicant adamantly insisted that the application for stay of execution was properly before this Court, even though the applicant was yet to obtain leave to appeal, we directed the parties to first address us on that issue because both parties agreed that it was a jurisdictional issue. This ruling is confined to that issue only.
3. Before we considered the parties' arguments, it is apposite to sketch the background to the application. The respondent acted for the applicant in some contentious matters and ultimately presented its bill



of costs for taxation. By a ruling dated June 14, 2022, the taxing master taxed the bill of costs at Kshs 8,985,417.42. The applicant was aggrieved and filed a reference in the ELRC specifically under Rule 11(2) of the Advocates Remuneration Order seeking, among others, stay of execution of the ruling of the taxing master, review or setting aside of the taxing master's ruling, reassessment by the Court of the costs due to the respondent and, in the alternative, an order that the respondent's bill of costs be re-taxed by a different taxing master.

4. Upon hearing the reference, the ELRC (Dr Gakeri, J), in a ruling dated February 13, 2023, remitted the bill of costs for re-taxation by a different taxing master. Although that was exactly one of the prayers that the applicant had prayed for as an alternative, the applicant was aggrieved and lodged a notice of appeal on February 21, 2023. On February 24, 2023, the applicant took out under rule 5(2)(b) of the Court of Appeal Rules, the notice of motion now before us, seeking stay of execution of the ruling of the ELRC pending the hearing and determination of an intended appeal. It is apt to point out that, on February 27, 2023, the applicant applied before the ELRC for leave to appeal to this Court against the ruling dated February 13, 2023, which application is still pending hearing and determination.
5. In support of his contention that, in the circumstances of this case, this Court has jurisdiction to entertain the application for stay of execution, Mr Oginga submitted that the Court is clothed with jurisdiction because the applicant has already lodged a notice of appeal, which is on record. As far as counsel was concerned, decisions of this Court have consistently held that, once a party has filed a notice of appeal, the Court has jurisdiction to entertain an application under rule 5(2) (b). Counsel relied on Githunguri v Jimba Credit Corporation Ltd (No 2) [1988] eKLR, where this Court held:

“We think this Court's jurisdiction under rule 5(2) (b) to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 74. And we are then clothed with jurisdiction to grant any such orders “on such terms as the Court may think just.” That rule confers an independent original discretion on us and we have to apply our own minds de novo on the suitability or otherwise of the relief sought. It is not an appeal from the learned Judge's discretion to ours.”

6. More recently in Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others (20130 eKLR) the Court, relying on Halai & Another v Thornton Turpin (1963) Ltd [1990] KLR 365, stated thus:

“The court becomes seized of the matter only (an application under rule 5(2)(b)) after the notice of appeal has been filed under the rule.”

8. Next, counsel for the applicant submitted that although the applicant had indeed applied for leave to appeal and that its application is still pending before the ELRC, that application was not necessary, and was filed out of abundant caution. Counsel contended that the applicant had an automatic right of appeal by dint of section 17 of the Employment & Labour Relations Court Act, which provides thus:

“17 Appeals from the Court (ELRC) shall lie to the Court of Appeal against any
(1) judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.”

9. For the foregoing reasons, counsel urged us to find that the applicant was properly before the Court under rule 5(2) (b), having filed a notice of appeal.



10. Mr, Mbuvi, learned counsel for the respondent, opposed the application contending that it was prematurely before the Court. He submitted that after the ruling on the taxation reference, the applicant filed an application for leave to appeal.
11. He added that the application was still pending before the ELRC for hearing and determination, and that it was sufficient proof that, as yet, the applicant had no right of appeal. In the circumstances of this application, counsel for the respondent contended that the applicant cannot move the Court under rule 5(2) (b) by merely filing a notice of appeal.
12. Lastly, counsel submitted that section 17 of the *ELRC Act* had no relevance to this application because the ruling that the applicant intends to challenge on appeal did not emanate from the exercise of the ELRC jurisdiction under Article 162(b) of the *Constitution* to hear and determine disputes relating to the environment and the use of and occupation of, and title to, land. Instead, the dispute arose from taxation of an advocate and client bill of costs under the *Advocates Remuneration Order*. It was counsel's submission that appeals from a decision of a judge on a reference in taxation matters are regulated by the *Advocates Remuneration Order*, and not the *ELRC Act*. Counsel added that rule 11(3) of the *Advocates Remuneration Order* requires that a party aggrieved by a decision of a judge in a reference must first obtain leave to appeal to this Court. Accordingly, counsel urged us to strike out the application.
13. We have carefully considered the issue identified by the Court and addressed by the parties. It is common ground that the ruling that the applicant intends to appeal to this Court arose from the applicant's reference to the ELRC challenging the advocate-client bill of costs as taxed by the taxing master. Rule 11(3) of the *Advocates Remuneration Order* provides thus:
 - “11. Objection to decision on taxation and appeal to Court of Appeal
 - (3) ny 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.” (Emphasis added).
14. Under the above rule, the applicant does not have an automatic right of appeal to this Court. To appeal, the applicant must first obtain leave of the learned judge. The rule is crystal clear that, without that leave, the applicant cannot sustain an appeal to this Court. But the applicant takes cover under the decisions of this Court that state that once a party has lodged a notice of appeal, he or she may approach the Court for a remedy under rule 5(2) (b) of the Rules.
15. We think, with great respect, that the applicant has not appreciated the distinction between a right of appeal and a notice of appeal and, as a result, it has completely misapprehended the decisions of this Court which it relied on. A party who has a right of appeal is entitled to invoke the jurisdiction of the court under rule 5(2) (b) once he or she has filed a notice of appeal. As the Supreme Court stated in *Nyutu Angrovet Ltd v Airtel Networks Kenya Ltd* [2019] eKLR, a right of appeal is conferred either by the *Constitution* or by a statute, and that “there is no direct access to the Court of Appeal by all and sundry.” Earlier on, in *Westlink Mbo v Equity Bank Ltd* [2013] eKLR, Githinji, J aptly observed that “there is no right of appeal by implication or inference”.
16. A notice of appeal does not confer the right of appeal. That right is conferred by the *Constitution* or by a statute even before a notice of appeal comes into play. The nature and effect of a notice of appeal was



succinctly explained in *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2others* [2010] eKLR. Omolo JA explained as follows: -

“ At the stage of determining an application under Rule 5(2)

(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”

17. A notice of appeal therefore is a merely an indicia of intention to appeal by a person who already has a right of appeal, including a person who has obtained leave to appeal where such leave is a precondition to appeal. This requirement for a notice of appeal stems from the obvious appreciation that not every person who has a right of appeal may wish to exercise that option. Accordingly, as far as rule 5(2) (b) is concerned, a notice of appeal only confers the right to apply for the remedies provided therein to a party who has a right of appeal. A party who has no right of appeal is not entitled to approach this Court under any circumstances, even after purporting to file a notice of appeal. We would go further and state that a party who has no right of appeal has, in fact, no capacity to file a notice of appeal.
18. Where the law confers upon a party the right of appeal subject to obtaining leave, such a party can only file a notice of appeal after obtaining leave, or after the Court has deemed the notice of appeal to be properly on record following grant of leave. Filing a notice of appeal before obtaining leave to appeal where such leave is required, does not give such an applicant standing before this Court, let alone standing to move the Court under rule 5(2) (b). Accordingly, we are satisfied that the decisions of this Court relied upon by the applicant have been misapprehended because they address only an applicant who has a right of appeal. As at the time the applicant appeared before us, it had not obtained the leave that is mandatorily required by rule 11(3) of the *Advocates Remuneration Order*. To hold that a party who has no right of appeal but has otherwise filed a notice of appeal may move the Court would be to reach the untenable conclusion that a right of appeal is conferred by a notice of appeal, rather than by the *Constitution* or statute. The foundational principle is that it is the existence of a right of appeal which enables an applicant to file a notice of appeal and not vice versa.
19. It is also a basic principle that should be readily apparent that a remedy under rule 5(2) (b) is invariably granted “pending the hearing and determination of an appeal or intended appeal.” So, legally speaking, from where would an appeal or intended appeal arise when a party has no to right of appeal to begin with? In our view, there cannot be a pending or intended appeal if a party has no right of appeal in the first place, or has not obtained leave to appeal if it is so required by law. For the sake of clarity, an “intended appeal” does not mean an abstract notion entertained in the mind of a party. It means that the party has a right of appeal conferred by law, and that he or she has evinced intention to actualise that right of appeal by filing a notice of appeal.
20. As an alternative argument to shore up its argument, the applicant cites section 17 of the *ELRC Act* to assert that if a right of appeal is required, at the time of lodging the notice of appeal, then it has such right by virtue of that provision. We agree with the respondent’s contention that the intended appeal arises, not from exercise by the ELRC of its ordinary jurisdiction under the *Constitution* or *ELRC Act*, but rather from the exercise of a special jurisdiction conferred by the *Advocates Act* solely for the purposes of disputes arising from the Advocates Remuneration Order.



21. Indeed, in *Macharia & Co Advocates v Magugu* [2002] EA 428, the High Court aptly held that:-
- “Taxation of costs, whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing Officer by the Advocates Remuneration Order.” (Emphasis added).
22. Being a special jurisdiction, disputes on taxation of costs are regulated by the Advocates Remuneration Order and, therefore, the question of whether a right of appeal exists to this Court from a reference to a judge in the Superior Court below must be answered with regards to the terms of the *Advocates Remuneration Order*.
23. In addition, to accept the applicant’s argument is to render otiose and irrelevant section 11(3) of the *Remuneration Order*, which sound canons of statutory interpretation decry. From the circumstances of this application, we have no doubt in our minds that, for purposes of appealing from a decision of a judge of the ELRC arising from a reference against the decision of a taxing master, it is section 11(3) of the *Advocates Remuneration Order* that is applicable rather than section 17(3) of the *ELRC Act*.
24. For the foregoing reasons, we find that this application is premature, the applicant has not obtained leave to appeal, and that the mere filing of a notice of appeal does not of itself give the applicant, who does not have the right of appeal, standing to move the Court under rule 5(2) (b). In the circumstances, the application before us is utterly incompetent and the same is hereby struck out with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023

K. M’INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

