



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 38 OF 2011 (UR 24/2011)

BETWEEN

**KENYA UNION OF SAVINGS & CREDIT CO-OPERATIVE
LIMITED.....APPLICANT**

AND

ONSANDO OSIEMO T/AONSANDO OSIEMO & COMPANY ADVOCATES.....RESPONDENT

**(Application for leave from the ruling and order of the High Court of Kenya at Nairobi
(Koome, J) dated 28th January, 2011**

in

HCCC NO. 81 OF 2005)

RULING OF THE COURT

The Motion on Notice before us purports to be taken out under “Order 39b), 41 and 47(1) of the Court of Appeal Rules, 2010”. The obvious mistake notwithstanding, the applicant, the **Kenya Union of Savings & Credit Co-operative Limited**, seeks leave to appeal against the ruling and order of **Koome J**, (as she then was) dated 28th January, 2011 and stay of further proceedings in **HCCC No 81 of 2005** pending the lodging, hearing and determination of an intended appeal.

The background to the application, as far as we can deduce from the paucity of information supplied by the applicant, is an advocate-client relationship gone sour between the parties. That resulted in the advocate filing his Bill of Costs which was taxed at **Kshs.1,372,909** by an order dated 27th May, 2010. The applicant did not object to the taxation within the prescribed time or at all. On 30th August, 2010, the applicant took out a chamber summons seeking enlargement of time to object to the taxation order of 27th May, 2010 and stay of execution of the awarded cost. That is the application that was dismissed by the learned judge on 28th January, 2011.

It would appear that subsequently the applicant applied before the High Court for leave to appeal against the order of 28th January, 2011. That application was dismissed on 8th February, 2011. Although rule 43 requires the order of the High Court declining leave to appeal to be attached to the application that is made before this court for leave to appeal, that order is not part of the record. **Mr Mond**, learned counsel for the applicant, informs us that he is unable to get the order as the court

file has since gone missing.

The grounds upon which the application before us is made is that the total amount claimed in the Bill of Costs was Kshs.609,427 but the taxed amount was Kshs 1,613,509; that the delay in raising the objection to the taxation was occasioned by the applicant's former advocates; that the declining to grant leave to appeal the High Court had acted injudiciously and that the respondent stands to suffer no prejudice.

Though, according to the return of service the respondent's advocate was served with the hearing notice on 4th July, 2014, neither a representative of the respondent nor its advocate appeared in court. In addition, the respondent did not file any grounds of objection or any replying affidavit.

Before us **Mr. Mond** canvassed the application on the basis of the grounds and the reasons that we have set out above. At the conclusion of his submissions, it became clear however that the High Court had, on 1st September 2010, ordered the applicant to deposit **Kshs.960,726** in an interest earning account in the joint names of the advocates for the parties. That amount was released to the advocates for the respondent upon the dismissal of the applicant's application on 28th January, 2010.

We have considered the application and the submissions of learned counsel. Before Koome, J. the applicant was very categorical that it was not challenging the amount awarded in the taxed Bill of Costs, but only the interest awarded on the decretal sum. The learned judge also found that at the time of applying for extension of time to object to the taxation, the applicant had not even given the notice or sought the reasons for the taxation, as required by **Rule 11 of the Advocates Remuneration Order**.

The considerations that guide this Court in an application for leave to appeal from a decision of the High Court are well settled. In **SANGO BAY ESTATES VS DRESDNER BANK AG (1972) EA, 17**, the predecessor of this Court stated that leave should normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration. And in **J. P. MACHIRA T/A MACHIRA & CO ADVOCATES VS WANGETHI MWANGI & ANOTHER, CA No Nai 433 of 2001**, this Court expressed itself as follows on the issue:

“The considerations for the grant or refusal of an application for leave to appeal (a matter for the discretion of the Court) are few but familiar and we consider it desirable and useful to have them briefly stated. 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 prospect 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 may be one which the Court considers should 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 requires clarification. There must, however, almost always be a ground of appeal which merit serious judicial consideration.”

See also **SADRUDIN KURJI & ANOTHER VS SHALIMAR LTD & OTHERS CA No Nai 197 of 2004** and **DR WILSON MWONGA NGOKA VS ANNE NDINDA NGOKA CA No Nai 296 of 2005**.

In both **SANGO BAY ESTATES VS DRESDNER BANK AG (supra)** and **J. P. MACHIRA T/A MACHIRA & CO ADVOCATES VS WANGETHI MWANGI & ANOTHER, (supra)**, the Court laid particular emphasis on the fact that where the order from which leave is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out to justify grant of leave to appeal by this Court.

In this particular case the applicant was seeking the exercise of discretion of the High Court to extend time to enable it object to the taxation of the Bill of Costs. The application for extension of time was made three months after the taxation, without as much as a request to the taxing master for the reasons for the taxation. The failure to object and the delay in the making of the application for extension of time to object, were not seriously explained, other than by a casual statement blaming the applicant's former advocates, who were not even disclosed. We are satisfied that no strong case has been made out to show wrong exercise of judicial discretion by the learned judge and further that there is no new or difficult point of law involved in the intended appeal. In those circumstances, there is no basis to support either the prayer for leave to appeal or for stay of proceedings. Accordingly, this application is not meritorious, and the same is hereby dismissed. We make no orders on costs since the respondent did not appear to defend the application.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. N. WAKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR

jkc