IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPLICATION NO. SUP. 4 OF 2014

BETWEEN

P. M. WAMAE & CO. ADVOCATES ……...…… APPLICANT

AND

NTOITHA M'MITHIARU ……..……. RESPONDENT

(An application for leave to file an appeal in the Supreme Court of Kenya from the judgment of the Court of Appeal at Nyeri (Visram, Koome & Odek, JJ.A) dated

18th June, 2014

in

Civil Appeal No. 17 of 2013)

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RULING OF THE COURT

1. The applicant herein filed an Advocate/Client bill of costs seeking Kshs. 8,731,711.14/= for services rendered to the respondent in High Court Election Petition No. 1 of 2003 at Meru. The bill of costs was taxed at Kshs. 3,236,343.68/=. Aggrieved by the said taxation, the respondent filed a reference in the High Court which was dismissed vide a ruling dated 17th January, 2013. It is that decision which provoked Civil Appeal No. 17 of 2013 in this Court.

2. In support of the appeal that was before us, the respondent contended that the applicant's retainer was based on a letter dated 20th March, 2003 written by the applicant. In the said letter, the applicant confirmed that it was offering its services on a voluntary basis to the respondent's sponsoring party, National Rainbow Coalition (NARC); the respondent would only be required to pay a concessionary fee of Kshs. 400,000/=; in the event the Petition succeeded, further fees would be recovered by the applicant from the costs which would be awarded to the respondent. It is on the basis of the aforementioned representation that the respondent paid Kshs. 400,000/= to the applicant and met their traveling expenses. The respondent contended that the applicant was not entitled to further fees.

3. On the other hand, the applicants contended that they were entitled to charge for its services under ***Section 51*** of the ***Advocates Act***; under ***Rule 13(1)*** of the ***Advocates Remuneration Order,*** the letter

dated 20th March, 2003 could not limit the costs charged to the respondent because it was not signed by the respondent as required under ***Section 45(1)*** of the ***Advocates Act.*** The applicant's position was that the bill as taxed was reasonable taking into consideration the importance and complexity of an Election Petition.

4. By a judgment dated 18th June, 2014, this Court allowed the respondent's appeal. We held that the applicants were bound by their letter dated 20th March, 2003 and was estopped from charging further fees. We set aside the taxed costs and directed the applicant's bill to be taxed afresh before another taxing master in the terms of the said letter. That is the decision that has provoked this current application seeking leave to appeal to the Supreme Court.

5. The application before us is brought pursuant to ***Articles 159(2)(a)&(d), 163(4)(b) & 259(1)*** of the ***Constitution, Sections 3A & 3B*** of the ***Appellate Jurisdiction Act, Section 15(1)*** of the ***Supreme Court Act, Rule 24*** of the ***Supreme Court Rules*** and ***Rules 42 & 43*** of the ***Court of Appeal Rules.*** The application is based on the ground that the intended appeal to the Supreme Court involves matters of general public importance, that is, it raises important questions of law as to whether:

> ***i. Under Section 45(1)(b) of the Advocates Act an Advocates' fee on an Advocate/Client basis can be based on unexecuted fee agreement;***
>
> ***ii. The Common Law doctrine of estoppel can be applied retrospectively;***
>
> ***iii. The circumstances in which common law principles may take precedence over written law;***
>
> ***iv. The Court of Appeal is a court of record in light of the provisions of Article 162(1) & 163(7) of the Constitution.***

6. While admitting that they wrote the letter dated 20th March, 2003, Mr. Paul Wamae pn behalf of the applicants deposed the same was not valid since it had not been signed by the respondent as required under ***Section 45(1)*** of the ***Advocates Act.*** According to the applicant, this Court's finding that the doctrine of estoppel was applicable created a state of uncertainty in the law in respect of the application of the doctrine of estoppel vis-à-vis written law; whether Advocate/Client bill can be premised on unexecuted fee agreement. The intended appeal seeks clarification of the Supreme Court on the extent and applicability of the Common Law principles where there are clear provisions of written law. The applicants contended that the intended appeal transcends the circumstances of the particular case and has a significant bearing on the public interest. This is because the decision of this Court affects how advocates are to deal with their clients while charging fees.

7. In opposing the application, the respondent deposed that the application was incompetent because it was brought by way of a Notice of Motion instead of an Originating Motion as per ***Rule 24(4)*** of the ***Supreme Court Rules, 2012.*** The intended appeal did not raise any issue of general public importance; the dispute between the parties was a private dispute.

8. The applicant filed written submissions and Mr. Macharia made oral highlights on their behalf. It was submitted on behalf of the applicant that the best practice in an application such as this one is for the same to be heard by a different bench as opposed to being heard by the same bench whose judgment is the subject of the intended appeal. The applicant urged us to refer the application to the President of this Court for reallocation to a different bench. It was the applicant's case that in considering an application for leave to appeal to the Supreme Court, this Court ought not to go to the merits of the intended appeal but follow the principles set out in the Supreme Court's decision in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone- Application No. 4 of 2012.*** Mr. Macharia reiterated the grounds in support of the application. He submitted that the matter affected advocate/client relationship and went beyond the parties. He urged us to allow the application.

9. Mr. Kairaria, learned counsel for the respondent, in opposing the application submitted that the same

was incompetent having been instituted by way of a Notice of Motion. According to him, the applicant had not demonstrated that the intended appeal raises issues of general public importance. The matter was a private matter between an advocate and client and was decided on its own peculiar facts. He argued that the matter was not a precedent setting case for all advocate/client disputes.

10. We have anxiously considered the application, submissions by counsel and the law. It is imperative at this Juncture to consider the issue of the competency of the application before us. In ***Hermanus Philipus Styen –vs- Giovanni Gnecchi- Ruscone- Civil Application No. Nai. Sup. 4 of 2012,*** this Court observed:-

> ***"Currently, there are no rules of procedure regulating the manner in which an application for certification should be filed and handled, the reason being that until the creation of the Supreme Court by the Constitution of Kenya, 2010 this Court was hierarchically the highest judicial organ. However, the absence of rules does not affect the jurisdiction of the Court, which is conferred by Article 163(4) (b) of the Constitution. The Court can apply the existing procedure for making applications to Court or the procedure provided for making a similar application in the Supreme Court. By rule 42 and 43 of the Court of Appeal Rules, all formal applications to Court should be made by motion supported by one or more affidavits. Similarly, interlocutory applications in the Supreme Court are made by Notice of Motion supported by an affidavit (Rule 21(1) , the Supreme Court Rules, 2011).***
>
> ***Until the rules are made to specifically prescribe a different procedure for making an application for certification to this Court, such an application should be made by a Notice of Motion supported by one or more affidavits in accordance with the practice of this Court. Thus the present application which is made by Notice of Motion supported by an affidavit is property before the Court."***

Since the aforementioned decision, no rules of procedure have been formulated providing that an application for certification in this Court ought to be way of an Originating Motion. We are of the view that the proper procedure for filing an application such as the one before us is by Notice of Motion. We find that the application is competently before us.

11. On the issue of the application being placed before a different bench, our examination of the ***Constitution*** and the ***Appellate Jurisdiction Act*** reveals that there is no restriction on an application such as this one being placed before the same bench whose decision is the subject of the intended appeal. Therefore, we find that the application is properly before us. Just as an application for leave before the High Court or the Magistrate Court is heard by the same Judge or Magistrate as the case might be, we find nothing peculiar that would preclude this Bench from hearing the instant application.

12. Turning to the merits of this application, we note that an appeal from the decision of this Court can only lie to the Supreme Court in only two instances. This Court in ***Jamlick Murithi Murumia -vs- M'imanyara M'murithi & another – Civil Application No. Sup. 1 of 2013*** aptly set out the two instances as follows:-

> ***"The Jurisdiction of the Supreme Court to hear appeals from this Court is, by Article 163(4) of the Constitution, limited to two situations only. Where the case involves the interpretation or application of the Constitution, there is a right of appeal to the Supreme Court as of right. In any other case, the Supreme Court itself or this Court must certify that a matter of general public importance is involved."***

13. In this case, the applicant's application is based on the ground that the intended appeal raises issues of general public importance. The onus lies with the applicant to demonstrate that the aforementioned issues actually constitute matters of general public importance. See the Supreme Court's decision in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone (supra)***.

14. The majority opinion in the Supreme Court in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-***

Ruscone (supra) set out the following as guiding principles in determining whether an issue raises matters of general public importance:-

> ***i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
>
> ***ii. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***
>
> ***iii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;***
>
> ***iv. Where the application for certification has been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***
>
> ***v. Mere apprehension of miscarriage of justice, a matter most at for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must fall within the terms of Article 163(4)(b) of the Constitution;***
>
> ***vi. The intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought;***
>
> ***vii. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."***

While adding to the aforementioned governing principles, Ibrahim & Ojwang, SCJJ in the dissenting judgment stated that matters of general importance also include:-

> ***i. Issues of law of repeated occurrence in the general occurrence of litigation;***
>
> ***ii. Questions of law that are, as fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or of litigants;***
>
> ***iii. Questions of law that are destined to continually engage the workings of the judicial organs.***
>
> ***iv. Questions bear ing on the proper conduct of the administration of justice."***

See also the Supreme Court's decision in ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & another- Application No. 1 of 2013.***

15. The main issue herein revolves around the taxation of the applicant's bill of costs; fees payable to the applicant for the services rendered to the respondent. It was the applicant's contention that this Court's decision that the applicants were estopped by the letter dated 20th March, 2003 from charging the respondent more than Kshs. 400,000/= created uncertainty in respect of how advocates fees are to be charged. This is because the said letter was not signed by the respondent as required by the law and they argued that finding created uncertainty as to whether Common Law doctrine of estoppel could override written law.

16. In finding that the applicants were bound by their letter dated 20th March, 2003 we noted firstly, that the said letter was written by the applicant; secondly, the applicants had indicated that the respondent was only required to pay Kshs. 400,000/= and thirdly, in the event the Petition succeeded the applicant would

be entitled to recover further fees from the costs awarded to the respondent. The Election Petition was struck out hence the applicant was estopped from going back on their representation in the said letter and for seeking further fees. We also considered that Kshs. 400,000/= was above the minimum prescribed fees for prosecuting an Election Petition of Kshs. 30,000/= provided under the then 1997 ***Advocates (Remuneration) Order.*** The law is settled in terms of advocates fees; the ***Advocates Act*** prescribes the minimum fees payable by a client to an advocate in any matter; it also recognizes fee agreements by parties. The law on taxation of advocate/client bill of costs is also clear and settled. We also find that the law on the applicability of the doctrine of estoppel is settled and clear. We find that the issue in dispute was one of fees payable to the applicant and was peculiar to the said case and did not transcend the circumstances of the case.

17. We are of the considered view that the contested issue of the applicant's fees was determined by this Court. As to whether the decision was right or wrong cannot be a basis for granting the leave sought. In ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & another (supra)***, the Supreme Court held,

> ***"It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law." Emphasis added.***

18. On the issue of whether this Court is a court of record, we cannot help but note that the same was never raised before us. Consequently, we cannot consider the same as a ground for granting the leave sought. In ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & another (supra),*** the Supreme Court held,

> ***" ..Such a position is consistent with the Court's holding in Hermanus Steyn case, that 'the question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination'- for them to become a 'matter of general public importance' meriting the Supreme Court's appellate jurisdiction. By this test, matters only tangentially adverted to, without a trial focus or a clear consideration of facts in the other Courts will often be found to fall outside the proper appeal cause in the Supreme Court."***

19. We are of the view that the applicant herein has not demonstrated that there are serious issues of law which transcend the circumstances of the case herein and/or have a bearing on the proper conduct of the administration of justice.

20. The upshot of the foregoing is that we find that the application has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 25th day of November, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR