



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, GATEMBU & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. 16 OF 2013

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME

BETWEEN

ERES N. V and

ERES ENTERPRISES LIMTIED.....APPELLANTS/APPLICANTS

VERSUS

MAINA MURAGE & CO. ADVOCATES..... RESPONDENT

(An Application for extension of time to file and serve a Notice of Appeal from the Judgment of the High Court of Kenya at Mombasa (M. K. Ibrahim, J.) delivered on 20th September, 2012

in

Misc. Application No. 459 of 2008)

RULING OF THE COURT

This is a reference from the decision of **Sichale, JA** dated 13th February 2014 whereby the single judge extended time to file and serve the notice of appeal out of time on condition that the applicants do deposit one half of the sum of Kshs. 57,793,600/- in an interest earning account in joint names of the respondent's counsel within 30 days from the date of the ruling. The reference is made under **Rule 54** of Court of Appeal Rules (now Rule 55 of Court of Appeal Rules 2010) (**Rules**). The applicants are dissatisfied with the part of the decision which required the applicants to deposit half of Kshs. 57,793,600/- as security and by this reference seeks to have that part of the decision varied or set aside.

The dispute between the applicants and the respondent relates to advocate/client bill of costs. **Rule 11** of the Advocates Remuneration Order stipulates the procedure to be followed by a party who wishes to object to the decision of the taxing officer. Such a party is required to give notice to the taxing officer within 14 days of the items of taxation to which he objects, after which the taxing officer is required to give reasons for the decision. Thereafter, the objector is required to apply within 14 days of the receipt of the reasons to a judge in chambers setting the ground of his objection. Rule 11(3) provides:

“Any person aggrieved by the decision of a 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.”

It is apparent that upon taxation of the advocate/client bill of costs by the taxing officer, the client (applicant herein) filed an objection to the ruling on taxation of various items to a judge in chambers. The objection was heard by **Ibrahim, J.** (as he then was) who on 14th August, 2012 allowed the reference partially and re-taxed the disputed items and remitted the bill of costs to the taxing officer to correct the certificate of taxation. The documents filed in Court do not disclose the quantum of costs allowed either by the taxing officer or by the learned judge. However, **Mr. Mogaka**, the learned counsel for the applicants states from the bar that the bill of costs was taxed at Kshs. 45,000,000 which sum was reduced by the learned judge to Kshs. 21,000,000.

Both the applicants and the respondent being dissatisfied with the decision of the learned judge filed respective applications in the High Court seeking leave to appeal against the decision of the learned Judge.

The Ruling of **Muya, J.** dated 29th May 2013 in Miscellaneous Application No. 459 of 2008 shows that the respective parties agreed that leave to appeal should be given to each party but it was contended by the respondent’s advocate that leave to appeal by the present applicants should be allowed on condition of depositing security, for the reason, essentially that, the client was not resident in Kenya nor did it have assets in Kenya. Ultimately the High Court granted leave to the applicant to appeal on condition that it deposits Kshs. 57,793,600/- in an interest earning account in joint names of the advocates within 45 days and to file the notice of appeal within the prescribed time, in default of which the application stood dismissed. It is not disputed that the applicant, pursuant to the ruling of **Muya, J.** filed a notice of appeal on 3rd June, 2013 but failed to comply with the condition of deposit of security.

The application for extension of time for filing and serving the notice of appeal which was allowed conditionally by **Sichale, JA** was lodged on 13th September 2013 about 3½ months after the Ruling of Muya, J. The application shows that the applicants intend to appeal against the decision of Ibrahim, J. dated 14th August 2012. The main reason given for delay in lodging the application was that the delay was occasioned by the applications for leave to appeal which the applicants’ advocates mistakenly believed was required. They contend that the Kenya Constitution 2010 now gives an automatic right of appeal and that the order of Muya, J. granting leave to appeal is unconstitutional. However, **Maina Murage** the respondent depones in paragraph 20 of the replying affidavit thus:

“That the application of the applicants is founded on a deliberate distortion and misinterpretation of the law and a completely wrong assumption that leave to appeal required by Rule 11(3) of the Advocates remuneration order was abolished by Article 164(3) of the new Constitution. Apart from the fact that as a lawyer I have an informed position on the issue, I am also advised by my lawyer Mr. Gikandi which advise, I verily believe to be correct, that the right of a party to appeal against a decision of the High Court is not an absolute and automatic right as it is subject to various rules of law and procedure which govern and regulate the exercise of that right.”

Although Sichale, JA. did not make an express finding whether or not leave to appeal was required the learned Judge nevertheless observed that the applicants had made “*wrong turns at every stage*” and made a finding that the delay had been sufficiently explained.

It is not necessary in this reference to determine the issue whether or not leave is required to appeal against the decision of a Judge as **Rule 11(3)** stipulates, for the following reasons. Firstly, the issue has not been raised in this reference and the Court therefore has not received full arguments for a proper judicial determination. Secondly, the issue was raised before the single judge as a reason for delay. The single judge made a finding that delay had been sufficiently explained. There is no reference from that part of the decision. Thirdly, it is appropriate that such an important issue relating to competence of the

appeal should be left for determination by the Court dealing with appeal in this dispute if the occasion arises and if the issue is raised.

Turning to the reference, we would observe at the outset that this is a rare reference where a successful applicant is dissatisfied with part of the decision of a single Judge. **Rule 55** provides:

“55(1) where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge –

a. ...

b. ***In any civil matter wishes to have an order direction, or decision of a single judge varied, discharged or reversed by the court.***

he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.”

The applicant seeks to have that part of decision of the single judge imposing a condition for deposit of security varied or discharged. Since it has not been contended that the reference from part of a decision by a successful party is not maintainable, the reference will be considered on the merits.

The Court has discretion to extend time under **Rule 4** “*on such terms as it thinks just*”. By **Rule 53(1)** an application for extension of time under Rule 4 is required to be heard by a single Judge.

It is contended in support of the reference that the order for deposit of security was unnecessary and plainly wrong considering the fact that the respondent had filed suits for the recovery of the costs and both parties were dissatisfied with the decision of Ibrahim, J.

Mr. Gikandi, the learned respondent’s counsel contends that the single Judge exercised her discretion properly and that the reference is an abuse of the process of the court, as amongst other things, the applicant has partly complied with orders of a single judge by filing a notice of appeal and subsequently Civil Appeal No. 8 of 2014 which has already been struck out.

The principles which apply to a reference from the decision of a single judge in exercise of discretion under Rule 4 require no repetition. They are succinctly set out in

Eddy Ndeto Gitetu v. Kenya Commercial Bank [2009] eKLR. It is sufficient to state that a reference is not an appeal and the fact that the full Court would have exercised discretion differently is not a sufficient ground for interfering with the exercise of discretion by a single Judge.

It has not been contended by the applicants that the single Judge had no jurisdiction to order the provision of security as a term for extending time in favour of the applicants. Rather, the contention is that the single Judge was plainly wrong in ordering provision of security in the circumstances of the case. The single Judge gave reasons for the order, that the applicant was a Belgian Company with no known assets in Kenya and that the order was intended to save the respondent from possible prejudice. It is not apparent that the order for provision of security was plainly wrong, seeing that upon extension of time, the applicants would start the appeal process with the possibility that the respondents may suffer loss in the circumstances of the case, pending the determination of the appeal.

Furthermore, although the reference was filed within the stipulated period, the circumstances had drastically changed within the 8 months before the reference was heard. The applicants had filed the notice of appeal within the time stipulated by the order of Sichale, J. and subsequently filed Civil Appeal No. 8 of 2014. An application to strike out the appeal was made by the respondents and allowed *ex parte* by this Court sitting in Mombasa on 30th June, 2014. It is a common ground that an application by the applicants to set aside the *ex parte* order is pending for hearing.

Extension of time was conditional on the applicants depositing security within 30 days of the order. The applicants failed to satisfy that condition with the result that the order for extension of time lapsed.

In the premises, the Court would be acting in futility if it were to allow the reference as the lifting of the condition for deposit of security will not have the effect of either reversing the subsequent events or further extending the time limits stipulated by the single Judge. In addition, allowing the reference will undermine the administration of justice as the Court would be deliberately undermining the orders made by the selfsame Court sitting in Mombasa.

It would be wrong to exercise our jurisdiction in favour of the applicant when he has abused the process of the court by lodging the notice of appeal and the appeal, while failing without proffering any reason, to comply with the condition for deposit of security.

Lastly, since Muya, J. had allowed the applicants leave to file a notice of appeal on condition of deposit of security which he failed to comply with and subsequently filed an application to set aside the favourable order, which application is still pending, it seems that the purpose of the reference is to forestall the deposit of security which is a further abuse of the court process.

For those reasons, the reference is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 18th day of December, 2014.

E. M. GITHINJI

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR