



**Katunga Mbuvi & Co. Advocates v Kenya County Government Workers Union  
(Miscellaneous Cause E245 of 2021) [2024] KEELRC 1075 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1075 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CAUSE E245 OF 2021  
NZIOKI WA MAKAU, J  
MARCH 13, 2024**

**BETWEEN**

**KATUNGA MBUVI & CO. ADVOCATES ..... APPLICANT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... RESPONDENT**

**RULING**

1. The Applicant/Client, Kenya County Government Workers Union, filed a Notice of Motion Application dated 28<sup>th</sup> August 2023 under Articles 50 and 159 of the Constitution of Kenya, sections 1A & 1B of the Civil Procedure Act, Order 51, rule 1 of the Civil Procedure Rules, 2010, and Rule 11(3) of the Advocates Remuneration Order. It sought to be heard for Orders:
  - a. That the Client Applicant herein be granted leave to appeal to the Court of Appeal against the whole of the decision of the Hon. Justice Nzioki wa Makau delivered on 15<sup>th</sup> June 2023.
  - b. That the Honourable Court be pleased to grant any other order and/or directions as it deems fit, just, and fair in the circumstances of the case.
  - c. That the costs of this application be provided for and the same be borne by the Respondent herein.
2. The Application was based on the grounds set out thereat and supported by the Affidavit of Mr. Roba Sharu Duba, who averred that this Court's Ruling of 15<sup>th</sup> June 2023 dismissed the Applicant/Client's reference application dated 31<sup>st</sup> March 2023. That however, by the same decision, the Court allowed the Respondent/Advocate's Application dated 6<sup>th</sup> April 2023 that sought inter alia, an order that its Certificate of Costs dated 6<sup>th</sup> April 2023 for an amount of Kshs. 3,516,728/- be entered as the final judgment for the costs in the suit. Mr. Duba asserted that the Union was aggrieved by the said decision and since it intends to challenge the same, it seeks leave of this Court to appeal to the Court of Appeal. He asserted that there is no automatic right of appeal to the Court of Appeal from this Court's



decisions on taxation/reference from taxation matters and that leave is therefore mandatory before filing of the appeal. He notified the Court that the Applicant had since filed a Notice of Appeal and had requested for proceedings from this Court to enable it prepare its proposed appeal, which is arguable and/or meritorious as evinced in the draft Memorandum of Appeal annexed to their Application herein. Mr. Duba further averred that the Application had been made without unreasonable delay and that the Advocate/Respondent will not suffer any prejudice if the instant Application is allowed in the interest of justice.

3. In response, the Respondent/Advocate filed a Replying Affidavit sworn by Mr. Leonard Katunga Mbuvi on 6<sup>th</sup> September 2023. Mr. Mbuvi averred that the Application herein is frivolous, vexatious, an abuse of the court process and a waste of this Court's time. He stated that the prayers sought in the Application are ones of trial and error and an attempt to frustrate the finalisation of the matter and that the Application is time barred having been filed out of time. In this regard, he argued that while leave ought to be sought within 14 days immediately after delivery of a ruling or judgment, the Respondent ignored this requirement and waited until 28<sup>th</sup> August 2023 to seek leave to appeal. Furthermore, the Applicant ought to have sought leave to appeal out of time instead of only seeking leave to appeal at the Court of Appeal, which omission makes the Application herein moot. He further averred that the Applicant had notably already filed a Notice of Appeal dated 15<sup>th</sup> June 2023 without first seeking leave to lodge an appeal out of time in any Court and was thus coming before this Court with dirty hands.
4. Mr. Mbuvi also notified this Court that the Applicant had already made part payments to the decretal sum amounting to Kshs. 600,000/- and have undertaken to pay the balance. He averred that it was mischievous for the Applicant to come to Court seeking leave to appeal yet they are making payments (see copies of forwarding letters and Cheques marked LKM2A, LKM2B and LKM2C). According to Mr. Mbuvi, the Applicant should come up with a solution on how they will finish paying the decretal amount considering they have already started paying for the same. He also contended that the Application herein is res judicata as the exact prayers have been sought in another application dated 22<sup>nd</sup> June 2023 filed by the Applicant and which is yet to be determined. He argued that one bill of costs cannot be subjected to over five (5) applications and that because there must be an end to litigation, this Court should exercise its discretion and issue an order barring the Applicant/Client from instituting any further application pursuant to the provisions of section 8 of the *Civil Procedure Act*, Cap 21 Laws of Kenya. Mr. Mbuvi prayed that the Court thus dismisses the Application herein with costs and proceed to allow the Respondent/Advocate enjoy the fruits of judgment.
5. The Respondent/Advocate thereafter filed a Further Affidavit sworn by Mr. Mbuvi on 16<sup>th</sup> November 2023. Mr. Mbuvi averred that there is a legal and valid Consent that was recorded before this Honourable Court on 16<sup>th</sup> November 2023 and wherein the Applicant/Client admitted to have already made payment of Kshs. 1,200,000/- in the matter and undertook to pay the balance in monthly instalments of Kshs. 400,000/-. He stated that they therefore did not understand the essence of the Application herein when parties herein have a recorded consent on the payment of the decretal amount.

#### 6. **Applicant's Submissions**

The Applicant/Client submitted that the only issue before Court for determination is whether the Applicant herein has met the legal threshold for the grant of leave to appeal the Court's decision dated 15<sup>th</sup> June 2023. It asserted that their intended appeal raises serious issues that deserve the attention of the Court of Appeal. That given the provisions of section 17 of the *Employment & Labour Relations Court Act* and Rule 11 of the *Advocates Remuneration Order*, the Applicant has no automatic right of appeal, without leave, to the Court of Appeal as enunciated herein below:



- a. Section 17 of the *Employment & Labour Relations Court Act*, 2011 provides;
  - b. Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the *Constitution*.
7. It was submitted that Rule 11(3) of the *Advocates Remuneration Order* provides;
- a. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with leave of the judge but not otherwise, appeal to the Court of Appeal.
8. The Applicant argued that despite section 17 of the Court's constitutive Act, leave to appeal decision of a judge emanating from a challenge on taxation of a bill of costs (reference) is mandatory pursuant to Rule 11(3) of the *Advocates Remuneration Order*. It cited the case of *Macharia & Co. Advocates v Magugu* [2002] EA 429 in which the High Court held that taxation of costs, whether the costs are between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer by the *Advocates Remuneration Order*. That consequently, the answer to the question whether or not a right of appeal to the Court of Appeal exists from a reference decision of a judge lies squarely within the provisions of Rule 11 of the *Advocates Remuneration Order*. It further argued that the Applicant/Client's intended appeal arises directly from this Honourable Court's exercise of the special jurisdiction conferred by the *Advocates Remuneration Order* and not out of the ordinary jurisdiction conferred under section 17 of the *Employment & Labour Relations Court Act*.
9. It was the Applicant's submission that the principles that guide this Court when determining whether or not to grant a party leave to appeal its decision are: that the applicant must demonstrate that their intended appeal, as can be discerned from their draft memorandum of appeal, has realistic chances of success; and that the intended appeal raises serious legal and factual issues deserving serious judicial ventilation and consideration on appeal. It relied on the case of *Machira t/a Machira & Company Advocates v Mwangi & another* [2002] 2 KLR 391 cited in *Zeinab Khalifa & 4 others v Abdulrazak Khalifa & another* [2016] eKLR, in which the Court of Appeal held that the grant or refusal to grant leave to appeal is a matter within the discretion of the court and that a court will only refuse leave if it is satisfied that the applicant has no realistic prospects of success on appeal. The Applicant further submitted that the said Court's discretion ought to be exercised judicially and not arbitrarily and that the bias must always be towards allowing the full court to consider the complaints of a dissatisfied litigant per the decision in *The Iran Nabuvat* [1990] 3 All ER 9. Moreover, that flowing from the foregoing authorities of the Court of Appeal, it is therefore incumbent upon the Court to sustain rather than stifle the rights of appeal and that only in exceptional circumstances should a party's right to appeal be limited or denied.
10. The Applicant invited this Court to look at the grounds of appeal contained in their draft Memorandum of Appeal dated 22<sup>nd</sup> June 2023 to inform itself on the potential strength of the intended Appeal. The Applicant's view was that prima facie, the said grounds of appeal merit serious judicial consideration and ventilation and are not merely academic or baseless. For instance, one of the grounds is that the Court erred in law and fact by making a blanket finding and holding that the Taxing Officer did not depart from the principles of taxation laid down in the *Advocates Remuneration Order* and as such did not arrive at an erroneous determination, contrary to the requirement under Rule 28(2) of the *Employment & Labour Relations Court (Procedure) Rules*, 2016. It argued that it had shown in its submissions that the taxing master had applied the wrong schedule of the *Advocates Remuneration Order* and had cited a myriad of authorities in which it has been held that application of a wrong schedule of the remuneration order is an error of principle and a ground for setting aside a taxation order, but that this Court did not find the same erroneous. Furthermore, that this Court did



not give a detailed reasoning why it was of the view that the taxing officer did not commit any principal error worth setting aside. It was the Applicant's submission that this, among the other grounds of appeal, are weighty issues that ought to be considered in appeal by the Court of Appeal.

11. Regarding the assertion that the Application herein is time-barred, the Applicant submitted that nowhere in Rule 11(3) of the *Advocates Remuneration Order* is there a timeline as to when a party is required to file an application for leave within 14 days of delivery of the decision on the Reference Application. That even assuming there is such a requirement ostensibly imported from the *Civil Procedure Rules*, which in the Applicant's view are inapplicable in this case anyway, this Court's directions of 15<sup>th</sup> June 2023 was that the Applicant files a formal application for leave to appeal. That the Applicant thus filed the Application dated 22<sup>nd</sup> June 2023 that went before Rutto J. on 26<sup>th</sup> June 2023 but for some reason was never heard thereafter. That when the matter came up before this Court on 31<sup>st</sup> July 2023, this Court directed the Applicant/Client to revive the said Application for leave to appeal dated 22<sup>nd</sup> June 2023 despite the same having not abated. That it was in compliance with this direction that the Applicant filed the instant Application dated 28<sup>th</sup> August 2023, which abandoned most of the earlier prayers that had become otiose. It was the Applicant's submission that it therefore did not need to seek leave to appeal out of time (or seek leave, to seek fresh leave to appeal out of time) as erroneously suggested by the Respondent/Advocate. It also urged the Court not to entertain the assertion that the current Application is res judicata.
12. The Applicant submitted that the argument that the Application is unwarranted because part payment of the decretal sum has already been made is erroneous and unsupported by any precedent or statutory provision. That the said part payment towards settling the decretal sum does not mean that the Applicant forfeits its right to appeal, which right remains sacrosanct and intact until it expressly waives the same. The Applicant's argument was that the sum paid to the Respondent/Advocate in fact remains refundable should the Applicant/Client's intended appeal succeed as was affirmed in the case of *Patrick Okello Obilo v South Nyanza Sugar Company Limited* [2017] eKLR.
13. The Applicant further submitted that it is trite law that a notice of appeal is not an appeal per se but merely an expression or indication of an intention to file an appeal and that there is therefore no appeal as of now. That secondly, even if the Applicant was required to seek leave to appeal out of time, such leave can only be properly sought at the Court of Appeal and not before this Court. The Applicant asserted that the Notice of Appeal was filed out of abundance of caution and does not necessarily mean it is a live appeal. It submitted that pursuant to Order 2 in the Applicant/Client's Application dated 28<sup>th</sup> August 2023, this Court should deem the said Notice as having been properly lodged should it allow the Application and grant the Applicant leave to appeal.
14. **Respondent's Submissions**

The Respondent submitted that this Court should determine whether an appeal can be lodged on a Ruling where consent has been entered by parties and whether the Application herein and the intended appeal is time-barred hence incompetent.
15. On the first issue, the Respondent submitted that a consent order is an order the terms of which are settled and agreed to by parties to the action. That section 67(2) of the *Civil Procedure Act* bars parties from appealing a matter passed by the court with the consent of parties. That the Supreme Court's decision in the case of *Geoffrey M. Asanyo & 3 others v Attorney General* [2018] eKLR and the decision in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, outlined the settled principles on the correct interpretation of consent orders. That a consent judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract or if certain conditions remain to be fulfilled and which are not carried out. It was the Respondent's submission that recording consent and



then coming to Court to seek leave to appeal the said orders is a clear violation of the justice system and a waste of the Court's time. That consent orders are elevated to the principles that apply in Contract Law and that this Court should evaluate the circumstances prior, during and after adoption of the Consent before this Court. That no new issues have been raised after the adoption of the said Consent and payment is being made as agreed by the parties. The Respondent also cited the case of *KCB Limited v Specialized Engineering Co. Ltd* [1982] KLR, in which the Court held that a consent order cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or in misapprehension or ignorance of suit facts in general. The Respondent asserted that the Applicant/Client was not under duress or coerced to record the Consent before Court and that neither was the same a mistake.

16. The Advocate/Respondent submitted that he is an entitled judgment debtor and should be allowed to enjoy the fruits of the services they offered the Applicant/Client who is still enjoying the said Orders. It argued that the Applicant had not brought forward any triable issues that ought to be dealt with by the Court of Appeal and that all issues had been properly dealt with and exhausted by this Court. Furthermore, that the claim was more than half way settled meaning the Application is badly overtaken by events. The Respondent asked the Court to thus dismiss the Application herein and to stop the Applicant from abusing and or flirting with the Court.
17. The application by the Applicant/Client seeks to appeal a decision of the Court made in June 2023. The parties before the Court subsequent to the Ruling entered into a consent and from all accounts there has been compliance with the Court order and substantial compliance with the terms of the consent. In the case of *Geoffrey M. Asanyo & 3 others v Attorney General* (*supra*), Lenaola SCJ, sitting with Ibrahim, Ojwang, Wanjala, Njoki SCJJ, held as follows:-

Where parties consent to the settlement of their dispute in light on Article 159(2)(c) of the Constitution, the court reserves no right to insist on determining the 'matter'.

18. As a Superior Court, I cannot reserve any right to determine the matter beyond the consent of parties. In the case before me, the Applicant/Client asserts it wishes to appeal and argues that despite section 17 of the Court's constitutive Act, leave to appeal decision of a judge emanating from a challenge on taxation of a bill of costs (reference) is mandatory pursuant to Rule 11(3) of the Advocates Remuneration Order. The Applicant/Client asks the Court to ignore section 17 of the Employment & Labour Relations Court Act and make the order the Applicant/Client seeks. This is ridiculous to the extreme. In light of the decision from the Supreme Court and the law, this cannot be. In addition, how can the Civil Procedure Rules override the express provisions of Statute? The prayer must be declined since it is clearly incapable of grant. Section 17 of the Employment & Labour Relations Court Act cannot be trumped by mere Rules. And to boot, the Civil Procedure Rules.
19. There is no allegation that there was a consent obtained through fraud, mistake or coercion. The application before me was an academic exercise in futility. The motion by the Respondent is an affront to the Rules of this Court as well as being unfounded as one cannot appeal a consent that has not been impugned. The singular outcome was this - dismissal. Application being completely devoid of merit is dismissed with costs on the higher scale for being an abuse of the court process.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2024**

**NZIOKI WA MAKAU**

**JUDGE**

