



**National Union of Water & Sewerage Employees v Nairobi Water & Sewerage Co Ltd & another; Kenya County Government Workers Union (Applicant); Mbuvi t/a Katunga Mbuvi & Co Advocates (Respondent) (Miscellaneous Case E209 of 2021) [2023] KEELRC 1784 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1784 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E209 OF 2021**

**JK GAKERI, J**

**JULY 24, 2023**

**BETWEEN**

**NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES ..... CLAIMANT**

**AND**

**NAIROBI WATER & SEWERAGE CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**KENYA LOCAL GOVERNMENT WORKERS UNION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... APPLICANT**

**AND**

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

**RULING**

1. This is the Applicant’s Notice of Motion dated 27<sup>th</sup> February, 2023 filed under Certificate of Urgency seeking ORDERS THAT;
  1. Spent.
  2. Spent.
  3. This Honourable Court be pleased to grant the Applicant leave to appeal against the ruling of this court dated 13<sup>th</sup> February, 2023.



4. Costs of this application be provided and the same be borne by the Respondent herein.
2. The Notice of Motion is based on the grounds expressed on its face and supported by the Affidavit of Roba Sharu Duba, sworn on 27<sup>th</sup> February, 2023.
3. The affiant states that the leave sought is based on the premise that the ruling is only appealable after leave is granted by the trial court.
4. That counsel had requested for leave on 13<sup>th</sup> February, 2023 but the same was not captured.
5. That the leave sought was essential to enable the applicant exercise the right of appeal and had already filed an application for stay of the order of this court under Rule 5(2)(b) of the Court of Appeal Rules which was pending directions.
6. That the Respondent will not suffer any prejudice if the orders sought herein are granted.

### **Respondent's case**

7. The Respondent filed grounds of opposition dated 1<sup>st</sup> March, 2023 stating that the application was intended to frustrate the directions given by the court on 13<sup>th</sup> February, 2023 and was maliciously made to delay proceedings slated before the Deputy Registrar on 28<sup>th</sup> February, 2023.
8. That the leave sought was granted by the court while delivering the ruling and the right to appeal was automatic.
9. It is argued that the application is frivolous, boon and an abuse of court process and was unmerited.
10. That the applicant had already filed a notice of appeal and a substantive application before the Court of Appeal dated 24<sup>th</sup> February, 2023 with case No. E059 of 2023.
11. That the court directs that the Taxation in the matter to proceed as directed by the court.
12. That the application be dismissed.
13. In his Replying Affidavit dated 26<sup>th</sup> April, 2023, the Respondent deposes that the application here was an abuse of court process as judgement was delivered on 13<sup>th</sup> February, 2023 and there was no application for extension of time.
14. That leave should not be granted as the same has been addressed before the Court of Appeal in App. No. E059 of 2023 the court directed counsels to address the court on the issue of leave and the applicant was before the Court of Appeal yet it had a pending application on leave to appeal and the issue is pending ruling by the Court of Appeal.
15. That the applicant fixed the application for hearing to confuse issues if the application for leave to appeal is allowed.
16. That Section 17 of the *Employment and Labour Relations Court Act*, 2020 read with Article 164(3) of *the Constitution* of Kenya, 2010 gave the applicant automatic right of appeal and the court addressed the issue in the context of Section 17 above.
17. That the applicant was relying on Section 13(3) of the Advocates (Remuneration) (Amendment) Order, 2014 which cannot override the provisions of Article 164(3) of *the Constitution* read with Section 17 of the *Employment and Labour Relations Court Act*, 2011 as both provisions were clear.



18. That the applicant should have sought leave to file a substantive appeal out of time as opposed to an application for leave to appeal which delays taxation of the Bill of Costs.
19. That the applicant was abusing the court process.
20. Counsel urged the court to disallow the application.
21. In its Supplementary Affidavit dated 28<sup>th</sup> April, 2023, the applicant deposes that Respondent's assertion that the applicant had filed another application seeking leave to appeal the court's decision was misleading as it was not factual as the application before the Court of Appeal in E059 of 2023 was for an order of stay of execution and re-taxing proceedings and a Memorandum of Appeal was attached.

### **Applicant's submissions**

22. Counsel submitted that the Respondent had no substantive or compelling reason to oppose the application.
23. According to counsel, the right to appeal was not automatic under the Section 11(3) of the Advocates (Remuneration) (Amendment) Order, 2014 which requires leave of the court. That Rule 29(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 recognizes the Advocates (Remuneration) (Amendment) Order.
24. Counsel urged that since the decision sought to be appealed against emanated from the Advocates Remuneration Order, leave was necessary and not automatic as held by Sewe J. in *Kagwimi Kang'ethe & Co. Advocates V Nairobi Mamba Village Ltd* (2017) eKLR where the judge underscored the unique nature of taxation of costs under the Advocates (Remuneration) Order citing the sentiments of Ringera J. in *Machira V Magugu* (2002) EA 428.
25. Counsel submitted that the court had jurisdiction to grant the leave sought.
26. That the court had already expressed itself on the issue that it had no jurisdiction under Section 17 of the Employment and Labour Relations Court, 2011. That the Court of Appeal had enquired as to whether leave to appeal had been obtained from the court.
27. Counsel relied on the provisions of Rule 41(1)(ii) of the Court of Appeal Rules, 2022 to urge that the application herein was merited.
28. It was submitted that if the leave to appeal is declined by the trial court, the same may be sought at the Court of Appeal.
29. That the Applicant's application before the Court of Appeal was on stay of execution and re-taxation proceedings.
30. That the Respondent was misleading the court.
31. Counsel admitted that on 4<sup>th</sup> April, 2023, when the matter came up before the Court of Appeal, the issue before the court was the jurisdiction of the court to determine an application under Rule 5(2) (b) of the Court of Appeal Rules, where a party had no leave and the court will deliver a Ruling on 23<sup>rd</sup> June, 2023 and the issue before the Court of Appeal was not before this court and alleged abuse of process did not arise.
32. Counsel submitted that the jurisdiction to grant or deny leave to appeal was discretionary but was to be exercised judiciously, as held in the *Iran Nabuvat* (1996) 3 ALL ER 9.



33. Other decisions such as *Machira t/a Machira and Co. Advocates V Mwangi & another* (2002) 2 KLR 391 and *Zeinab Khalifa & 4 others V Abdulrazak Khallifa & another* (2016) eKLR were cited to buttress the submission.
34. Counsel urged that the intended appeal had realistic chances of success and invited the court to scan through the grounds of appeal in the draft memorandum of appeal annexed to the Supplementary Affidavit to appreciate the strength of the applicant’s intended appeal.
35. Counsel further invited the court to consider ground 1 of the draft memorandum of appeal.
36. Finally, counsel urged that since the Advocate (Remuneration) Order has been held to be a complete code on taxation matters, the court had jurisdiction to exercise its discretion to grant leave to appeal as provided by Rule 11(3) of the Remuneration Order and the appeal was not frivolous.

### **Respondent’s submissions**

37. Counsel isolated one issue for determination, namely; whether the application dated 27<sup>th</sup> February, 2023 was merited.
38. Counsel objected to the application on the premise that the issue had been addressed before the Court of Appeal in Court of Appeal App. No. E059 of 2023.
39. That the Ruling sought to be appealed against was delivered on 13<sup>th</sup> February, 2023 and any intended appeal was time barred and no application for extension of time had been made.
40. Counsel submitted that the issue of leave came up before the Court of Appeal and counsels submitted on the issue specifically and a ruling was pending before the court.
41. Reliance was made on the provisions of Section 17 of the *Employment and Labour Relations Court Act* and Article 164(3) of *the Constitution* of Kenya, 2010 to urge that the right of appeal to the Court of Appeal was automatic and the trial court had pronounced itself on the issue of leave.
42. That Section 11(3) of the Advocates (Remuneration) Order could not override Article 164(3) of *the Constitution* of Kenya, 2010 read together with Section 17 of the *Employment and Labour Relations Court Act*.
43. The court was urged to disallow the application.

### **Determination**

44. The only issue for determination is whether the Applicant’s Notice of Motion dated 27<sup>th</sup> February, 2023 is merited.
45. The Applicant is principally seeking leave to appeal the ruling delivered by this court on 13<sup>th</sup> February, 2023 and the same is justified under Section 11(3) of the Advocates Remuneration Order, which provides that;
 

“ 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.”
46. No doubt as the applicant’s counsel submitted, taxation of costs is governed by a special code the Advocates Remuneration Order which is subsidiary legislation promulgated by the Chief Justice pursuant to the provisions of Part IX of the *Advocates Act*.



47. According to the Claimant’s counsel, the provisions of Section 11(3) of the Advocates (Remuneration) Order are mandatory and a party intending to appeal to the Court of Appeal on issue relating to taxation of costs was obligated to seek leave.
48. On the other hand, Section 17 of the [Employment and Labour Relations Court Act](#), 2011 provides that; Appeals from the court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the court in accordance with Article 164(3) of [the Constitution](#).
49. Similarly, Article 164(3) of [the Constitution](#) provides that;
- “The Court of Appeal has jurisdiction to hear appeals from –
- a. the High Court; and
- b. any other court or tribunal as prescribed by an Act of Parliament.”
50. None of these provisions subject appeals from the Employment and Labour Relations Court to other requirements including leave.
51. The foregoing notwithstanding, the applicant’s case is grounded on Section 11(3) of the Advocates (Remuneration) Order above which requires leave to file an appeal against a decision made pursuant to an objection to an assessment of a Bill of Costs.
52. Similarly, Rule 41(1)(ii) of the Court of Appeal Rules, 2022 provide for application for leave at the Court of Appeal if the same is declined by a superior court.
53. There is no gainsaying that the Advocates Remuneration Order is a complete code on matters germane to remuneration of advocates for services rendered.
54. The foregoing and the fact that this court has previously granted leave to the applicant in a similar matter between the same parties, the court is inclined to grant the leave sought to avoid making inconsistent decisions on similar issues.
55. Finally, another issue raised by the Respondent’s that during appearance before the three Judge Bench of the Court of Appeal, the judges wondered why the applicant had filed an application before the Court of Appeal while an application for leave to appeal was pending before the trial court and counsels were directed to address the court on the issue of leave.
56. In its Supplementary Affidavit, the applicant correctly depones that the application before the Court of Appeal dated 24<sup>th</sup> February, 2023 was for an order of stay of execution and re-taxation proceedings as opposed to leave as suggested by the Respondent.
57. In his submissions, counsel for the applicant admitted that indeed the Court of Appeal enquired whether the applicant had obtained leave to appeal the Ruling delivered on 13<sup>th</sup> February, 2023.
58. Counsel admitted that the court wondered whether the Court of Appeal had jurisdiction to determine a 5(2)(b) application by a party who does not have leave to appeal from the trial court and a ruling is due on 23<sup>rd</sup> June, 2023.
59. Rule 41(1)(ii) of the Court of Appeal Rules, 2022 provides that;
- “In a civil matter –
- Where an appeal lies with leave of the court, application for such leave shall be made –



- i. . . .
- ii. Where application for leave to appeal has been made to the Superior Court and refused within fourteen days after such refusal.”

60. Counsel further admitted that the Court of Appeal will deliver a ruling on the issue whether the court has jurisdiction to determine the applicant’s application before it yet the applicant had no leave of this court to appeal its ruling.
61. Although counsel for the applicant urged that the issue before the Court of Appeal was not before this court, the court is of the view that the ruling could impact on the instant application.
62. Be that as it may, the applicant is by law entitled to a determination of the issues raised and it behoves the court to render a decision and do so expeditiously.
63. In the upshot, the Notice of Motion dated 27<sup>th</sup> February, 2023 is merited and it is granted to the extent that the applicant is granted leave to appeal the court’s ruling delivered on 13<sup>th</sup> February, 2023 subject to compliance with the Court of Appeal Rules.
64. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF JULY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

