



Muraguri v Raffia Bags (East Africa) Limited; Diamond Trust Bank Kenya Limited (Objector) (Employment and Labour Relations Cause 435 of 2016) [2023] KEELRC 1668 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1668 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 435 OF 2016**

**M MBARŪ, J
JULY 6, 2023**

BETWEEN

JAMES KINENE MURAGURI CLAIMANT

AND

RAFFIA BAGS (EAST AFRICA) LIMITED RESPONDENT

AND

DIAMOND TRUST BANK KENYA LIMITED OBJECTOR

RULING

1. The claimant, James Kinene Muraguri filed a Notice of Motion under the provisions of Section 11 of the *Advocates (Remuneration) Orders*, Section 17 of the ELR Act read together with Rules 41(1) and 42 of the Court of Appeal Rules and seeking for orders that;
 1. The court set aside ex-debito justitiae, its direction(s) declining leave to appeal on the grounds that all its rulings and orders/decrees are appealable as of rights under Section 17 of the ELR Act.
 2. The court grants ex-debito justitiae leave to appeal its decision on taxation of costs on the two objections, under Section 11 of A(R)O, just in case Section 17 of ELR Act is in applicable: and has not impliedly amended Section 11 of A(R)O.
 3. Alternatively, the court certifies that the intended appeal involves or raises a point of law of general public importance, as regards taxation of costs in objection proceedings which proceed (by order of court) as an ordinary suit through physical hearing and taking viva-voce evidence.
2. The application has no Supporting Affidavit in terms of Rule 17(8) of the Employment and Labour Relations Court (Procedure) Rules, 2016;



- (8) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party.

The facts of the application are that;

- i. This court refused to grant leave to appeal its decision on April 20, 2023.
 - ii. An appeal does not lie to the Court of Appeal except with leave of the court of first instance, under Section 11 of A(R)O.
 - iii. There is an apparent conflict of law and an error of fact and law on the interpretation of Section 11 of the Advocates (Remuneration) Order, vis-a-vies section 17 of ELR Act.
 - iv. That the aggrieved claimant cannot go to the Court of Appeal without express leave of this court, by reasons of Section 11 of the A(R)O as read together with Rule 41 of the CoAR.
 - v. By refusing the leave to appeal sought at the time of delivery of ruling the learned judge shut out the claimant's right to urge an issue of law of public importance in that the objection proceedings had by order of court been turned to a suit requiring cross examination of the deponent of affidavits sworn in the proceedings.
 - vi. Under the current Civil Rules, 2022 the Court of Appeal has no power to entertain an application for leave to appeal given the provision of Section 11 of the Advocates (Remuneration) Order as read with rule 41. it could never have been the intention of Parliament to shut out appeals on taxation, merely because the court of 1st instance declined or otherwise through that its orders under section 11 of the Advocates (Remuneration) Order are appealable as of right, contrary to the express provision of law.
 - vii. The intended appeal and this application present a novel point of comparative law to compare the old law (Section 11 Advocates (Remuneration) Order) with the new law Section 17 of ELR Act.
 - viii. There is also an important point in the interpretation of Section 17 ELRC Act vis-a-vies section 11 of the Advocates (Remuneration) Order.
 - ix. It is doubtful if Section 17 of ELR Act impliedly amended Section 11 of Advocates (Remuneration) Order.
3. Upon delivery of ruling on 20 April 2023 the claimant through his advocate applied for leave to file an appeal against the ruling through application of Section 11(3) of the Advocates (Remuneration) Order and the court directed that under Section 17 of the *Employment and Labour Relations Court Act, 2011* a party has a right of appeal from the decision of the court. There is the right of appeal. A party does not require leave.
4. The clarity of Section 17 of the *Employment and Labour Relations Court Act, 2011* is that;
17. Appeals
 - (1) 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*.



on the other hand, Rule 11 of the Advocates (Remuneration) Order provides that;

11. Objection to decision on taxation and appeal to Court of Appeal

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the 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.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

5. The substantive statute, the *Employment and Labour Relations Court Act*, 2011 gives a right to appeal which cannot be negated under the subsidiary rules and Advocates (Remuneration) Orders. The right of appeal must be seen in the context of Article 164(3) of the *Constitution*.

(3) 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.

6. The objections by the claimant have since been addressed with regard to applications dated December 16, 2022 and a ruling delivered on April 20, 2023. in my humble view, the outcome of such application is part of the any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the *Constitution*, an appeal shall lie to the Court of Appeal.

7. To this extent, the court finds no conflict. Upon the ruling of the court, there is right of appeal.

8. With regard to Rule 41 of the Court of Appeal Rules, 2022 the requirements are that;

41.

- (1) In a civil matter—
 - a. Where an appeal lies with the leave of the superior court, application for such leave may be made—



- i. Informally at the time when the decision against which it is desired to appeal is given; or
 - ii. By motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
 - b. Where an appeal lies with the leave of the Court, application for such leave shall be made—
 - i. In the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or
 - ii. (ii) where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.
- 9. The right of appeal from the orders of the court is secured in law, buoyed under Article 164(3) of the Constitution. The orders sought that the right of appeal was refused is without merit. The order seeking to appeal the decision on taxation of costs is addressed in the ruling delivered on April 20, 2023 and the outcome is an order of the court subject to Section 17 of the Employment and Labour Relations Court Act, 2011. On these findings, the alternative orders sought are dealt.
- 10. Application dated May 3, 2023 is hereby dismissed. The respondent and objector did not participate. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

