



**Kenindia Assurance Co. Limited v Raymond Olendo t/a Olendo, Orare & Samba Co. Advocates
(Miscellaneous Case E019 of 2022) [2023] KEELRC 3057 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3057 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E019 OF 2022
CN BAARI, J
NOVEMBER 30, 2023**

BETWEEN

KENINDIA ASSURANCE CO. LIMITED CLIENT

AND

**RAYMOND OLENDO T/A OLENDO, ORARE & SAMBA CO.
ADVOCATES ADVOCATE**

RULING

1. Before Court is the applicant's application dated May 29, 2023, seeking orders that: -
 - i. Spent.
 - ii. The Honourable Court be pleased to grant leave to the Applicant to appeal against the ruling of Hon. Justice Christine N. Baari, delivered herein on April 20, 2023.
 - iii. Upon granting of order 2 above, the draft Notice of Appeal annexed to this application be deemed as duly filed.
 - iv. Costs of this application be in the cause.
2. The application is supported by grounds on the face thereof, and the affidavit of Raymond Olendo. The crux of the application is that the ruling on the Respondent's application dated December 19, 2022, was delivered on April 20, 2023 without notice to the Applicant and the ruling being on a Reference filed to this Court, the Applicant desires to appeal against it.
3. It is the Applicant's assertion that the [Advocates \(Remuneration\) Order](#) provides that such an appeal can only be preferred with leave of this Court and therefore this application.
4. It is the applicant's assertion that it has an arguable case with realistic chances of success as relayed hereunder, and in the draft memorandum of appeal.



5. The applicant avers that the Hon. Judge fell into error by imputing that a retainer can only be proved or found by a written agreement oblivious of the facet of existence or creation of a retainer by implication. The Applicant further avers that the Hon. Judge fell into error and contrary to the glaring evidence on record, to find no retainer between the Applicant and the Respondent.
6. It is the Applicant's contention that the Hon. Judge overlooked and/or disregarded, and/or did not make any determination on the Respondent's third-party bill being remitted to another Taxing Master for fresh taxation.
7. The Respondent opposed the motion vide a Replying Affidavit sworn on June 14, 2023. The respondent states that the reference was determined *vide* a Ruling delivered on April 20, 2023 by her Ladyship, Justice Baari and which ruling date was prior fixed by mutual consent of the parties present in Court on the February 28, 2023, and upon Court confirming compliance in filing of parties' respective submissions.
8. The Respondent's further states that its instructions in this matter were issued to J.B Shilenje & Company Advocates whose fees were fully settled, and therefore, there is no Advocate/Client Relationship between the Applicant and the Respondent in the circumstances giving rise to the claim for professional fees herein, and/or entitling the Applicant to claim professional fees herein, and/or entitling the Applicant to seek leave to Appeal on the Ruling delivered in the Employment & Labour Relations Court in Kisumu Cause No. E019 of 2022 to claim professional fees on Advocate/Client services rendered in Kisumu ELRCA No.39 of 2019.
9. Parties filed submissions on the application and which have been duly considered.

Determination

10. The reference subject of the instant application came up for compliance on the filing of submissions on February 28, 2023, when one Ms. Achieng held brief for Ms. Kwena for the Applicant. A Ms. Ochieng was equally present for the Respondent. Ms. Achieng confirmed to Court that both parties had filed submissions and sought a ruling date on the reference.
11. The record shows that this Court fixed the reference for ruling on April 20, 2023, by consent of the parties, and further that the Court rendered the ruling on April 20, 2023 as scheduled.
12. It is however noted again from the record, that both parties did not attend Court for the ruling despite the date having been fixed by consent of the parties. The Court nonetheless proceeded to deliver the ruling as scheduled.
13. The instant application seeks firstly, grant of leave to file an appeal against the decision of this Court rendered on April 20, 2023, and secondly, extension of time to lodge the appeal.
14. Paragraph 11 (3) of the [Advocates Remuneration Order](#) states thus:

“ 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.”
15. The application is premised on amongst others, that the ruling subject of the intended appeal was delivered without notice to the parties. For starters, the Court record does not support this position, and the Applicant is outrightly dishonest in its submission in this regard.



16. In the case of Ravelston Corporation Limited Re 2007 Onca (CanLii) the Court stated thus:

“A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal.”

17. The grounds upon which the intended appeal is premised is that the judge in her ruling fell into error by imputing that a retainer can only be proved or found by a written agreement, oblivious of the facet of existence or creation of a retainer by implication. It is the Applicant’s further assertion that the Hon. Judge overlooked and/or disregarded, and/or did not make any determination on the Respondent’s third-party bill being remitted to another Taxing Master for fresh taxation.

18. These in my view, are arguable issues deserving a day in Court. In the premise, the Applicant is hereby granted leave to file an appeal against the decision of this Court in this matter rendered on April 20, 2023.

19. In respect to extension of time, the Court in *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

20. Having granted the applicant leave to lodge an appeal as prayed, this decision will be an exercise in futility if time to file the appeal is not extended, in view of the time lines granted under the law, and which time has since lapsed.

21. I proceed to allow the prayer to extend time, and further order that the appeal be filed within 7 days of this order.

22. I make no orders on costs.

23. Orders accordingly.

SIGNED, DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF NOVEMBER, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Mario Jackson h/b for Olendo for the Applicant

N/A for the Respondent

