



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 2015

BETWEEN

KINYUA MUYAA & COMPANY ADVOCATES ADVOCATE

VERSUS

1. KENYA PORTS AUTHORITY PENSION SCHEME

2. ALBERT CHAUREMBO MUMBA

3. ABDALLAH H. MWARUWA

4. M.K. MURE

5. MARY WAIRIMU NG'ANG'A

6. ALEX TEIPAN

7. MARY OTIENDE

8. MARGARET NYAGA

9. MAJENGO KATANA [sued on their own behalf

and on behalf of the Predecessors and/ or Successors in title, in their capacities as the Registered Trustees of

the Kenya Ports Authority Pension Scheme] CLIENTS/ RESPONDENTS

RULING

1. In their Application filed on 22nd July 2020, the Clients / Respondents seek leave to appeal the Ruling and Orders of this Court, made on 17th July 2020. The Application is brought under Paragraph 11 [3] of the Advocates Remuneration Order, and grounded on the Affidavit of Legal Officer and Company Secretary of the 1st Respondent, Mr. Stephen Kyandih, sworn on 20th July 2020.

2. The Application is opposed through an Affidavit sworn by the Advocate, Ms. D. Muyaa, on 28th July 2020.

3. The Clients/ Respondents submit that the ELRC erred, by assuming jurisdiction, in taxing Advocate/ Client Bill of Costs; the primary litigation, Cause Number 113 of 2016 was declared a nullity by the Supreme Court of Kenya, and could not therefore form the basis for taxation of Advocate/ Client Bill of Costs; a Draft Memorandum of Appeal has been prepared, exhibiting weighty grounds of appeal; and the interest of justice demands these weighty questions of law, are ventilated and determined at the Court of Appeal.

4. The Advocate's position is that leave to appeal is not granted automatically. The Application is in abuse of the Court Process. The Clients/ Respondents filed Notice of Appeal against the Ruling of this Court, without the leave of the Court. They filed at the Court of Appeal, an Application for stay of execution. Their argument before the Court of Appeal is that it is not necessary to obtain leave, before filing the

Notice of Appeal. It is submitted by the Advocate, that the Clients/ Respondents made a similar Application for leave, dated 23rd November 2015. The Application was dismissed on 6th May 2016. No Appeal was lodged against the orders dismissing the Clients/ Respondents' first Application for leave to appeal. The first and the current Application for leave to appeal, relate to the same issues- mainly the jurisdiction of the ELRC in taxation of Advocate/Client Bill of Costs.

The Court Finds: -

5. On the proceedings initiated at the Court of Appeal by the Clients/ Respondents before determination of the Application for leave, the Court prefers to make no comment, and let the Parties pursue those proceedings as required under the law. The ELRC is focused on the Application placed before it.

6. The record is clear that the Clients/ Respondents have previously applied for leave to appeal a decision of the Judge of ELRC, relating to reference made by the Parties upon taxation of the Advocate/ Client Bill of Costs, made by the ELRC Deputy Registrar. The view of this Court, in the Ruling of 17th July 2020, is that the Clients/ Respondents re-litigated the same issues.

7. The Advocate urges the Court to decline leave, based on the same grounds the reference was declined on 17th July 2020. The Court is bound, in considering an Application for leave, to ascertain the circumstances in which the Application is made. This goes beyond the confines of the reasoning of the Court, with regard to determination of the reference.

8. The Rulings made by different Judicial Officers of this Court, relate to a fundamental question of jurisdiction. One, does the Deputy Registrar ELRC have the mandate to tax Advocate/ Client Bill of Costs? Two, did the decision of the Supreme Court, in the primary dispute, to the effect that the ELRC did not have jurisdiction to hear and determine the primary pension dispute, affect this dispute between Advocate and Clients?

9. These questions have been answered by the ELRC affirming its jurisdiction. There is no answer provided from any other higher jurisdiction. The right of appeal protects both private litigants and the justice system as a whole. Whereas it is broadly recognized that the right of appeal, is the immemorial cry of every defeated litigant, a Court tasked with the responsibility of considering whether a defeated litigant should have leave to appeal, must go beyond merely focusing on the place of the Parties, the private litigants; it must look into the promotion and protection of the justice system as a whole.

10. There are no binding Judicial Authorities, on the jurisdiction of the Deputy Registrar of the ELRC in taxing Advocate/ Client Bill of Costs. The Parties in this dispute have not cited a single Court of Appeal or Supreme Court decision, establishing whether the Deputy Registrar ELRC, has such jurisdiction. The delimitation of the ELRC is a subject which has preoccupied legal thinkers in recent years, the Court having been repositioned in the justice system in rapid succession, in 2007 and 2010. It is important that the position of the Court, its operations and architecture, is clarified through distillation of caselaw, in our robust appellate system. The Judges and Deputy Registrars of the ELRC have given their views on the subject. The question is important to the entire legal profession, and like the questions which were raised in the primary dispute, needs distillation through the appellate system, so that in future, we have binding Judicial Authorities, rather than just strong Judicial Opinions of the same Court, whose jurisdiction is under scrutiny. The outcome of the exercise of the right of appeal in the matter, would enrich the institutional legitimacy of the ELRC. For the sake of the justice system, and not merely that of any of the private litigants herein, the Court feels the way should be opened for the weighty matters raised in this Application, to be placed before the Court of Appeal. As the primary dispute has shown, the error-correction function of the appellate system, which is entwined with the public-trust function, is central to a strong, functional Judiciary. There is value to be gained by the whole justice system, in having binding decisions about the mandate of Judicial Officers.

11. The Court has taken note of the Advocate's submission that there was a previous Application for leave to appeal, made by the Respondents. It is noted that the Application was made prior to the decision of the Supreme Court, in the primary dispute. It is noted also, that reference to the Judge initially, was made by both Parties, while reference leading to the Ruling of 17th July 2020, was by the Clients/ Respondents alone. Parties subjected themselves to a second round of taxation, in obedience to the Ruling of the Court, under the first Ruling. The question of *res judicata*, can be ventilated, alongside the principal question of jurisdiction, at the Court of Appeal. There are recondite matters of law raised by the proposed Appeal, that are best, bindingly, dealt with through an Appeal. The reaffirmation of jurisdiction by the ELRC is not binding and does not aid future Practitioners and Litigants, confronted with similar disputes. An Appeal would benefit the Parties, the ELRC, all Courts, and the Legal Practitioners as a whole.

IT IS ORDERED: -

a. The Application for leave to appeal, filed by the Clients/ Respondents on 22nd July 2020 is allowed.

b. No order on the costs.

Dated and delivered at Mombasa this 24th day of September 2020

James Rika

Judge