REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC MISC. NO. E046 OF 2022

SHERMAN NYONGESA & MUTUBIA ADVOCATES::::::::::::::APPLICANT

VERSUS

ANTI-COUNTERFEIT AGENCY::::::::::::::::::::::::::::::::::::::RESPONDENT

RULING

The application is dated 4th March 2024 and is brought pursuant to the provision of paragraph 11(3) of the Advocates Remuneration Order and Order 51 of the Civil Procedure Rules seeking the following orders;

1. Leave be granted to the Respondent to appeal the decision of the Honourable Judge delivered herein on 28th February 2024 to the Court of Appeal.
2. Costs be in the cause.

It is premised on the following grounds that the Respondent is aggrieved by the decision of the Honourable Judge delivered herein on 28th February 2024. The Respondent did obtain a copy of the aforesaid decision on 29th February 2024 and has since studied it. That an appeal to the Court of Appeal on the decision of the Honourable Judge is premised upon leave of the Honourable Judge. The Respondent has consistently raised

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legal and jurisdictional questions from the onset that have not been resolved to its satisfaction and requires that the same be determined finally by the Appellate Court. The legal and jurisdictional questions require final certainty and determination that can only be granted by the Appellate Court, the Court of last resort in the present circumstances of this case. All the legal and jurisdictional questions, in the circumstances of this particular case, are arguable and require finality that can only be granted by the Appellate Court. It is imperative, in furtherance of the Respondent's right to access justice, that leave prayed for herein be granted. The application has been made expeditiously and without any undue or unreasonable delay. It is further premised on the Supporting Affidavit of Naylor Deputy Director Legal Services of the Respondent.

This court has considered the application and the submissions therein. Paragraph 11 of the Advocates Remuneration Order provides for Objection to decision on taxation and appeal to Court of Appeal in the following words;

11.

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) far 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.

Paragraph 11(1) reveal that it only applies to a party objecting to the decision of a taxing officer. It provides for 14 days for the objection under the said section. Paragraph 11(2) provides for the steps by the taxing master after the objection. Paragraph 11(3) provides that *"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."* This provision does not prescribe a time limit for a party to appeal to the Court of Appeal.

The Respondent in opposing the application stated that the applicant does not have an arguable case with a realistic chance of success. That the argument that there existed no Advocate/Client relationship between the Applicant and the Respondent is baseless. That there is no sufficient cause such as public interest or a novel point raised to allow the application.

It is not disputed that whether or not to grant leave to appeal is a matter of this court's discretion. The court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case M/S Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 OF 1997. where the Court stated;

> *"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."*

A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e. statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law. Whenever the court is invested with the discretion to do certain acts as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner.

In the case of Nasibwa Wakenya Moses vs University of Nairobi & another (2019) eKLR the court held that;

> *"Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[13] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in Rookey's Case[14] stated as follows:-*
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> > *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

The Applicant argued in their supporting affidavit that it is a public -body and what is involved is public funds and that consequently there is considerable public interest to determine this matter with finality. They submit that they have raised legal and jurisdictional questions which have not been resolved to their satisfaction and requires

that the same be determined finally by the Appellate Court. The ruling in contention was delivered on the 29th February 2024 and this application is dated 4th March 2024. I find that the application was made expeditiously and without any undue or unreasonable delay. The applicant being a public body it is in the public interest that they be granted leave to appeal. Judicial discretion, by nature, is the exercise of a power that is not at all available as of right; there must be just cause weighing in the mind of a Judge, to move him or her to exercise this power. It is a residual power always held in reserve, and will only be exercised where just cause is shown, in tandem with equitable and responsible conduct on the part of the applicant. From the circumstances of this case I find that this application is merited and I grant it as prayed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31st DAY OF OCTOBER 2024.

N.A. MATHEKA

JUDGE

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