



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPL. NO. 806 OF 2019

FIRDOSH EBRAHIM JAMAL T/A F. E. JAMAL ADVOCATES.....APPLICANT

-VERSUS-

BONIFACE NJIRU T/A NJIRU BONIFACE & CO. ADVOCATES.....RESPONDENT

RULING

The parties herein are practicing advocates. The applicant lodged a complaint before The Advocates Disciplinary Tribunal, Vide cause number 12 of 2013 against the respondent. On 20th January, 2014 the two parties recorded a consent before the Tribunal and an order was issued adopting the consent as an order of the Tribunal. The terms of the consent are: -

DISP CAUSE NO. 12 OF 2013

In the matter of NJIRU BONIFACE ADVOCATE

BY CONSENT:

Mr. Njiru do pay liquidated sum of Kshs. 3 Million (Three Million) inclusive of costs and interest by the following installments: -

(a) Kshs. 100,000 (One hundred thousand) on or before 20th February, 2014.

(b) Kshs. 500,000 (Five hundred thousand) on or before 20th March, 2014.

(c) The balance of Kshs. 2.4 Million (Two million four hundred thousand) by 12 (twelve) equal instalments of Kshs. 200,000 (Two hundred thousand each) commencing 20th April, 2014 until payment in full.

In default, execution to issue.

Signed - Njiru Boniface

Signed - F. E. Jamal

As witness - Z. N. Gathaara Advocates

On 10th December, 2019, The applicant filed an application seeking to have the order of the Disciplinary Tribunal adopted as an order of this Court and enforced as this Court's judgment. The respondent raised a preliminary objection in the following terms: -

1. There has been a long and inordinate delay of 6 years in bringing this proceeding from the date of the Tribunal order of 20th January, 2014 which has not been explained out or justified in any manner by the Applicant. It is wholly unconscionable, inequitable, unjust and unfair to the Respondent for this Honourable Court to adopt or grant enforcement for an order which has delayed that inordinately. The maxim in law that delay defeats equity and that equity does not assist the indolent is particularly applicable in this case and hinders this Honourable court from entertaining the Application.

2. Section 61 of the Advocates Act concerning a Report to the Court by Law Society secretariat has also not been complied with and therefore this Application is improper before the court. The applicant as a consequence relies on unverified documents.

3. This Honourable court lacks jurisdiction to hear and determine this application since there was no compliance with the elaborate provisions of Section 60 (10) by registering the said order of the Tribunal prior to the Application with the Civil Registry within 21 days of the grant of such order.

Mr. Lawrence Mbaabu appeared for the respondent who raised the preliminary objection. Counsel submit that this Court lacks jurisdiction to deal with the application. It is a violation of the constitution for this Court to supersede or interfere with the jurisdiction of the Tribunal. Counsel relies on the case of **ALICE MWERU NGAI –V- KENYA POWER & LIGHTING CO. LTD; KERUGOYA ELC NO. 287 OF 2014** where Justice B. Olao held: -

“It is clear from the above that the plaintiff’s first port of call should be the Energy Regulatory Commission and not this court. Where the Law has granted jurisdiction to other organs of Government to handle specific grievances, the court must respect and up hold the Law. The highest court in the land in Supreme Court Constitution Application No. 2 of 2011 recognized this where it stated as follows: -

To allow the application now before us, would constitute an interference with due process as with the right of parties to be heard before a court duly vested with jurisdiction, allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to Supreme Court. This is the situation in which the court must protect the jurisdiction entrusted to the High Court.”

It is further argued that Section 62 of the Advocate’s Act provide that the High Court shall be the appellate Court for decisions arising from the Disciplinary Tribunal. It is therefore a violation of Article 50 of the constitution to confer jurisdiction on the same High Court powers to also enforce orders of the Tribunal. This denies the respondent the Crucial right to appeal to the High Court from the decision of the Tribunal. Counsel contend that Section 60 (10) (b) and Rule 11 of the Advocates Act are unconstitutional for violating the right to a fair hearing and the right to appeal.

Lastly, Counsel maintains that the applicant’s application is time barred. There has been a long and inordinate delay of six (6) years before seeking the leave of this court to execute the order of the LSK Tribunal. The decision of the Tribunal was given on 20th January, 2014. Leave should have been sought within 21 days of the date of the order under Section 60 (10) (b) of the Advocate’s Act. The applicant has not explained why it took so long to bring the application.

Miss Makokha appeared for the applicant. On the issue of limitation, it is submitted that the period of six (6) years has not lapsed. The suit was filed on 10th December, 2019 before the expiry of six years.

In relation to jurisdiction, Counsel maintains that Section 57 of the Advocates Act empowers the Tribunal to enforce its own Judgment by executing against the immovable and movable properties of the Judgment Debtor. Article 165 of the Constitution gives the High Court supervisory jurisdiction over the subordinate courts including Tribunals. The LSK Tribunal falls under Article 162 (4) of the Constitution which establishes the subordinate Courts and Tribunals. Counsel contends that no appeal was filed against the order of the Tribunal. The Tribunal is now functus officio. Counsel referred to the cases of **NELLY NAFULA MUTUAL –V- SHIVAJI SIMON [2017] eKLR** and **JOSEPH BRADLEY WAWERU GITARI –V- STEPHEN KINYANJUI KIBUNJA [2018] eKLR** where the High Court granted orders seeking to enforce decisions of the Law Society Disciplinary Tribunal.

It is further submitted that the parties recorded a consent before the Tribunal. The said consent was adopted as an order of the Tribunal. No appeal was filed against the order of the Tribunal. The respondent filed Judicial Review Miscellaneous Application number 11 of 2016 seeking to stop the Tribunal from acting further on the matter. The respondent made request for an extension to comply with the consent order but failed to comply.

Preliminary objection should be based on legal issues and be capable of disposing the dispute at the preliminary state. In the case of **MUKISA BISCUIT CO. –V- WEST END INDUSTRIES, [1969] E. A. 697**, Sir Charles Newbold, P stated at page 701 as follows: -

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper practice should stop.

The respondent has raised the issue of limitation of actions contending that six (6) years have lapsed from the date of the order by the Tribunal.

Section 4(1) of the Limitation of Actions Act states as follows: -

The following actions may not be brought after the end of six years from the date on which the cause of actions accrued: -

- a) Actions founded on Contract.**
- b) Actions to enforce a recognizance.**
- c) Actions to enforce an award.**

d) Actions to recover a sum recoverable by way of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

If one is to compute the six year period, the applicant's cause of action would have lapsed on 19th January, 2020. This claim was filed on 17th December, 2019 which is within the six (6) period for a claim to enforce an award or contract. It is therefore clear that the applicant's claim is not time barred. Further, the applicant still had the leeway of seeking extension of time should it be found that the six (6) year period had lapsed.

Section 60 (11) of the LSK Act states as follows: -

If no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favor of whom the order is made may apply ex parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the Court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the Civil Procedure Rules.

The LSK Act provides for the right of Appeal from the orders of the Disciplinary Tribunal. There is nothing unconstitutional in Section 60(II). The respondent entered into a consent to settle the claim. There was no appeal filed by the respondent against the consent order: There is no law which stopped the applicant from lodging an appeal to the High Court. The issue of fair hearing does not arise as the respondent voluntarily executed the consent before the Tribunal. I do find that both the issues of Limitation and right to fair Trial or right to appeal have not been proved and the same must fail.

The matter was heard by the Disciplinary Tribunal where parties recorded a consent. Section 60 (10) (b) of the Advocates Act provides: -

“An order made by the Tribunal under this Section (b), in writing of the filing of the order may be filed in the Civil Registry of the Court by any party thereto who shall within 21 days of the filing, give a notice to all parties”

The above provision does not make it mandatory that the orders of the Tribunal must be filed within 21 days. The term used in the provision is “May”. There is no obligation on any party to file the order at the High Court Registry within 21 days, the word shall applies after the order of the Tribunal has been filed in court. This court has jurisdiction to determine the dispute. The dispute emanated from the Tribunal and the authority of **Alice Mweru Ngai –v- Kenya Power & Lighting Co. Ltd (supra)** does not assist the respondent. The right of appeal to this court is provided by the law. No appeal was filed. The matter before the Tribunal was decided by way of a consent.

I am satisfied that the preliminary objection lacks merit and the same is hereby dismissed with costs.

Dated and Signed at Nairobi this 27th day of January, 2021

.....

S. CHITEMBWE

JUDGE