



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. E468 OF 2020**

**STEPHEN NGARI KAHOME.....APPLICANT**

**-VERSUS-**

**ONGETA HESBON MOMANYI.....RESPONDENT**

**RULING**

In a judgement delivered on 7th December, 2015, the Advocates Disciplinary Tribunal found the respondent guilty and convicted him of failure to account for Kshs. 520,000/= belonging to the complainant and/or withholding the same. The tribunal held that the respondent released Kshs. 500,000 to a vendor without a signed transfer and continues to withhold Kshs. 20,000 belonging to the complainant without any just cause.

The Tribunal ordered the respondent to deposit Kshs. 520,000 with the Law Society of Kenya within 60 days from the date of judgement together with interest at 12% from 22nd February, 2014 till payment in full. Following this judgement, the respondent filed an application for stay pending hearing of the appeal dated 25th February, 2016. A ruling delivered on 17th October, 2018 allowed the respondent's application on condition that he deposits a sum of Kshs. 520,000 in a joint interest earning account within 30 days from the date of the Ruling. Paragraph 16 of Justice Thurania's ruling states:-

**“In the final analysis, to balance the competing interest of the parties, I will exercise discretion and allow the application for stay of execution pending the hearing of the Appeal on condition that the Applicant do deposit the sum of Ksh.520,000/= in a joint interest earning bank account of both counsels for the parties herein or in court within 30 days from date hereof.”**

The respondent is yet to deposit the said amount in a joint interest earning account and despite sending account opening documents via a letter dated 18th October, 2018 having been sent, the respondent has failed to respond to the same.

The applicant has now filed the current application dated 11th November, 2020 seeking the following orders;

- 1. THAT this application be and is hereby certified as urgent and service be dispensed with at the first instance and the same be heard and determined ex parte as provided for under Section 60(11) of the Advocates Act.**
- 2. THAT this honourable court be and is hereby pleased to grant leave to the applicant to enforce the Order of the Disciplinary Tribunal issued on 7th December, 2015 as against the respondent to pay the applicant a sum of Kshs. 520,000 together with interest at 12% per annum from 22nd February, 2014 till payment in full as a Decree.**
- 3. THAT costs of this application be provided for.**

The application is supported by the affidavits of **STEPHEN NGARI KAHOME** sworn on 11<sup>th</sup> November, 2020. The respondent filed his replying affidavit sworn on 15<sup>th</sup> December, 2020. The respondent filed written submissions.

Mr. Kigani appeared for the applicant and argued the application orally in court when the same came up for hearing. Counsel submitted that the application is brought under Section 60(11) and 62(3) of the Advocates Act, Cap 16. The applicant is seeking to enforce judgement of the Advocates Complaints Tribunal dated 7th December, 2015. It is submitted on behalf of the applicant that the order issued by Justice Thurania on 17th October, 2018 was a conditional stay which the applicant has not fulfilled. The respondent was ordered to deposit Kshs. 520,000 within 30 days from the date of the ruling. It is submitted for the applicant that under Section 60 of the Advocates Act, this court has the power to convert the decision of a tribunal to be a decree of the court.

On the status of the Appeal, Mr. Kigani contends that the respondent has failed to prosecute the appeal to date. It is his submission that the appeal should not act as stay as provided by the Advocates' Act. The appeal is not properly on record for the reason that at the time of filing the appeal, time had lapsed and further that the applicant is not a party therein.

The respondent argues that the Nairobi Civil Appeal No. 698 of 2016 is still pending hearing and determination. Although, the respondent claim that it is the applicant herein and the tribunal who have occasioned its delay, he has not provided evidence in support thereof. The respondent further argues that there is no provisions in law available for the applicant to move the court for the said judgement appealed against to be made a decree. The respondent further takes issue with the Tribunal powers to award the retrospective interest at all and that the same is subject of the appeal. The respondent submits that the ruling in Misc App No. 71 of 2016 was misconceived and made under Order 46 Rule 6(2) of the Civil Procedure Rules instead of Sections 3 and 63 (e) of the Civil Procedure Act, Cap 21. It is the respondent's submission that the judgement by the Tribunal is irregular and incapable of being enforced as the same is contradictory on whether the respondent had been instructed by the applicant and that the same is subject to a pending appeal Civil Appeal No. 698 of 2016.

It is further submitted that the Tribunal made an order staying its proceedings until the appeal is heard and determined.

Section 60(11) of the Advocates Act, Cap 16 provides that:-

**60. (11) If no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favour 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 (Cap. 21, Sub. Leg.).**

Section 62 of the Advocates Act, Cap 16 provides that;

**62.(1)Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.**

**(2)The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days' notice of the date of hearing.**

**(3)An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.**

It is not in dispute that judgement was entered against the respondent by the Advocates' Disciplinary Tribunal on 7th December, 2015 together with orders of conviction and sentence made on 14th March 2016. The Respondent moved to appeal the said decision by filing a Notice of Appeal dated 24th October, 2016 pursuant to Section 62 (1) of the Advocates Act, Cap 16 and and further made an application seeking stay of proceedings and execution of the judgment.

It is also undisputed that the respondent did not obey the orders issued by Justice Thurania on 17th October, 2018 which was a conditional order and that no review or appeal has been preferred against the ruling. It therefore follows that the stay of execution pending the hearing and determination of the appeal is equally vacated.

This court will not delve into the merits of the appeal as the same is not before this court. The court is also guided by the provisions of Section 62(3) of the Advocates Act, Cap 16 which provides that an appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.

The provisions of Section 60 (11) of the Advocates Act, Cap 16 allows any party to seek leave to enforce an order of the Tribunal where no Memorandum has been filed.

The current position is that the Tribunal ordered the respondent to pay Kshs.500,000. This was in 2015. The ruling of Justice Thurania directed the respondent to deposit the money in a joint interest earning account. This was in October, 2018. It is now over two years from that ruling and no deposit has been made. The decision of the Tribunal was done in December, 2015 while the appeal was filed on 17<sup>th</sup> November, 2016. Nothing has happened in between. I do find that the respondent has had ample time to challenge the decision of the Tribunal. Equally, he has not complied with the order of Justice Thurania to deposit the money in a joint account. I do find that the application herein is merited and is hereby granted as prayed.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2021.**

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**S. CHITEMBWE**

**JUDGE**