



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 806 OF 2019**

**FIRDOSH JAMAL T/A F.E JAMAL ADVOCATE.....APPLICANT**

**VERSUS**

**BONFICACE NJIRU T/A NJIRU BONFACE &**

**CO. ADVOCATES .....RESPONDENT**

**RULING**

The application dated 10<sup>th</sup> December, 2019 seeks the following orders:-

- 1. The Order of the Law Society of Kenya Disciplinary Tribunal issued in Disciplinary Tribunal Case No 12 of 2013 on 20<sup>th</sup> January, 2014 be adopted and enforced as a Judgment of the Honourable Court.**
- 2. The Honourable court be pleased to grant the Applicant leave to enforce the said order as a decree of this Honourable court.**
- 3. The Honourable court be pleased to direct that the costs of this application be borne by the Respondent.**

The application is supported by the affidavit of Firdosh Ebrahim Jamal sworn on 10<sup>th</sup> December, 2019. The respondent filed a notice of preliminary objection dated 13<sup>th</sup> January, 2020. This was followed with an application dated 26<sup>th</sup> February, 2020 seeking prayers that the preliminary objection be disposed off first. The preliminary objection was heard and a ruling was delivered on 25<sup>th</sup> January, 2021 dismissing the same. Parties determined the application dated 10<sup>th</sup> December, 2019 by way of written submission.

Miss Makoha appeared for the applicant. It is submitted that the Respondent made a professional undertaking in a land transaction to the tune of Ksh. 3,000,000. The undertaking was not honoured. The matter ended up at the Law Society Disciplinary Tribunal and was registered as case No 12 of 2013. The dispute was compromised by way of a consent whereby the Respondent undertook to liquidate the sum of ksh. 3 million by way of installments. The terms of the consent Were not complied with.

It is submitted that the consent was adopted as an order of the Law Society Disciplinary Tribunal. No appeal was filed against that order. The Respondent filed Judicial Review Miscellaneous Application member II of 2016 and the court ordered that the Law Society Disciplinary Tribunal is functus officio. Counsel relied on the case of NELLY NAFUTALA MUTUA VS SHIVAJI SIMON (2017) Eklr and that of JOSEPH BRADLEY WAWERU GITARI VS STEPHEN KINYANJUI KIBUNJA (2018) EKLr. In both cases the court granted similar orders as those being prayed for in the current application.

Mr. Mbaabu appeared for the respondent. It is submitted that there is no finding by the Law Society Disciplinary Tribunal that there was breach of professional undertaking and that the provisions of Order 52 Rule 7 of Civil Procedure Rules which relates to enforcement of professional undertakings has not been invoked. It is also submitted that the application relies on section 60 (4) of the Advocates Act. That section cannot be read in isolation. It must be read together with section 61 of the same Act which provides;

- 1. On the termination of the hearing of the complaint, if the Tribunal does not dismiss the same, the Tribunal shall embody its findings and the order or orders made by it in the form of a report to the court, which shall be delivered to the Registrar, together with the record of evidence taken and any documents put in evidence.**
- 2. The Registrar shall give to the complainant, to the complainant Commission (if the complainant has been referred by it to the Tribunal), to the council of the Society and to the advocate to whom the complaint relates notice of delivery of the report, which shall be open to inspection by the complainant, the Commissioner, the advocate to whom the complaint relates and their respective advocates, if any, and by the Council.**

Counsel submits that no report of the Disciplinary Tribunal has been annexed. No Registrar's certificate referring the matter to the court has been attached. The court is being called upon to rely on the naked documents produced by the applicant. According to counsel, the Law Society Disciplinary Tribunal is still seized of this dispute. Further, section 12 of the Law Society Act empowers the LSK Tribunal to execute its own orders.

The record shows that there was professional undertaking by the Respondent in favour of the applicant. It is not disputed that the applicant filed a complaint before the Law Society of Kenya Tribunal. It is also not disputed that the matter was compromised by way of a consent. The terms of the consent are as follows -:

**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 20<sup>th</sup> February, 2014.**
- (b) Kshs. 500,000 (Five hundred thousand) on or before 20<sup>th</sup> 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 20<sup>th</sup> April, 2014 until payment in full.**

**In default, execution to issue.**

Before this application was heard the Respondent raised a preliminary objection raising the following issues.

- 1. There has been a long and inordinate delay of 6 years in bringing this proceeding from the date of the Tribunal order of 20<sup>th</sup> 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.**

The totality of the dispute is that the Respondent does admit having made the professional undertaking. There is also no dispute that the Respondent agreed to pay the sum of Ksh. 3 million by way of installments but failed to do so. A professional undertaking is part and parcel of the normal working processes of an advocate. Its sanctity has to be upheld. An advocate should not make a professional undertaking and be allowed to back out of it at the detriment of the other advocate. Allowing the Respondent to walk away without honouring his obligation under the professional undertaking will be tantamount to watering down one of the guarded tenets of the legal profession. It is a mark of utmost dishonesty on the part of the Respondent to make such professional undertaking, follow it up with a consent promising to settle it by way of installments and thereafter come to court blazoning that the court has no jurisdiction or that the Law Society of Kenya Tribunal has its own mechanism of executing its orders. It does not matter whether the orders are to be executed by the Law Society of Kenya Tribunal or by the court. All what is necessary is for the Respondent to honour the undertaking.

Part of the consent recorded before the Tribunal is that in default of the promised payments by installments, execution was to issue. The application is part of the execution process.

The upshot is that the application is merited and is hereby granted as prayed. Costs of the application to the applicant.

**DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2021**

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**S. CHITEMBWE**

**JUDGE**