REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E020 OF 2021

JOHN WACIRA WAMBUGU.....APPELLANT/APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL OF

LAW SOCIETY OF KENYA.....1ST RESPONDENT

MONICA WANJIKU NGUGI.....2ND RESPONDENT

(Being an appeal from the Orders of the Honourable Tribunal, of the 1st Respondent issued on the 15th June, 2020 and 20th July, 2020)

RULING

1. The applicant moved this court vide the notice of motion dated 18th January 2021, seeking an order for leave to file appeal out of time against the 1st respondent's Rulings issued on 15th June, 2020 and 20th July, 2020.

2. He again filed another notice of motion dated 23rd February 2021 seeking an order to stay/set aside the orders issued on 15th February, 2021 by the 1st respondent in Disciplinary Tribunal Cause no.79 of 2013 pending the hearing of the intended appeal.

Both applications were argued simultaneously.

3. The application dated 18th January 2021is supported by the grounds on its face plus the applicant's sworn affidavit. A summary of all this is that the 1st respondent on 20th June 2020 issued orders inter alia compelling the applicant to deposit the sum of Kshs 11,900,000/= without taking into consideration the fact that parties had not reconciled their accounts. That on 20th July 2020 it gave further orders striking the applicant from the roll of advocates and allowed the 2nd respondent to pursue execution proceedings without considering material facts.

4. He claims that the advocate handling his matter failed to safeguard his interests. He explained that he had on several occasions invited the 1st and 2nd respondents' advocates to physically meet to enable all parties present a detailed statement of accounts and settle the matter amicably.

5. The 2nd application dated 23rd February 2021 is supported by the grounds on its face plus the applicant's sworn affidavit. He deponed that if the 2nd respondent is allowed to proceed with execution proceedings against him, it will amount to double jeopardy as accounts have not been reconciled.

6. In his further affidavit he deponed that the only way of resolving the main issue in contention in this suit is by the court allowing the appeal and exercising its discretion by ordering the parties to a mandatory joint account reconciliation. According to him that is the only way of resolving this issue.

7. In both applications the applicant has expressed his willingness to offer a bank guarantee of a reasonable amount as the court may deem fit as security for the suit herein.

8. In opposition to the application, the 1st respondent's secretary Ms. Mercy Wambua swore a replying affidavit on 12th March 2021. She has averred that the applicant as an advocate ought to be aware of timelines imposed on filing appeals. In this case delay to file his appeal is for a period of over 6 months when the appeal should have been filed within 14 days. She has deponed that the order directing the applicant

to deposit Kshs 11,900,000/= was made on 4th February 2019 yet paragraph 3 of the supporting affidavit talks of 15th June 2020 and 20th July 2020.

9. She further deposed that the applicant has not set down sufficient grounds upon which an appeal out of time should be granted. She adds that the applicant has filed several applications in an attempt to frustrate both respondents. It is seven years since the complaint was filed before the Tribunal and all through those years the applicant has been taken through a fair process.

10. She has referred to two Review Applications Miscellaneous Applications Nos. 445 of 2013 and 131 of 2020 filed by the applicant. Both were dismissed by the High court.

11. In response to the application dated 23rd February 2021 she deponed that the 1st respondent acted within its mandate under section 60 of the Advocates Act Cap. 16, Laws of Kenya by receiving and hearing the complaint against the applicant, who was represented by counsel. A judgment was then rendered on 27th October 2014 where he was ordered to pay Kshs 27,484,708/= within 14 days in default execution to issue.

12. The amount of Kshs 11,974,708/= was found to be undisputed, while the disputed sum was Kshs 4,810,000/=. A copy of the proceedings (Annexture "MW-1") shows what transpired before the Tribunal. This money has never been paid as directed by the Tribunal.

13. The 2nd respondent swore a replying affidavit on 24th February 2021.She avers that the applicant is seeking leave to file an appeal out of time against rulings issued on 22/06/2020 and 20/07/2020, which are not about accounts reconciliation but rather that he should pay the undisputed sum of Kshs.11, 900,000/= and he should be struck off from the roll of advocates. She further deposes that a joint reconciliation of the accounts was dealt with when the applicant met with the 1st respondent's chief executive officer. She gave a detailed history of the matter.

14. The history shows that the applicant filed a judicial review No. 161 of 2015 challenging the 1st respondent's decision of 27th October 2014. The same was dismissed by Justice Odunga on 2nd July 2015, vide a Ruling (MWN-2). Several other applications were filed, heard and dismissed (MWN3 & 4).

15. The applicant again filed Judicial Review No. 131 of 2020 to have the 1st respondent's decision to have the applicant deposit the undisputed sum of Kshs 11,900,000/= quashed. The same was dismissed on 8th December 2020 by Justice Nyamweya *(as she then was)* vide the Ruling (MWN-5).

16. She avers that the applicant has not shown how his advocate mishandled the matter before the 1st respondent. She states that the advocate who handled the matter in respect to the Rulings of 22nd June 2020 and 20th July 2020 is the same one appearing for him now (MWN 6, 7 & 8).

17. She depones that a joint reconciliation of accounts was done by the applicant and the chief executive officer of the 1st respondent M/s Mercy Wambua. That indeed the sum of Kshs 11,900,000/= is undisputed as can be seen from the proceedings of 4th February 2019 where the applicant was represented by Mr. Kimani (MWN-9).

18. Further, she depones that she is against the applicant providing a bank guarantee for a reasonable amount because he has continuously ignored the orders issued by the 1st respondent to deposit funds. Further that there is nothing to show that he will not go against the orders of this honourable court. She avers that his appeal has a zero chance of success and should be dismissed.

19. The applications were disposed of by written submissions. The applicant through his advocate Mr. Muindi identified the issue for determination to be whether the applications have merit and relied on **Section 95 of the Civil Procedure Act** which provides:

> ***"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."***

20. He further relied on the case of **Patrick Maina Mwangi v Waweru Peter (2015) eKLR** where the honourable court cited with approval the case of **United Arab Emirates v Abdel Ghafar & Others 1995 IR LR 243** that cited with approval **Nicholas Kiptoo Arap Salat V IEBC & 7 Others (2014) eKLR** which held that:

> *"……the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively, or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of the exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses….."*
>
> *As Sir Thomas Bingham M.R pointed out in **Costellow V Somerset CC (supra) at page 956 C,** times problems arise at the intersection of two principles, both salutary, neither absolute …..…The first principle is that the rules of court and the associated rules of practice, deserved in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met ……". The second principle is that …..a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merit because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate ….."*

21. Counsel further submitted that if the court declines to grant the orders sought, the applicant would lose his sole source of livelihood which is his practice of law as an advocate and in turn render him incapable of settling the outstanding amount to the 2nd respondent.

22. He relied on the case of **Kenya Power & Lighting Company Ltd v Rose Anyango & Another (supra)** which opined as follows, in granting stay of execution and exercising its discretion in expanding the time allowed for filling an appeal;

> *"**Order 42 rule 6** of the **Civil Procedure Rules** grants this court, as well as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the present case, there is no dispute that leave to appeal out of time has been granted and as stated above, from the draft Memorandum of Appeal, it is clear to me that it is not frivolous. It raises triable issues of whether or not the trial magistrate erred in law and fact in holding the appellant 100% liable for the occurrence of the accident. Indeed,the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise as it was not shown that the respondent decree holder is so impecunious that she cannot refund the decretal sum awarded if the same is paid out to her. Furthermore, in its pleadings, the appellant has not disclosed the quantum of damages awarded to the 1st respondent. It is therefore difficult for this court to establish whether such award was manifestly excessive or otherwise and capable of interference by the court on appeal should the court find that the appellant was liable for the accident. The applicant has therefore not demonstrated that it will in any way suffer any loss in the event that stay is not granted. The applicant has offered security for the due performance of decree."*

23. He further submitted that the applicant has demonstrated that the quantum of damages he has been condemned to pay which is in contention is enormous and that he has demonstrated good faith by honouring this court's order by depositing the security sum.

24. Nyawira Milimu & Co. Advocates for the 1st respondent identified the issues for determination to be as follows:

> *i. Whether due process was followed in arriving at the judgment in Advocates Disciplinary Tribunal Miscellaneous Cause No.79 of 2013.*
>
> *ii. Whether the applicant has met the criteria to file an appeal out of time.*
>
> *iii. Whether the appellant/applicant's application should be allowed.*

25. On the first issue counsel referred to **sections 60(3) and 62 of the Advocates Act** and submits that the Advocates Disciplinary Tribunal is a body structured towards promoting the national values and principles enshrined in the Constitution of Kenya 2010. It has rules and procedures followed by the 1st respondent in handling complains against accused advocates. That it was evident that due process was followed by the 1st respondent in arriving at its decision and the applicant who was represented by an advocate of his choice was given an opportunity to defend himself.

26. On the second issue counsel has relied on **Order 95** of the **Civil Procedure Act and Section 62** of the **Advocates Act**. He submitted that the applicant's application for leave to file an appeal out of time was made on 18th January 2021 more than 5 years after delivery of judgment. Counsel further submits that the applicant lacks good faith as the delay is inordinate with the sole intention of frustrating the 2nd respondent and he should be barred by laches.

27. He submitted that the Secretary of the 1st respondent had deponed that the applicant had made two judicial reviews which were dismissed. Referred to is the case of **Stephen Nyasani Menge v Rispah Onsase (2018) eKLR.**

28. On the third issue counsel relied on **Order 42 Rule 6(1) of the Civil Procedure Rules** posits as follows:

> *"no appeal shall operate as a stay of execution except in so far as the court appealed from making order and whether a stay is granted or not by the court, the court to which the Appeal is preferred shall be at liberty on application being made, to consider such application and to make such order therein as may seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside"*

29. On this issue learned counsel has relied on two authorities namely**;**

(i) Butt vs Rent Restriction Tribunal [1979] eKLR Madan, Miller & Potter JJA where the court held:

> *"the power of the court to grant or refuse an application for stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal…..the court in exercising its discretion whether to grant or refuse an application for stay will consider circumstances of the case and its unique requirements"*

(ii) Antonie Ndiaye vs African Virtual University (2015) eKLR where Gikonyo J, cited with the approval the holding of **Sewankambo Dickson vs. Ziwa Abby HCT 00 CC Ma 0178 of 2015** where it was stated as follows;

> *"no doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal …..…substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"*

30. Learned Counsel Ms. Jin for the 2nd respondent in her written submissions asserts that the applicant's application for stay is unmerited and an afterthought calculated at evading payment of the decretal sum. She relied on **Order 42 Rule 6(2)** of the **Civil Procedure rules** on the three conditions to be satisfied for stay of execution. They include

a) That substantial loss may result to the applicant unless the order is made.

b) That the application has been made without unreasonable delay.

c) That the applicant has furnished to the court such security for the due performance of the decree.

31. She referred to two authorities namely:

(i) James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR where the court held that-

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, that does not in itself amount to substantial loss under **Order 42 Rule 6 of the CPR**. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal."*

(ii) Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) (2019) eKLR which cited with approval the case of **Machira T/A Machira & Co. Advocates vs East African Standard (No.2) (2002) 2 KLR 63** where Kuloba J held as follows:

> *"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars… where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."*

32. Counsel also referred to **Section 79G of the Civil Procedure Act** and submitted that the applicant was required to lodge the appeal against the orders of the 1st respondent within the 30 days of the pronouncements. She submitted that the applicant has not bothered to explain the delay of filing the appeal within the time limits. On this she relied on the case of **Githire Peter & Another v Kennedy Kimuyu (2016) eKLR** where it was held:

> *"At this juncture this Court cannot go into the merits of the intended appeal. The only issue for determination is whether there are justifiable grounds for delay. Before I go into that, it is to be noted that judgment was delivered herein on or about 21st April, 2016 and the Court granted thirty (30) days of stay of execution during which time the Applicants was to appeal. The Applicants did not appeal hence this application. The Applicants' reason is that they received a copy of the said judgment three (3) weeks after the delivery of the same and immediately proceeded to review it and by the time they reached a decision time had already lapsed."*

33. She also cited the case of **Hilda Mwendwa v Zakayo M Magara & 2 Others (2016) eKLR** and **Aviation Cargo Support Limited v St.Mark Freight services Limited (2014) eKLR** which held that in an application for extension of time, delay must be explained by the party in default.

Analysis and Determination

34. Having keenly considered the applications, grounds, affidavits, submissions and authorities I find the main issue for determination to be whether the applicant has met the required principles for grant of *(a) leave to file appeal out of time* and *(b) stay of execution pending the hearing and determination of an intended appeal.*

35. The important considerations in such applications have been restated in several decisions. In the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR** the Court of Appeal restated the principles in the following terms:

> *"…it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."*

36. Section 79G Civil Procedure Act proceeds to indicate the timelines within which an appeal should be filed. It states:

> ***"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for***

not filing the appeal in time."

37. The first two impugned orders were issued on 15th June 2020 and 20th July 2020 respectively. By the time the applicant was filing the intended appeal and application dated 18th January 2021 it was seven (7) and eight (8) months since the delivery of the said orders. After filing the intended appeal and notice of motion dated 18th January 2021 the 1st respondent issued another order on 15th February 2021 allowing the 2nd respondent to levy execution against the applicant for the Kshs 11,900,000/=.

38. The applicant has given two reasons as the cause of the delay in filing an appeal. The first one is that the advocate representing him before the tribunal mishandled the matter making him not receive a fair hearing. The second reason is that he had on several occasions invited the 2nd respondent to conduct a joint reconciliation of accounts in order to amicably settle the matter. The invitation has never taken up by the 2nd respondent and this has contributed to the delay in filing the appeal.

39. A perusal of the annextures herein in particular (MWN1) shows that the first order for the deposit of Kshs 11,974,708/= with the Law Society of Kenya was made on 4th February 2019. The one of 15th June 2020 was just a re-enforcement of the one of 4th February 2019. In effect there was no new order issued on 15th June 2020 for deposit of the said sum as claimed.

40. I have also read the Rulings in Nairobi High Court Misc. Application No. 161 of 2015 and Nairobi High Court Misc. Application No. 131 of 2020 which Judicial review applications were in respect to quashing of the judgment and execution respectively in the 1st respondent's cause No. 79 of 2013. In Misc. Application No. 131 of 2020 the applicant sought to challenge the order to have him deposit the Kshs 11,900,000/= with the Law Society of Kenya. Both applications were dismissed, for lack of merit. I will not say more on that.

41. The proceedings (MWN1) before the Tribunal clearly confirm that joint reconciliation was done and the only sum disputed is Kshs 4,810,000/= while Kshs 11,900,000/= is undisputed hence the order for him to deposit the said sum. There is no evidence of such deposit or even a portion of it having been made.

42. From the memorandum of appeal filed herein it is clear that the applicant is not challenging the judgment which adjudged him to pay Kshs 27,484,708/=. He does not deny having only paid Kshs 9,500,000/= of the said sum. Despite his alleged calls for reconciliation of accounts the applicant who is an advocate has not told this court how much he has paid in total and which has not been accounted for with proof of receipts and/or other documents. The orders of 15th June 2020 and 20th July 2020 originate from the judgment of 27th October 2014 and the Ruling of 4th February 2019 which have both not been set aside.

43. The ruling for deposit of Kshs 11,900,000/= having been made on 4th February 2019 means that the leave for extension of time for appealing is being made almost two years out of time. He cannot claim that he was seeking for reconciliation of accounts when the same had already been filed before the 1st respondent.

The order of 20th July 2020 was made as a result of non-compliance with the order of 4th February 2019. Since the order of 20th July 2020 touches on the applicant's profession and may be his main source of livelihood I find that in the interest of justice he should not be shut out of pursuing the appeal, on that limb only.

44. On the issue of stay of execution, the court notes that the same is discretionary but must be exercised judiciously. In the case of **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** Mabeya, J held as follows;

> *"As I stated in the case of **Kenya Commercial Bank Limited Vs Sun City Properties Limited & 5 Others [2012] eKLR** "in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. … In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case."*

45. Further in the case of **Absalom Dova vs Tarbo Transporters [2013] eKLR** its was stated:

> *"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination".*

46. Upon considering all the above stated facts and law I hereby:

(i) Allow the application dated 18th January 2021 and grant the applicant leave to file appeal against the order of 20th July 2020 ONLY within 10 days.

(ii) The application dated 23rd February 2021 is allowed to the extent that the order of 15th February 2021 is stayed on the following conditions:

(i) Kshs 2,000,000/= already deposited in court in compliance with the court orders of 24th February 2021 to be released to the

Law Society of Kenya with immediate effect.

(ii) The balance of Kshs 9,900,000/= to be deposited with LSK within 21 days.

(iii) Failure to comply will automatically lapse the order of stay of execution.

(iv) The Law Society of Kenya not to release the funds before the determination of the appeal.

(v) Costs in cause.

(vi) When the appeal is finally filed let it be heard by any other judge in the division.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF JUNE, 2021.

H. I. ONG'UDI

JUDGE