



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 698 OF 2016

ONGETTA HESBON MOMANYI..... APPELLANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

STEPHEN NGARU KAHOME.....INTERESTED PARTY

RULING

1) This ruling is the outcome of two applications. The first application is the motion dated 5th May 2021 taken out by the Advocates Disciplinary Tribunal hereinafter referred to as the 'Tribunal' whereof the Tribunal sought for the following orders:

i. THAT this application be and is hereby certified as urgent and service be dispensed with in the first instance and this file be listed before Hon. Justice Chitembwe who is handling a file that relates to this appeal, Misc. App. No. E468 of 2020.

ii. THAT the appeal herein be dismissed for want of prosecution.

iii. THAT the appeal herein be and is hereby dismissed for failure by the appellant to enjoin the complainant in Disc. Case 563 of 2014, subject of this appeal, yet the outcome of the appeal will directly affect the said complainant.

iv. THAT the appeal herein be and is hereby dismissed and/or struck out for being fatally defective since the appellant never filed notice of appeal within 14 days from the date of receipt of the report on 20th July, 2016 and for failing to file memorandum of appeal within 30 days after notice of appeal 14 days period i.e by 3rd September, 2016 in breach of express mandatory provision of Section 62(1) of the Advocates Act.

v. THAT costs of this application be provided for.

2) The Tribunal filed the affidavit sworn by Mercy Wambua in support of the motion. When served, Ongetta Hesbon Momanyi filed a replying affidavit he swore to oppose the application.

3) The second application is the motion dated 2nd June 2021 taken out by Ongetta Hesbon Momanyi, the appellant/applicant herein.

4) In the aforesaid motion the appellant/applicant sought for the following orders:

a) THAT the application herein be certified as urgent and heard exparte and service of the same be dispensed with in the first instance.

b) THAT this honourable court do issue orders of temporary stay execution of orders made on 23/2/2021 in Misc. Application no. E463 of 2020 pending the hearing and determination of this application.

c) THAT this honorable court do issue orders of stay execution of orders made on 23/2/2021 in Mis. Application no. E463 of 2020 pending hearing and determination of the appeal herein.

d) THAT this honourable court do issue orders calling upon/ compelling the respondent to submit the original file in Disciplinary Cause no. 53 of 2014 to this court forthwith to enable the High Court Deputy Registrar fix the appeal herein for hearing as per the provisions of Sections 62 and 63 of the Advocates Act (CAP 16) Lassa of Kenya.

e) Costs of this application be provided for.

- 5) The appellant/applicant filed an affidavit he swore in support of the application. The advocates disciplinary Tribunal the respondent/respondent herein, filed a notice of Preliminary objection to oppose the motion. The replying affidavit of Stephen Ngare Kahome was also filed to resist the application. The appellant/applicant also filed a further supporting affidavit to buttress his application and in response to the preliminary objection.
- 6) In the first application, the Tribunal urged this court to dismiss the appellant's appeal for want of prosecution and for being fatally defective. The Tribunal further urged this court to strike out the appeal since the appellant did not join the complainant in Disciplinary Case on. 53 of 2014.
- 7) It is the submission of the Tribunal that the appellant is in contempt of court orders. It is pointed out that on 22.02.2014 the appellant was ordered to deposit a sum of ksh.500,000/= with the Law Society of Kenya within 60 days but has so far not complied with the order.
- 8) Secondly it is also the appellants submission that on 17.10.2018 the appellant was granted an order for stay of execution on condition that he deposits the sum of kshs.520,000/= in an interest earning account in the joint names of the advocates appearing in this appeal within 30 days but the appellant has failed to make the deposit despite the respondent's advocates providing him with the account opening documents.
- 9) The Tribunal further pointed out that the appellant was required under Section 62 of the Advocates Act to file a notice of appeal after receiving the notice of report and to further file the memorandum of appeal within 30 days after the lapse of 14 days pursuant to Section 61(2) of the Advocates Act.
- 10) The Tribunal further pointed out that the appellant has not taken any steps to have the appeal prosecuted for the last five (5) years.
- 11) In response, the appellant/respondent opposed the motion stating that the Tribunal has failed to comply with Section 61(1) of the Advocates Act to forward its original file i.e DC 53 of 2014 to the court. He averred that he is desirous to have the appeal expeditiously dispensed with if the original file is forwarded to this court. The appellant further stated that he filed the appeal within 30 days as required.
- 12) It is pointed out by the appellant that due to the outbreak of the covid 19 pandemic, the court's operations were partially paralysed and came to a standstill.
- 13) The appellant further averred that the Tribunal came to court with unclear hands hence the application ought to be dismissed. The appellant also argued that non-joinder or misjoinder of parties in an action like this is not fatal.
- 14) He also argued that the Tribunal is also under duty to list the appeal for hearing. It is the appellant's averment that the notice of delivery of the report allegedly given to him is a forgery hence there is need to have the deponent of the supporting affidavit cross-examined.
- 15) Having considered the grounds stated on the motion dated 5/5/2021 plus the facts deponed in the rival affidavits, I have come to the following conclusions;
- 16) First, that it is not controverted that the appellant was found guilty by the Tribunal of unlawfully withholding a sum of kshs.20,000/= belonging to one Stephen Ngari Kahome, the complainant in D.C 53 of 2014 as legal fees for an aborted transaction and for irregularly releasing a sum of kshs.500,000/= belonging to the complainant in breach of the agreement.
- 17) Secondly, it is also apparent that the appellant was on 22.2.2014 ordered to deposit with the Tribunal the aforesaid amount within 60 days which order the appellant failed to comply.
- 18) Thirdly, the appellant further failed to deposit a sum of ksh.520,000/= in an interest earning account in the joint names of the advocates appearing in this appeal as a condition for the grant of the order for stay of execution of the Tribunal's decision.
- 19) Fourthly, that though the appellant has denied being served with the notice of delivery of the Tribunal's report, I am satisfied that he was actually given notice as required under Section 61(1) of the Advocates Act.
- 20) It is clear from the averments made in paragraph 4 of Mercy Wambua's affidavit filed in support of the motion that the appellant was given notice of delivery of the Tribunal's report vide the letter dated 19th July 2016 which the appellant acknowledged receipt by stamping on the copy. The allegation that the stamp and signature acknowledging receipt of the report is a forgery cannot stand in the absence of expert opinion.
- 21) Under Section 62 of the Advocates Act, the appellant was required to file a memorandum of appeal by 3rd September 2016 but he chose to do so on 17th November 2016 without seeking for prior leave. In the circumstances the appeal is rendered fatally defective and incompetent.
- 22) Fifthly, there is no doubt that this appeal has remained unprosecuted for the last five (5) years. The appellant has admitted the delay but has stated that the Tribunal's original file has not been forwarded to this court.
- 23) The appellant attached to his replying affidavit sworn on 19th July 2021 a letter written by the Deputy Registrar of this court indicating that the Tribunal's file had been forwarded to this court.

24) It therefore does lie in the mouth of the appellant to state that he was unable to prosecute the appeal because the Tribunal's file had not been forwarded to this court. The Tribunal's application seeking for this appeal to be dismissed for want of prosecution therefore has merit.

25) Sixth, the appellant does not deny that the complainant in DC 53 of 2014 namely; Stephen Ngari Kahome has not been made a party to this appeal. The appellant is of the opinion that failure to do so is not fatal. The record shows that the Tribunal found the appellant guilty of professional misconduct of failing to account for ksh.520,000/= belonging to the complainant.

26) The Tribunal further stated that the appellant had no right to charge the complainant fees of ksh.20,000/= since the complainant was not his client. The Tribunal further ordered him to deposit the amount with the Tribunal.

27) The appellant preferred this appeal to challenge the decision of the Tribunal. It is clear that the complainant should have been made a party to the appeal either as a respondent or an interested party because the order sought shall directly affect the complainant. However, in my view, the failure to enjoin the complainant to this appeal is not fatal. The court can still use its discretion suo moto or upon being moved to make an order to join the complainant as a party on appeal.

28) In the end I find the Tribunal's motion dated 5th May 2021 to be meritorious. The same is allowed, consequently the appeal is dismissed for want of prosecution and is further struck out for being fatally defective having being filed out of time without leave.

29) The second motion is the application dated 2nd June 2021. In the motion the appellant/applicant is seeking for two main orders. First, is an order for stay of execution of the orders made on 23rd February 2021 vide Misc. Application no. E468 of 2020 pending the hearing and determination of this appeal. The second order sought is for an order to compel the Tribunal to submit to this court the original file (ie DC no. 53 of 2014).

30) It is the submission of the appellant that the Tribunal has adamantly refused to forward to this court its original file to enable him prepare the record of appeal. The appellant further argued that the interested party who is the complainant on 23rd February 2021 vide DC 53 of 2014 obtained an order converting the Tribunal's judgment into a decree vide H.C Misc. Appl. No. E468 of 2020 therefore unless an order for stay is granted tis appeal will be rendered nugatory.

31) The appellant averred that he has already filed a notice of appeal.

He further argued that he will be denied the right to natural justice unless the order for stay is granted.

32) In response to the appellant's submission, the Tribunal stated that the application is resjudicata in that the appellant applied and was granted the orders for stay of execution of the decree pending appeal on 17/10/2018 vide H.C Misc. Application no. 71 of 2016 on condition that he deposits the decretal sum.

33) It is also pointed out that the application seeking to be supplied with the Tribunal's report was heard and found to have been given vide H.C. Misc. Application is resjudicata. It is also pointed out that the appellant should have sought for the orders for stay of execution in H.C Misc. E468 of 2020 instead of using this appeal since the order was issued by a court of concurrent jurisdiction as this court.

34) In response to the Tribunal's response, the appellant filed a further replying affidavit in which he averred that the instant motion seeks for completely different orders as those given vide H. C. Misc. application no. 71 of 2016.

35) Having considered the rival submissions, I think the main issue which has arisen for the determination of this court is whether the appellant's instant application is resjudicata. It is not in dispute that the appellant was ordered by the Tribunal to deposit with it the sum of ksh.520,000/= plus interest vide DC 53 of 2014.

36) It is also not in dispute that the appellant successfully obtained an order for stay of execution of the Tribunal's decision vide H.C Misc. Application no. 71 of 2016 on condition that he deposits the decretal sum of ks.520,000/= in a joint interest earning account within 30 days from 17th October 2018.

37) It is further not disputed that the appellant did not make the deposit within 30 days as ordered by this court. It is also not disputed that this court converted the decision of the Tribunal into a decree vide H.C. Misc. Application no. E468 of 2020. Pursuant to the provisions of Section 60(11) of the Advocates Act. This court was also informed vide H.C. Misc. Appl. No. E468 of 2020 that Section 61 of the Advocates Act had been complied with. It is clear to this court therefore that the appellant's motion dated 2nd June 2021 is resjudicata. Consequently, the same is hereby dismissed with no order as to costs.

38) In the end and for the avoidance of doubt, this court makes the following orders;

i. The motion dated 5th May 2021 is allowed. Consequently, this appeal is ordered is dismissed and struck out for want of prosecution and for being fatally defective having been filed out of time without leave of court.

ii. The motion dated 2nd June 2021 is dismissed for lacking merit and for being resjudicata.

iii. Each party to bear their own costs in the applications.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER,

2021.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

..... for the Interested Party