



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CONSTITUTIONAL PETITION NO.20 OF 2019

BETWEEN

OTIENO CLEVELAND OKOTH AYAYO.....PETITIONER

AND

THE LAW SOCIETY OF KENYA DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

ELIJAH MIDIGO OCHIENG.....1ST INTERESTED PARTY

THOMAS JUMA OULA.....2ND INTERESTED PARTY

JAMES ORONY NGOCHE.....3RD INTERESTED PARTY

BARNABAS OCHIENG OBUYA.....4TH INTERESTED PARTY

JUDGMENT

Background

1. The Interested Parties herein instructed the Petitioner to act for them in various cases.
2. The subject matter of this Petition arises from one of the various suit and particularly **KISUMU ELRC NO. 26 OF 2013**. By a judgment in dated 21.11.14, the court awarded various sums to the Interested Parties and a decree for the same was issued on 14.01.15.
3. On 04.08.17, the Interested Parties lodged a complaint with the Respondent, against the Petitioner, alleging that he was withholding and failing to account for their dues arising out of **KISUMU ELRC NO. 26 OF 2013**. The complainant was registered as **Disciplinary Cause No. 140 of 2017 (Cause)**.
4. The Petitioner asserts that the Interested parties have withdrawn the complaint against him but the Respondent insists on delivering a judgment in the cause.

Petition

5. The Respondent's alleged insistence to deliver a verdict in the Cause prompted the Petitioner to file this petition dated 09.10.19 seeking the following orders **THAT:**

a) A declaration that the Respondent's conduct of the Disciplinary Cause No. 140 of 2017 is null and void and in breach of the rules of natural justice and fair hearing under Articles 27(1), 28, 29(f), 47(1), 48, 50(1), 159 and 259 of the Constitution of Kenya and the entire proceedings relating to the Petitioner be quashed and nullified

b) A declaration that the Respondent's insistence to deliver a judgment violates the rights of the Petitioner under Articles 27(1), 28, 29(f), 47(1), 48, 50(1), 159 and 259 of the Constitution of Kenya

c) A permanent injunction to restrain the Respondent from proceeding with the delivery of the judgment and prohibiting the Law Society of Kenya by itself and/or Disciplinary Tribunal Cause Committee from continuing with the proceedings in Disciplinary Cause No. 140 of 2017

d) Costs of the Petition

e) Any other relief

Petitioner's case

6. The petitioner's case is set out in his petition and affidavit in support sworn on 09.10.19 and submissions filed on 03.07.2020.

7. The Petitioner submits that the consents to withdraw the Cause are binding on the parties and in support has placed reliance on Brooke Bond Liebig Ltd v Mallya [1975] EA 266 where it was held: -

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

8. Reliance was also placed on Flora N. Wasike v Destimo Wamboko[1988] eKLR where the court held:

It is abundantly clear to me that the appellant was a ready and willing party to the material judgment by consent and that the terms and consequences of the judgment were explained to her. The subject matter is, and the circumstances were, such that the appellant, who was accompanied by her husband, must have fully appreciated the implications of the judgments.

9. In his affidavit, the Petitioner deposes that the Respondent's insistence to deliver a judgment in a Cause that has been withdrawn by a consent of the parties is driven by an ulterior motive, to wit malice, bias and ill-will and violates his right to a fair hearing under Article 50(1) and offends Article 159(2) of the Constitution.

10. Further to the foregoing, the Petitioner argues that the Respondent was declared null and void vide a judgment dated 27.09.19 in Law Society of Kenya v Attorney General & 2 others [2019] eKLR.

Respondent's case

11. The Respondent in the response to the Petition filed on 11.12.19 and submissions filed on 29.06.2020 argues that the jurisdiction to determine the Cause arises from Section 55 together with section 60(1) of the Advocates Act as was reiterated in Patricia Njeri Wanjama v Advocates Disciplinary Committee & another [2019] eKLR that:

A reading of section 55 together with section 60(1) of the Advocates Act, reveal that the jurisdiction of the Disciplinary Tribunal is anchored on two things. First is the status of the person against whom the complaint is made, that is the person must be an advocate, and secondly, the complaint should relate to professional misconduct.

12. Respondent further submitted that consumers of legal services are entitled to consumer rights as was held in Okenyo Omwansa George & Another V Attorney General & 2 Others [2012] eKLR that:

Legal services are not excluded from the purview of Article 46 and neither are lawyers and law firms which are private entities for purposes of Article 46(3).

13. Concerning Law Society of Kenya v Attorney General & 2 others (above), the Respondent submitted that its effect was to revert the name of the Respondent from a tribunal to a Committee but that its duties and functions remain the same.

14. The Interested Parties by their affidavits have denied filing any notices or consents to withdraw the complainant against the Petitioner and state that they are desirous to have the Cause concluded.

15. I have considered the Petition in the light of the responses and submissions. The parties have raised a novel point of law concerning the Respondent's legal status to determine the complainant lodged by the Interested Parties.

16. I have considered the holding in Law Society of Kenya v Attorney General & 2 others (above) and I totally agree with the Respondent that the effect of the court's finding was to revert the name of the Respondent from a tribunal to a Committee. I am therefore persuaded that the Respondents duties and functions which include determination of complaints remain the same.

17. The Petitioner has pleaded that the Respondent afforded both parties an opportunity to file documents in support of their respective cases.

Consequently, I find that the Petitioner's assertion that his right to a fair trial has been violated cannot hold.

18. Concerning the issue of withdraw of complaint, I concur with the Petitioner's submission that a consent order can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons.

19. Other than that, it is my considered view that the Petitioner has missed the point on this issue for the reason that the matter before the court is not for setting aside of a consent judgment but whether or not the Cause should proceed in view of the Interested Parties' alleged withdrawal of the complaint.

20. I have with respect purposely referred to the withdrawal as an alleged withdrawal for the reason that the Interested Parties have by their affidavits denied withdrawing the complaint.

21. Be as it may, even if the consents to withdraw have been filed, the Respondent having accorded the parties a chance to be heard cannot be restrained from carrying out its mandate of giving a verdict on a matter before it only because the Petitioner suspects that the judgment might not be in his favour.

22. In the circumstances, I can find no violation of the Petitioner's rights in the proceedings before the Respondent. The petition is therefore, in my view, totally devoid of merit, and it is hereby dismissed with costs to the Respondent and the interested party.

DATED AT KISUMU ON THIS 23rd DAY OF September 2020

T.W. CHERERE

JUDGE

Court	Assistants-	Ms.	Amondi/Ms.	Okodoi		
For	Petitioner	-	Mr. Mwamu	for	Mwamu & Co.	Advocates
For	Respondent	-	Mr. Ojuro	for	Otieno, Yogo,Ojuro & Co.	Advocates

Interested parties - In person

Order

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic