



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 151 OF 2018**

AHMED ISSACK HASSAN.....PETITIONER

VERSUS

THE LAW SOCIETY OF KENYA

DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

FRED KONDO ATHUOK .....1<sup>ST</sup> INTERESTED PARTY

SOSPETER M. NJOROGE .....2<sup>ND</sup> INTERESTED PARTY

**RULING**

1. This ruling relates to an the application dated 18<sup>th</sup> April 2018 in which the applicant/petitioner herein seeks orders, *inter alia*, that a conservatory order do issue staying proceedings in Disciplinary Cause No. 212 of 2013 pending the hearing and determination of the petition. The gist of the applicant’s petition is that the respondent delayed and/or failed to determine a preliminary objection he had raised in Disciplinary Cause No. 212 of 2013 within a reasonable period thereby violating his rights under Articles 10, 47, 50 and 159 (2) (b) of the Constitution.

2. The application is premised on the grounds that:

- a) **The respondent’s conduct in relation to Disciplinary Cause No. 212 of 2013 continues to occasion immense prejudice and substantial injustice to the applicant.**
- b) **The petitioner/applicant (“applicant”) is aggrieved by the conduct of the respondent and has presented the petition and filed herewith seeking redress the various contraventions detailed in the petition.**
- c) **The applicant is apprehensive that unless the orders sought in this application is granted, the respondent will take steps or action that will alter the substratum of the application and petition filed herewith and thereby render the petition nugatory.**
- d) **It is therefore crucial for this Hounorable court to intervene to protect the applicant’s rights, including the applicant constitutional right to approach this court by issuing the conservatory orders sought pending the hearing and determination of the petition.**
- e) **No prejudice will be occasioned to the respondents if the orders sought herein are granted.**

3. The application is also supported by the applicant’s affidavit sworn on 18<sup>th</sup> April 2018 in which he narrates the sequence of events that led to the filing of a preliminary objection to challenge the procedure adopted by the respondent in conducting its proceedings. The applicant avers that the respondent deliberately failed to consider his preliminary objection in time which, in turn, caused a delay in the determination of the complaint within reasonable time. It is his contention that the delay affected his prospects in seeking gainful employment as the complaint filed before the respondent continues to ‘hang over his head’ thereby tainting his professional record.

4. Mr. Melly, learned counsel for the applicant, submitted that the petition addresses violations of both the due process and the Constitution. He informed the court that the matter before the tribunal has been set down for mention on 1<sup>st</sup> October 2018 and argued that the effect of the

parallel proceedings would fundamentally alter the substratum of the of the petition before this court.

5. It was submitted that the applicant and the respondent are in an adversarial contest before this court and the applicant is therefore genuinely apprehensive that the proceedings before the tribunal will occasion a violation of his right to a fair hearing before an impartial tribunal. He maintained that the proceedings before tribunal will disrupt the proceedings before this court and that the court has jurisdiction to issue the conservatory orders sought. Counsel relied on the decisions on the case of **MUHURI vs The Attorney General [2011] eKLR** and **Evangelical Mission for Africa & another v Kimani Gachuhi & another [2015] eKLR**.

6. Mr. Wangai, learned counsel for the 2<sup>nd</sup> interested party, supported the application and submitted that the stay sought will give this court the opportunity to determine the merits of the petition. He maintained that the applicant has an arguable case before this court and that the orders sought should be granted in order to avoid judicial paradox.

7. The respondent's secretary Mercy Wambua and the 1<sup>st</sup> interested party Fred Athuok filed a replying affidavits and a further affidavit in response to the application. The gist of their response is that the respondent acted within its mandate in entertaining the complaint filed against the applicant at the Tribunal.

8. Miss Nakato, learned counsel for the respondent submitted that under Section 60 of the Advocates Act, the respondent is mandated to receive complaints against advocates and that the respondent followed the due process upon receiving such a complaint against the applicant .

9. Counsel submitted that the petition is premature as the process before the Tribunal is yet to be concluded and that ordering for a stay of proceedings will be tantamount to denying the respondent the opportunity to exercise its mandate. She argued that the applicant cannot allege a violation even before the process before the Tribunal starts. Counsel relied on the case of **Republic vs Disciplinary Tribunal of Law Society of Kenya & 2 Others Exparte John Wachira Wambugu [2015] eKLR** and **Republic vs Law Society of Kenya Exparte Nelson Har & Another [2018] e KLR**.

10. Counsel maintained that the matter before the Tribunal was referred to mediation and that no adverse action had been taken against the applicant so as to warrant the issuance of orders of stay as such an order would scuttle the mediation process whose outcome the Tribunal still awaits.

11. Mr. Adan, learned counsel for the 1<sup>st</sup> interested party opposed the application and submitted that the Tribunal has jurisdiction to hear the complaint lodged against the applicant, which complaint has been referred to mediation. It was the 1<sup>st</sup> interested party's case that the applicant's primary claim that there was a delay by the respondent in determining the complaint had been overtaken events.

## **DETERMINATION**

12. I have considered the application dated 18<sup>th</sup> April 2018, the responses filed thereto and the rival submissions by the parties' advocates. The main issue that presents itself for determination is whether this court should issue conservatory orders to stay the proceedings before the respondent Tribunal.

13. Courts have severally held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this interlocutory stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly, this court will not make any findings of law or fact on the pending petition as that may have the effect of prejudicing the hearing of the main Petition.

14. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice.

15. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi vs. Attorney General [2011] eKLR** Musinga, J (ahw) stated that:

***“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”***

16. In a majority decision in the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held as follows:

***“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”***

17. Starting from the question of whether the applicant has established a *prima facie* case I find that it has been held that a *prima facie* case

is not a case which must succeed at the hearing of the main case but is rather a case which is not frivolous. In other words, the applicant needed to demonstrate that his case discloses arguable issues and in this case arguable Constitutional issues. Considering the totality of the issues raised in the petition, this Court cannot say with certainty that the Petitioner's case is frivolous as he has raised fundamental questions of violation of constitutional rights which this court will have to address at the appropriate time.

18. On the issue of whether or not the applicant will suffer irreparable loss unless the conservatory orders sought are granted, I note that the applicant's case was that the substratum of the petition will be affected if stay orders are not granted. The applicant did not however identify the exact loss that will be occasioned to him if the proceedings before the tribunal are not stayed. In effect, the applicant did not state that the violations alleged in the petition were still continuing so as to necessitate the stay orders sought. I am therefore not satisfied that the applicant established that he will suffer any irreparable loss if the proceedings before the tribunal are not stayed. This court notes that section 60 of the Advocates Act grants the respondent the power to hear and determine disputes arising between advocates and their clients. It was not disputed that the matter before the tribunal is yet to be determined and that on 11<sup>th</sup> June 2018, the tribunal made orders referring the dispute to arbitration/mediation as follows:-

***a) The parties to the complaint therein shall attempt to resolve their disputes as provided under Clause 29 of their Partnership Deed If they are unable to do, the respondent shall proceed to determine the complaint.***

***b) The matter shall be mentioned on 1<sup>st</sup> October 2018 whereupon the parties shall inform the respondent whether or not they have agreed to resolve their dispute under Clause 29 of their Partnership Deed, and for further directions."***

19. Having regard to the above orders, one can say that the resolution of the complaint before the tribunal is currently in the hands of the applicant and the complainant with the assistance of a mediator. Considering that the matter before the tribunal was gone for mediation, one cannot rule out the possibility that the mediation process could as well end up in resolving the dispute and under those circumstances, this court is of the view that it would be premature and indeed against to the interest of the parties before the court Tribunal to be prevented, through an order of stay of proceedings, from pursuing mediation process which, under Article 159(2) (c) of the Constitution, is one of the principles governing the courts and the tribunals in the exercise of judicial authority. The applicant has not demonstrated that the mediation process ordered by the Tribunal on 11<sup>th</sup> June 2018 amounted to a violation or a continued violation of his rights. It is also noteworthy that the applicant has not challenged the mediation process ordered by the Tribunal and I am therefore not persuaded that irreparable harm would be caused to the applicant if the mediation process is allowed to take its full course.

20. In the case of **Global Tours & Travels Limited Nairobi HC. Winding up Cause No. 43 of 2000**, Ringera J. ( as he then was), had the following to say when dealing with the issue of stay of proceedings pending an appeal:-

***"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice ....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. (Emphasis added)***

21. Going by the dictum in the above cited case, the question which this court should ask itself in determining whether or not to grant stay of proceedings is whether such an order would serve the interest of justice. As I have already found in this ruling, the matter before the respondent was referred to mediation process which is yet to be concluded. I am of the humble view that in the circumstances of this case, it will not serve the interest of justice to grant the orders sought in the instant application.

22. I have perused the petition and the prayers sought therein. I note that the applicant's claim is that his constitutional rights were violated as a result of the delay, by the respondent, in determining his preliminary objection in time or at all. The claim before the tribunal, on the other hand, involved a dispute revolving around an advocate client relationship. My take is that the applicant's claim that the delay before the tribunal resulted a violation of his rights will not dissipate merely because the Tribunal subsequently determined the complaint.

23. Having regard to the foregoing reasons, I am not satisfied that the application dated 18<sup>th</sup> April, 2018 is merited and it is consequently dismissed with orders that costs shall abide the outcome of the petition.

**Dated, signed and delivered in open court at Nairobi this 28<sup>th</sup> day of September 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:-**

Mr. Wangai holding brief for Melly for petitioner and for 2<sup>nd</sup> interested party.

Miss Nakato for the respondent

Mr. Adan for Yogo for 1st interested party.

Court Assistant -Kombo