



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPEAL NO. 161 OF 2016**

**NDOMBI TOM WACHAKANA OSOLIKA.....APPELLANT**

**- V E R S U S -**

**THE DISCIPLINARY COMMITTEE OF THE**

**LAW SOCIETY OF KENYA .....RESPONDENT**

**RULING**

1) The subject matter of this ruling is the motion dated 12.04.2016 taken out by Ndombi Tom Wachakana Osolika, the appellant/applicant in which he sought for:

***1. THAT the matter be certified urgent and heard on a priority basis.***

***2. THAT leave be granted to the appellant/applicant to file his memorandum of appeal out of time and the draft memorandum of appeal annexed hereto to be deemed filed.***

***3. THAT there be a stay of execution of the tribunal's orders convicting the applicant pending the hearing inter-partes/appeal.***

***4. THAT costs be provided for.***

2) The Disciplinary Committee of the Law Society of Kenya the respondent herein was served with the motion but the same did not elicit any response.

3) When the motion came up for interpartes hearing, the applicant was granted leave to proceed for hearing exparte when it became apparent that the respondent was served with a hearing notice but failed to attend court.

4) Betty Rashid, learned advocate for the appellant/applicant urged this court to grant the applicant leave to file an appeal out of time and to also issue an order of stay to bar the respondent from proceeding to mete out the appropriate sentence having convicted the applicant for professional misconduct. The applicant pointed out that he could not appeal in time because he concentrated on prosecuting Judicial Review application no. 439 of 2012 which application was eventually compromised. On the basis of this ground, this court was beseeched to grant the applicant leave to appeal out of time. I have carefully considered the material placed before this court. It is apparent from the record that the respondent convicted the applicant for professional misconduct on 15.09.2014. The respondent then invited the applicant to submit facts in mitigation before meting out the appropriate sentence. It is also clear from the record that the applicant filed Judicial Review application vide the notice of motion dated 20.2.2015 upon obtaining leave to inter alia quash the conviction order of the respondent. Pursuant to the aforesaid

motion, this court issued orders deferring the decision of the respondent. The applicant was further allowed to put in submissions in his defence before the Disciplinary case. Basically the conviction order was set aside and the applicant was given an opportunity to put in written submission. Those submissions were eventually considered and the Disciplinary Committee still went ahead to convict the applicant before inviting him to make submissions in mitigation. The applicant is now before this court seeking for leave to file an appeal out of time against the conviction order. In my assessment and appreciation of the applicant's conduct, I do not think he made a genuine mistake in this matter that delayed him to file his appeal in time. In my view, the delay to file an appeal within time allowed by law was deliberate and was meant to further delay the conclusion of the matter before the Disciplinary Committee of the Law Society of Kenya. If the order of leave to file an appeal out of time is given, a considerable amount of time may be lost in the process. One can only imagine of a situation where the applicant will pursue the appeal against conviction and if unsuccessful, the applicant will be required to go back to make submissions in mitigation before the Disciplinary committee.

5) If the applicant is dissatisfied with order on sentence, he will be tempted to appeal. The appeal may take long to determine thus frustrating the expeditious disposal of the case. I see no harm for the applicant to submit himself to the jurisdiction of the Disciplinary committee for purposes of mitigation and sentencing. The applicant will have a right of appeal to challenge both the order on conviction and sentence. I am not convinced that the order for leave should be allowed. On the basis of the above reasons I decline to grant the order.

6) The second prayer sought is for an order for stay pending appeal.

It is not difficult to determine this prayer. The order can only be granted on the basis that there is a pending appeal. Having declined to grant leave to appeal, then there is no competent appeal in place. Since the substratum of the appeal is lacking the prayer for stay cannot be given.

7) In the end, the motion dated 12.04.2016 to be without merit.

The same is ordered dismissed with no order as to costs.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of October 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent