



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 368 OF 2014

SAWE BEATRICE JEPKOECH ADVOCATE.....APPELLANT

VERSUS

CAPTAIN MARK KIPRUTO KOROSS.....RESPONDENT

RULING

Before me for determination is a notice of motion dated 14/8/2014 supported by an affidavit sworn by the applicant Sawe Beatrice Jepkoech advocate on the same day. The applicant seeks for an order of stay of execution of judgment of the second Respondent Advocates Disciplinary Tribunal of the Law Society of Kenya delivered on 4th August, 2014 in favour of the client complainant Captain Kipruto Koross in Disciplinary committee cause Number 68 of 2013, pending hearing and determination of this appeal as filed.

The application is opposed by the Respondent who filed their Grounds of opposition on 27th October, 2014. The same is dated the same day by the Law firm of Nyiha, Mukoma and Co. Advocates for the 2nd Respondent.

The applicant is represented by the firm of Anya Kalwa & Co Advocates. The application is based on the ground that the applicant/appellant is dissatisfied with the judgment of the ADC delivered on 4/8/2014 and has filed an appeal against the judgment; the appeal will be rendered nugatory and the applicant will suffer substantial loss should sentence and execution proceed and the appellant eventually succeed in the Appeal, it is highly unlikely that should sentence and execution proceed the irreparable effects and results thereof will be reversible whilst the appellant will suffer irreparably and irremediably in her profession and financial well (sic); and that the applicant is able and willing to give such security as the court may order for the due performance of the judgment or any other order of the court.

In her supporting affidavit, the applicant deposes that she has a meritorious appeal with very high chances or success, that she has already applied for certified copies of proceedings and judgment; that her appeal shall be rendered nugatory unless the execution of the judgment and sentence are stayed; that she is willing to deposit security for the due performance of the decree; that the respondent will suffer no prejudice if the stay sought is granted; the application had been filed timeously and without unreasonable delay; and that the application meets the criteria for the grant of stay pending appeal.

In the grounds of opposition filed by the 2nd Respondent, it is stated that the application for stay pending appeal by the appellant/applicant is totally incompetent, bad in law, and misconceived and an abuse of the court's process; that this court has no power as per the provisions of section 62 (3) of the Advocates Act

(Cap 16 Laws of Kenya) to stay execution of the judgment of the ADC delivered on 4/8/2014; that the appeal is premature as the ADT process is concluded upon sentencing, which has not yet been done and that the judgment from which the appellant is grounded is not part of this record of appeal.

The parties advocates appeared before me on 16/12/2014 and orally argued their respective positions. Mr. Kabathi advocate holding brief for Mrs. Kalwa for the appellant/ applicant submitted, restating the grounds in support of the application and the supporting affidavit sworn by the applicant Sawe Beatrice Jepkoech adding that the comments by the ADT on the second last paragraph of the judgment that she should refund the money to the client is prejudicial to the appellant as it is tantamount to sentencing her before mitigation since in effect, the ADT was ordering her to refund to the client the amount in issue before according her an opportunity to mitigate. He maintained that the jurisdiction of this court is donated by order 42 rule 6 of the Civil Procedure Rules hence the application was properly before the court, adding that mitigation and sentencing is due on 19/1/2015 hence the need to issue stay of execution of judgment as the verdict is clear that the applicant has to refund the amount allegedly withheld.

In Response, Mr Otembo Advocate for 2nd Respondent opposed the applicants application relying on the grounds of opposition as filed on 27th October 2014 and maintaining that the application is premature as sections 61 & 62 of the Advocates Act provides for a procedure to be followed before an appeal can be filed in that the Registrar of the High Court must be supplied with the verdict of ADT which has not been done.

In addition, he submitted that under Section 62 (3) of the Advocates Act, an appeal shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order hence, this court cannot grant the orders sought. He added that the process before the ADT is only complete after mitigation and sentencing as was affirmed by **Hon. Justice Onyancha J** in the case of **T.O. Kopere Vs the Disciplinary committee of the LSK and Sister Dominic Saudid Okoth (HCA 461 of 2011)**.

In his view, the issue of payment before mitigation and sentencing as ordered is a fact that will assist the advocate remedy a loss by mitigating the loss and not to serve as a punishment per se.

Mr. Seda Advocate holding brief for Mr. Mugalo advocate for the 1st Respondent opposed the application relying on the replying affidavit filed on 9/9/2014 by Captain Mark Kipruto Koross, maintaining that the appeal herein and the application for stay of execution of the judgment by the ADT is premature as they are premised on incomplete proceedings. Further, that the appeal and application are an abuse of the court process and aimed at scuttling the laid down legal process to deny the 1st Respondent complainant justice after the appellant was found guilty and culpable by the ADC.

In addition, the 1st Respondent deposes that the applicant has not demonstrated what loss or injury if any will be suffered if the stay sought is not granted since there is no decree as yet, capable of being enforced.

He further, adopted the submissions by counsel for the 2nd Respondent and the authority of **T.O. Ko'pere (Supra)**.

In a rejoinder, Mr. Kabathi submitted that under Article 165 (6) of the constitution, this court has unlimited supervisory jurisdiction over subordinate courts and tribunals as an appeal from ADT lies to this court and therefore order 42 rule 6 on stay pending appeal is applicable to this case. He urged this court not to adopt the decision in **Tom K'opere case (Supra)** as it is not binding on this court.

I have carefully considered the application herein as filed, the Grounds of objection and Replying affidavit by the respondents and the rival submissions by counsels for all the parties to this appeal.

From the record and submissions, the following issue appears clear for determination whether the High court herein has jurisdiction to hear and determine the appeal herein as filed and therefore, the application for stay of enforcement of the judgment delivered by the ADT.

Mr. Olembo maintains in his submissions that the appeal and application are premature as the procedure for Appeal as provided for under section 61 and 62 of the Advocates Act has not been complied with and further, that under section 62 (3) of the said Advocates Act, an appeal shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order appealed against is not a final order hence, this court cannot grant the orders sought as the ADT process would only be complete after mitigation. On the other hand, the applicant maintains that the appeal and application are properly before court as they fall under Order 42 rule 6 of the Civil Procedure Rules and the High court has supervisory jurisdiction over Tribunals as contemplated in Article 165 (6) of the constitution.

Section 60 (4) of the Advocates Act provides thus:

60 (4) after hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the committee may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the committee may order:-

- a. That such advocate be admonished; or
- b. That such advocate be suspended from practice for a specified period not exceeding five years or
- c. That the name of such advocate be struck off the roll; or
- d. That such advocate do pay a fine not exceeding one million shillings; or
- e. That such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings or such combination of the above orders as the committee thinks fit.

Thus, the above provisions empower the committee/ Tribunal to order an advocate to pay to the aggrieved party compensation or reimbursement not exceeding five million shillings.

Under sub section 11, if no Memorandum of Appeal is filed in accordance with Sub section (1) of Section 62 the party in whose favour the order is made may apply ex parte by summons for leave to enforce such order or decree and the order may be executed in the same manner as an order of the court to the like effect and if the order is for recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the provisions of the Civil Procedure Rules. The Tribunal does not possess any enforcement mechanisms and hence the Civil Procedure Rules apply.

However, a Memorandum of Appeal under section 62 (1) can only be filed within 14 days after receipt of the advocate of the Notice to be given to him / her pursuant to section 61 (2) where an appeal against such orders of the ADT to the court is done by giving notice of appeal to the Registrar of the High Court and the Memorandum filed shall set out the grounds of Appeal within 30 days after giving of such notice of appeal.

Clearly it is trite that before a process of an appeal can be triggered by an aggrieved party, the Registrar of the High Court must play a role and it is that same role which can trigger the process of enforcement of the order by way of execution under section 60 (11) of the Advocate's Act.

Although Section 60 (12) of the said Advocates Act provides that the committee may issue a warrant of the levy of the amount of any sum ordered to be paid by virtue of this section on the immovable and movable property of the advocate by distress and sale under warrant, and such warrant shall be enforced as it were a warrant issued by the court, and, perhaps, the reason why the appellant/applicant herein is in a state of panic seeking stay of enforcement of the judgment before mitigation, and concluding that the judgment having ordered for payment of the amount in issue is complete, it is my most considered opinion that this section 60 (12) must be read together with all the other preceding provisions under section 60 and not in isolation, which is a principle applicable in the interpretation of statutes that the instruments being considered be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole.

Albeit the wordings under section 60 (2) of the Advocates Act appear to be mandatorily couched "**shall be enforced**", my reading of this provision, and in line with the decision in **Velji Shahmad Vs Shamj**,

Bros & Popatlal Karman & Co CA 7/1956 (1957) EA 438 is that “*where a statute confers a judicial authority to do any act which has judicial effect, in a certain sense there would be such a right in the public as to make it a duty of the justices to exercise that power; to put it another way, where the exercise or an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises*”. See **Republic versus Disciplinary Tribunal of the LSK & Another** Exparte Patrick Lubanga Mutuli JR Misc 443/2013- (2014) Eklr per Hon G.V. Odunga J who further stated, and I am in agreement with his wise sentiments at paragraph 38 that;

“It must be appreciated that execution proceedings are normally very intricate and it is therefore not unusual to find that such proceedings often give rise to other proceedings which strictly speaking cannot fall under the Act (read Advocates Act) such as objection proceedings. Unless the committees’ decision is executed through the court, any third parties aggrieved by the execution process would not have an avenue of ventilating their grievances”.

I add that even before such warrant is issued, the party against whom it is issued must be given an opportunity to pay where there is no challenge of the order or where the order is challenged by way of an appeal, then the normal process will take place including, as appropriate, applications for stay of execution pending appeal. In the instant case, there is absolutely no threat of the committee invoking or exercising its powers under Section 60 (2) of the Advocates Act.

Further, there is no decree issued by the court capable of execution, besides the fact that the sentencing process pursuant to the provisions of section 60 of the Advocates Act is not completed.

In Republic Vs Disciplinary Tribunal of the Law Society of Kenya and Another Exparte Patrick Lubanga Mutuli (Supra), the court held that considering the totality of the provisions of sections 60, 61 and 62 of the Advocates Act, the execution process which was carried out outside the preview of the court process was clearly unlawful. The court accordingly questioned the proclamations it issued by the Auctioneers.

Under Section 62 (3) of the Act, an appeal under section 62 shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.

In my view, the final order by the committee would only be after sentencing.

However, the Act recognizes that a party can appeal against an order which is not a final order like in the case herein, as long as subsection (1) of the section 62 is complied with. In this case, the applicant has not complied with section 62 (1) of the Advocates Act and with regard to Notice pursuant to section 61 (2) where the Registrar must give her Notice, and as there is no imminent execution of the judgment as given, I find no merit in this application as filed. I am fortified by the decision in **Vincent Kilingah Ndirangu Vs Peter Waigwa Ngunjiri T/A Waigwa Ngunjiri & Co Advocates (2014) e KLR** where the application was in parimateria as the one before me. Hon. R.E. Ougo J in dismissing the applicant /appellant’s application for lack of merit held that although the applicant had correctly exercised his right of Appeal and that although order 42 rule 6 (2) of the Civil Procedure Rules was applicable as that was the procedure available to the applicant for lodging an application for stay of execution pending appeal, and that although the applicant had expressed his fears on the imminent sentence, he did not demonstrate what loss if any he would suffer if stay of sentence was not granted. The learned judge further held that as the tribunal had not passed sentence, there was nothing to be stayed as no substantial loss would be suffered. In the instant case, just like in the Peter Waigwa case, the applicant has not been sentenced. The Tribunal advised her to refund the amount withheld from the client before sentencing after the conviction. In my view, and as I have stated above, as no execution for recovery of the said shs. 5 million can be put in motion without following the laid down procedure, the applicant’s apprehension is unwarranted. She has already exercised her right of appeal pending sentencing. Although, she has offered to deposit security for the due performance of ‘decree’, there is so far no decree drawn or issued for execution purposes.

I am further enjoined, to accept Hon Justice Onyancha's decision in the **T.O. Kopere Vs Disciplinary Committee of the LSK (Supra)** and add that no plausible reasons have been advanced herein to enable this court interfere with the Tribunal lawfully carrying out its mandate under an established Act of Parliament to its fruitful conclusion which, it has not been shown, that if concluded will in any way prejudice the applicant.

The sentencing aspect, in my considered view, is the legal outcome of the conviction, which the applicant and the public expect under the applicable law and upon which the applicant herein has an unimpeded right of appeal. In other words, the applicant's right of appeal is not in any way obstructed by the sentencing process whether the sentence will be harsh or soft, as is contemplated under the Advocates Act. Her apprehension in my view has no foundation as she can still challenge the sentence that may be imposed by the Tribunal by way of an appeal, in addition, to her appeal against the conviction and recommendation that she refunds to the client the sum of 5 million that she was found to have withheld without the client's consent.

In conclusion, the applicant has not made out a case for this court to stay the execution of the judgment as the same cannot be executed without a lawfully established process, and as there is no evidence that there is imminent execution of the same.

The upshot of all the above is that I decline to grant the prayers sought in the Notice of Motion dated 14/8/2014 and dismiss the application with no orders as to costs.

R.E. ABURILI

JUDGE

16/01/2015

Coram Hon. Aburili J

CC- Adline

Kiongera holding brief for Olando for 2nd Respondent.

N/A for 1st Respondent

N/A for Appellant/ applicant (However, the court notes that in court is a lady by the name Nancy Mutara who says she is a pupil from the firm of Kalwa and Co. Advocates and who informs the court on inquiry that Mrs. Kalwa send her to listen to the Ruling as counsel was unable to attend court and the court delivers this ruling in her presence.

R.E. ABURILI

JUDGE

16/1/2015

Court- Ruling read and delivered in open court as schedule in the presence of the Kiongera holding brief for Mr. Olando for the 2nd Respondent, Miss Nancy Mutara (pupil) from the firm of Kalwa & Co. Advocates; No appearance on behalf of the 1st Respondent and Adline court assistant.

R.E. ABURILI

JUDGE

16/1/2015