



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

**CIVIL SUIT NO. 40 OF 2015**

**PROF. PAUL MUSILI WAMBUA.....PLAINTIFF**

**VERSUS**

**JOHN KATIKU .....1<sup>ST</sup> DEFENDANT**

**HON. STEPHEN KALONZO MUSYOKA.....2<sup>ND</sup> DEFENDANT**

**HON. WILLIAM MUSYA MUSYOKA.....3<sup>RD</sup> DEFENDANT**

**LAW SOCIETY OF KENYA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Prof. Paul Musili Wambua, the Plaintiff/Applicant herein, sued John Katiku, Hon. Stephen Kalonzo Musyoka, Hon. William Musya Musyoka and Law Society of Kenya, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents respectively vide the plaint dated 4<sup>th</sup> February 2015. In the aforesaid plaint the Plaintiff sought for judgement against the defendants in the following terms:

***1. A declaration that a dispute has arisen between the Plaintiff on one hand and the 1<sup>st</sup> Defendant on the other hand, and as such the said dispute should be resolved in accordance with the dispute resolution mechanism contained in the Deed of Partnership dated 15<sup>th</sup> December, 2003.***

***2. This Honourable court be pleased to issue a permanent injunction under the provisions of Section 7 of the Arbitration Act No. 4 of 1995, restraining the Law Society of Kenya from tabling the complaint by the 1<sup>st</sup> Defendant against the Plaintiff before the Disciplinary Committee.***

***3. This Honourable court be pleased to issue a permanent injunction under the provision of Section 7 of the arbitration Act No. 4 of 1995, restraining the Disciplinary Committee from hearing and determining the complaint by the 1<sup>st</sup> Defendant against the Plaintiff.***

***4. This Honourable court be pleased to issue a permanent injunction under the provisions of Section 7 of the arbitration Act No. 4 of 1995, restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their assigns, agents, advocates or servants whomsoever from shifting, removing, wasting, selling and/or dealing in any way whatsoever with the books, furniture, computers, documents, files and/or assets of Musyoka Wambua & Katiku Advocates as listed in the annex and schedules to the Partners Agreement dated 4<sup>th</sup> March, 2009 pending the hearing and final determination of the Arbitral proceedings between the Plaintiff and the 1<sup>st</sup> Defendant.***

**5. The Honourable court be pleased to issue a permanent injunction under the provisions of Section 7 of the Arbitration Act No. 4 of 1995, restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their assigns, agents, advocates or servants whomsoever from solely transferring, withdrawing, operating and/or dealing in any way whatsoever with all the bank accounts of Musyoka Wambua & Katiku Advocates without the mandatory joint mandate and/or signature of the Plaintiff herein pending the hearing and final determination of the Arbitral proceedings between the Plaintiff and the 1<sup>st</sup> Defendant.**

**6. The costs of this suit be awarded to the Plaintiff against the 1<sup>st</sup> and 4<sup>th</sup> Defendants.**

2. The Defendants each filed a defence to deny the Plaintiffs claim. The Plaintiff has now taken out the summons dated 4<sup>th</sup> February 2015 in which he sought for interalia:

**1. THAT an ex-parte temporary injunction do issue restraining the 4<sup>th</sup> Respondent, by itself, its successors, assigns, agents, advocates or servants whomsoever from tabling before the Disciplinary committee of the 4<sup>th</sup> respondent the complaint by the 1<sup>st</sup> Respondent against the Applicant pending the inter-partes hearing and final determination of this application.**

**2. THAT a temporary injunction do issue restraining the 4<sup>th</sup> Respondent, by itself, its successors, assigns, agents, advocates or servants whomsoever from tabling before the Disciplinary Committee of the 4<sup>th</sup> respondent the complaint by the 1<sup>st</sup> Respondent against the Applicant pending hearing and final determination of the suit herein.**

**3. THAT a temporary injunction do issue restraining the Disciplinary Committee of the 4<sup>th</sup> Respondent, by itself, its successors, assigns, agents, advocates or servants whomsoever from admitting, hearing and/or determining in any way whatsoever the complaint by the 1<sup>st</sup> Respondent against the Applicant pending hearing and final determination of the suit herein.**

**4. THAT a temporary injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, by themselves, their assigns, agents, advocates or servants whomsoever from shifting, removing, wasting, selling and/or dealing in any way whatsoever with the books, furniture, computers, documents, files and/or assets of Musyoka Wambua & Katiku Advocates as listed in the annexure and schedules to the Partners Agreement dated 4<sup>th</sup> March, 2009 pending hearing and final determination of the suit herein.**

**5. THAT a temporary injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, by themselves, their assigns, agents, advocates or servants whomsoever from solely transferring, withdrawing, operating and/or dealing in any way whatsoever with all the bank accounts of Musyoka Wambua and Katiku Advocates without the mandatory joint mandate and/or signature of the Applicant pending the hearing and final determination of this suit.**

3. The summons is supported by the affidavit of Prof. Paul Musili Wambua plus a supplementary affidavit he also swore. The 1<sup>st</sup> Defendant opposed the summons by filing a replying affidavit. The 4<sup>th</sup> Defendant filed the replying affidavit of Apollo Mboya to oppose the application. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition to resist the summon.

4. When the application came up for interpartes hearing, learned counsel appearing in the matter recorded a consent order to have the summons disposed of by written submissions. I have considered the grounds set out on the face of the summons plus the affidavits filed in support and against the application. I have also considered the grounds of opposition and the oral highlights presented by learned counsels. At this stage, the main prayers the Applicant is beseeching this court to issue are interim measures of protection by issuance of temporary orders of injunctions against the respondents pending the hearing and determination of the substantive suit.

5. It is the submission of Mr. Gitonga learned advocate for the Plaintiff/applicant that since a dispute has

arisen between the Plaintiff and the 1<sup>st</sup> to 3<sup>rd</sup> Defendants which has been referred to arbitration there is need to stay the disciplinary proceedings being conducted by the 4<sup>th</sup> Defendant.

6. The plaintiff has submitted that the dispute between him and the 1<sup>st</sup> Defendant was referred to Nzamba Kitonga S.C to arbitrate in accordance with an arbitration clause in the Partnership Agreement between him and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.. He beseeched this court to find that it is just and equitable to grant an interim measure of protection before the commencement of or during the arbitral proceedings. The Applicant stated that the 1<sup>st</sup> Defendant has lodged a complaint with the 4<sup>th</sup> Defendant who in turn forwarded the complaint to the Disciplinary committee for review, hearing and determination. It is his submission that the tabling of the complaint before the disciplinary committee is bound to irreparably injure his reputation and professional good standing as a well respected advocate of the High Court of Kenya of many years standing. He further argued that unless the interim order is issued he will be unable to obtain satisfactory clearance from the 4<sup>th</sup> Defendant during the pendency of the disciplinary proceedings for purposes of renewal of retainers with his numerous clients. The Plaintiff also argued that there is imminent danger that the assets and funds of Musyoka Wambua & Katiku Advocates, forming a significant part of the matters set for determination by the arbitrator, stand to be fraudulently alienated by the 1<sup>st</sup> Respondent.

7. Mr. Wangila, learned advocate for the 1<sup>st</sup> Respondent urged this court to dismiss the Plaintiff's application. The 1<sup>st</sup> Respondent admitted that he filed a complaint against the Plaintiff with the 4<sup>th</sup> respondent which in turn set up the disciplinary committee to investigate such complaints. It is said that instead of the Plaintiff filing a response to the complaint he resorted to filing this suit. The 1<sup>st</sup> Respondent further argued that the Plaintiff has also sought for similar orders before this court vide J.R. case no. 231 of 2011 but that application was dismissed. The Applicant is alleged to have retired and withdrawn from the partnership in the year 2013 and that the Applicant is seeking to use these proceedings to make a come back to the firm. The 1<sup>st</sup> respondent further argued that the jurisdiction of the arbitral tribunal and that of the disciplinary committee of the 4<sup>th</sup> Defendant are distinct and parallel and that all advocates are subject to the jurisdiction of the disciplinary tribunal without exception.

8. Though the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's advocate did not appear in court during the interpartes hearing of the summons, I am bound by law to consider the grounds of opposition they had filed to oppose the summons. The 3<sup>rd</sup> Respondent stated that he is no longer a partner to the firm having resigned a while ago. The 2<sup>nd</sup> Respondent was also emphatic that he was a silent partner since he was not engaged in the day to day running of the law firm. The firm was left to the Plaintiff and the 1<sup>st</sup> Respondent to manage. In short, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are of the view that they were wrongly enjoined to this suit.

9. Mrs. Wangui Koech, learned advocate for the 4<sup>th</sup> Defendant urged this court to dismiss the application on the basis that the 4<sup>th</sup> Defendant is mandated under Section 60 of the Advocates Act to refer, a complaint like that lodged against the applicant, to its disciplinary committee to hear and determine the same and that the existence of any arbitral proceedings cannot be used to hinder the 4<sup>th</sup> Defendant from performing its statutory duty. The learned advocate pointed out that the Applicant has not shown the prejudice he can suffer if the order is denied.

10. Having considered the material placed before this court plus the submissions, it's clear to me, which fact is admitted by the parties to this dispute, that there is a dispute before an arbitral tribunal between the Applicant and the 1<sup>st</sup> Respondent. It is also not in dispute that there is a complaint which has lodged by the 1<sup>st</sup> Respondent against the Applicant pending hearing and determination before the 4<sup>th</sup> Defendant's disciplinary committee.

11. The Applicant has urged this court to issue an order to restrain the 4<sup>th</sup> Respondent from proceeding to hear and determine the complaint presented to its disciplinary committee because failing to do so will seriously injure his reputation. Under Section 60 of the Advocates Act, the 4<sup>th</sup> respondents disciplinary

committee is mandated to ensure that ethical and professional conduct by 4<sup>th</sup> Defendant's members is maintained by dealing with complaints regarding ethical and professional misconduct which is incompatible with the status of an advocate.

12. In essence the 4<sup>th</sup> Defendant's duty is statutory. The Act and the regulations therein provide for a recourse to this court where a party is dissatisfied with the decisions of the 4<sup>th</sup> Defendant's disciplinary committee.

13. In my view, I do not see the prejudice the Applicant will suffer if the order of injunction sought against the 4<sup>th</sup> respondent is denied.

14. The proceedings pending before the arbitral tribunal cannot therefore be used to bar the disciplinary committee from performing its statutory duty. The two processes can run concurrently. The arbitral tribunal will continue to deal with the dispute between the parties while the disciplinary committee can continue to deal with the dispute touching on ethical and professional conduct.

15. The Applicant has sought for orders of injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from interalia operating or dealing with the firms bank accounts and other assets of the firms of Musyoka Wambua and Katiku advocates.

16. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have averred that they do not run the day to day operations of the firm. The duo also aver they left the firma a while ago hence they are strangers to the plaintiffs claims. This averment has not been controverted by the Applicant and I have no reason to doubt the veracity of those averments. The court therefore cannot issue orders in vain. There is no doubt that the 1<sup>st</sup> Defendant runs the litigation department of the firm. He is also a signatory to the firm's bank accounts. If the orders sought against the Respondent are issued, it will mean that the operations of the firm will grind to a halt. This will lead to untold suffering to clients seeking services from the firm thus creating crisis.

17. Applying the balance of convenience doctrine, I find that justice will be served better by declining the grant of the orders sought.

18. In the end, I find no merit in the summons. It is dismissed with costs abiding the outcome of this suit.

Dated and delivered in open court this 19<sup>th</sup> day of June, 2015

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant