



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case No. 270 Of 2013

IN THE MATTER OF THE ADVOCATES ACT CAP 16 (LAWS OF KENYA)

AND

IN THE MATTER OF AN APPEAL BY AN ADVOCATE

AND

IN THE MATTER OF THE ADVOCATES DISCIPLINARY COMMITTEE

(Being an Appeal from the Judgment and Orders of the Advocates Disciplinary Committee dated 3rd October, 2011 but delivered on 22nd April, 2013, before M/s Wanjama (Chairman), A.O. Weda (Member) and G. Wamaitha (Member) in Disciplinary Cause No. 20 of 2011.)

BETWEEN

Vincent Kiingati NdiranguPrivate Prosecutor

versus

Peter Waigwa Ngunjiri T/A Waigwa Ngunjiri & Co. Advocates.....Accused Advocate

RULING

Before this Court is a Notice of Motion dated 14th June, 2013 brought under Section 1A, 1B, 3A Civil Procedure Act and Under Order 42 Rule 6(1) (5) and (6) Civil Procedure Rules and all other enabling Provisions of the law.

The appellant/applicant hereinafter referred to as the applicant seeks the following orders;-

1. Spent
2. **That** there be a temporary stay of further proceedings and/or execution of the Orders made by the Disciplinary Committee in Disciplinary Cause No. 20 of 2011 on 22nd April, 2013 until this application is heard inter-partes.
3. **That** there be a stay of further proceedings/sentencing in Disciplinary Cause No. 20 of 2011 until this appeal is heard and determined.
4. **That** there be a stay of execution of the orders of the Advocates Disciplinary Committee made on 20th April, 2013 until this appeal is heard and determined.
5. **That** this Honourable Court do make such orders as to security as it deems just.
6. **That** the costs of this application be provided for.

The application is based on the following grounds that;

- a) The Disciplinary Committee has ordered that the Appellant do pay Kshs.227,629.00 to an unidentified Judgment/Debtor together with interest thereon at 12% from December, 2010 until final refund.
- b) The Disciplinary Committee will proceed with mitigation and sentence on 15th July, 2013 unless this Honourable Court stays such proceedings.
- c) The payment of the sum ordered shall be the principal mitigating factor and yet such payment shall render this appeal nugatory.
- d) The Disciplinary Committee by pegging sentence on compliance has effectively scuttled the accused Advocate's right of Appeal since non-compliance will inevitably lead to a harsh sentence.
- e) The proceedings and finding of the Disciplinary committee are wholly erroneous.
- f) The proceedings and findings of the Disciplinary Committee are incurably defective. Since one of the purported members of the committee was a sitting Judge of the high Court at the time of the purported writing and signing of the Judgment of the Disciplinary Committee.
- g) Unless stay of further proceedings is granted by this Honorable Court, the Appellant will suffer irreparably.

The application is supported by the affidavit of the applicant dated 14th June, 2013 and supplementary affidavit dated 29th June, 2013. In the supporting affidavit the applicant gives a brief history of his role as the Plaintiff's Counsel in Naivasha Court namely **PMCC No. 447 and 448 of 2008** where **M/S Kairu Mbutia & Kiingati Advocates** acted for the Defendant, at paragraphs 2 to 11. He states that his client instituted a complaint with the Disciplinary Committee who heard the complaint and pronounced a judgment against him. He was ordered to compensate the judgment debtor by paying Kshs 227,629/=, which according to the Disciplinary Committee was the actual loss sustained together with interest thereon at 12% p.a from December 2010 until full refund. According to him, the Disciplinary Committee in its Proceedings and Judgment it did not address itself to how he handled the matter between his client and the Defendant in the Lower Court case; that he never appeared before a bench comprising **M/s D. Kitaa, A. Weda and D. Majanja** together and the record of proceedings is clearly misleading; that the Judgment of the Disciplinary Committee was put off so many times from **3rd October, 2011** and was not read until **22nd April, 2013**; that the Judgment completely failed to address the issues raised in the pleadings and submissions before the Disciplinary Committee; that the Judgment purports to have been dated **3rd October, 2011** yet after that date the committee continued to say that the same was not ready until **22nd April, 2013**; that as at **3rd October, 2011** **Mr. D. Majanja** who appears as one of the members signing the Judgment was already a Judge of the High Court; that the Judgment of the Disciplinary Committee is accordingly invalid and cannot stand; that there is overwhelming chance of success on Appeal; that the Disciplinary Committee now expects him to comply with the orders before he goes for mitigation and sentence on 15th July, 2013; that if he fails to comply by paying the decreed amount he shall be taken to have failed to comply and he sentence will be that much harsh; that if on the other hand he complies he shall have negated the substratum of my Appeal.

The application was opposed by the Respondent through a replying affidavit sworn in by Kiingati Ndirangu, dated 26th June, 2013. He depones that; he had the conduct of the Advocates Disciplinary Committee Cause No. 20 of 2010 on behalf of China Wu Yi Company Limited; that the appellant's application dated 14th June, 2013 has no merit; that the said application is bad in law, misconceived and incompetent; that the appeal has no chances of success; the disciplinary cause having been properly heard and determined; that the contrary to assertions by the appellant, the sum of Kshs.227,629.00 ordered by the Disciplinary Committee is payable to China Wu Yi Company Limited; a fact well known to the appellant; that the said company is involved in major road constructions within the Republic of Kenya

and is involved in real estate development and it would therefore be in a position to reimburse the said sum of Kshs.227,629/- without any difficulty in the unlikely event that this appeal succeeds; the appellant has not demonstrated that he would suffer any loss to warrant the grant of the orders prayed for and the appeal cannot therefore be rendered nugatory.

In the appellant's supplementary affidavit he states that he only received what was due on the Decrees and certificates of costs and if any excess payments were made, they were made to auctioneers and not released to him; that the auctioneers confirms in the Disciplinary proceedings through the affidavit of Sarah Njoki Muge that they received Kshs 200, 349/= and Kshs 134,000/= from the Judgment Debtor which they receipted as Auctioneers costs; that the auctioneers only forwarded to them Kshs. 106,290/= which was the actual amount due on the Decree at the time; that the complaining Advocates should have pursued the auctioneers for refund and not them since we had not received any excess payment; that any order that he reimburses Kshs 227,629/= was made unjustly without due regard to the fact that he do not have any such money at all.

Parties filed written submissions. In the applicant' submissions he gives the background of the suits in the Lower Court **PMCC No. 447 and 448 of 2008**. On security the applicant urges that his an advocate of close to 20 years standing and he has no difficult in raising the Kshs 270,000/= and the appeal is not basically about the sum decreed by the Disciplinary Committee but that any conviction of the Appellant will far-reaching professional and career implications for the Appellant. For this argument Counsel relied on the case of **Gitahi & Another - Vs- Warugongo (1988) KLR 621** the Court of Appeal dealt with the adequacy or otherwise of security before stay of execution where the Court held that;

- a. So long as the opposite party be adequately protected it is right and protests that security should be given in a way that is least disadvantageous to the party giving that security.
- b. The security may take many forms and guarantee and payment into Court are just two of them. The Court in that case actually directed that a bank guarantee and an undertaking be given as security.

He also relied on the case of **Oceanic View Hotel Ltd – Vs- Kenya Commercial Bank (2002) KLR 338**; the Hon. Justice Khaminwa held that an Appellant needs to satisfy only two conditions to be able to obtain stay of execution pending Appeal and the case of **Mukumu –vs-Abuoga (1988) KLR 645** where the Court of Appeal a party such as the Appellant is exercising his undoubted right of Appeal the Court ought to see that the Appeal is not rendered nugatory by preserving the status quo until the Appeal is heard.

The respondent submitted that the Court has no jurisdiction to grant orders sought under the provisions cited in the application, that is Sections 1A, 1B, 3A and under Order 42 Rule 6 (1) (5) and (6) of the Civil Procedures Rules. That proceedings of the Advocates Disciplinary Committee are special proceedings governed by the Advocates Act and Order 52 of the Civil Procedure Rules, A party cannot properly invoke any other provisions. That neither the Advocates act nor the provisions of Order 52 grants the Court powers to grant stay pending appeal that the Appeals from the Disciplinary Committee now the Disciplinary Tribunal are governed by Section 62 of the Advocates Act. That Section 62 (3) specifically takes away any chance of granting of stay pending appeal. It provides, ***“An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order”***.

That this provision has not changed despite the 2013 amendments to the Advocates Act. That Section 64 of the Advocates Act defines the powers of the Court. It states, ***“The Court, after considering the evidence taken by the Tribunal, the report of the Tribunal and the memorandum of appeal, and having heard the parties, and after taking any further evidence, if it thinks fit so to do, may-***

- a. ***Refer the report back to the Tribunal with directions for its findings on any specified point; or***
- b. ***Confirm, set aside or vary any order as to the payment by any person of costs, or otherwise in relation to the appeal, a sit may think fit”***.

That neither the Court nor a party in proceedings can confer jurisdiction where none exists; that the provisions of Order 42 of the Civil Procedure Rules only apply to appeals arising out of matters under the Civil Procedure Act. These are governed by Part VIII of the Civil Procedure Act; that those sections of the Civil Procedure Act have no application whatsoever to matters emanating from the Advocates Disciplinary Committee or Tribunal Order 42 therefore is totally misplaced; that Sections 1A, 1B and 3A of the Civil Procedure Rules cannot be invoked in this proceedings to confer jurisdiction on the Court where none exists; that the nature of the proceedings from the Advocates Disciplinary Committee/Tribunal can be compared to Judicial Review Proceedings which are special in nature; that such proceedings are governed purely by the Law Reform Act and Order 53 of the Civil Procedure Rules and that no other provisions of the Civil Procedure Act or Rules apply. The Respondent relied on the case of **Welamondi V the Chairman Electoral Commission of Kenya (2002) 1 KLR 486** and also the case of **Republic v Principal Magistrate's Court Murang'a & 4 others Ex-parte Milka Nyambura Wanderi & another (2013)eKLR**.

It was further submitted that under Section 65 of cap. 16 the powers of the Court can only be exercised by not less than 2 Judges and that the applicant has not sought for 2 or more Judge Bench to be constituted and hence therefore the Court lacks jurisdiction to entertain the application. That the appellant submissions the respondent argued that the appellant has addressed issues of the appeal and yet the Court is not dealing with issues of the appeal at this stage. On the constitution of the Disciplinary committee, Counsel argued that it was proper and that the argument that Hon Majanja has become a Judge the time of the preparations and pronouncement of the judgment is totally misplaced. That Section 57(3) of the Advocates Act which has only been amended to substitute Committee for Tribunal provides that, ***"In the event of there being any complaint or matter pending before the (Committee) Tribunal at the date of retirement of any member and such member being a member of a tribunal thereof which had, prior to such date, entered upon the hearing thereof in accordance with Section 60, that member shall, in the event of his not being re-elected, be deemed to remain in office for the purpose only of such complaint or matter and shall so remain until such complaint or matter has been finally disposed of"***.

According to Counsel the retirement of Justice Majanja as a member of the Committee by virtue of his appointment to the bench did not mean he could not finish his duties as required under the Advocates Act. That the judgment was therefore properly prepared and read in accordance with the law.

Counsel concluded by stating that the Appeal will not be read mandatory if stay is granted as this is not an issue for the Court's consideration under the Advocates Act or Order 52 of the Civil Procedure Rules and in the event the appeal succeeds the company China Wu Yi Co. Ltd will be able to repay the funds, which funds who were wrongly paid by the complainant instructions of the appellant.

Having considered the affidavits annexures, submissions, cases relied on and the law these are my findings; on whether the Court has jurisdiction to deal with the application it is my view that Section 62 of the Advocates Act Cap 16 give the aggrieved party a right to appeal and does not in any way oust this court's jurisdiction. Further order 52 rule 8(1) of the Civil Procedure Rules envisages a situation where there will be an appeal from Cap 16 as provided under section 62(1) of the said Act. Since the applicant has a right of appeal and Order 52 8(1) provides how the appeal shall be filed, it therefore follows that the provisions of Order 42 of the Civil Procedure Rules apply. This court therefore has jurisdiction to deal with this matter. On the wrong provisions of the law being cited bearing in mind the provisions of Article 159 (2) (d) i will not strike out the application for being bad in law or incompetent.

On whether a stay should be granted, guided by Order 42 rules (6) (2). The application was filed within reasonable time. On the issue of substantial the applicant has expressed his fears on the sentence but I fail to see the loss he will suffer. He was ordered to pay a sum, the respondent argues they can pay back if the appeal succeeds. The applicant has failed to persuade this court that he will any suffer substantial loss, further the Tribunal is yet to pass the sentence. The other issues raised on the Coram, signing of decision and who was paid the money are matters to be considered by the court that shall hear the appeal. The hearing of the appeal shall be as provided in section 65 of Cap. 16. The application has no merit it is dismiss it with costs to the Respondent.

Orders accordingly.

Dated signed and delivered this **18th** day of **September 2104**.

R. E. OUGO

JUDGE

In the presence of;-

.....**For the Applicant/ Appellant**

.....**For the Respondent**

.....**Court Clerk**