



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JR MISC. APPLICATION NO. 443 OF 2013

IN THE MATTER OF LAW REFORM ACT

AND

ORDER 53 CIVIL PROCEDURE RULES

AND

THE ADVOCATES ACT

AND

THE ADVOCATES (DISCIPLINARY COMMITTEE) RULES

AND

DISCIPLINARY CAUSE NUMBER 157 OF 2011

IN THE MATTER OF PATRICK LUBANGA MUTULI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA.....RESPONDENT

AND

JOHNSON MWANGI KARIUKI.....INTERESTED PARTY

EX PARTE: PATRICK LUBANGA MUTULI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th January, 2014, the *ex parte* applicant herein, **Patrick Lubanga Mutuli** seeks the following orders:

(a) **THAT this honourable court be pleased to quash the decision of the Disciplinary Committee of the Law Society of Kenya made on the 26th August 2013 in Disciplinary Committee Cause No 157 of 2011 in the matter of Patrick Lubanga Mutuli directing the *Ex parte* Applicant to pay to the Law Society of Kenya the sum of Kshs 1,025,600/= within thirty (30) days.**

(b) **THAT this honourable court be pleased to quash the proclamations dated 3rd December 2013 issued by Samuel Mutahi Gathoge Trading as Valley Auctioneers.**

(c) **THAT the costs of this application be paid by the Respondent.**

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by the applicant on 10th December, 2013.

3. According to the deponent, On the 23rd September 2011 one **Esther Jowi Anyango Aduma** Commissioner with the Advocates Complaints Commission caused to be filed against him before the Disciplinary Committee of the Law Society of Kenya an affidavit of Complaint sworn on the 15th September 2011 which affidavit was to the effect that the complaint by **Johnson Mwangi Kariuki** related to a sum of Kshs 320,000/= being an undertaking the Applicant made upon the instructions and request of his client **David G. Methu** and a dishonoured cheque for Kshs 100,000/= made out to the said **Johnson Mwangi Kariuki**.

4. According to the applicant, he was shocked and surprised when the Secretary of the Law Society of Kenya who also holds office as the Secretary to the Disciplinary Committee caused to be served upon him an order dated 26th August 2013 directing that he pays to the Law Society of Kenya within thirty (30) days a sum of Kshs 1,027,600/=.

5. According to the applicant, the complaint by **Johnson Mwangi Kariuki** was in respect of Kshs 320,000/= and Kshs 100,000/= as foresworn aggregating to Kshs 420,000/= and he did know the circumstances upon which the disciplinary Committee of the Law Society of Kenya arrived at the order that he pays Kshs 1,027,600'=. To him, the Disciplinary Committee of the Law Society of Kenya is an agency created by the statute and those powers do not include the power to award interest or impose a penalty.

6. He deposed that under Sections 60(4)(d) and (e), 60(4)(e) and 60(9) The Disciplinary Committee of the Law Society of Kenya can only make orders relating to payment of a fine not exceeding 1,000,000/=, payment of compensation or reimbursement not exceeding Kshs 5,000,000/=, payment of costs, witness expenses or the expenses of the Disciplinary Committee and payment of the amount in dispute. In his view, the Disciplinary Committee did not base their decision on above referred provisions but acted *ultra vires* in awarding interest or imposing a penalty upon me.

7. It was further averred that consequent upon the decision, the council of the Law Society or the said **Johnson Mwangi Kariuki** have instructed **Mr. Samuel Mutahi Gathongo** trading as Valley Auctioneers to levy attachment or distrain without first complying with the requirements of Section 60(10) and 60(11) of the **Advocates Act** (hereinafter referred to as the Act) namely to file the order of the Disciplinary Committee in the Civil Registry of the court and in the circumstances the proclamation issued by M/s Valley Auctioneers is unlawful.

8. He therefore sought the Court's its intervention so as to protect him from an order which is *ultra vires* the powers conferred upon the Disciplinary Committee.

9. Although the Court gave directions on the filing of submissions, the ex parte applicant did not file any.

Respondent's Case

10. In opposition to the Motion the Respondent filed a replying affidavit sworn by **Apollo Mboya**, the Respondent's Secretary on 24th June, 2014.

11. According to the deponent, to the extent that the Applicants' application relates to the merit of the decision made by the Respondent the same is bad in law misconceived and an abuse of the Judicial Review process which relates to the process in which the decision was made and not to the merit of the decision. He deposed that under Section 60(4)(e) of the Act, the Respondent has got the power to order that where a case of professional misconduct has been made on the part of an Advocate, that such Advocate pays to the aggrieved person compensation or reimbursement not exceeding Kenya Shillings Five Million (Kshs. 5,000,000.00).

12. According to him, as mandated by Section 60(1) of the Act, the Respondent received a complaint form one **Esther Ajowi Aduma** a commissioner for the Advocates Complaints Commission (hereinafter the commissioner) on 23rd September 2011, on behalf of the Interested Party relating to the fact that the Applicant herein was withholding the Interested Party money amounting to Kshs 420,000 on account of an undertaking given to the Interested Party on 5th March 2002. Despite being served with the Notice of plea taking, the applicant did not appear before the Tribunal on 21st September 2011 and in the circumstances a plea of not guilty was entered and the advocate was served with a hearing notice for 4th February 2012 whence again the advocate did not appear prompting the Respondent to grant the commissioner leave to proceed under Rule 18 of the **Advocates (Disciplinary Tribunal) Rules**.

13. It was deposed that prior to the complaint being fixed, the commissioner had exchanged correspondence with the Applicant using the same postal address that was used in serving the Respondent and therefore he had been properly served yet failed/and or refused to appear before the Respondent. The matter was then fixed for delivery of judgment on the 2nd of July 2012 and on the said date the judgment was not ready and the same was further fixed for delivery on 13th August 2013 when the then accused, Applicant herein appeared in person and judgment was read in his presence in favour of the Interested Party herein and a date was further fixed to confirm compliance with the judgment to wit that the Interested Party should refund the decretal sum of Kshs 420,000.00

14. According to the deponent, the Applicant filed a Replying affidavit did not raise any issue and/or objection upon the judgment, being read in his presence. The matter was then fixed for mention on 1st October 2010 to confirm whether the advocate has complied with the judgment, whereupon the Advocate did not appear despite the date having been taken before the Tribunal and in his presence. Thereafter the matter was fixed on several occasions for mitigation and sentencing and for various trivial reasons the Applicant did not attend in person as required by the Notices sent to him.

15. It was therefore the deponent's case that the conduct of the Applicant throughout the mitigation and sentencing proceedings was itself contumacious and unprofessional as enumerated below:

(a) 19th November 2012 – **Mr Lempaa** Advocate held his brief and indicated the advocate was unwell.

(b) 18th February 2013 – **Albert Khaminwa** Advocate held his brief and indicated he was help up in a High Court Matter.

(c) 6th May 2013 – **Miss Mutuku** advocate appeared for him and sought more time to pay decretal amount.

(d) 3rd June 2013 – **Mr Njengo** Advocate held his brief and asked for time allocation for the

advocate to appear in person and mitigate. Time was allocated at 11.00 a.m. but by noon the advocate had not appeared and therefore the matter proceeded for mitigation and sentence in his absence and an order for costs and fine was made and matter fixed for a further date to confirm compliance.

(e) 8th July 2013 - **Mr. Wanga** Advocate appeared for the Applicant requested for more time to comply with the previous orders and the order for costs and fine. Matter was fixed for a further date to discuss issue of interest.

(f) 26th August 2013- **Mr. Wanga** Advocate appeared for the Applicant the commission raised the issue of interest and the same was not opposed. The interest was calculated amounting to Kshs 537,400 and matter fixed for a further date to confirm compliance with the orders to pay the decretal amount, interest together with interest and costs.

(g) 28th October 2013 – no appearance for the advocate to confirm progress of compliance and no compliance as per the records and in the circumstances the committee ordered execution to issue.

(h) 3rd December 2013 – Respondent issued letters of instructions to valley Auctioneers to execute against the Advocate to recover the Decretal amount plus interest, costs and fines.

16. It was therefore deposed that the intention of the Applicant through these proceedings was to avoid complying with the orders of the Tribunal to pay the decretal amount, fine and costs to which he is not opposed.

17. The Respondent's position was therefore that by dint of Section 60(4)(e) the Respondent had not exceeded its mandate as the amount payable in interest does not exceed the pecuniary jurisdiction of the Respondent and the same will serve as compensation for the loss on investments for all the years that the advocate had failed to refund the money to the Interested Party herein. To the Respondent, in awarding compensation to the Interested Party who are aggrieved by the act of an Advocate withholding funds must base its calculation on the amount withheld and this would only be done by way of interest.

18. It was contended that one of the main purposes of the Respondent is to protect members of the public by checking the conduct of the members of its profession, and thus the decision of the Respondent is meant to caution against such future conduct of an accused advocate in regard to professional misconduct relating to withholding of funds.

19. To the Respondent, it had the option not to comply with the provisions of Section 60(5) (10) and 60 (11) of the Act as the same are not mandatory in nature and further by dint of Section 60(12) of the Act the Tribunal may issue a warrant for levy of amount of the any sum ordered to be paid by virtue of this section on the immovable and moveable property of the advocate by distress and sale under warrant and such warrant shall be enforceable as if it were a warrant issued by the court.

20. In the Respondent's opinion, the question of whether or not the Respondent should award interest, goes into the merit of the decision and the best avenue for such a claim is by way of appeal as provided under Section 62(1) of the Act and not by way of Judicial Review and in the premises the Respondent objected to the Applicant's application for Judicial Review orders of Certiorari against the Respondent in regard to Disciplinary cause number 157 of 2011.

21. On behalf of the Respondent, it was submitted that the finding by the Respondent on interests was within its mandate pursuant to section 60(4) of the Act since the Respondent has the power to order an advocate to pay the aggrieved person compensation or reimbursement not exceeding five million shillings. Therefore by ordering interest the Respondent sought to compensate the interested party. In support of this submission the Respondent relied on **Later vs. Mbiyu [1965] EA 392**, **Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another [2006] eKLR** and **Lwanga vs. Centenary Rural Development Bank [1999] 1 EA 175**.

22. It was therefore submitted that the wrong act of the applicant deprived the Interested Party herein the use of his money from 202 to date hence it was only just and equitable that the applicant pay interest to the Interested Party.

23. It was further submitted that the issue of interest goes to the merits of the decision which judicial review does not deal with as the said proceedings deal only with the process. Under section 62(1), it was submitted the applicant ought to have appealed against the decision. In support of this decision the Respondent relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Republic vs. Disciplinary Committee & 2 Others ex parte William Ochanda Onguru [2013] eKLR**.

24. With respect to section 60(5)(10) and (11) of the Act, it was submitted that the same are not mandatory. It was submitted based on **Standard Chartered Bank Ltd vs. Lucton (Kenya) Ltd HCCC No. 462 of 1997** that the use of the word shall in the section is not necessarily mandatory.

Determinations

25. I have considered the application, the affidavits both in support of and in opposition thereto and the submissions on record.

26. In my view the only issues that fall for consideration are whether the Respondent had power to levy interest and whether execution proceedings could issue without the decision being filed in Court.

27. Section 60(4), (5), (10), (11) and (12) of the *Advocates Act* provide:

(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;

(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.

(5) The Committee may make any such order as to payment by any party of any costs or witness expenses and of the expenses of the Committee or the members thereof in connection with the hearing of any complaint as it may think fit, and any such order may be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect.

(10) An order made by the Committee under this section—

(a) shall be in the name of the advocate or firm of advocates in respect of whom or of which the order is made;

(b) may be filed in the civil registry of the Court by any party thereto who shall, within twenty—

one days of the filing, give a notice to all other parties in writing of the filing of the order, which shall bear the date, the cause number and the registry in which it has been filed and a return of service of the order.

(11) If no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favour of whom the order is made may apply ex parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the Civil Procedure Rules.

(12) The Committee may issue a warrant for 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 if it were a warrant issued by the Court.

(11) If no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favour of whom the order is made may apply ex parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the Civil Procedure Rules.

(12) The Committee may issue a warrant for 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 if it were a warrant issued by the Court.

28. From the foregoing provisions it is clear that the Committee has the power to order an advocate inter alia to pay a fine not exceeding one million shillings or compensation or reimbursement not exceeding five million shillings or even both. The question for determination is what amounts to compensation or reimbursement. In Later vs. Mbiyu (supra) it was held:

“The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court’s discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judicially exercised, and where no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

29. Similarly in Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another (supra) it was held:

“The justification for an award of interest on principal sum is to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant.”

30. In the same vein it was held in Lwanga vs. Centenary Rural Development Bank [1999] 1 EA 175 that:

“The award of interest prior to the institution of the suit is rationalised in two ways: (1). that the plaintiff is thereby being compensated for being kept out of his money. He has been deprived of the use of his money from the time he incurred his loss. On that basis, interest is to run from that date. (2). that the defendant wrongfully withheld the plaintiff’s money. The emphasis here is on the Defendant’s wrongful withholding of the Plaintiff’s money. On that basis, interest is to run from the date when the Defendant ought reasonably to have settled

the plaintiff's claim. This is rather punitive.”

31. It is therefore clear that an award of interest is a form of reimbursement or compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, by the party who has wrongfully deprived him of the use of goods or money.

32. Section 60(4)(e) of the Act empowers the Committee to order an advocate to pay to the aggrieved person compensation or reimbursement not exceeding five million shillings. It is therefore my view and I so hold that the Respondent was empowered to award reimbursement or compensation to the interested party if such an award was warranted and it does not matter whether it was called interest because the said terms refer to the same thing.

33. The applicant cannot therefore successfully contend that the Respondent had no such power. The only issue that the applicant can be heard on is the quantum of the award. However it must always be remembered that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

34. Accordingly, I do find nothing wrong with the Respondent's decision to impose interest.

35. That then brings me to the issue of the warrants. A reading of section 60(5) of the Act, in my view reveals that the said section only applies to an order for payment by any party of any costs or witness expenses and of the expenses of the Committee or the members thereof in connection with the hearing of any complaint. It is the order for these that may be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect. That provision however does not apply to reimbursements and compensation.

36. Under section 60(11) of the Act, if no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favour of whom the order is made may apply *ex parte* by *summons* for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the ***Civil Procedure Rules***. However a memorandum of appeal under section 62(1) can only be filed within fourteen days after the receipt by the advocate of the notice to be given to him pursuant to section 61 (2). That notice however can only be given by the Registrar who under section 2 of the Act must be the Registrar of the High Court. It is therefore clear that before the process of an appeal can be triggered, 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).

37. It is however, section 60(12) of the Act that seems to be a source of confusion. That provision states that the Committee may issue a warrant for 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 if it were a warrant issued by the Court. It is however my view that this provision must be read in conjunction with the preceding provisions. This provision in my view cannot be read in isolation to the other provisions. It is a principle of interpretation of statutes that the instruments being considered must 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. Although the Respondent took the view that the word “shall” may merely be directory, it has similarly been held that such expressions as “may”, “shall be empowered”, “may be exercised”, in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power. Where a statute confers an authority to do a judicial act, in a certain sense there would be such a right in the public as to make it the duty of the justices to exercise that power: to put it another way where the exercise of 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 **Velji Shahmad Vs. Shamji Bros. and Popatlal Karman & Co. Civil Appeal No. 7 Of 1956 [1957] EA 438** and *Maxwell On The Interpretation of Statutes* (9TH EDN) PP. 246-249.

38. 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 such as objection proceedings. Unless the Committee's decision is executed through the Court, any third parties aggrieved by the execution process would not have an avenue of ventilating their grievances.

39. Therefore considering the totality of the provisions of sections 60, 61 and 62 of the Act, it is my view and I so hold that the execution process which was carried out outside the purview of the Court process was clearly unlawful.

Orders

40. Consequently, whereas I decline to quash the decision of the Disciplinary Committee of the Law Society of Kenya directing the *Ex parte* Applicant to pay to the Law Society of Kenya the sum of Kshs 1,025,600/= within thirty (30) days, I quash the proclamations dated 3rd December 2013 issued by **Samuel Mutahi Gathoge** Trading as Valley Auctioneers.

41. As both parties have partly succeeded there will be no order as to costs.

Dated at Nairobi this 28th day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chege for Mr Olando for the Respondent

Cc Richard