



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 425 OF 2013

**IN THE MATTER OF AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION BY DANIEL GICHURU NJUGI**

IN THE MATTER OF THE ADVOCATES ACT CAP 16

IN THE MATTER OF THE DISCIPLINARY COMMITTEE CAUSE NO. 128 OF 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DISCIPLINARY COMMITTEE.....RESPONDENT

JOHN NYORO WAIRUMBI.....1ST INTERESTED PARTY

TRADECOM HOLDINGS LIMITED.....2ND INTERESTED PARTY

DANIEL GICHURU NJUGI.....EX PARTE:

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 14th March, 2014, the *ex parte* applicant herein, **Daniel Gichuru Njugi** seeks the following orders:

(a) That an order of certiorari be issued to remove to this honourable court for the purposes of being quashed the Respondent's decision made on 28th October 2013 directing the *Ex parte* Applicant to pay interest of Kshs 2,250,000/- to the Interested Party

(b) That an order of Prohibition be issued to prohibit the Respondent, Interested Party, their servants, agents and/or whomsoever from executing and/or enforcing the Respondent's decision made on 28th October 2013

(c) That the costs of this application be borne by the Respondent and Interested Party.

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by the applicant on 28th November, 2013.

3. According to the deponent, an advocate of the High Court of Kenya practicing as such in the name of style of **Gichuru & Gichuru Advocates**, during the course of his practice, he undertook a conveyancing transaction which resulted in a complaint against him in which complaint the reliefs sought by the complainant were set out in the complaint and no interest whatsoever was prayed for.

4. However, by a judgment delivered by the Respondent on 18th July 2011, the applicant was ordered to pay the outstanding amount lost by the complainant which in his view, could only have been premised on the complaint which clearly did not pray for any interest.

5. Being dissatisfied with the said judgment, the applicant invoked the appeal mechanism under Section 62 of the **Advocates Act** which Appeal is still pending determination. That notwithstanding the applicant paid an amount of Kshs 6,500,000/- to the complainant and on the 15th November 2012, the Advocates for the complainant responding to his letter of 14th November 2012 confirmed the amount lost did not include interest.

6. It was the applicant's case that he duly paid the entire amount as per the complaint through his letter of 15th November 2012 aforesaid and that the costs in relation to the High Court case were to await its determination. When the complaint came up for mention before the Respondent with a view to confirming compliance and marking the same as settled, despite the applicant's contention that the amount lost as per the complaint had been repaid in full and the matter should thus be marked as settled, without any application from any person in that regard, and despite the interested party confirming to the Respondent that the total amount outstanding as at 2nd April 2012 was Kshs 6,250,000/= (which according to him had been fully paid) the Respondent on its own motion sought to know whether interest had been paid and the applicant clarified that that claim was not in the complaint and the judgment had been satisfied in full.

7. However, on the 28th October 2013, when the matter came for further orders, the Respondent in the absence of the applicant's advocates who was held up in the High Court proceeded to compute interest based on the principal claim of Kshs 6,250,000/- for 3 years and ordered that he pays interest of Kshs. 2,250,000/-. To him, after the said order was made, the total amount ordered by the Respondent to be paid to the complainant is as follows;

Amount in the complaint	-	Kshs.	7,054,000/-
Interest	-	Kshs.	2,250,000/-
		Kshs.	9,304,000/-

8. The applicant's case however was that the pecuniary jurisdiction of the Respondent is limited to 5 million, which clearly was exceeded when the Respondent made this subsequent order of interest. Further it was also irrational how the Respondent could compute interest for 3 years yet judgment was delivered on 18th July 2011 and the final reimbursement instalment effected on 14th November 2012. It was therefore contended that the manner in which the issue of interest was raised by the Respondent also smacks of bias, as no application was filed by the complainant on the issue of interest hence the filing of HCCC 404 of 2011 in the High Court seeking interest.

9. It was deposed that it was unreasonable how the Respondent being cognizant of the claim before it and being fully aware that there is a pending suit in the High Court in which the issue of interest was being litigated could circumvent the High Court process and summarily issue final orders without even affording the applicant a chance to be heard.

10. The applicant therefore contended that he was exposed to the risk of execution pursuant to unlawful

orders and was bound to suffer tremendous loss and prejudice unless the orders sought are stayed and subsequently quashed.

11. It was submitted that the Respondent having delivered its judgement on 18th July, 2011 became *functus officio* and could not purport to re-open it as it did on 28th October, 2013 by ordering that interest be paid as it had no jurisdiction to do so. In support of this submission the applicant relied on **Kenya National Examinations Council vs. Republic ex parte Njoroge & Others Civil Appeal No. 266 of 1996; Karauri vs. Ncheche [1995-1998] 1 EA 87** and **Cherutich Kibiwot vs. Emmanuel Cheromoi [2007] eKLR**.

12. Since the interested party instituted a suit in the High Court claiming inter alia interest, it was submitted that for the respondent to short circuit the process before the High Court and make summary payment of interest was grossly illegal, unreasonable, irrational and in bad faith and reliance was placed on **Council of Civil Service Unions vs. Minister for Civil Service [1984] 3 All ER 935**.

13. According to the applicant he impugned order was made without an application by the interested party despite judgement having been delivered and without giving the ex parte applicant a chance to be heard hence was in violation of all grounds known to judicial review. The applicant on this score relied on **Anisminic Ltd vs. Foreign Compensation Commission [1969] 1 All ER 208 at 213**.

14. It was submitted that by its decision on interest the Respondent exceeded its pecuniary jurisdiction of Kshs 5 million hence based on **M'Muthaura M'Mukua vs. Senior Resident Magistrate & 2 Others Misc. Appl. No. 75 of 2005**, the order was a nullity. To the applicant the decision manifests open bias hence the application ought to be granted as prayed.

Respondent's Case

15. In opposition to the Motion the Respondent filed a replying affidavit sworn by **Apollo Mboya**, the Respondent's Secretary on 4th July, 2014.

16. According to the deponent, a complaint was received by the Law Society of Kenya vide an affidavit of complaint against the Applicant from one **Patrick Mbugua** on 20th June 2011 alleging that the *Ex parte* Applicant had failed to honour a professional undertaking given to the firm of **Namachanja & Co. Advocates**. It was deposed that under Section 4 of the **Law Society of Kenya Act** (Chapter 18 Laws of Kenya) the objects for which the Law Society of Kenya is established are, *inter alia*, to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. It therefore falls within the objects of the Law Society of Kenya through the Respondent to receive hear and determine complaints lodged against advocates such as the *Ex parte* Applicant herein and by virtue of Section 60(1) of the **Advocates Act** a complainant against an advocate of professional misconduct may be made to the tribunal by any person.

17. It was deposed that a sum of Kshs 6,250,000.00/- was a refund of the money received by the advocate in regard to the complainant before the Respondent and the said refund was only a mitigation factor to the sentence that was to be meted upon him after conviction and not a compensation or a reimbursements as alleged by the Applicant.

18. According to the deponent's understanding, the proceedings before the Respondent are quasi Criminal and therefore the order made do not depend on the complainant's prayers in the complaint but has to be within Section 60(4)(a-e) of the **Advocates Act**. It was therefore contended that contrary to the *Ex parte* Applicant allegation, the specific sentence meted upon the advocate was payment of interest of Kshs 2,250,000 which amount does not exceed Kenya Shillings Five Million and the Respondent has the power, by dint of Section 60(4)(e) of the **Advocates Act** Cap 16, to order that any advocate found guilty of professional misconduct to pay to the aggrieved person compensation or reimbursement not exceeding five million (5,000,000.00).

19. It was the Respondent's case that the manner in which the interest was calculated goes in to the merits of the case and thus is not within the purview of judicial review whose main concern is on the manner in which the decision was made and not on the merit of the decision and that the best avenue to deal with the issue of interest would have been review of the issue interest and whereas the *ex parte* Applicant was granted liberty to apply for the same which the applicant opted not to pursue.

20. Since the Disciplinary Cause No. 86 of 2014 before the Respondent was instituted before the institution of the High Court Civil Suit number 404 of 2011 which suit is yet to be set down for hearing, it was contended that the complainant had every right to claim for interest before the Respondent.

21. To the Respondent, the *Ex parte* Applicant's allegation of bias particulars of violation of the wednesbury principle, irrationally and unreasonableness are unfounded, lack merit, and ought to be disregarded in their entirety as he has not demonstrate how the tribunal acted irrationally or unreasonably.

22. It was further deposed that it is a common law practice that money received should be repaid with interest from the time of receipt till payment in full to compensate the rightful owner for the deprivation of the same which format was adopted by the Respondent in calculating the interest.

23. It was the Respondent's case that the allegation that the *Ex parte* Applicant was not given an opportunity to be heard was unfounded as he was always present in person as well as represented by a counsel hence the application for judicial review was brought with a view of abusing the process of this honourable court and the process of the Respondent since it will defeat the logic behind the establishment of the Respondent of persons whom it is meant to receive complaints against refuse the outcome of the disciplinary process and only rush to this honourable court once judgment has been entered against them.

24. The Respondent therefore urged the Court to allow it to proceed with the execution of the orders issued on 28th October 2013.

25. On behalf of the Respondent, it was submitted that the award of interest at the time of the sentencing was a matter of course and 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.**

26. It was submitted that the procedure before the Respondent was pursuant to section 58(5) of the ***Advocates Act*** quasi-criminal in nature. Therefore under section 216 of the ***Criminal Procedure Code***, the Court was entitled to receive such sentence as would inform itself as to the sentence to be properly meted and hence the Respondent only became functus officio after the passing of the sentence.

27. According to the Respondent, it acted within its pecuniary limit since the actual sentence was Kshs 2,250,00 which amount did not exceed the Kshs 5,000,000/= compensation or reimbursement fixed by section 60(4) of the ***Advocates Act***.

28. It was submitted that complaints against orders made under section 60(4) of the ***Advocates Act*** ought to be addressed by way of an appeal and not judicial review and relied on **Republic vs. Disciplinary Committee & 2 Others ex parte William Ochanda Onguru [2013] eKLR.**

29. According to the Respondent since the High Court Suit No. 404 of 2011 was filed on 21st September 2011 after the delivery of its judgement but before the sentence, the Respondent was not influenced thereby.

Interested Party's Case

30. On behalf of the interested party the following grounds of opposition were filed in respect of the application:

1. **It is misconceived, frivolous and vexatious. It lacks merit and is bad in law.**

2. **Interest was claimed in the complaint.**
3. **The judgement directed the ex parte applicant to pay the amount lost which was definitely included in the interest.**
4. **An order for payment is discretionary and deserved in the circumstances of the complaint.**
5. **The disciplinary Tribunal had jurisdiction to grant the orders it granted.**
6. **No prejudice and loss will be suffered by the ex parte applicant but his client.**

31. It was submitted on behalf of the interested party that since the complaint was made on behalf of the companies, the interested party ought not to have been joined to these proceedings in his personal capacity. It was further submitted that in any case no orders can issue against the said interested party. It was submitted that since what the applicant seeks is to quash an award of Kshs 2,250,000/= it is clear that the applicant had no problem with the award of Kshs 7,050,000/= which sum in any event the applicant admitted having paid.

32. It was submitted that interest was one of the claims that was expressly sought and that the Respondent did not divest itself of the power to award interest but instead reserved the same.

33. Since the date on which the award of interest was made was communicated to the parties, it was submitted that the applicant was not denied an opportunity of being heard but to the contrary was sufficiently accommodated after making an application after the other to delay the matter.

Determinations

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

35. That the Respondent has jurisdiction to award interest is in my view beyond dispute.

36. 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.

37. From the foregoing provisions it is clear that the Respondent 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.”

38. 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.”

39. 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."

40. 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.

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

42. The Applicant, however, contends first that there was no prayer for an award of interest hence the same ought not to have been awarded. The law, however is that the mere fact that there is no specific prayer for interest does not bar the Court from awarding the same if the same is from the evidence on record warranted. In **Govinji Mulji Dodhia vs. Jos Hansen & Soehne (East Africa) Ltd [1979] KLR 118; [1976-80] 1 KLR 1225** it was held that although the plaint did not claim interest, the court may allow interest, even if not claimed; and as the tenant has had the use of the money over the years, interest at court rates could fairly be allowed. As to whether or not it is fair to allow interests depends on the circumstances of the case and is therefore a matter which goes to the merit of the decision rather than to the process hence is a matter more suitable for an appeal rather than judicial review. 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.***

43. It was also contended that after the delivery of the judgement, the Respondent became *functus officio* and could not reopen the proceedings and award interest. The Respondents on the other hand relied on sections 58(5) of the ***Advocates Act*** as read with section 216 of the ***Criminal Procedure Code*** to justify its action taken after the delivery of the judgement. It is correct that by virtue of section 58 aforesaid, the procedure under the ***Advocates Act*** borrows from the ***Criminal Procedure Code***. Section 216 of the ***Criminal Procedure Code*** provides:

The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.

44. A reading of section 60(4)(d) of the ***Advocates Act*** clearly indicates that the Respondent may after hearing the parties and considering the evidence adduced order an advocate do pay a fine not exceeding one million shillings. The issue of compensation can only be dealt with under section 60(4)(e). Therefore the receipt of evidence under section 216 of the ***Criminal Procedure Code*** can only be meant to facilitate the meting out of the sentence and cannot be for the purpose of compensation. It is therefore my view that to invoke the provisions of section 216 aforesaid for the purposes of awarding interest, which I have held is a form of compensation, would be clearly improper and without jurisdiction. Therefore whereas the Respondent would have been properly entitled to impose a fine of not exceeding Kshs 1,000,000.00 at the time of the sentencing, the imposition of payment of interest in the sum of Kshs 2,250,000/- on 28th October, 2013 was without legal basis.

45. Since that is the only prayer the subject of the instant Notice of Motion, it is unnecessary for me to deal with any other issues alluded to herein in order not to trespass on the pending proceedings before the

High Court.

46. In the premises I find merit in the amended Notice of Motion dated 14th March, 2014. With respect to costs, it is clear that the impugned orders were more favourable to the complainant before the respondent rather than the Respondent itself. It is also however clear that instead of bringing these proceedings against the complainants only the same were also brought against their director who is legally a different person from the companies in which he held the position of a director.

Orders

47. Consequently, the orders which commend themselves to me and which I hereby grant are as follows:

(a) An order of certiorari removing into this court for the purposes of being quashed the Respondent's decision made on 28th October 2013 directing the *Ex parte* Applicant to pay interest of Kshs 2,250,000/- to the Interested Party which decision is hereby quashed.

(b) An order of Prohibition prohibiting the Respondent, from executing and/or enforcing the Respondent's decision made on 28th October 2013 directing the *Ex parte* Applicant to pay interest of Kshs 2,250,000/- to the Interested Party.

(c) Each party will bear own costs of the application.

Dated at Nairobi this 10th day of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sausi for Mr Nganga for the Applicant

Mr Kiongera for Mr Olembo for the Respondent

Cc Richard