



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 200 of 2011

WILLIAM OWADE OMARI.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE LAW SOCIETY OF KENYA.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, William Owade Omari is an advocate practicing Law in the name and style of M/s. Modi and Company Advocates. His single complaint is that the Advocates (Professional Indemnity) Regulation, 2004 is and was made in contravention of the Constitution and more particularly was enacted in contravention of his fundamental rights and freedoms and should be declared null and void.

2. In the Petition dated 10th May 2012, the Petition has averred that;

- (i) The Law Society of Kenya exceeded powers donated to it by **Section 81(1)** of the **Advocates Act, Cap.16**, Laws of Kenya when it enacted a Regulation that made the taking out of a professional indemnity cover, compulsory, and a condition precedent to the taking out of an annual practicing certificate for advocates.
- (ii) An advocate has no insurable interest in his client's claim and the Society's action was akin to a wage and not insurance. A wager, he has urged is akin to gambling and is also illegal and against public policy.
- (iii) The indemnity cover amounts to extortion as the relationship between an advocate and his client is not a risky undertaking within the context of insurance Law.
- (iv) The regulation is in any event unreasonable as it fixes the amount of cover at Kshs One Million which amount is "*exorbitant, exploitative and extortive*".
- (v) The imposition of the indemnity cover and denial of a practicing certificate to him has an impact on his right to life as without earning a livelihood by practicing Law, He "*would die of starvation*".

It is the Petitioner's further contention that the Society's actions violated **Articles 2(3)(1), 28, 43(1)** and **46(1)(a)** and **(b)** of the **Constitution, 2010**.

He now seeks the following Orders;

“(a) A declaration that the Petitioner herein is entitled to the full observation, protection, respect, promotion and fulfillment of his fundamental rights and freedoms as follows;

- i) The right to life**
 - ii) The right to human dignity**
 - iii) Economic and social rights**
 - iv) The freedom to enter into a contract of indemnity on his own free will**
- b) A declaration that the consumer rights of the Petitioner's clients are observed, protected, promoted and fulfilled.**
- c) A declaration that the Advocates (Professional Indemnity) Regulation 2004 is ultra vires and contravenes the fundamental rights and freedoms of the Petitioner and is inconsistent with the 2010 Constitution of the Republic of Kenya and therefore null and void.**
- d) Any other orders deemed just**
- e) an order for compensation**
- f) Costs be provided for”**

Case for the Respondents

3. The 1st Respondent filed grounds of opposition to the Petition and it is the argument by the Attorney-General that the Petition is frivolous and an abuse of court process and does not disclose any denial, violation, infringement or threat to the Petitioner's fundamental rights and freedoms.

4. The 2nd Respondent on its part filed a Replying Affidavit sworn on 13th June 2012 by Apollo Mboya, (its Secretary) and its case is that firstly, that the Petitioner as a member of the Law Society of Kenya is bound by the provisions of the Law Society of Kenya Act and particularly and of relevance, to the provisions of **Section 81** under which the Regulations were enacted.

Secondly, the professional indemnity cover is used to cover compensation for loss or damage from claims in respect of civil liability attaching to an advocate or his employees in a dispute involving allegations of professional negligence or breach of trust.

Thirdly, that the minimum cover of Kshs.1 million is reasonable and the Petitioner has not shown that he is unable to pay the same.

Fourthly, the right to equality and benefit of the Law (**Article 27**), the right to deprivation of property (**Article 40**) and the right to life (**Article 26**), while important, have not been breached in respect of the Petitioner.

Lastly, that the professional indemnity cover demanded of all advocates is neither discriminatory nor unique as other professionals like doctors and architects have taken similar covers to cushion themselves from claims of professional malpractices.

The Respondents therefore jointly seek that the Petition be dismissed with costs.

Determination

5. I have read the submissions on record and I have elsewhere above set out the single issue that needs to be determined. To do so, it is important to note that what is before me is a Petition based on

alleged violation of fundamental rights and also a claim that the Advocates (Professional Indemnity) Regulations was made by the Law Society of Kenya against its powers as conferred by the **Law Society of Kenya Act, Cap.16 Laws of Kenya**.

6. I should begin by addressing the latter issue because the Petitioner's arguments are wholly misguided. I say so because **Section 81** of the **Advocates Act** provides as follows:

“(1) The Council of the Society, with the approval of the Chief Justice, may make rules with regard to-

(a) the professional practice, conduct and discipline of advocates;

(b) the keeping of accounts by advocates;

(c) the annual submission to the Council of a certificate by an accountant registered under the Accountants Act or by some other person or class of persons specified by such Council that he has examined the books, accounts and documents of the advocate to such extent as may be prescribed and stating-

(i) whether or not he is satisfied that, during the period covered by his certificate, the advocate has complied with the rules for the time being in force regulating the keeping of accounts by advocates; and

(ii) if he is not so satisfied, the matters in respect of which he is not satisfied;

(d) the retention or otherwise by advocates of interest earned on money deposited received or held for or on account of clients;

(e) the issue of practicing certificates, the fee payable thereon and the duties of the Registrar with respect to the issuing of such certificates;

(ee) the procedure for the conferment of, and the privileges attached to, the rank of Senior Counsel.

(f) the establishment of a compensation fund for the benefit of clients;

(g) indemnity for clients against loss or damage arising from claims in respect of any civil liability incurred by an advocate or his employee, or from breach of trust by the advocate or his employee;

(h) continuing professional education for all advocates practicing in Kenya.

(i) generally for the better carrying out of the provisions of this Act, other than Parts III, IV, IX, X and XI.

(2) If an advocate fails to comply with any rules made under this Section, any person may make a complaint in respect of that failure to the Disciplinary Committee.

(3) No rule made under this Section shall require an advocate who is a member of the National Assembly or the Speaker and who holds a practicing certificate to undergo continuing legal education during his tenure as such member or as the speaker.”

7. The operative words and relevant to the matter before me are that the rules will govern inter-alia “*professional practice of advocates*”. The words are wide enough to cover every aspect of practice but more importantly, the Society has power to make rules with the approval of the Chief Justice. To argue, like the Petitioner, that the Society has no such power is to misread the express letter of the Law.

8. I have tried to discern the Petitioner's displeasure with the power to make rules but in his submissions, the issue is not even mentioned and I will quickly dismiss any complaints in that regard.

9. On the issue of breach of fundamental rights, I will begin by addressing the right to life which is guaranteed by **Article 26** of the **Constitution**. The Petitioner's argument is that his life and the right thereto is threatened by the Law Society of Kenya. The threat, it is submitted, is manifest in the Society's refusal to grant him a practicing certificate for failure to obtain the professional indemnity cover under the Regulations. In Joseph Kindler vs Canada, the right to life was described as “*the most fundamental of all human rights*” and in Willy Aaron Sibiya & others vs DPP & Others 2006 (1) SACR 220 (CC), Chaskalson, P. discussed that right at length in a case involving the question whether the death sentence was constitutional and he stated inter-alia as follows;

“Two factors are stressed in the judgment of the Court (citing Decision No.23/1990 (x.31) AB of the Hungarian Constitution). First, the relationship between the rights of life and dignity and the importance of these rights taken together. Secondly, the absolute nature of these two rights taken together. Together they are the source of all rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity.”

10. In the context of the above powerful holding, it is obvious to me that the Petitioner's assertion is baseless if looked at also in the circumstances of his case. The requirement that he should take out a professional indemnity cover is protective rather than punitive. The beneficiary of the cover is himself and his clients to whom he owes a duty of care in the performance of his professional duties. How can such a cover be taken to be akin, say, to a sentence of death? The Petitioner has picked on a very fundamental right to argue a pedestrian and inconsequential point and I will firmly hold that his life and his dignity are in safe hands.

11. The Petitioner has also urged the point that he has been denied the right to equality and the benefit of the Law (**Article 27** of the **Constitution**). It is unclear to me how this right has been violated because neither in the Petition nor in his submissions has he said anything of it save a bare mention in the Petition. I will not therefore trouble myself with any findings in that regard.

12. Regarding the economic and social rights raised in the Petition, it is obvious to me that the Petitioner has only raised the issue in the context of his right to practice Law. However, such a right cannot be discussed in the abstract. Why is a practising certificate important? To ensure the dignity and professionalism of the practice of Law. If any quack, as has happened, is given a window of opportunity to practice Law, how can Society be assured of the best legal services? Conditions attached to obtaining such a Certificate are important safeguards in ensuring that only the qualified are allowed to practice Law. If one fails to meet the conditions lawfully put in place, he cannot blame anyone, other than himself when he is stopped from exercising the right so to do.

13. Having held as above, I should now turn back to the Advocates (Professional Indemnity) Regulation 2004. I have held that the Regulations were lawfully enacted in 2004. The Petitioner, I am aware, is an advocate of long standing. Why did he wait for eight (8) years before challenging the Regulations? Even if I should excuse the obvious delay, I have seen nothing nor heard anything serious to warrant a finding in his favour.

14. The need for a professional indemnity cover is a useful safeguard where negligence may be attributed to an advocate. It protects the advocate, his client and his employee. What is unlawful about that? What is unconstitutional about such a cover?

15. It must be understood that the whole essence of the Bill of Rights is protection of the individual and where actions of a public body remove that protection, then the Courts must move in to secure the protection. In this case, the cover is protective and I see no violation of the Bill of Rights.

16. The Petitioner has argued that the cover is “*extortive*” (*sic*) and was imposed on him without his

consent. The simple answer to his Complaint is that he had an opportunity to argue his case before the Regulations were passed. The Law Society of Kenya, as a practice, always places amendments to the **Law Society Act** to the attention of advocates. When an advocate (assumed to know the Law) sits on his laurels for eight years and wakes up to challenge a simple regulation affecting him, how can he be taken seriously?

17. My finding is that there is nothing to be made out of the Petitioner's complaints generally and I will dismiss all assertions to the contrary.

Conclusion

18. I have carefully assessed the case by the Petitioner and I am satisfied that all issues raised by him are not such as to tilt the judicial eye to look his way.

19. The Petition is frivolous, and with respect, ought to have been framed and argued more seriously.

20. I shall dismiss it with costs to the Respondents.

21. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2012

**ISAAC LENAOLA
JUDGE**

In the presence of:

*Coram: Kariuki – Court clerk
Applicant in person*

Mr. Gichuhi for 2nd Respondent

Order

Judgment duly read and delivered.

**ISAAC LENAOLA
JUDGE
21/12/2012**