



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Appli. 410 of 2008

LEO MASORE NYANG'AU APPLICANT

V E R S U S

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

R U L I N G

This is an interesting case in which an application for leave to file Judicial Review proceedings was filed in this court as High Court Miscellaneous Application No. 395 of 2008. The ex-parte applicant in Misc. 395 of 2008 was the same **LEO MASORE NYANGAU**, the applicant herein who is an advocate of the High Court of Kenya. The respondent in Misc. 395 of 2008 was the same, **DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA**. The subject matter in that miscellaneous Application 395 of 2008 and this present application is the same proceedings before the **DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA** in District Commissioner No. 37 of 2008 relating to the applicant herein.

This application No. Misc. 395 of 2008 was under Certificate of urgency. The substantive prayers in the said application were prayers 2, 3, 4 and 5 that-

2. *The Honourable Court be pleased to grant leave to the ex-parte applicant to apply for an order of mandamus, prohibition and certiorari directed against the Disciplinary Committee of the Law Society of Kenya prohibiting the said Committee from hearing, or continuing to hear, Disciplinary Cause No. 37 of 2008 Ann Nyanchama Ombura –Vs- Leo Masore Nyang'au t/a Masore Nyang'au & Company advocates.*

3. *The Honourable court be further pleased to*

issue an order of certiorari to remove the said proceedings in Disciplinary Cause No. 37 of 2008. Anne Nyanchama Ombuna –vs- Leo Masore Nyang'au t/a Masore Nyang'au & company advocates to the High Court for the purposes of quashing them.

4. *The grant of the said leave to operate as a stay of the decision of the Disciplinary Committee in the said Disciplinary Committee Cause No. 37 of 2008: Anne Nyanchama Ombuna -Vs- Leo Masore Nyang'au t/a Masore Nyang'au & Company advocates.*

5. The ex-parte applicant do deposit with this court sum of Kshs.1 million within a reasonable period the court may order.

I heard that Chamber Summons Application. On 7th July, 2008, I gave the following orders-

- 1. I grant prayer 2 of the Chamber Summons. The main motion will be filed within 21 days from today, otherwise the leave hereby granted will automatically.**
- 2. I decline to grant prayer 3 of the Chamber Summons as it is premature.**
- 3. I decline to grant prayer 4 and 5 of the Chamber Summons.**
- 4. Costs in the cause.**

Instead of filing the Notice of Motion for which leave to file was granted, M/s Nyakundi & Company advocates for the ex-parte applicant, on the next day 8/7/2008, filed in court in that file a notice which reads-

“NOTICE OF WITHDRAWAL

TAKE NOTICE that the ex-parte applicant has wholly withdrawn the application filed in this case.

Dated at Nairobi this 8th day of July, 2008.

NYAKUNDI & CO. ADVOCATES

FOR THE EX-PARTE APPLICANT”

The above notice to withdraw appears to have been taken to the Deputy Registrar, and on 14/7/2008, and without the attendance of any Counsel for the parties, the Deputy Registrar is recorded as having decided-

“Upon reading notice of withdrawal of suit dated 8th July, 2008, filed herein on 8th July, 2008 and signed by M/s Nyakundi & Company advocates for the ex-parte applicant, the following order is hereby recorded;

- 1. The ex-parte applicant has wholly withdrawn the application filed in this case.**

Dated this 14th Day of July, 2008.

Deputy Registrar”

In the meantime, on 10th July, 2008 Counsel for the ex-parte applicant filed Miscellaneous Application No. 410 of 2008 (***the present application***). That was even before the Deputy Registrar had marked the previous application as withdrawn. The present application was actually brought before me under certificate of urgency on 11/7/2008, but the applicant and his Counsel did not show up in court. I marked the same as stood over generally, and observed that I could remember a similar previous application which I had ruled upon.

Mr. Nyakundi appeared before me on 22nd July, 2008. On inquiry from the court, that is when he explained that there was a previous application in which leave orders were granted by this court. He contended that they withdrew the previous application because the title therein was wrong, and that on 14/7/2008, the Disciplinary Committee of the Law Society had made decisions in a hurry when the ex-parte applicant was unwell.

In my view, this present application is not competent and has to be struck out. Firstly, the previous

application could not be withdrawn, as it was already determined. There was therefore nothing to withdraw. In addition, a ruling of the court had already been made, and that decision of the court cannot be withdrawn by a litigant. The ruling can only be challenged through the normal judicial process. As it is, my ruling still stands.

Secondly, the Deputy Registrar did not have jurisdiction to withdraw the application which had already come before me. If there was any request to withdraw the Chamber Summons, it should have come before the High Court Judge. Even assuming that there is power to withdraw, this application miscellaneous 410 of 2008 was filed four days before 14/7/08 when a court official the Deputy Registrar purported to mark the said application as withdrawn.

The issue of wrong title of the previous application is no ground for withdrawing an application which has been determined. In any case that issue has not raised by any party, and the court made a decision not based on the title. The main motion is also to be field in its own format, not in the format of the Chamber Summons. The Chamber Summons is already spent. The issue of the Disciplinary Committee making a decision which the ex-parte applicant does not agree with, is neither here nor there. I did not grant stay orders and the Disciplinary Committee is entitled to progress the proceedings before it. In any event, those decisions of the Disciplinary Committee are the issues, that should be raised in the main motion for determination by court.

I find this application incompetent, misconceived, dishonest and an abuse of the process of the court. I strike out the same. I also quash the orders of the Deputy Registrar dated 14th July, 2008 purporting to order the withdrawal of Miscellaneous Application No. 395 of 2008. In my view the Deputy Registrar must have been misled by Counsel for the applicant, as the notice to withdraw did not indicate that the Chamber Summons application had already been determined and a ruling delivered. I direct the Deputy Registrar to vacate the orders withdrawing Application No. 395 of 2008.

Dated and delivered at Nairobi this 4th day of August,

2008.

George Dulu

Judge.

In the absence of-

Counsel for the ex-parte applicant, as he was present when ruling date was given.