



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**MISC APPLICATION NO. 639 OF 2006**

**REPUBLIC.....APPLICANT**

**Versus**

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

**DAVID IUEAN JENKINS.....1<sup>ST</sup> INTERESTED PARTY**

**AMBROSE RACHER.....2<sup>ND</sup> INTERESTED PARTY**

**RACHER & AMOLLO ADVOCATES.....3<sup>RD</sup> INTERESTED PARTY**

**LAW SOCIETY OF KENYA.....5<sup>TH</sup> INTERESTED PARTY**

**HARDEV SINGH PALL.....4<sup>TH</sup> INTERESTED PARTY**

**ATTORNEY GENERAL.....6<sup>TH</sup> INTERESTED PARTY**

**RULING**

In the Notice of Motion dated 20<sup>th</sup> March 2007, the Applicant prays for a stay of further proceedings in Disciplinary Cause No. 4 of 2006 against the Applicant and the Respondent and that the Interested Party be restricted from undertaking or instituting any proceedings in respect of the same facts or allied to the facts pending before this Judicial Review proceedings. That the order issued by this High Court on 31<sup>st</sup> October 2006 be confirmed and do serve as stay pending the hearing of the Notice of Motion and that costs be in the cause.

The Application is supported by the Affidavit of the Applicant, David Odhoch; Mr. Makori Counsel for the Applicant urged that when they came before the court on 31<sup>st</sup> October 2006, the court having heard them and found them to have a good case, gave leave and leave was to operate as stay for 30 days. Counsel submitted that they have complied with all the orders of the court, filed the Notice of Motion in time and that there is a real likelihood of the Respondents taking action against the Applicant if stay is not granted.

Mr. Mungla, Counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed grounds of opposition which are as follows:-

1. That the Application is fatally defective incompetent and cannot lie;
2. That the order dated 31<sup>st</sup> October 2006 was couched in mandatory and peremptory terms. This court is now *funtus officio* and can neither consider nor grant the prayers sought in the subject Application;
2. That paragraphs 12 and 13 of the affidavit are vague, repetitive and of no consequence;
3. That the Applicant has not placed before the court any material on the basis of which the court can grant this Application. He has not also shown real interest in prosecuting the substantive application.

Betty Nyabuto, the secretary of the 5<sup>th</sup> Interested Party swore a Replying Affidavit in which she deponed that the orders of stay granted on 31<sup>st</sup> October 2005 lapsed on 25<sup>th</sup> January 2007 and have never been extended. She contends that the Applicant admits to the orders having lapsed due to want of service; that the Affidavit at Paragraph 7 is vague.

Before the matter was heard, Mr. Makori Counsel for the Applicant explained that there were errors at Paragraphs 3 and 6 of these affidavit in that it was a misdescription of the parties and so the Interested Parties abandoned their arguments at paragraph 3 of the 1<sup>st</sup> to 3<sup>rd</sup> Interested Party arguments and paragraph 4(b) of Betty Nyabuto's Affidavit.

There is no doubt that when the Applicant sought leave of the court to bring an Application for Judicial Review, the court did find that he had an arguable case and granted an order for leave and that leave was to operate as stay for 30 days. The substantive Notice of Motion was filed on 6<sup>th</sup> November 2006 and thus the orders were complied with.

On 28<sup>th</sup> November 2006, Mr. Makori appeared before the court, having failed to serve the parties but the court extended the orders of stay to 30<sup>th</sup> November 2006, when the other parties could be served. On 30<sup>th</sup> November again not all parties were served. Orders of stay were not extended as from that date. The Applicant has been coming to court since then and the court notes that the Applicant did not serve all the parties in good time and directions as to the hearing could not be taken despite the fact the matter was brought under certificate of urgency. Due to the urgency of the matter, even though all the parties had not filed their documents, the court directed that they do file and the matter be placed before the Honourable the Chief Justice for fixing of hearing dates.

I have noted the objection raised by Mr. Mungla regarding the provisions of the law under which the Application is made. Such an Application should be made under the inherent powers of the court there being no specific provision under Order 53 for such an Application. Having invoked Order 53 Civil Procedure Rules amongst other Sections, the court will ignore the other provisions of law and deem the Notice of Motion to be properly before the court.

I have considered all the submissions by all Counsel, it is this court's view that when an order of stay is granted for a certain period it was this court's discretion to extend or decline to extend it. The fact that it was granted at the time leave was given did not guarantee the Applicant enjoying the order of stay till the matter was heard.

On 28<sup>th</sup> November 2006 when the Applicants Counsel came for extension of the orders, the court noted none service of the parties. For some time thereafter some parties were never served and the matter, though filed under certificate of urgency was now being dragged by Applicants failure to serve.

Since the order of stay lapsed on 30<sup>th</sup> November 2006, there has been no attempt to have it extended. It is now that the Applicant wants the stay extended because of threats that the Interested Parties intend to proceed with disciplinary action against him. That threat is not new. It was real even when the leave to bring Judicial Review proceedings was sought. There is no reason given why extension of leave was not sought before the orders expired. As correctly submitted by Counsel for the Interested Party, the prayer for leave is considered alongside that of stay and this court did consider the same. The stay has lapsed

and there is nothing to stay. There are no exceptional circumstances shown to the court that would warrant the court to exercise its discretion to revive the dead orders considering that the Applicants Counsel has been coming to court for directions.

In any case a look at the file speaks for itself. The court which grants interim orders can set them aside. The Applicant did not deserve the stay orders since the Applicant seemed to drag his feet after grant of stay orders and this court is inclined not to revive the orders of stay for the above reasons. The notice of Motion dated 20<sup>th</sup> March 2007 is hereby dismissed with costs to the Interested Parties.

Dated and delivered this 5<sup>th</sup> day of April 2007.

R.P.V. WENDOH

**JUDGE**

Mr. Omondi holding brief for Mr. Makori – Applicant

Ms Oduor holding brief for Mr. Mungla – 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party

R.P.V. WENDOH

**JUDGE**