REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 482 of 2004

STEPHEN OKERO OYUGI…….…….....….PLAINTIFF/RESPONDENT

-VERSUS-

LAW SOCIETY OF KENYA…….....…….…1ST DEFENDANT/APPLICANT

SANJEEV KHAGRAM…….....……..……2ND DEFENDANT

RULING

1. The Application and the Prayers

The 1st defendant's Notice of Motion, drawn and filed on 3rd June, 2004 was brought under rules 2 and 3 of the Law Society of Kenya (Arbitration) Regulations; the Law Society of Kenya Act (Cap.18); section 6(1) of the Arbitration Act, 1995; and Order L, rule 1 of the Civil Procedure Rules.

The application carries one substantive prayer, "that these proceedings be …stayed and the matter… referred to an arbitration process", and the procedural one regarding costs.

The application is premised on three grounds: (i) that the claim emerges from a dispute related to the management of the affairs of the Law Society of Kenya; (ii) that the dispute is between the plaintiff, who is a member of the Law Society of Kenya, and the Society itself; and (iii) that the Law Society of Kenya (Arbitration) Regulations, 1997 oblige a member to submit to *arbitration* and not litigation.

2. The Depositions

Learned counsel for the 1st defendant/applicant, ***Kenneth Wabwire Akide***, on 3rd June, 2004 swore a supporting affidavit in which he makes depositions, in summary, as follows. He is duly conversant with the facts of the case, and is authorised to make the averments. He depones that the plaintiff by his pleadings has acknowledged that he is a member of the Law Society of Kenya; and that the plaintiff's "alleged grievance" which is the cause of action in the suit, relates to the issuance of a practising certificate by the 1st defendant. The deponent states that by rules (2) and (3) of the Law Society of Kenya (Arbitration) Regulations, 1997 if any dispute arises relating to the management of the affairs of the said Society, and with regard to a member or members as against a member or members, or between a member or members on the one hand and the Council of the Society on the other hand, then such dispute shall be referred to arbitration before any Court proceedings are instituted. At paragraph 5 the deponent states: "I annex and mark 'KWA 1' a copy of the Law Society of Kenya (Arbitration) Regulations, 1997." It is, however, not clear whether the document is one of valid, operational regulations and not just a draft. Clearly, the document was designed to be published as a Legal Notice; but no particulars of such notice are set out, nor is its date of execution specified. On the face of this document, and without

evidence to the contrary, it cannot possibly be held to be a valid legal instrument.

The deponent avers that the suit herein has been commenced before the arbitration process has been undertaken; and that the Law Society of Kenya remains ready and willing to submit to the arbitration process. The deponent expresses his belief (para. 8) "that these proceedings ought to be stayed and the dispute referred to an arbitration process."

To the Law Society of Kenya's application for stay of litigious proceedings, and to its supporting affidavit, the plaintiff filed grounds of opposition on 5th August, 2004 and a replying affidavit on 15th September, 2004. In the replying affidavit, the plaintiff depones, in summary as follows. He avers that "there is no dispute as to the management of the applicant's affairs but a suit for defamation arising from libellous correspondence authored by the applicant's officers." He depones that the issuance of a practising certificate "is never the responsibility of the applicant but that of the Registrar of the High Court"; and he exhibits his practising certificate for the year 2004, serial No. JUD/2004 dated 1st January, 2004 and issued and signed by the Registrar of the High Court. The deponent states his disagreement with the statement in the supporting affidavit, that any regulations of the Law Society of Kenya, regarding the referral of certain disputes within the Society to arbitration, would be applicable to the defamation suit now pending in Court. The plaintiff avers that no evidence, in any case, exists that the applicant has in the past been willing to submit itself to arbitration: a letter of demand was served upon the applicant by the plaintiff on 29th April, 2004; to-date the plaintiff has received no response. (The letter of demand is exhibited as an annexure to the replying affidavit).

Potential matters in issue are foreshadowed by the plaintiff in the grounds of opposition filed on 5th August, 2004. These are as follows:

(i) that, the application is incompetent, misconceived, and amounts to an abuse of Court process;

(ii) that, there is no agreement between the plaintiff and the Law Society of Kenya to refer this matter to arbitration;

(iii) that, "the purported rules do not apply in the instant case";

(iv) that, "the purported rules are illegal, unconstitutional, ultra vires, null and void in so far as they seek to oust the jurisdiction of the Honourable Court".

3. Submissions for the Law Society of Kenya

On the occasion of hearing, on 21st February, 2005 ***Mr. Akide*** appeared for the Law Society of Kenya (1st defendant) while ***Mr. Chacha*** appeared for the plaintiff.

Learned counsel, ***Mr. Akide*** stated the overall stand of the Law Society of Kenya in this matter: that the matter in dispute related to *the management of the affairs of the 1st defendant*; the dispute was between the Law Society of Kenya (LSK) and one of its members, and so "the same ought to be referred to arbitration." ***Mr. Akide*** submitted that the plaint in the suit is concerned with matters relating to the question whether or not the plaintiff had a practising certificate for 2003 and 2004; and management of the affairs of the LSK "includes issuance or non-issuance of practising certificates." Learned counsel contended that as a matter of law (though he was not unambiguous on the identity of this law), "any of the parties can put in motion the process of arbitration; the plaintiff o*ught* to have put in motion that process; this is not the exclusive role of the LSK." ***Mr. Akide*** went on to submit that, as a matter of law, if the parties cannot agree on an arbitrator, then the Chairman of the Chartered Institute of Arbitrators (Kenya Section) shall appoint an arbitrator. He urged that the proceedings currently pending in Court be stayed, and the dispute referred to arbitration.

Such a submission, it was apparent, followed a course slightly in departure from the tone of the depositions in the supporting affidavit, where the plaintiff's case had been referred to as based on "alleged

grievance" (para.3). In the grounds on the face of the Notice of Motion of 3rd June, 2004 the Plaintiff's gravamen is referred to (Para 2) as "the alleged dispute." Such references could subtract from the weight of the averment in ***Mr. Akide's*** supporting affidavit (Para. 7) that "the 1st defendant remains ready and willing to submit to the arbitration process", particularly in the light of learned Counsel's submission that there was some obligation, resting on the Plaintiff as much as on the LSK, to put in motion the arbitration process and that "the plaintiff ought to have put in motion that process."

4. Submissions for the Plaintiff/Respondent

Learned counsel, ***Mr. Chacha*** submitted that the issue before the Court was the tort of *defamation*, perceived to have been committed by the 1st defendant/applicant. It was, in the circumstances, necessary for the Court to determine whether the document complained of was defamatory; the matter naturally fell to the Court for decision; it was not tenable that an arbitrator be appointed to arbitrate on matters of defamation.

Counsel stated that the cause of action arose from a letter of 17th March, 2004 written by the applicant, stating that the plaintiff did not have a practising certificate for 2003 and 2004. On 28th April, 2004 the plaintiff wrote to the LSK through its Secretary, pointing out that the content of LSK's letter of 17th March, 2004 was misleading. The plaintiff had stated in his said communication that he had paid for and duly received his practising certificates for both 2003 and 2004, and called upon the LSK to issue a correction. The request had carried the following material paragraph:

"The said letter [of 17th March, 2004] is now in circulation and it is in the public domain, as it is being used in Court against [the plaintiff] in Nairobi High Court Miscellaneous Application No. 27 of 2004."

The Law Society of Kenya was called upon to withdraw the letter; it was offending and defamatory; but LSK took no action by way of rectification, and so the plaintiff filed suit.

Learned counsel, ***Mr. Chacha***, submitted that filing suit in Court as the plaintiff did was the correct course of action, from a legal standpoint. In the words of counsel:

"Arbitration relates to matters contractual, but not matters relating to defamation. Only the Court can determine whether defamatory matter has been published."

On this point counsel stated he had been unable to find any authority.

Mr. Chacha questioned the validity of the document which was exhibited as carrying the Law Society of Kenya (Arbitration) Regulations, 1997. They had no numbering, they were undated; counsel submitted that they were null and void. They were not published in the ***Kenya Gazette*** as they should have been. In the words of counsel:

"What we have is an intention to make the regulations; it is only a draft — unless the contrary is proved."

Counsel questioned the validity of clause 6 of the said regulations. It thus states:

"The decision of the arbitrator or arbitrators shall be final and binding on all parties to such dispute.

Mr. Chacha submitted that the tenor and effect of such a provision would amount to an attempt to oust the jurisdiction of the Court; and on this account it would be null and void. Since the Court's jurisdiction was derived from the Constitution, the Judicature Act (Cap.8) and other enactments, it could not be ousted by what purported to be subsidiary legislation.

In support of this argument, counsel cited the East African Court of Appeal case, ***Davies & Another v. Mistry*** [1973] E.A. 463. The principle advanced by counsel is clear from the judgement, in that case, of ***Spry, VP*** (at p.466):

"…**in my opinion, s.5 gives the Board no power to interfere in the contractual arrangements between architect and client and no power to deprive either of his access to the Courts to resolve any dispute with the other. I would repeat the words of Viscount Simonds in the English case of *Pyx Granite Co. v. Ministry of Housing* [1960] A.C. 260:**

'**It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words.'**

I would adopt those words, substituting only 'the Courts of the Republic' for 'Her Majesty's Courts', to Kenya and hold that the right of access to the Courts of the Republic may only be taken away by clear and unambiguous words of the Parliament of Kenya."

In that case, just as in the present matter, one party had attempted to force other parties, in a relationship involving surveyors, quantity surveyors and architects, to go to arbitration in place of the regular Court. The Court held that such was an attempt to oust the jurisdiction of the Court, and was null and void.

Relying on the ***Davies*** case, learned counsel submitted that it was not tenable in law for the Law Society of Kenya to force parties (or a party) to submit to arbitration and the decision of an arbitrator, forgoing the opportunity for a judicial determination of the relevant question.

Even were the avenue of arbitration appropriate, counsel submitted, the LSK had by its own conduct disentitled itself to that process. When, on 29th April, 2004 the plaintiff sought withdrawal of the offending letter by the applicant, this was not done. When the suit was filed and served upon the applicant, there was no intimation at all that arbitration was a possible recourse; and only from the affidavit belatedly sworn by the applicant's advocate, on 3rd June, 2004 does the arbitration issue emerge. Counsel urged that this apparent reluctance, to respond, to apologise, to propose early the possibility of arbitration, now disentitled the LSK to the discretion of the Court - a point supported by the principle in ***Esmailji v. Mistry Shamji Lalji & Co***. [1984] K.L.R. 150. The following entry in the headnote (p.150) may be quoted:

"**It is a condition precedent that before the Court can exercise its discretion to make an order staying proceedings the applicant must satisfy the Court that he is and was at all times willing to do everything necessary for the proper conduct of arbitration. Failure to show this to the satisfaction of the Court will result in refusal for stay of order**."

Mr. Chacha submitted that there had been not even a single letter from the applicant undertaking to go to arbitration. In these circumstances, learned counsel submitted, LSK must be taken to have been ready to sue and be sued, and so, this is the route they should adhere to.

Learned counsel, besides, impugned the bona fides and the veracity of the supporting affidavit. Although the deponent avers (in para.1) that he is conversant with the facts of the case, it is not at all clear how he became so conversant with the facts. The affidavit ought to be founded on facts - within the deponent's knowledge, or based on sources disclosed. The one who would know the pertinent details, would be an official of the LSK, rather than an independent legal practitioner running his own firm. In ***Kisya Investments Ltd & Another v. Kenya Finance Corporation Ltd & Others***, Civil Suit No. 3504 of 1993, ***Mr. Justice Ringera*** had considered the bona fides of a deponent such as the one in the instant matter. He thus observed:

"**It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters the advocate courts an adversarial invitation to step [down] from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso [to] Order XVIII, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs."**

Such a scenario, I think, very well describes the kind of affidavit sworn by counsel for the applicant in this case; the plaintiff's objection is in my view well founded. As ***Mr. Chacha*** submitted, ***Mr. Akide*** had sworn an affidavit on contentious matters without anywhere stating who gave him the information, or the grounds whereupon he held certain beliefs; yet he wanted to use some beliefs and certain information in his depositions to persuade the Court to stay the proceedings before it and to require recourse to arbitration. Such would not be a cogent basis for seeking the Court's discretion, as I see it.

5. Applicant's Rejoinder

Mr. Akide contended that *defamation* was just as normal a subject of dispute as any other. He contended that no check-list of "dispute subjects" had been set out, and thus defamation ought not to be excluded from that category.

Counsel contested the submission that he was not the proper person to swear the supporting affidavit. He said the matters in dispute were well known to him as an advocate; he was familiar with the regulations regarding arbitration, and he had deponed to no matters outside the arbitration regulations.

Mr. Akide contended that it was not, in the circumstances of this matter, the role of the Court to determine whether there had been defamation, as a basis for going to arbitration; all that was required was to establish that there *was a dispute*.

6. Analysis and Orders

How serious is the applicant's case, that this Court do stay the plaintiff's defamation suit and direct that the parties resort to arbitration in the first place? Seriousness in this regard is to be judged on the basis of whether valid points of law are raised (which will lead to allowing of the application); and whether just cause is shown (which may lead to judicial discretion in favour of the application).

(a) Arbitration regulations

It is already clear from my earlier analysis of evidence and submissions, that although the very foundation of the 1st defendant's application for stay of judicial proceedings, to facilitate arbitration, is certain regulations of the LSK regarding arbitration, no valid legal instrument regulating arbitration has been placed before the Court. The document placed before the Court carried no validity on its face, and neither was any evidence provided as to its status. I assume that such evidence could only have been provide by senior officers of the LSK, who did not, however, make any depositions.

(b) Is a claim based on defamation a "dispute", for resolution by arbitration?

The fact that counsel did not cite any case law on this point, would suggest that it is a matter of first impression. The term "dispute" is of a general scope, and need not relate always to the legal domain. It is defined in ***Black's Law Dictionary***, 7th ed. (1999) as (p. 485):

"**A conflict or controversy, especially one that has given rise to a particular lawsuit."**

Counsel for the plaintiff submitted, and I think quite justifiably, that arbitration issues are essentially contractual matters - disputes over things in respect of which the parties may compromise on their own interests; matters which in legal thinking, belong to the sphere of compromises and bargains among those affected. As the law, in such a private domain, primarily seeks to effectuate private choice, it is a matter of public interest and of judicial policy, that the parties in dispute be accorded wide opportunities for seeking solutions outside the restrictive procedures of the judicial process. I have no doubts in my mind that such is a wise policy; but I also would agree that the main sphere in which arbitration applies is *contract.* It does not, for example, and ought not to apply, in the sphere of *criminal law*. For the beacons of crime have been strictly defined by law, and entrusted to the Courts to adjudicate upon. I would go further and say that the beacons of the law of *tort* - and this includes negligence and defamation - are also firmly set, and the task of adjudicating upon them rests with the Courts.

Therefore, I am unable to agree with counsel for the defendant/applicant, that a claim in defamation such as that brought by the plaintiff, is subject to the compromise solutions such as may be adopted in arbitral proceedings.

It follows that I am unable to agree with counsel for the applicant, that the well-defined legal issues in the tort of defamation, can possibly be generalised as issues of the *administration and management* of the Law Society of Kenya, and which, therefore, should be taken out of the Court's machinery and passed over to compromise solutions through arbitration. Defamation, just as choses in action, or mortgagee's power of sale, must be dealt with as strict questions of law directly requiring Court orders; such legal concepts cannot be transformed into general principles of *administration,* and on that account reserved for arbitral dispute settlement.

(b) Is there scope for judicial discretion?

From the foregoing analysis, there are clear principles of law to guide the Court in this matter; and so hardly any room is left for free exercise of discretion by the Court. However, were there scope for the exercise of such discretion, I would have been reluctant to apply it in favour of the applicant: because I am not convinced that their case is perceived even by them to carry conviction. The evidence upon which they rely is from an advocate who is unlikely to be very well informed about the circumstances in which the plaintiff's gravamen arose; the evidence given is cursory, and not in all respects in compliance with the requirements of Order XVIII, rule 3 of the Civil Procedure Rules; the applicant appears to have only belatedly been converted to arbitration as forum for resolving the "dispute" in hand; although the plaintiff's grievance is a serious one, the applicant appears not to have accorded it any degree of priority. Prima facie, therefore, this is a matter in respect of which justice requires that the plaintiff should prosecute his suit and, if he is entitled, obtain his reparations through the judicial process.

(c) Orders

Consequently, I must determine the 1st defendant's Notice of Motion of 3rd June, 2004 against them and in favour of the plaintiff/respondent. I will order as follows:

(i) the prayer that the plaintiff's suit be stayed and the matter referred to arbitration, is refused;

(ii) the 1st defendant shall bear the costs of this application in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the 1st Defendant/Applicant: Mr. Akide, instructed by M/s. Akide & Co. Advocates

For the Plaintiff/Respondent: Mr. Chacha, instructed by M/s. Chacha Mwita & Co. Advocates.