



**Ngugi v Wachira Wambugu & Co Advocates (Miscellaneous Application E381 of 2022)
[2023] KEHC 1684 (KLR) (Commercial and Tax) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E381 OF 2022**

PN GICHOHI, J

MARCH 1, 2023

BETWEEN

MONICA WANJIRU NGUGI APPLICANT

AND

WACHIRA WAMBUGU & CO ADVOCATES RESPONDENT

RULING

1. The Applicant herein has through the firm of Munyithya, Mutugi, Umara, Muzna & Co Advocates filed a Chamber Summons dated May 5, 2022 under Section 60 (1) (b), & (11), 39 of the Advocates Act 2010, Sec 1A, 1B, 3A, 26, 27 and 63 (e) of the Civil Procedure Act. She seeks orders that:-
 1. The court does adopt as an order of the court, the judgment given by the Advocates Disciplinary Tribunal (hereafter referred to as the Tribunal) on October 27, 2014.
 2. Interest together with interest be awarded to her at court rates from the date of filing the complainant until payment in full.
 3. A decree does issue for the sum of Ksh 27,484, 708/- less the amount paid by the Respondent, plus interest as prayed in order 2 above.
 4. The Applicant be granted costs and expenses that are incidental to the order and execution of this application.
2. The grounds on the face of the application are that the Applicant filed a complaint against the Respondent on May 9, 2013 and a plea was taken on June 17, 2013. On October 27, 2014, the Tribunal delivered its judgment against the Respondent and ordered him to pay the Applicant Ksh 27,484,708/-.



3. That since then, the Respondent has been filing a series of applications in High Court seeking various orders including stay of execution of the Tribunal but all the applications were dismissed. Thereafter, the Tribunal gave an order of execution to recover the money the Respondent had been told to pay. She states that since no application for setting aside of the judgment by the Tribunal has been successful but efforts to recover the money owed by the Respondent have not borne any fruit hence this application.
4. In her affidavit in support sworn on May 5, 2022, the Applicant has annexed documents including judgment by the Tribunal dated October 27, 2014 and rulings delivered by High Court on applications filed by Respondent herein.
5. In his response, the Respondent filed a Notice of Preliminary Objection dated September 16, 2022 on the ground that the Application dated March 8, 2022 falls short of the doctrine of *Res sub judice* for reasons that the issues being raised in this application with respect to the judgment by the Tribunal are the same issues that gave rise to Nairobi High Court Civil Appeal No E 389 of 2022 which is still pending. He therefore says that there is no purpose of hearing this application as it may lead to parallel judgments by multiple fora to the detriment of the Respondent.
6. Lastly, he urges the court to dismiss this suit for reasons that the application was filed in total disregard of the above suit, He therefore states that application is bad in law, misconceived and does not disclose reasonable cause of action and therefore defective, abuse of the court process.

Submissions

7. In submissions dated December 10, 2022 filed by the form of Wacira Wambugu & Co Advocates , the Respondent has farmed three issues for determination , that is :-
 1. Whether the claim is *res-sub judice*
 2. Whether the application is an abuse of court process.
 3. Who should bear the costs of the application.
8. On the issue of *res- sub judice*, counsel cites the case of *Republic v Registrar of Societies v Kenya & 2 Others Ex-parte Moses Kirima & 2 Others* [2017]eKLR on the prequalification of raising the said doctrine and that several courts have severally quashed suits and applications that offend this principle. He submits that the appeal Nairobi High Court Civil Appeal No 389 of 2022 that is pending in High Court arose out of the Tribunal's Case No 79 2013 concerning both parties and the same subject matter and orders. He therefore submits that the suit should be heard first.
9. On the second issue and while citing the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* (2009)eKLR where the Court of Appeal addressed the term abuse of court process, counsel submits that the suit is an abuse of court process and that the path chosen is waste the court's time, subject the Respondent to multiplicity of litigation on the same issues thus killing the essence of justice. Terming the suit oppressive to the Defendant, counsel the suit is meant to occasion burden on the Respondent . He urges the court to dismiss the application.
10. On the issue of costs, counsel submits that costs follow the event and urges the court to exercise its discretion in his favour as against the Plaintiff.
11. In their submissions dated December 5, 2022, counsel for the Applicant has given the history of the matter and the various applications that have been filed as stated in the affidavit in support of the Application herein and their outcome. He submits that the Preliminary Objection has no merit and



should be dismissed with costs for reasons that the points raised by the Respondent do not relate to the judgment of the Tribunal that the Applicant seeks to enforce.

12. He further submits that the Respondent had an opportunity to appeal against the said judgment but has not done so to date which is eight years after it was delivered. Further, counsel submits that the Respondent has disobeyed all other orders of the same Tribunal and therefore, the court should not exercise discretion in his favour. He therefore urges the court to allow the Application for enforcement of the judgment as prayed by the Applicant.

Determination

13. After hearing the parties on the document, they have filed in court, it is clear that this matter has had a long history as stated by the Applicant. The Respondent did not file a replying affidavit to the averments raised by the Applicant on the face of the application and in her supporting affidavit. It is important to start with the Preliminary Objection filed by the Respondent as his response to the application dated May 8, 2022.

14. A Preliminary Objection is one based on a point of law where facts are not in dispute. It would not be sustainable if the court would be called upon to make enquiries into fact of the matter. While laying down the principles as to what constitutes a Preliminary Objection, the Court of Appeal in *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* (1969) EA 696 stated: -

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. The Preliminary Objection herein is purely on the doctrine of sub judice and the Respondent aptly quotes the definition as per *Black's Law Dictionary* 9th Edition as to mean “-‘before a court for determination’”. The issue then is whether the issues raised in this application are issues pending determination before another court.

16. The Respondent does not dispute that a judgment was delivered by the Tribunal over the complaint raised against him by the Claimant (Applicant) in Cause No 79 of 2013. In that judgment annexed by the Applicant herein, the Respondent was found convicted on October 27, 2014 of;

- a. Failure to render an account of the funds held by him on behalf of the estate of John Mbugua Ngigi.
- b. Unlawfully withholding the aforesaid estate’s funds in the sum of 27,484,708/=.
- c. Failure to honour an order of this Tribunal.

The judgment thereof was as follows:-

“The Respondent is consequently ordered to pay the sum of Ksh 27,484, 708/= to the complainant within 14 (fourteen) days from the day of this judgment. In default execution to issue immediately against him.”

17. From the history herein which the Respondent does not challenge, he had filed Nairobi High Court Misc. Application No 161 of 2015 and Nairobi High Court Misc Application No 131 of 2020. In Misc Application No 161 of 2015 , the Respondent was seeking to quash the Judgment and execution



respectively of the dated October 27, 2013 in Disciplinary Cause No 79 of 2013 but that application was heard and dismissed by G V Odunga J (as he then was) on July 2, 2015. In Nairobi High Court Misc Application No 131 of 2020, the Respondent was challenging the Tribunal's order that he deposits Ksh 11,900,000/= with the Law Society of Kenya but it was dismissed for lack of merit.

18. In High Court Civil Appeal No E 20 for 2021, the Respondent filed application for leave to file appeal out of time against the Tribunal's rulings issued on June 15, 2020 and July 20, 2020 in Disciplinary Cause No 79 of 2013 pending the hearing and determination of the intended appeal. In respect of Ruling dated June 15, 2020, the Respondent was given conditional stay to have some Ksh 2,000,000/- deposited in court to be released to Law Society of Kenya with immediate effect. The balance of Ksh 9,900,000/= deposited with Law Society of Kenya within 21 days. In respect of orders of July 20, 2020, the Respondent was granted leave appeal to file within 10 days and failure to comply, the stay orders automatically lapsed.
19. While the Applicant does not dispute been served by the Respondent with the record of appeal in Nairobi High Court Civil Appeal No E398 of 2021, Respondent has not challenged the Applicant's position that the orders of stay pending appeal lapsed. That appeal is in respect of the Tribunal orders of June 15, 2020 and July 20, 2020 in Disciplinary Cause No 79 of 2013 the subject of High Court Civil Appeal No E 20 of 2021 that is, *John Wachira Wambugu v Disciplinary Tribunal of Law Society of Kenya & another* [2021]eKLR, Ong'undi J had this to say about the memorandum of appeal in that ruling;

“From the memorandum off appeal filed herein, it is clear that the applicant is not challenging the which adjudged him to pay Ksh. 27,484,708/=. He does not deny having only paid Ksh. 9,500,000/= of the said sum, despite his alleged calls for reconciliation of accounts the applicant who is an advocate has not told this court how much he has paid in total and which has not been accounted for with proof of receipts and/or other documents. The orders of 15th June 2020 and 20th July 2020 originate from the judgment of 27th October 2014 and the Ruling of 4th February 2019 which have both not been set aside.”

20. That means that the issues in the application before this court are not before court in the appeal in Nairobi High Court Civil Appeal No E398 of 2021. The doctrine of *sub judice* does not apply in this application. The judgment by the Tribunal remains valid to date eight years after delivery. It has not been set aside or appealed against.
21. Regarding abuse of court process, the Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* (2009)eKLR, the had this to say:-

“Again, the Court of Appeal in Abuja, Nigeria in the case of *Attahiro V Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.”

22. The Respondent's allegations that the Applicant is abusing the court process by engaging him in multiplicity of litigation to burden him and waste the court's valuable time do not reflect the conduct of the Applicant at all. On the contrary that description fits the Respondent perfectly as can be



discerned by the history of this matter. He has kept the Applicant busy with endless applications whose fate is seen on record and whose outcome generally depicts his abuse of the court process.

23. Litigation must surely come to an end. The origin of the Applicant's complaint at the Tribunal are funds of an estate of a deceased person. Engaging the Applicant in this kind of litigation is unjust and oppressive as it has clearly denied the Applicant her right to expeditious realisation of the fruits of her Award for over eight years now since the judgement was delivered by the Tribunal. This court will not entertain further delay in this matter and it has jurisdiction to grant the orders sought by the Applicant.
24. In the circumstances the court makes the Respondent's Preliminary dated September 16, 2022 is hereby dismissed with costs. On the other hand, the Applicant's application dated May 5, 2022 is allowed in the following terms;
 1. The judgment given by the Advocates Disciplinary Tribunal on October 27, 2014 be and is hereby adopted as a judgment of this court.
 2. Interest is awarded at court rates from the date of filing the complaint at the Tribunal until payment in full.
 3. A Decree be and is hereby issued for the sum of Ksh 27,484, 708/- less amount so far paid with interest at court rates from the date of filing the complaint at the Tribunal until payment in full.
 4. The Applicant is also awarded costs and expenses incidental to the order and execution of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 1ST DAY OF MARCH , 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

M/s Jin for Applicant

Mr. Ombiri for the Respondent

Kevin Isindu Court Assistant

