



REPUBLIC OF KENYA



Wambugu v Disciplinary Tribunal of the Law Society of Kenya & another (Civil Appeal E398 of 2021) [2023] KEHC 18642 (KLR) (Civ) (8 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18642 (KLR)

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

CIVIL

CIVIL APPEAL E398 OF 2021

JN MULWA, J

JUNE 8, 2023

BETWEEN

JOHN WACIRA WAMBUGU APPELLANT

AND

**DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF
KENYA 1ST RESPONDENT**

MONICA WANJIKU NGUGI 2ND RESPONDENT

RULING

1. Sometime in January 2021, the Applicant moved this court in Civil Appeal No E020 of 2021 vide a Notice of Motion dated 18/1/2021 seeking leave to file an appeal out of time against two of the 1st Respondent's Rulings delivered on 15/6/2020 and 20/7/2020. Later on, he filed a second Notice of Motion dated 23/2/2021 in the same matter seeking an order for stay of the orders issued on 15/2/2021 by the 1st Respondent in Disciplinary Tribunal Cause No 79 of 2013, pending the hearing of the intended appeal.
2. Vide a Ruling delivered therein on June 30, 2021, Ongudi J allowed the application dated 18/1/2021 and granted the Appellant leave to file an appeal against the 1st Respondent's order of 20/7/2020 only. The learned judge also allowed the application dated 23/2/2021 and stayed the 1st Respondent's Order of 15/2/2021 on the following conditions:
 - "i. The Kshs 2,000,000/= already deposited in court in compliance with the court orders of February 24, 2021 to be released to the Law Society of Kenya with immediate effect.
 - ii. The balance of Kshs 9,900,000/= to be deposited with LSK within 21 days.



- iii. Failure to comply will automatically lapse the order of stay of execution.
 - iv. The Law Society of Kenya not to release the funds before the determination of the appeal.
 - v. Costs in cause.
 - vi. When the appeal is finally filed let it be heard by any other judge in the division.”
3. Subsequently, the Appellant lodged his appeal herein vide a Memorandum of Appeal dated 8/7/2021. Nine months later, he filed the instant application which is a Notice of Motion dated April 12, 2022 through which he seeks the followings Orders:
1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to issue a temporary injunction restraining the 2nd Respondent herein by herself, advocates, auctioneers, employees, agents and others acting through him from executing Order number 1 of the 1st Respondent dated February 15, 2021 pending the hearing and determination of this Appeal.
 4. That the appellant herein be ordered to deposit a bank guarantee of Kshs 9,900,000/- in court.
 5. That the costs of this application be provided for.
 6. Any other prayers the Honourable Court deems just and equitable to issue.
4. The Application is purportedly brought pursuant to Section 59 of the [Advocates Act](#), Rule 3 of the [Advocates \(Disciplinary Committee\) Rules 1990](#), Sections 1A, 1B, 3, 3A, and 63 (c) of the [Civil Procedure Act](#), Order 40 Rule 1 (a) & (b) and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#).
5. The Application is supported by the Appellant’s Affidavit. It is based on the grounds that the Appellant released the sum of Kshs 2,000,000/- to the Law Society of Kenya as ordered. However, the stay order issued by this court on 30/6/2021 has since lapsed, as he was unable to deposit the sum of Kshs 9,900,000 /- with the LSK as ordered given that he has been out of gainful employment since being struck off the Roll of Advocates on 20/7/2020. Further, the Appellant avers that Disciplinary Tribunal Cause Number 79 of 2013 came up for mention on April 4, 2022 whereupon the Advocates of the 2nd Respondent confirmed that they are in the process of applying for warrants of attachments to commence the execution of the 1st Respondent’s orders of February 15, 2021. He contends that if execution proceeds, the 2nd Respondent shall have unjustly enriched herself as she will receive monies already released to her as detailed in the annexed statement of accounts since the order was made without verification of the amount of money that is in dispute.
6. In addition, the Appellant avers that he is apprehensive that if he deposits the Kshs 11,900,000/- as per the order of 15/2/2021, the 1st Respondent will release the said sum of money to the 2nd Respondent since the stay orders issued by this court lapsed. He is further apprehensive that the 2nd Respondent might not be able to reimburse the money released to her by the 1st Respondent if it is discovered that he did not misappropriate the alleged money upon verification of the statement of accounts.



7. The Application was opposed through a Replying Affidavit sworn by Monica Wanjiku Ngugi, the 2nd Respondent herein. She averred that the application is frivolous, vexatious and an abuse of the court process. She stated that the issue of accounts was heard and determined on merit by the 1st Respondent and thus the Appellant cannot claim that the decision of the Tribunal was informed by bare allegations. It was also the 2nd Respondent's contention that the Appellant does not deserve audience before this honourable court because he failed to fully comply with the orders issued on June 30, 2021.
8. The Application was canvassed through written submissions which the court has carefully considered alongside the orders sought and the parties respective Affidavits in support and in opposition of the Application. The only issue that falls for determination is whether the Applicant has satisfied the test for grant of an order of temporary injunction pending appeal.
9. This court's jurisdiction to grant a temporary injunction pending the hearing and determination of an appeal emanates from Order 42 Rule 6 (6) of the *Civil Procedure Rules* which provides thus: -

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”
10. From the above provision, it is clear that the power to grant an injunction pending appeal is discretionary and such discretion must be exercised judiciously on the basis of law and evidence. Justice Visram (as he then was) distilled the applicable principles for the grant of injunction pending appeal in *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR as follows:
 - a. An order of injunction pending appeal is a discretionary one which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict greater hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”
11. In the *locus classicus* case of *Giella v Cassman Brown* [*supra*], the court set out the conditions necessary for the grant of interlocutory injunctions as follows:

“First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience.”



12. Has the Appellant established has a prima facie case with chances of success? what constitutes a prima facie case was determined by the Court of Appeal in the case of *Mrao Limited V First American Bank of Kenya and 2 Others* [2003] eKLR as follows:
- “In civil cases, it is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...
- ...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
13. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal stated that:
- “The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”
14. The determination of whether the Appellant has a prima facie case with chances of success in the present application calls for a consideration of the prospects of success of the pending appeal since the ultimate objective is to safeguard the rights of the Appellant in the appeal by maintaining the status quo, if need be. See Mwita J in *Bilha Mideva Buluku v Everlyne Kanyere* [2016] eKLR. From the Memorandum of Appeal filed herein, it can be deduced that the Appellant is aggrieved that the 1st Respondent struck him off the Roll of Advocates before conducting an audit and/ or reconciliation of accounts as per its order of 4/2/2019 to determine the amount payable to the 2nd Respondent, if any.
15. From the 1st Respondent’s proceedings of 4/2/2019, parties were ordered to take accounts and appear before the Tribunal with confirmed figures on 15/4/2019. The Applicant claims to have presented the annexed statement of accounts marked “JWW 3” to the 1st Respondent in compliance with the said Order. However, it is impossible to tell whether that statement of accounts was indeed presented to the 1st Respondent as claimed as it does not have any proof of having been received by or filed with the 1st Respondent. Further and in any event, not even a copy of the so-called Statement of Accounts is included in the Record of Appeal. In addition, the Appellant complains that the Order was made despite the fact that the 2nd Respondent did not present her accounts in compliance with the Order. However, the court’s perusal of the proceedings of the Tribunal reveals that at no point did the Appellant complain of the 2nd Respondent’s alleged failure to present her own Statement of Accounts. Moreover and without delving further into the merits of the Appeal, it is clear that the order to strike him off the Roll was informed by other reasons that are not related to reconciliation of accounts. In the premises, the court finds that the Appellant has not demonstrated a prima facie case with probabilities of success.
16. Similarly, the Appellant has not demonstrated that he will suffer irreparable damage or that the appeal would be rendered nugatory if a temporary injunction is denied. The amount of money that is the subject of the intended execution is quantifiable and thus damages can be an adequate remedy. Further, he has admittedly not complied with the court’s order of 30/6/2021 that required him to deposit



a percentage of the executable amount with the Law Society of Kenya and has not shown that the Respondents would be unable to compensate him.

17. It is also noteworthy that the Appellant has not approached the court with clean hands as he went into slumber upon failing to comply with this court's orders only to be woken up by the 2nd Respondent's attempt to proceed with execution in the absence of stay orders. Additionally, the Appellant's offer to deposit a bank guarantee of Kshs 9,900,000/- in court as a condition for the grant of the temporary injunction is not supported by any evidence. He did not annex the purported draft bank guarantee to his Affidavit and neither has he shown any efforts made towards obtaining the same.
18. For the foregoing therefore, the court has no doubt that the balance of convenience tilts against the Appellant. Granting the injunction sought will no doubt occasion a greater inconvenience to the 2nd Respondent as she will continue to be kept away from monies that were determined to be undisputedly owed by the Appellant.
19. Consequently, the court finds that the Appellant's Notice of Motion dated April 12, 2022 lacks merit and is hereby dismissed with costs to the 2nd Respondent only since the 1st Respondent did not participate in these proceedings.
20. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 8TH DAY OF JUNE 2023.

JANET MULWA

JUDGE

