



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTA AT KISII

CIVIL APPEAL NO 95 OF 2015

MOHAMMED SALIM KHAN T/A

M/S KHAN & ASSOCIATES, ADVOCATES.....APPELLANT

VERSUS

JOANES YOYA.....1ST RESPONDENT

LAW SOCIETY OF KENYA.....2ND RESPONDENT

JUDGMENT

1. This dispute arose as a result of the disagreement between an advocate (appellant) and the 1st respondent who was his client. The dispute was initially presented to the Complaint's Commission and later tabled before the Disciplinary Committee.
2. The Disciplinary Committee upon considering the complaint entered judgment in favor of the 1st respondent. The appellant was admonished and ordered to pay a fine of Kshs 40,000/-, costs of Kshs 10,000 to the 2nd respondent and Kshs 15,000/- to the 1st respondent.
3. The Appellant being dissatisfied with the above decision has now moved this Court through a Memorandum of Appeal dated 13th August 2015. The memorandum of Appeal has raised 15 grounds of appeal.

BACKGROUND

4. A brief background of the appeal is that on 25th July 1995 the Appellant while in the company of his wife Elsa Aoko Gumbo were involved in a road traffic accident. They sought the services of the appellant to pursue the accident claim. They were examined by a private doctor on 4th May 1995 within the appellant's chambers. On 3rd December 1996 William Odhiambo informed them that the appellant was in the process of taking a hearing date. The 1st respondent claimed that he never got any further communication from the appellant prompting him to file a complaint at the Advocates Complaint's Commission. He had also sought assistance from M/s Nyairo & Co. Advocates in an attempt to find out status of his case. He was informed by the Advocates Complaints Commission that his pleadings were filed without payment of court fees.
5. According to the respondent, the parties had mutually agreed that M/s Khan & Associates would pursue the case on his behalf and on receipt of the compensation sum from the owners of the matatu, the appellant would deduct one third of the total amount plus costs of their fees.
6. He claims that the appellant's failure to inform him of the progress and true status of the claim led to the loss of his case as the appellant failed to advise him to pay court fees. The 1st respondent also alleged that the appellant refused to file his bill of costs and release his original file thus curtailing his bid to instruct another advocate to pursue his claim.
7. The appellant on the other hand maintained that the 1st respondent was at all times informed of the progress in his claim. They contend that the 1st respondent thereafter made a complaint to the Advocates Complaints Commission and instructed the firm of M/S Roseline Odede and Company Advocates to take over the matter. He submitted that the 1st respondent gave the impression that the appellant had received monies on his behalf which happened to be false. They Submitted that the 1st respondent was asked to pay court fees but neglected to do so and subsequently his office was constrained to file a plaint without court filing fees to beat the limitation period as per the Limitation of Actions Act. His office ceased to act for the 1st respondent when he failed to pay the requisite court filing fees.
8. On their fees, they advance that they prepared a bill of costs and sent it to the 1st respondent's address.

SUBMISSIONS

9. When the appeal came up for hearing parties were directed to file written submissions.
10. The appellant in its submission argued that the 1st respondent was required to pay filing fees but the tribunal shifted the duty to the appellant. It was submitted that the advocate ought not to have been convicted on a wrong he did not commit. They also submitted that since the Advocates Complaint's Commission did not find any merit in the initial complaint by the 1st respondent, the 2nd respondent had no sufficient materials to convict the appellant.
11. The respondents filed their submission and argued that the appellant failed to carry out and execute the instructions by the 1st respondent and thus the conviction was based on the failure to carry out instructions. The appellant did not advise the 1st respondent of the need to pay any fees either on account of professional fees or disbursement.
12. The appellant in obtaining the police abstract and medical report signaled that it was ready to prosecute and lodge the intended claim. The respondents noted that the accident occurred on 25th July 1995 and that the intended claim would be due for filing latest, by 24th July 1998. The issue of non-payment of fees was raised long after the statutory period had lapsed. They cited the case of **South Nyanza Sugar Company Limited v Samwel Osewe Ochillo P/A Ochillo & Company Advocates [2007] eKLR** in support of its case.
13. It was advanced that the appellant had original documents which had been procured on behalf of the 1st respondent. They urged court to consider that the appellant was rightly found to have been guilty of professional misconduct and convicted appropriately.
14. The respondent's submissions led to the filing of further submissions by the appellant and in their submissions it cited the case of **Kenya Commercial Bank v James Osebe, (1992-88) 1KAR**.

ANALYSIS AND DETERMINATION

15. I have considered the grounds of appeal, the evidence adduced in the form of affidavits and the submissions filed on behalf of the parties herein.
16. In this appeal, the only issue for consideration is whether the appellant exhibited unprofessional conduct as alleged by the 1st respondent. If so, whether the sentence by the disciplinary committee was appropriate.
17. From the 1st respondent's complaint is evident at paragraph 15-17 of his affidavit filed at the Disciplinary Committee on 9th September 2013 where he deposed that;
- “15. THAT he thus not only failed to inform me on the progress but also misinformed me on the true status of my claim.*
- 16. THAT also deliberately led to the loss of my case for failure to pay court fees (which he nevertheless undertook to pay and recover thereafter) thus rendering my whole claim time barred).*
- 17. THAT he similarly refused to file his bill of costs and/or release my original file thus curtailing my bid to instruct another advocate to pursue my claim.”*
18. It is common ground that the appellant received instructions to act for the 1st respondent as well as his wife and pursue the road traffic accident claim. The appellant through their letter dated 4th May 1995 informed the 1st respondent that he should avail himself for examination so that a medical legal report could be prepared. The 1st respondent was assured that his claim was progressing well. On 3rd December 1996 the 1st respondent was then notified that the appellant was yet to set a hearing date and as soon as that was done, they would notify the 1st respondent.
19. The 1st respondent through the firm of Roseline Odede & Co Advocates on the belief that the claim had been settled sought compensation from United Insurance Company Ltd.
20. The 1st respondent then referred the dispute to the Complaint's Commission. The appellant was informed of the complaint by the commission but the appellant denied the assertions made by the 1st respondent in their letter dated 10th March 1998.
21. Although the appellant withdrew his instructions on 18th June 1999, at this point his claim was already statute barred. Notably, after the instructions were withdrawn and the claim lapsed, the appellant purported to request Kshs 5,000/- from the 1st respondent to be utilized towards court fees. The appellant through its letter to the commission dated 19th February 2007 took the position that no suit had been filed as no court file was opened. In its letter it stated;
- “Please note that in an attempt to defeat the limitations of Actions Act, which prohibits filing of suits based on tort after 3 years, subsequently, we registered the suit but because no court fees has been paid, the documents were rejected by the court, hence no suit really exists as no court file was opened.”*
22. In **Law Society of Upper Canada v. Ghobrial, 2015 ONLSTH 225 (CanLII)**, it was held as follows;

“... The Lawyer deliberately misled his client.

[258]To compound the failure to serve his client and misleading her, the Lawyer did not appear for his client on October 16, 2013.

...

[272] The often cited decision of Bolton v. Law Society, [1993] EWCA Civ 32 at paras. 13-16 is of direct application in this case, as the seminal statement of principle concerning penalty in lawyer discipline cases.

It is required of lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness...

Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.....

...In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence..... The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission..... A profession's most valuable asset is its collective reputation and the confidence which that inspires.

... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.

23. In this instant case the appellant on two occasion misled the 1st respondent that his claim was ‘progressing very well’ and that they were to ‘set a hearing date’, but in the reality, the documents had been rejected by the court and no suit really existed.

24. In **Mombasa Cement Limited v Speaker, National Assembly & another [2018] eKLR** the court stated;

“26. The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case.

27. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent...”

25. In this case while payment of fees is a duty that falls on the 1st respondent. However, the appellant’s failure to request for disbursement to cover filing fees and continuously assuring the 1st respondent that the suit progressing well and would be soon set down for hearing amounted to deliberate misleading of his client, the 1st respondent. The effect of such misinformation led to the failure to file the suit before lapse of the limitation period under **section 4 of the Limitation of Actions Act**.

26. In the end, I find no error with the finding of the Disciplinary Committee’s and it subsequent sentence made against the appellant. The appeal is thus lacking in merit and is hereby dismissed. The respondents shall have the costs of the appeal.

Dated, signed and delivered at KISII this 4th day of March, 2021.

R. E. OUGO

JUDGE

In the presence of;

Appellant Absent

Mr. Kipngetich For the Respondent

M/s Rael Court Assistant