REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 583 OF 2018

NELSON HEZRON OUNDU.....APPELLANT

-VERSUS-

PHILIP OGETO.....RESPONDENT

(Being an appeal from the ruling and order of the Advocates

Disciplinary Tribunal delivered on 12th November, 2018 in

Advocates Disciplinary Tribunal Cause No. 58 of 2016)

JUDGEMENT

1. A brief background of the matter is that the appellant who is an Advocate of the High Court of Kenya, represented the respondent in a criminal case, namely **Anti-corruption Case No. 35 of 2006 (Republic v Philip Ogeto & Another)** which case was later withdrawn by the prosecution.

2. It is alleged that thereafter, the respondent instructed the appellant to institute a malicious prosecution claim on his behalf and which claim was allegedly settled in the sum of Kshs.3,300,000/= received by the appellant on behalf of the respondent.

3. It is further alleged that the appellant did not pay the abovementioned sum to the respondent despite several requests for him to do so.

4. The above circumstances led the respondent who was the complainant before the Advocates Disciplinary Tribunal ("the Tribunal") to institute a complaint against the appellant and a third party in **the Advocates Disciplinary Tribunal Cause No. 58 of 2016** for withholding funds and for failure to account for the sum of Kshs.3,300,000/=.

5. The appellant filed a replying affidavit to oppose the respondent's complaint, to which the respondent rejoined with a further affidavit.

6. Upon hearing the parties, the Tribunal vide its judgment delivered on 12th June, 2017 found the appellant guilty of professional misconduct and convicted him accordingly.

7. The above was followed by sentencing which took place on 22nd January, 2018 whereby the appellant was ordered *inter alia*, to pay to the respondent the sum of Kshs.3,300,000/= plus interest of 12% p.a. with effect from 24th December, 2014 within 60 days, failing which the appellant would be suspended from practicing law for a period of one (1) year; and further ordered to pay a fine of Kshs.100,000/ and costs in the sum of Kshs.50,000/ within 60 days from the aforementioned date.

8. The complaint against the third party was dismissed and she was discharged accordingly.

9. Subsequently, the appellant filed the application dated 6th June, 2018 and sought for an order for review of the orders made by the Tribunal on 22nd January, 2018.

10. To oppose the application, the respondent swore a replying affidavit.

11. Upon hearing the parties, the Tribunal dismissed the application for review with no order as to costs, in its ruling delivered on 12th November, 2018.

12. Being dissatisfied with the aforesaid ruling, the appellant has sought to challenge the same in the instant appeal vide the memorandum of appeal dated 10th December, 2018 and has put forward the following grounds of appeal:

> ***i. THAT the Honourable Tribunal erred in law and fact in holding that there was settlement in regards to a malicious prosecution case against Kenya Revenue Authority.***
>
> ***ii. THAT the Honourable Tribunal erred in law and fact in holding that the appellant had received and withheld Kshs.3,300,000/ belonging to the respondent herein.***
>
> ***iii. THAT the Honourable Tribunal erred in law and fact in shifting the burden of proof to the appellant herein.***
>
> ***iv. THAT the Honourable Tribunal erred in law and fact in holding that the appellant had issued a Kshs.3,300,000/ cheque to the respondent as his legal obligation to his client.***
>
> ***v. THAT the Honourable Tribunal erred in law and fact by failing to exercise its discretion judicially.***
>
> ***vi. THAT the Honourable Tribunal erred in law and fact in holding that the application for review lacked merit.***
>
> ***vii. THAT the Honourable Tribunal erred in law and fact by not applying the law on review correctly.***

13. In response, the respondent filed a reply to the memorandum of appeal dated 13th March, 2019.

14. Subsequently, this court gave directions that the appeal be canvassed by written submissions. In his submissions dated 7th December, 2020 the appellant argues that the differences that have arisen between the parties herein are of a personal nature and that the claim by the respondent that the sum of Kshs.3,300,000/= was paid by the Kenya Revenue Authority (KRA) as a settlement arising out of a malicious prosecution claim is purely false.

15. According to the appellant, a cheque for the above sum issued by himself to the respondent was purely a means to calm a nasty argument that had ensued between the wives of the parties, and was never intended to actually be banked or cashed in.

16. The appellant further argues that following delivery of the judgment and impugned ruling, he discovered upon enquiry that no such case for malicious prosecution had been filed, where a settlement was made out of court. The appellant is therefore of the view that the Tribunal erred in declining to review its earlier orders on the grounds of discovery of new and important evidence.

17. To support his submissions, the appellant relied on inter alia, the case of **Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR** in which the court reviewed and set aside an earlier order on grounds of error apparent on the face of the record.

18. In his reply submissions dated 6th January, 2021 the respondent who agreed fully with the findings of the Tribunal, contends that the Tribunal correctly found that the issue of compensation for malicious prosecution did not necessarily depend on whether a suit was filed or not, since the appellant informed the respondent that the matter was settled out of court and hence he did not have to attend court for the hearing of the matter.

19. The respondent further contends that it is on that basis that the appellant issued him with the relevant cheque for the sum of Kshs.3,300,000/=, and that the appellant has failed to demonstrate any other reasons that would warrant the issuance of such cheque.

20. It is the submission of the respondent that the Tribunal had exhaustively addressed the issue touching on any settlements made by KRA in respect to the malicious prosecution claim and that the letter written by the official from KRA was not conclusive evidence of the absence of such settlement.

21. The respondent is also of the view that it is strange that the appellant is claiming the non-existence of any payments made to him on behalf of the respondent and yet he was aware of the accusations made against him in the Tribunal case, at all material times.

22. According to the respondent, the application for review was a mere afterthought and hence the appeal is wanting of merit and is deserving of a dismissal.

23. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal lies principally against the decision by the Tribunal dismissing the appellant's application seeking a review of its earlier orders. I will therefore deal with the four (7) grounds of appeal under the two (2) limbs below.

24. The *first* and foremost limb on appeal has to do with whether the Tribunal correctly applied the law on review in respect to the grounds brought forward by the appellant.

25. In his application for review, the appellant stated that the cheque for the sum of Kshs.3,300,000/= was issued to the respondent under personal circumstances, namely in the course of personal differences that ensued between his family and that of the respondent.

26. The appellant further stated that the respondent neither instructed him to file any civil suit for malicious prosecution, nor paid any instruction fees in that regard.

27. It was also stated by the appellant that the above was confirmed through his visit to KRA and Milimani Commercial Courts, where he came to learn that no such case was ever filed or settlement arrived at.

28. The appellant further denied withholding any funds belonging to the respondent.

29. In his reply, the respondent stated that the appellant was his legal representative at all material times, during which times he lacked capacity to practice law for failure to take up practicing certificates in the years between 2009 and 2016.

30. The respondent similarly stated that if at all the appellant did not receive any funds from KRA as settlement for any civil claims, he ought to have raised this issue with the Tribunal at the onset, and that the documents annexed to his application do not constitute conclusive evidence of the absence of payments made on account of the respondent.

31. It was also the assertion of the respondent that the appellant has not sufficiently explained his reasons for issuing the cheque and that if at all no such payments had been made to the respondent, then the actions of the appellant completely misled the respondent into thinking a malicious prosecution claim had been filed on his behalf when this was not the case, thereby amounting to professional misconduct.

32. In its ruling, the Tribunal found that the settlement of the respondent's claim for malicious prosecution did not have to arise out of a civil suit filed in court, and hence the arguments by the appellant in this respect could not constitute proper grounds for review.

33. On the subject of the alleged payments by KRA, the Tribunal found that the letter dated 5th June, 2018 from a KRA official did not specifically confirm the absence of any payments by KRA and could therefore not be relied upon conclusively.

34. The Tribunal further found that going by the averments made by the appellant, it is plausible that the purported payments to the respondent could have either been made by KRA or the complainant in the Anti-corruption case (now deceased) or his estate.

35. On the subject of actual issuance of the cheque, the Tribunal held that if at all the appellant issued the cheque to the respondent under duress or coercion, he ought to have reported the matter to the authorities but there is no indication that he did; thereby making the cheque binding and enforceable.

36. Similarly, the Tribunal held that by holding himself out as an advocate qualified to practice law in the absence of valid practicing certificates, the appellant committed a grave offence and discredited himself.

37. In conclusion, the Tribunal found that an advocate cannot issue a cheque for such a large amount in favour of a client, without the existence of a legal obligation for payment and hence in the present instance, the appellant is duty bound to remit the sum of Kshs.3,300,000/= to the respondent.

38. The Tribunal found that the appellant had not satisfied any of the legal grounds to warrant a review of its earlier orders, further noting that there was an inordinate delay in bringing the application.

39. It is clear that the application which was before the Tribunal concerned itself with an order for review and was brought under the provisions of **Order 45, Rule 1(1)** of the **Civil Procedure Rules, 2010** and **Section 80** of the **Civil Procedure Act Cap. 21 Laws of Kenya** stipulating that:

> ***"Any person considering himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."***

40. The principles/grounds upon which an order for review can be granted are as follows:

> ***a) the discovery of new and important matter or evidence, or***
>
> ***b) some mistake or error apparent on the face of the record, or***
>
> ***c) any other sufficient reason.***

41. On the issue of delay, upon my perusal of the record, I note that the application was filed close to six (6) months following the order of sentencing which was the basis of the review. Contrary to the averments of the Tribunal that there was an unreasonable delay in bringing the application, I find that the delay was not inordinate since it was essentially against the sentencing order and not specifically against the judgment.

42. On the merits of the application, from my perusal of the record, it is apparent that the appellant approached the Tribunal under the three (3) grounds for review provided for.

43. Under the first ground of error apparent on the face of the record, the appellant argues that the error arose from the finding of the Tribunal that the appellant had withheld the respondent's funds.

44. What amounts to an error apparent on the face of the record was explored by the Court of Appeal in the case of **Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243** as cited in the case of **Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR** in the appellant's submissions, thus:

> ***"In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is***

certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

45. From my re-examination of the averments and exhibits availed to the Tribunal, I am of the view that the issue of whether the appellant truly withheld the funds which the respondent was entitled to does not constitute a ground for review though it may apply as a ground of appeal.

46. The mere fact that the appellant does not agree with the finding of the Tribunal on the above subject does not amount to an error apparent on the face of the record within the definition of the term. The appellant, in my view, did not demonstrate the manner in which the finding of the Tribunal constituted an apparent error requiring a review.

47. The appellant also approached the court under the ground of new and important evidence on account of the letter dated 5th June, 2018 from KRA and the purported visits by the appellant to Milimani Commercial Courts.

48. An answer into what constitutes new and important evidence can be found in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** thus:

"For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."

49. The court further borrowed from the following reasoning by the Supreme Court of India in the case of **Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608**:

"the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made."

50. From my study of the application for review and re-examination of the exhibits annexed thereto, I have not come across anything to suggest that the information relied upon was not within the knowledge of the appellant or that he was unable to obtain, produce or attach those exhibits prior to the ruling or the judgment for that matter.

51. It is apparent from the record that the issues associated with the purported funds and existence or lack thereof of a malicious prosecution claim ought to have been within the knowledge of the appellant but there is nothing to show that he sought confirmation at the earliest opportunity.

52. Consequently, I am not convinced that the ground of discovery of new and important evidence has been satisfied in the present instance.

53. This leaves me with the ground of sufficient reason. Upon my study of the record, it is not in dispute that the appellant and respondent enjoyed an advocate-client relationship at all material times. It is also not in dispute that the appellant represented the respondent in the Anti-corruption case, which was later withdrawn.

54. Further to the above, the appellant is not denying in his evidence that he issued a cheque to the respondent in the sum of Kshs.3,300,000/= a copy of which was availed to the Tribunal.

55. The key issues for determination on appeal revolve around the existence and settlement of the malicious prosecution claim; the cheque issued to the respondent; and the professional standing of the appellant.

56. Concerning the malicious prosecution claim, I note that no credible evidence was adduced before the Tribunal to confirm its existence or to ascertain the instructions given by the respondent to the appellant to file the same.

57. I concur with the Tribunal that whereas the letter from KRA indicates that no such claim was filed, it does not offer a conclusive position on the subject. In addition, I note that the said letter is referenced: **"Philip Ogeto**

(VAT Domestic Taxes Department) v Nelson Hezron Oundu" which to my mind may have created some confusion regarding any claim made by the respondent against KRA.

58. Suffice it to say that and in respect to the cheque issued by the appellant to the respondent, I find the averments by the respondent to be more plausible than those made by the appellant.

59. Notwithstanding the absence of any evidence to indicate instructions or the existence of a suit, it is more plausible than not that the respondent had instructed the appellant to file a suit on his behalf and that some form of settlement may have been entered into in that respect, resulting in issuance of the cheque.

60. I note that though the appellant was claiming that he issued the cheque in the name of the respondent solely with the intention of calming the stormy relationship between his family and that of the respondent and that the cheque was never intended to be banked, he did not bring any credible evidence to corroborate this position or to show that his decision was driven by some form of duress or coercion by the respondent.

61. In my view and upon considering the fact that the parties herein enjoyed an advocate-client relationship, coupled with the colossal nature of the sum indicated in the cheque, I find it more plausible than not, as the Tribunal did, that the sum was intended to be remitted to the respondent. In any event, the appellant did not offer any reasonable explanation as to why he issued a cheque for such a large sum if he never intended for it to be banked or cashed.

62. Likewise, the record and material tendered on appeal shows that between the years 2009 and 2016 the appellant had not taken out valid practicing certificates. This position was not explicitly denied by the appellant, who explained that he was attending to personal matters, and yet it appears he engaged in legal practice at one point or another during that period.

63. It is clear that failure by the appellant to take out practicing certificates amounted to professional misconduct within the provisions of **Section 34B (1)** of **the Advocates Act Cap. 16 Laws of Kenya** which reads as follows:

> ***"A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct."***

64. For all the foregoing reasons, I support the finding of the Tribunal that the appellant did not satisfy the required threshold to warrant a review of its earlier orders of 22nd January, 2018 arising out of the judgment. Grounds (i), (ii), 9iv), (v), (vi) and (vii) of the appeal cannot stand.

65. The *second* limb on appeal touches on whether the Tribunal correctly applied the burden of proof.

66. The law is clear that the burden of proof lies with he who alleges.

The application in question concerned itself with an order for review. Consequently, the burden of proof rested with the appellant to demonstrate sufficient grounds for review. I have already established that he did not meet the threshold for review.

67. Moreover, upon my perusal of the record and material, I have found nothing to indicate that the Tribunal misapplied the principles surrounding the burden of proof. Since the respondent had brought reasonable evidence to show that the appellant had withheld his funds, the appellant ought to have disproved this position through credible evidence to the contrary but did not. Resultantly, ground (iii) of appeal failed.

68. In the end therefore, the appeal is dismissed with costs. The decision of the Tribunal is upheld.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 12th day of March, 2021.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent