**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION NO. 454 OF 2017**

**JOSEPH AWINO.....APPLICANT**

**VERSUS**

**THE ADVOCATES DISCIPLINARY TRIBUNAL.....1ST RESPONDENT**

**THE LAW SOCIETY OF KENYA.....2NDRESPONDENT**

**RULING**

***Introduction***

1. A brief history of this case is useful so as to bring application dated 8th March 2019, the subject of this ruling into proper perspective. The applicant moved this court on 19th July 2017 seeking leave to institute judicial review proceedings. The leave was granted as sought and the applicant was granted ten days to file and serve the substantive Motion.

2. Despite the clear court order, the applicant filed the substantive application on 29th September 2016, 20 days late. The late filing attracted a preliminary objection from the Respondent's counsel who invited the court to strike off the application for having been filed out of time. In a ruling delivered on 24th October 2017, Odunga J upheld the said objection and struck off the applicant's application for being incompetent.

3. Despite the said ruling, on 11th December 2017, the applicant filed an application seeking for extension of time within which to file the substantive application. Odunga J struck off the said application citing the said ruling and stating that the application was a non-starter.

4. On record is yet another application filed by the applicant dated 30th May 2018 seeking to reinstate orders of stay which were granted in disciplinary tribunal case number 178 of 2015. I is not clear how the applicant expected this court to grant the said order as framed, but, at the ex parte stage and I observed as follows:-

"On 13th December 2017, Odunga J dismissed the applicant's application dated 11thDecember 2017 on grounds that these proceedings were truck off on 24th October2017 and observed that the said application was incompetent since these proceedings had not been reinstated. The applicant now seeks orders that a

stay be granted in terms of paragraph 2 of the Notice of Motion dated 30th May 2018 and that the JR proceedings be reinstated.

Obviously, prayer 2 of the application cannot be granted unless these proceedings are reinstated nor can prayer 3 be granted ex parte. I therefore decline to certify the application as urgent on the grounds that since on 13th December 1917, the applicant did not attempt to apply for reinstatement and was only woken up by the notice to show cause which he has since been served with.

I direct that the application be served for mention on 30th July 2018."

5. However, on 30th July 2018, none of the parties attended court. I directed that the parties do take fresh dates at the registry. On 17th October 2018, a representative from the applicant's advocates firm took a date at the registry for mention on 10th December 2018. However, on the said date, despite taking the said date, the applicant's counsel did not attend court. I noted this suit was dismissed by Odunga J as earlier stated and that since it has never been reinstated, the application dated 30th May 2018 could not be sustained. I therefore dismissed it.

6. On 8th March 2019, the applicant's advocates filed the application the subject of this ruling seeking to reinstate the application dated 30th May 2018 to be heard on merits. The grounds in support of the application are that the said application was dismissed for attendance and not on merits, that, it is fair and just to reinstate the application.

**The arguments**

7. The applicant's counsel argued that the advocate who was handling the matter has in his affidavit explained the reasons for non-attendance in his affidavit. The reasons are that the advocate walked into court after the application had been dismissed, that, the matter was determined without his input, and, that, the applicant has a good case which ought to be heard on merit. Counsel referred to Article 159 (2) (d) of the Constitution which requires courts to determine matters without undue regard to technicalities of procedure. Lastly, counsel admitted his misstate and urged the court to find that the reasons offered are sufficient. He also argued that it is in the interests of justice that the application be allowed.

8. The Respondents counsel submitted that the orders dismissing the suit have never been appealed against and that this suit stands dismissed.

**Determination**

9. I enumerated the history of this case earlier to demonstrate one elementary point, that is, the applicant's suit was dismissed on 24th October 2017. The applicant never appealed against the said ruling. Instead, the applicant, an advocate of this court, continued to file numerous applications on a non - existent suit. What is worrying, is the fact that right from Justice orders striking off the suit made on 24th December 2017 and the order dated 13th December 2017 striking off the applicant's application dated 11th December 2017 to my ruling made on 30th May 2018 when the file was placed before me ex parte and the ruling made on 10th December 2018 dismissing the applicant's application now sought to be reinstated, the court kept on emphasizing that this suit was struck off, and, that, the subsequent applications were incompetent.

10. Even a first year law student would have no difficulty understanding the effect of the orders made on 24th October 2017 and the subsequent pronouncements by the court enumerated above. Viewed from the perspective the history enumerated above and the proper appreciation of the law, I find no difficult concluding that the application the subject of this ruling is an abuse of court process, the same is vexatious and is not brought in good faith.

11. I have severally[1]observed that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[2] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Additionally, abuse of court process arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right.*
>
> ***(d)*** *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> ***(e)*** *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[3]***
>
> ***(f)*** *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> ***(g)*** *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
>
> ***(h)*** *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* ***[4]***

12. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Filing several applications in a non-existent suit amounts to abuse of court/legal process especially so, when the court has kept on reminding the applicant that the subsequent applications are all incompetent.

13. Thus, the multiplicity of applications on the same matter, in the same court, on a matter that was dismissed by the court, and no appeal or review has been preferred is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[5] On this ground alone, the applicant's application cannot be entertained.

14. The applicant states that the application was not determined on merits. Counsel relied on Article 159 of the Constitution and urged the court to allow the reinstatement.

15. First, prayer one of the application sought to be reinstated invites the court to reinstate the stay of proceedings in Advocates Disciplinary Tribunal Case No. 178 of 2015 which were granted to the applicant. No such stay was ever granted in the first place. This alone renders the said prayer incompetent.

16. Second, the applicant seeks to reinstate his application which was dismissed on 24th October 2017. The said ruling has never been appealed against or reviewed. The ruling still stands. There is no application before me seeking to set aside, review or vary the said ruling. There is no basis for the court to grant such an order. Simply put, even the application was heard on merits, the orders could not be available at all. Simply put, the application sought to be reinstated is fatally sick, incompetent and unsustasinable.

17. I have stated severally that Article 159 of the Constitution was not meant to be a panacea to cure all sorts of shortcomings and to open a window for litigants to abuse court process. The applications discussed above including the current application were filed in a nonexistent proceedings since the suit was struck off. Such applications including the instant application are hanging in the air and even merit consideration cannot save them.

18. In view of my above findings, the conclusion becomes irresistible that the applicant's application dated 8th March 2019 is incompetent, unmerited and unstainable. I therefore dismiss the said application with costs to the Respondents.

Orders accordingly.

**Signed, Delivered, Dated at Nairobi this 20th day of November 2019.**

**John M. Mativo**

**Judge**

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[1] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

[2]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[3] *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[4](2007) 16 NWLR (319) 335.

[5] Ibid.