



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 73 OF 2015

STEPHEN OWINO.....APPELLANT

VERSUS

THE ADVOCATES DISCIPLINARY

TRIBUNAL.....RESPONDENT

AND

POWER ENGINEERING

INTERNATION LIMITED.....INTERESTED PARTY

JUDGEMENT

The appellant is an advocate of the High Court of Kenya. He was subjected to disciplinary proceedings before the Advocates Disciplinary Tribunal following a complaint by the interested party herein named as Power Engineering International Limited. Several charges were laid against him to wit;

- a) Breach of trust and dishonest conduct incompatible with the status of an advocate by withholding a sum of Kshs. 1,539,948.88 received by the said advocate to hold in trust for the benefit of the complainant.
- b) Breach of trust and dishonourable conduct, incompatible with the status of an advocate by failing to remit to the complainant the sum of Kshs. 1,539,948.88 held by the advocate in trust for the benefit of the complainant.
- c) Dishonourable conduct and conduct unbecoming of an advocate for deliberately neglecting or refusing to release to the complainant the VAT certificate for Kshs. 254,012.19.
- d) Dishonourable conduct and conduct unbecoming for an advocate for deliberately neglecting and or refusing to release to the complainant the withholding tax certificate for Kshs. 47,627.28.

In addition to the foregoing, the complainant sought orders against the appellant herein for the remittance of the principal sum of Kshs. 1,539,948.88 together with interest from the date of receipt of the said funds by the appellant till payment in full, and delivery of the VAT certificate and tax certificate cited above.

The appellant pleaded not guilty to all those charges upon which the parties filed their affidavits. After hearing the parties the appellant was convicted on counts a), c), and d) set out above. The Tribunal found that, having convicted the appellant on count a), he could not be convicted of count b) as that would be an affront to the principle against double jeopardy because there was no difference between withholding and failing to remit the funds in question. The two counts were found to be duplex.

Following the said conviction, the appellant was ordered to pay the sum claimed by the complainant, in this case the interested party, together with interests at court rates of 14% per annum from 26th March, 2006 until payment in full, and further to release the two certificates cited above. The payment and the release of the said certificate was to be done within 60 days from the date of the judgment and in default execution to issue.

A further mention was given for mitigation and sentence and for any further orders. The appellant was aggrieved by the said judgment and lodged this appeal, the memorandum of which is date 23rd February, 2015.

The thrust of the appeal is that there existed no contractual or fiduciary duty between the appellant and the interested party, to call upon him to account for any money held on behalf of his clients.

Further, the Tribunal was faulted for failing to find that there must exist an advocate/client relationship between the parties for it to make orders of payment to the interested party. In any case, the claim the interested party had against the appellant's client cannot override the legal lien the appellant had as an advocate of his client.

It was also his case in the memorandum of appeal that, he was only accountable to his client, and only his client could make a complaint against him as his advocate. The appellant claimed a solicitor's lien on all funds he held on behalf of his client against the payment of his fees, and therefore cannot become liable to third parties by the mere fact of receipt of the funds. He added that no trust relations arose between him and the interested party, either in the sum stated or at all and in the event, if the interested party had any claims, they should have been directed to PABCO with whom they had a contract.

The Tribunal was also accused of failing to properly frame the issues for consideration, as a result of which it arrived at erroneous conclusions of law and fact and finally it considered matters beyond its jurisdiction.

As the first appellate court it is my duty to reconsider and evaluate the evidence presented before the Tribunal with a view to arriving at independent conclusion. Some facts which stand out and are not in dispute are that the appellant received a sum of Ksh. 36,256,999. through the firm of advocates Inamdar and Inamdar Advocates who were acting for Communication Commission of Kenya (CCK) and who had contracted Pan Africa Building Contractors Limited (PABCO) to carry out some building works. The interested party had been retained by PABCO as a sub-contractor in the project. After the interested party completed its assignment, a dispute arose between PABCO and CCK. This led to the filing of HCCC No. 305 of 2006 between PABCO as the plaintiff and CCK as the defendant.

This suit was settled leading to the payment of the above sum to the appellant. It then transpired that PABCO was indebted to the appellant in the sum of Kshs. 31,258,565 on account of unpaid fees. The appellant retained the said sum. The interested party then brought the claim of Kshs. 1,539,948.88 which was owed to it by PABCO, together with a demand for the certificates cited herein above.

In the proceedings, the appellant took the position that he was entitled to a lien over the funds received on behalf of PABCO. Further, he had never dealt with the interested party and there was no privity of any kind, neither did he owe them any duty. If at all, then the interested party should follow PABCO not the appellant.

It is true that as a general rule the terms of a contract affect only the parties thereto and cannot be extended or enforced by or against a party who is not in that arrangement. – see **Agricultural Finance Corporation vs Lengetia Limite & Jack Mwangi (1985) e KLR**. There is also no dispute that an advocate can hold a lien over his client's property to protect his fees. – see **Centurion Holdings vs. William Richu t/a Kimani Richu & Associates (2017) e KLR, Booth Extrusions (formerly) Booth Manufacturing Africa Limited vs. Ndumbeya Nelson Muturi Aaron t/a Nelson Aaron & Co. Advocats (2014) e KLR**. Some cases however have held that fees are due and payable after taxation and in some cases, if taxation has not been done then the court may order the same – see **National Bank of Kenya Limited vs Kang'ethe George Joseph & another (2015) e KLR**.

In the contract between CCK and PABCO, the subcontracting of the interested party made it part and parcel of the execution of the works PABCO was to undertake. It is common knowledge that subcontractors, as the term implies, ride on the back of the main contractor and in that case, for purposes of payment from the party giving the contract, the contractor becomes the agent for the subcontractor. It is logical therefore that, when a payment is made to the contractor, either directly or through a third party, and in this case the appellant, then the sub contractor has a valid claim whether or not there is a contract between the third party and the subcontractor.

The complaint against the appellant finds its genesis in Section 60 of the Advocates Act which states as follows,

“A complaint against an advocate of professional misconduct which expression includes disgrace or dishonourable conduct incompatible with the status of an advocate may be made to the committee by any person.”

The interested party in the proceedings before the Tribunal was not only “any person” it had an economic interest in the funds received by the appellant on behalf of PABCO. In my view, that position created privity in addition to fiduciary relationship between the appellant and the interest party. In contracts there is what is known as the doctrine of undisclosed principal. – see **Cheshire Fifoot 15th Edition pages 575 and 576**. As the advocate for PABCO, which had subcontracted the interested party, and who therefore became agents of the said interested party, the appellant became an agent of the interested party under that doctrine. He cannot escape that responsibility.

When the appellant received the payment from CCK on behalf of PABCO as his client there was a schedule attached which had the names of all companies claiming the said sum. The appellant was duty bound to pay the beneficiaries set out in the schedule. The interested party was supposed to be paid the sum claimed before the Tribunal and forming the charges laid.

The appellant cannot claim a lien over the same funds. They belonged to the interested party who was not his client. Under the arrangement of the contract however, he was duty bound to pay the said sum. The tribunal cannot therefore be faulted for finding the appellant guilty of the charges laid against him. I conclude this judgment by citing paragraph 17 of the Judgment of the Tribunal which stated as follows,

“Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining an individual is a fit and proper person to be entrusted with the responsibilities belonging to an advocate. Members for the public many of them wholly inexperienced and untrained in matters of business or of law, inevitably must put great faith and trust in the honesty of advocate in the handling of matters on their behalf. The tribunal must ensure that this trust is not misplaced.”

This court shares the same view with the Tribunal and in the end state, we shall be failing in our duty to instil, maintain and preserve the professional calling required of members of this honourable profession, in the event we depart from those set expectations.

The appeal is lacking in merit, and is therefore dismissed with costs to the respondent and the interested party.

Dated, signed and delivered at Nairobi this 10th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE