



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. No. 71 OF 2016

IN THE MATTER OF THE ADVOCATES DISCIPLINARY TRIBUNAL

AND

IN THE MATTER OF DISCIPLINARY TRIBUNAL CAUSE NO.53 OF 2014

ONGETTA HESBON MOMANYI.....APPLICANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

STEPHEN NGARE KAHOME.....INTERESTED PARTY

RULING

1. Through a Notice of Motion application dated 25th February 2016, the Applicant, Ongetta Hesbon principally seeks orders that the Honourable Court do issue an order for stay of proceedings and execution of judgment in Disciplinary Cause No 53 of 2014 until the intended appeal is heard and determined by High Court.
2. Secondly, that Applicant be supplied with the necessary documents as per section 61(1) and 2 of the advocates Act. The application is supported by the grounds on its face together with the supporting affidavit of the Applicant. It is averred that the Applicant, an Advocate of the High Court of Kenya, was acting in a conveyancing transaction for the vendor. A sale agreement was drawn and a deposit made of Ksh.840,000/=. That before the transfer could be signed the purchasers advocate came to his office and requested to take the original title, indicating that the transfer together with the completion documents would follow. That the Applicant thereafter released Ksh. 500,000 to his client the vendor through the client's wife. That the vendor was to get the remainder after signing the transfer form. That the vendor's counsel received a telephone call from the purchasers Advocate who informed him that the vendor was a fraud and should therefore not be given any money. That the Applicant had by then already given out Ksh.500,000/= to the vendor. That later on the purchaser's Advocate took the remainder of the money, Ksh.340,000/= less Ksh.20,000/= which the Applicant stated was his legal fees.
3. It is further averred that the purchaser later on filed a complaint at the Disciplinary Committee against him. The Applicant filed his response and, the Tribunal delivered judgment on the on the 7th December, 2015. The Applicant was found guilty for failure to account for Ksh.500,000/= and ordered to pay the same within 60 days. The Applicant applied for copy of the proceedings orally but states that he has not received the same.
4. The Applicant's contention is that the mitigation and sentence was going to take place on the 14th March, 2016 and unless the proceedings and execution are stayed, he will suffer irreparable loss and damage as the amount is substantial, beyond his reach and excessive. It is further averred that the Applicant released the money to his client who has not complained against him. That is unable to appeal because the Tribunal has not complied with the section 61(1) of the advocates Act.
5. The Applicant further stated that execution herein is imminent and that the complainant had made a report to the police station and therefore he is likely to suffer double jeopardy. That he is a lawyer and makes a living from the profession and the adverse orders would jeopardise his practice.
6. A perusal of the court record shows that the Respondent appears not to have filed a replying affidavit to the application dated 25th

February 2016.

7. The Interested Party Stephen Ngare Kahome opposed the application. It is deposed in the replying affidavit that the Applicant has already been supplied with the requested documents. That the application deals with issues that have already been determined by the Disciplinary Tribunal. That the Applicant has not pointed out any error of facts or law to warrant stay of execution pending appeal and that neither has the Applicant satisfied the conditions set out in order 46 rule 6(2) of the Civil Procedure Rules. That the Applicant has neither indicated anywhere that he is ready to avail security for the due performance of a decree to pay the sum of Ksh. 520,000/= and there is nothing to demonstrate that the intended appeal has any chances of success.

8. In the further affidavit sworn on 28th February, 2018 the Applicant stated that the delay in filing the Appeal was caused by the Respondent and therefore the Respondent cannot claim that the Applicant did not attach the Memorandum of Appeal when they had refused to supply the proceedings and judgment. It is contended that eventually the Applicant filed an appeal which is Civil Appeal No 698/16. That it's not for this Court to determine at this stage whether the grounds of Appeal have merits or not.

9. I have considered the application, the response filed and the submissions made by the respective counsels for the parties.

10. Order 42 rule 6(2), 2010 Civil Procedure Act provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. In the case at hand, the application before Court was filed on the 25th February 2016; the judgment of the Tribunal was delivered on 7th December, 2015. The application seeking stay of the proceedings has been overtaken by events.

12. On whether the Applicant will suffer substantial loss if there is no stay of execution, the Applicant contended that he will suffer irreparable damage as the amount is too high for him. That he is in private practice and the judgment would have an adverse effect on him. That the reason he could not attach the Memorandum of Appeal, which he later did, was due to the fact the Respondent had not complied with the earlier order herein to supply him with the proceedings. It is however noted that the court was informed on 15th September, 2016 that Section 61 of the Advocate Act had been complied with.

13. The Interested Party on the other hand contended that it has not been shown that the Appeal has chances of success and neither has the Memorandum of Appeal been attached or deposit of security made.

14. Although the Appellant has contended that he is unable to pay the money in question, his assertion is bare. No documents have been exhibited to show how much he earns for the court to be able to determine whether he is in a position to pay or not. There is also no allegation that the interested Party is unable to refund the decretal sum if paid and no security has been offered for the due performance of the decree.

15. The Memorandum of Appeal which has been exhibited herein is dated 17th November, 2016 whereas the judgment of the Tribunal was delivered on 7th December, 2015. However, I will leave the issue of the competency and merits of the Appeal to be dealt within the Appeal itself.

16. In the final analysis, to balance the competing interest of the parties, I will exercise discretion and allow the application for stay of execution pending the hearing of the Appeal on condition that the Applicant do deposit the sum of Ksh.520,000/= in a joint interest earning bank account of both counsels for the parties herein or in court within 30 days from date hereof.

Date, signed and delivered at Nairobi this 17th day of Oct., 2018

B. THURANIRA JADEN

JUDGE