



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 444 OF 2016

TOM WACHAKANA T/A WACHANA & COMPANY ADVOCATES... APPELLANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE ... RESPONDENT

RULING

The appellant is an advocate of the High Court of Kenya practising in the name and style of Wachakana & Company Advocates. From the record before me the appellant is said to have compromised an action before the Industrial Court now known as Employment and Labour Relations Court on behalf of some employees of the respondent.

After the said compromise the respondent paid the appellant a sum of Kshs. 4,000,000/= in full and final settlement of the matter. It then turned out that the appellant did not have instructions and consent to settle or compromise the suit. This compelled the respondent to demand the refund of Kshs. 4,000,000/= paid under the consent order. The appellant did not comply even after a demand had been made by the advocates for the respondent and a threat to institute legal proceedings.

The dispute ended before the Advocates Disciplinary Committee for resolution. The Committee further held that it had full mandate to try the appellant for dishonourable conduct. On 13th June, 2016 the Committee found that the appellant compromised the action without the consent of his clients and thereafter held onto to the money paid.

At the end of it all the Committee convicted the appellant of dishonourable conduct of withholding clients fund and failing to account for the same. The appellant then lodged this appeal to challenge the finding of the Committee.

There is now before me an application by way of Notice of Motion under Order 42 Rule 6 (1) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act, seeking a stay of execution of the judgment, decree and orders of the said Committee.

The grounds upon which the application is made are that the appellant is dissatisfied with the order of the disciplinary Committee, and had filed an appeal; that the appeal is arguable, had merit, is not frivolous and has chances of success and that if sentence is passed the appeal may be rendered nugatory. There is a supporting affidavit sworn by the appellant.

The appellant further filed an affidavit of means pursuant to order 42 (2) of the Civil Procedure Rules. The application is opposed and both counsel have filed written submissions and cited some authorities.

The appellant has a right of appeal and is therefore properly before this court. He has offered security in

the form of professional indemnity policy so as to satisfy the requirement under Order 42 Rule 6 of the Civil Procedure Rules. The application was filed on 8th July, 2016 and therefore timeously.

It is true that if the appellant is subjected to whatever punishment following his conviction, adverse consequences may follow. This court however must consider the matter holistically, paying special attention to the nature of the dispute, the conduct of the appellant and that justice must look at both sides. That is to say, whether or not there is an arguable appeal becomes a primary consideration.

The professional indemnity policy is not limited to the matter in this court alone. I also take judicial notice of the fact that any policy of such a nature is dependent on payment of appropriate premium and in any case, the expiry date of the policy submitted was 1st February, 2017.

The appellant has lodged two bills of costs against his former clients reflecting different amounts to the same subject matter. Although the two bills of costs run into millions of shillings, I note from the correspondence leading to the disputed consent order that, when the respondent was demanding settlement of the claim he, the appellant, indicated that his party to party costs amounted to Kshs. 450,000/=.

This application is not an appeal but both counsel have submitted on the merits of the appeal, thereby inviting the court to comment thereon. Whatever the case, the chances of success of the said appeal are extremely slim. The disputed consent order was set aside at the instance of the appellant's previous clients. The main reason for setting aside the said order is that he had no authority to compromise the claim. That being the case the money paid still belongs to the respondent. Any claim of a lien over the said sum based on any costs may not be sustained.

If the sentence adversely affects his professional standing, and the appeal eventually succeeds, reinstatement will follow and any loss may be mitigated by a claim in damages. I am not persuaded that an order for stay is justified in the instant case. The application is therefore dismissed with costs to the respondent.

Orders accordingly.

Dated, signed and delivered at Nairobi this 7th Day of March, 2017

A. MBOGHOLI MSAGHA

JUDGE