



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 73 OF 2015

STEPHEN OWINOAPPELLANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

POWER ENGINEERING INTERNATIONAL LTD.....COMPLAINANT

RULING

1. Stephen Owino, the Appellant herein was on 10th November 2014 ordered by the Law Society of Kenya Advocates Disciplinary Tribunal, the Respondent, to pay Power Engineering International Ltd, the complainant herein, kshs.1,153,948/88 plus interest at 14% from 2006 until full payment and to further forward the VAT certificate for Ksh.47,627/80. He was also sentenced to pay a fine of ksh.60,000/=. The Appeal felt aggrieved by the aforesaid decision, hence he was forced to file this Appellant to challenge the respondent's decision.
2. On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal.
 1. *The Disciplinary Tribunal erred in failing to find that indeed there existed no contractual or fiduciary duty between the Appellant and interested party that enable the Appellant to account for any monies held by the Appellant on behalf of his clients.*
 2. *The Disciplinary Tribunal erred in failing to find that there must indeed exist and Advocate-client relationship between the parties for it to make orders of payments to the Interested Party in the manner the Tribunal ordered.*
 3. *The Disciplinary Tribunal erred in failing to find that the Claim the Interested Party had against Pan African Builders Company Limited (PABCO) cannot operate to override the legal lien the Appellant has as an advocate of their client, PABCO.*
 4. *The Disciplinary Tribunal erred in failing to find that the Appellant was only accountable to his client, PABCO only as regards the sums ordered to be paid to the interested party and if, the said PABCO had any issue with the funds held by the Appellant, it is only the said PABCO that can make a complaint against the advocate.*
 5. *The Disciplinary Tribunal erred in failing to find that there was indeed a solicitor's lien on all the funds held by the Appellant on behalf of his client against the payment of his fees and cannot become liable to third parties by mere fact of receipt of the funds only.*
 6. *The Disciplinary Tribunal erred in failing to consider all the materials before the court including various affidavits filed on behalf of the Appellant.*
 7. *The Disciplinary Tribunal failed to consider the fact that no trust relations arose between the Appellant and the Interested Party either in the sum stated or at any claims the Interested Party had to be instead directed to PABCO with whom they had a contract n respect of the subject sum.*

8. ***The Disciplinary Tribunal erred in failing to properly frame issues for consideration and hence arrived at erroneous conclusions of law and fact.***
3. The Appellant is now before this court seeking for an order for stay of execution of the decision of the Law society of Kenya Disciplinary Tribunal pending the hearing and determination of this appeal. The motion is supported by the affidavit of George Abudho Ogembo sworn on 28th January 2016. When served, the Respondent filed the replying affidavit of Mercy Wambua sworn on 29th February 2016 and the grounds of opposition to resist the motion. I have considered the oral submissions of learned counsels and the material placed before this court. Mr. Akello, learned advocate for the Appellant/Applicant argued that the Applicant was erroneously ordered to interalia, pay substantial sums of money to a party who has never been his client and whose pecuniary and or accessibility later is totally unknown to him. He also pointed out that the Law Society of Kenya has now declined to accept the Applicant's application for this year's practising certificate unless he complies with the decision of its Disciplinary Tribunal rendered on 9th February 2015, which decision he has challenged on appeal before this court. Mr. Akello further argued that the Respondent's decision will affect the Applicant's profession and the rights of his clients will be exposed to jeopardy. The Applicant further argued that if he complied with the Disciplinary Tribunal's decision his appeal would therefore be rendered nugatory. He also complained that the Respondent has deliberately delayed to provide him with the original records of the Disciplinary Tribunal's proceedings thus preventing the expeditious disposal of this appeal.
4. The Respondent vehemently denied the Appellant's assertions. Mrs Koech, learned advocate for the Respondent, argued that the Appellant's motion is intended to circumvent the requirements of section 25 of the Advocates Act, Cap. 16 Laws of Kenya by blocking the execution of the Disciplinary Tribunal's decision. The learned advocate further argued that the Appellant has not taken due regard to the provisions of Section 62 (3) of the Advocates Act. The Respondent also stated that the Appellant has fallen short of satisfying the grounds necessary to enable the court exercise its discretion in favour of granting an order for stay of execution of the decision. This court, was consequently beseeched to dismiss the motion.
5. I have already stated that the main order the Appellant is seeking is that for a stay of execution pending appeal. The applicable principles when deciding such applications are well settled. **First**, an applicant must show that unless the order for stay is granted appeal would be rendered nugatory. **Secondly**, that the application should be filed without undue delay. **Thirdly**, that the court should consider the provision for security. On the first principle, the Appellant has clearly stated that he will suffer irreparable loss in that he may not obtain this year's practising certificate to the utter detriment of the Appellant and his clients. It is true that if the order for stay is denied, the Appellant is likely to suffer substantial loss. The Appellant does not deny that he has not complied with the decision of the Disciplinary Tribunal. At this juncture it is important to lay out the background of this dispute. By a contract entered between the Communication Commission of Kenya (hereinafter referred to as CCK) and Pan African Building Contractors Ltd (hereinafter referred to as PABCO), CCK contracted PABCO to carry out some building works. PABCO retained **Power Engineering International Ltd**, the complainant, Interested Party herein to carry out subcontract works in the same project. The Interested Party completed the sub contract and was finally issued with a final certificate by the project architects. A sum of kshs.1,841,588/35 was certified as payable. A dispute arose between PABCO and CCK over payment of the contractual sum. The dispute between PABCO and CCK was resolved vide **Nairobi H.C.C.C. No. 305 of 2005** with PABCO being awarded kshs.36,256,99/50. The money was paid to PABCO through the Appellant's firm of advocates. The money was forwarded through the firm of Inamdar with a schedule detailing payments subcontractors which included **Power Engineering International Ltd**. The Appellant refused to release to the complainant the sum of kshs.1,841,585/35 less 16% V.A.T 254,012/119 and withholding tax of ksh.47,627/28. The complainant filed a complaint before the Respondent, Disciplinary Tribunal. The Appellant contested the complaint arguing that there was no privity of contract between him and Power Engineering International Ltd (complainant) hence the complaint was incompetent. The Respondent heard the dispute and in the end it made the decision it is now being contested before

this court. In a nutshell, the Respondent ruled **interalia** that the Appellant withheld a sum of kshs.1,539,948/88 which he had received to hold in trust and for the benefit of the Interested Party. The Appellant was ordered by the Respondent to release the money to the Interested Party within 60 days in default execution to follow. This court has been urged that if the aforesaid order is complied with, the Appellant will suffer substantial loss. I am unable to comprehend the argument of the Appellant. In most cases, advocates retain money as a lien for their fees. In this case the Appellant does not claim that he is holding the money as a lien. His main argument is that the party he was ordered to pay was not his client. The principal client i.e. PABCO has not denied that the Interested Party was its sub contractor. I do not foresee a situation where the principal client will raise a complaint against the Appellant. I am therefore unable to agree that the Appellant will suffer any substantial loss. With respect, I agree with the submissions of Mrs Koech, that this application was filed with the sole intention of circumventing the provision of Section 25(2) of the Advocates Act.

6. I also agree with the submissions of Mrs Koech that the Respondent's hands are tied in that given the mandatory provisions of Section 25 (2) of the Advocates Act, 2014 and the fact that the Appellant has not complied with the same, then the Respondent cannot complete the processing of the Appellants' practising certificate for forwarding to the registrar of the High Court. Having come to the conclusion that the Appellant has not shown a genuine substantial loss he would suffer if the order for stay is denied, then I do not think I should consider the principle for the provision of security. I am satisfied that the motion was timeously filed. However, the application lacks merit. In the end and on the basis of the above reasons, the same is dismissed with costs to the Respondent.

Dated and delivered in open court this 1st day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent