REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NUMBER 506 OF 2015 (JR)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TOAPPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI BY WILBERFORCE NYABOGA MARIARIA

AND

IN THE MATTER OF THE ADVOCATES DISCIPLINARY TRIBUNAL

AND

IN THE MATTER OF DISCIPLINARY CAUSE NO. 27 OF 2014

REPUBLIC…….APPLICANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL….....RESPONDENT

EXPARTE APPLICANT: WILBERFORCE NYABOGA MARIARIA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st December, 2015, the *ex parte* applicant herein, **Wilberforce Nyaboga Mariaria,** seeks the following orders:

> **i. An order of CERTIORARI to remove into this court, and quash the proceedings and the orders of the Advocates Disciplinary Tribunal of the Law Society of Kenya dated 20th July, 2015 and 2nd November, 2015 in Miscellaneous Cause Number 27 of 2014.**
>
> **ii. Costs of this application be provided for.**

Ex Parte Applicants' Case

2. According to the applicant, sometimes in the year 2014 a Tribunal (sic) was filed against him before the Respondent whose subject was the enforcement of the professional undertaking he allegedly made in the year 2014. In the same year a similar claim was filed before the High Court in Civil Division involving the same subject matter and the parties. According to the applicant, during the pendency of the Disciplinary Tribunal proceedings in cause no. 27 of 2014 the Respondent also filed HCCC No. 196 of 2014 claiming for the recovery of the aforesaid deposit purchase price. The applicant averred that the

Disciplinary cause No. 27 of 2014 before the Tribunal is seeking recovery of Kshs. 3.2 Million, out of which a sum of Kshs. 600,000/= has been paid.

3. The applicant deposed that he filed a preliminary objection application before the Advocate's Disciplinary Tribunal which objection is still pending prosecution. However, the Tribunal proceeded to hear the complaint and delivered judgment ignoring to hear and determine the Preliminary Objection on Points of Law before it, yet the said preliminary objection dated 28th October 2014, ought to have been heard by the Tribunal.

4. It was averred that the Tribunal ordered the applicant in its sentence of 20th July 2015 to liquidate/refund the deposit by three equal monthly instalments of Kshs. 1,000,000/= with effect from 3rd August, 2015, though as at 2nd November, 2015, he had paid a sum of Kshs. 600,000/= to the respondent's advocates. The applicant however averred that he is unable to liquidate the Tribunal Respondent's Decree as ordered, and therefore filed an application for review/variation of the said orders of 20th July 2015, which application is also pending before the Tribunal. He however averred that the Tribunal declined to hear him on the said application for Review and possible variation of the monthly instalments and instead confirmed the orders of suspension, thereby denying him a chance to explain why he could not be able to comply with the orders of 20th July, 2015 and why he needed more time to pay the decretal sum in plausible palatable and reasonable terms of instalments.

5. It was averred that in execution of the Tribunal orders, the Respondent commenced execution process for the payment of a sum of Kshs. 3,200,000/= through Janen/Auctioneers even before 2nd November, 2015, notwithstanding the he had made a payment of Kshs. 600,000/=. To the applicant, he was likely to be a victim of double jeopardy while taking note that the complainant initially lodged his claim at the High Court hence the orders sought herein.

6. The applicant believed that the Tribunal acted in bad faith in the proceedings for the following reasons:

a. The Committee did not rule on the objection, and did not correct the situation, which it knew or ought as a professional body to have known was unlawful.

b. Despite the objection, which it did not rule on, the committee conducted the whole proceeding with this situation in place.

c. Despite the review application being before it, it did not rule or make any directions on it, despite the fact that the Tribunal was asked by his Advocate to give directions on it, and the committee conducted the whole proceeding with this situation in place.

7. The applicant therefore contended that he did not get a fair trial and determination and that the Tribunal acted with manifest bias, and or the appearance of bias. To the applicant, the orders complained of are unlawful for being in frustration of the legislative purpose(s) of the ***Advocate Act*** Cap.16, the Constitution and of the Disciplinary Rules, among which is a fair, full and impartial hearing and determination. Consequently, it was averred that the hearing conducted by the Committee is for an extraneous purpose and that the 'Judgment', and the form of the hearing are each oppressive and in violation of the ***Advocates Act***, Cap.16 and the Constitution and in purported defeasance of its express provisions and of court decisions and law pertaining thereto.

8. The applicant disclosed that he filed HC. Misc. Civil Application Number 412 of 2015 (JR) against The Law Society of Kenya, touching on the same subject matter, but which was withdrawn.

Respondent's Case

9. In opposition to the application, the respondent averred that a complaint was received by the Respondent herein on the 3rd day of December 2013 against one, **Wilberforce Mariaria** practicing in the name and style of Momanyi Associates Advocates vide an Affidavit of Complaint drawn by the firm of

Daly and Figgis Advocates and sworn by one **Ayoub Muhammed** in which affidavit the Respondent herein was being called upon to determine whether the accused Advocate, the Ex parte Applicant herein, was guilty of professional misconduct for:-

a) Failing to honour his undertaking in so far as he undertook to release an original title deed to the firm of Daly & Figgis to be held by them on behalf of the complainant but in fact provided Daly & Figgis with a fake title deed.

b) Failing to refund the sum of Kenya Shillings Three million Two Hundred Thousand (Kshs.3, 200,000/=) to the complainant at an interest rate of 12%.

c) Performing his duties in a negligent manner, as he failed to exercise the necessary due care and skill expected of an Advocate when carrying out a property transaction.

10. That upon receipt of the said Affidavit of Complaint by the Respondent, the matter was given a reference Miscellaneous Cause No.DCC 27 of 2014 and went ahead and fixed it for plea taking on 24th March 2014 and informed the *Ex-parte* Applicant of the same vide a letter dated 19th February 2014 wherein was also attached a copy of the Affidavit of Complaint referring the complaint to the Respondent.

11. It was deposed that on 24th March 2014 the ex parte Applicant appeared before the Respondent as directed and took a plea of not guilty and was given 21 days within which to file and serve a Replying Affidavit and the matter was fixed for hearing on 7th July 2014. On that date the *Ex-parte* Applicant was represented by one **Mr. Maosa** while the Complainant was represented by **Mrs. Waiganjo**. It was deposed that even though the *Ex-parte* Applicant had filed the Replying Affidavit he was not ready to proceed and sought leave to file a further affidavit which application was opposed by the Complainant's advocate. Despite the opposition by the Complainant's Advocate the Respondent granted the *Ex-parte* Applicant leave to file and serve a further affidavit within 7 days whereas the complainant was given corresponding leave to address any new issues raised by the *Ex parte* Applicant also within 7 days of service and the matter was fixed for mention on 3rd November 2014.

12. On 3rd November 2014, the *Ex parte* Applicant was not present but had filed and served the further Affidavit and had also filed a Preliminary Objection on 28th October 2014 and which Preliminary Objection was objected to by the Complainant's advocates on the ground that it did not raise purely points of law. The Respondent directed that the complainant does file his submissions within 7 days and the *Exparte* Applicant to file his submissions within 7 days upon service and Judgment was to be delivered on 12th January 2015 on which date both the Advocates of the Complainant and the Ex parte Applicant was present and judgment was delivered by which the Respondent found the Accused Advocate guilty of withholding Kshs 3, 200,000/= belonging to the complainant and directed him to deposit the said amount with the Law Society of Kenya within 60 days from the date of delivery of the judgment with interest accruing at the rate of 12% p.a. from 4th September 2013 and in default face sanctions as the Respondent shall deem fit. The matter was then scheduled for mitigation and sentencing on 20th April 2015 on which date the Ex parte Applicant was not present in person but was represented by his said Advocate who requested the Respondent to adjourn the mitigation and sentencing on the grounds that the *Ex parte* Applicant had lost his colleague. The same adjournment was granted the said adjournment and the mitigation and sentencing rescheduled to 22nd June, 2015. However on 22nd of June 2015 when the matter came up for mitigation and sentencing the *Ex parte* Applicant was not present in person but was represented by his said Advocate who once again requested for an adjournment on the ground that the Ex parte Applicant was bereaved as he had lost one of his brothers who was also his partner in the firm. The Respondent once again granted the adjournment and rescheduled the mitigation and sentencing to 20th July 2015. However on 20th July 2015 when the matter came up the Ex parte Applicant was present in person and he gave a proposal on how to liquidate the Complainant's monies and which proposal was accepted by the Respondent on condition that upon default in payment of one of the instalments the Ex parte Applicant was to stand suspended for a period of one year. The matter was then fixed for mention

on 2nd November 2015 for further directions on which date the applicant had not complied and the Respondent directed that the advocate be suspended for one year.

13. It was averred that to date the *Ex parte* applicant has not paid the Complainant the said sum Kshs.3, 200,000/= as per his proposal to the Respondent yet he now claims that he is exposed to double jeopardy because there is also a High Court matter filed against him by the Complainant emanating from the same set of facts as the complaint before the Respondent. However, the Respondent's position is that the issue of double jeopardy does not arise as the said forums deal with different aspects of the same set of facts. The matter before the Respondent deals with the issue of professional misconduct as mandated by the ***Advocates Act*** whereas the case filed before the High Court seeks an injunction and the recovery of the money owed to the Complainant by the Ex parte Applicant. To the Respondent, by virtue of section 60(1) of the ***Advocates Act*** (Cap 16 Laws of Kenya), it is the body legally mandated to handle all issues of professional misconduct relating to Advocates and the *Ex parte* Applicant herein being an Advocate and the subject matter concerning him being one of professional misconduct, then he rightfully falls within the ambit of the Respondent.

14. The respondent contended that section 62 of the ***Advocates Act*** provides that a party who is aggrieved by the decision of the Respondent ought to appeal to the High Court and the Respondent being a quasi-judicial body the proceedings before it are only complete upon mitigation and sentencing being carried out. Accordingly, the Applicants application for Judicial Review orders is only aimed at defeating the purposes for which the Respondent is established as mitigation and sentencing is yet to be carried out.

15. It was the Respondent's case that the allegation that the Respondent contravened the rules of natural justice is unmerited since the Respondent ensured that the *Ex parte* Applicant was served with all the relevant notices requiring him to appear before it and also accorded him a fair and an impartial hearing in accordance with and in the strict observance of the rules of Natural Justice. To the Respondent the *ex parte* Applicant's application does not clearly set down sufficient grounds upon which an Order for certiorari should be granted to quash the decision of the Respondent and in addition, and without prejudice to the foregoing, the Respondent is mandated to deal with matters of professional misconduct against advocates and if this court allows the Ex parte Applicant's application for the judicial review orders of certiorari, then this will only go into defeating the very purpose for which the Respondent was established.

16. This Court was therefore urged to dismissed the application with costs in order to allow the Respondent to proceed with Mitigation and sentencing in DC No. 27of 2014.

Determinations

17. I have considered the application, the evidence adduced in the form of affidavits, the grounds and the submissions filed on behalf of the parties herein.

18. The applicant's complaints are hinged on the procedural impropriety. It is the applicant's case that the Respondent ought not to have entertained the disciplinary proceedings in light of the pending civil proceedings in HCCC No. 196 of 2014.

19. This Court dealt with the issue of the concurrency of proceedings before the Respondent Tribunal and in a Succession Cause in **R. vs. Disciplinary Tribunal of the Law Society of Kenya Ex Parte John Wacira Wambugu Nairobi High Court Miscellaneous Application No. 445 of 2013** and expressed itself as follows:

> **"In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent.**

Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

20. It is therefore my view that as long as there is no allegation that the Respondent Tribunal intends to usurp or has usurped the powers exclusively reserved for civil courts, there ought not to be any objection to the Respondent Tribunal exercising its disciplinary jurisdiction against advocates based on such other civil proceedings since the roles of the two Tribunals and distinct and separate. It is therefore my view that the issue of double jeopardy does not arise in the circumstances of this case.

21. The applicant has also faulted the decision by the Respondent to proceed with the hearing of the disciplinary proceedings during the pendency of his preliminary objection and the application for variation of the orders. The ordinary rule is that where a preliminary objection is raised that goes to the jurisdiction of a Tribunal such objection ought to be determined at the earliest opportunity. This was the position in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** where the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

22. Where however an objection is properly raised before the Court or judicial Tribunal and the objector is ready to prosecute the same, the Court ought to hear and determine the same whether as a preliminary issue or within the main cause itself. What is objectionable is the complete refusal to entertain an objection which has been placed before the Court or Tribunal *bona fide*. This was the position adopted by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243** where he expressed himself as follows:

"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

23. It is however my view that the failure by a Tribunal to determine its jurisdiction before hearing the parties on the main case does not call for the quashing of the decision in question as long as the Tribunal deals with the matter. Even where the Tribunal fails to do so an appellate Court is properly entitled to deal with the same. See **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998.**

24. Accordingly the manner of proceeding in such circumstances is a matter within the discretion of the trial Tribunal and ought to be challenged by way of an appeal where it is contended that the decision was erroneous. In other words the mere fact that a party files a notice of preliminary objection does not enjoin the Tribunal to hear and determine the same *in limine* particularly where the party raising the objection shows lethargy in prosecuting the same, which is what the Respondent is alleging in this matter.

25. Apart from those two issues which I find unmerited, it is my view that the applicant if aggrieved by the decision of the Respondent on its merit ought to invoke the appellate Jurisdiction of the High Court under section 62 of the ***Advocates Act***.

Order

26. In the premises I find no merit in the Notice of Motion dated 21st December, 2015 which Motion is hereby dismissed with costs to the respondent.

27. It is so ordered.

Dated at Nairobi this 2nd day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyarindo for the Respondent

CA Mwangi