



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO.403 OF 2013**

**KIMAIYO KERONEY ARAP SEGO ADVOCATE.....APPELLANT**

**VERSUS**

**ADVOCATES COMPLAINTS COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ADVOCATES DISCIPLINARY COMMITTEE.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

Before the court is the Applicant's Notice of Motion dated 31<sup>st</sup> July 2013, brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rule 6 (6), Order 51 Rule 1 of the Civil Procedure Rules seeking:-

1. Spent
2. Spent
3. **That this honorable court be pleased to grant a temporary order of injunction restraining the 2<sup>nd</sup> Respondent from conducting mitigation and delivery and /or passage of sentence against the Appellant/ Applicant in DISCIPLINARY COMMITTEE CASE NO . 123 OF 2007 scheduled for the 5<sup>th</sup> day of August 2013 or any other date thereafter until otherwise directed by this honourable court pending the hearing and determination of the appeal herein.**
4. **That costs be in the cause.**

The Applicant's case is that he received a letter from the advocate's Complaints Commission requiring him to answer complaints made by his client. He replied to the letter stating his position and expected the commission would investigate the complaints, summon witnesses and conduct a hearing in terms of Section 53(4) (d) of the Act and make a decision thereafter. On the 13<sup>th</sup> November 2007 he was informed by a stranger that the commission had heard the claim ex parte in the month of October 2007. When he visited the Commissioner's offices, a Mr. Chege informed him that the claim was heard and he also supplied him with the supporting affidavit to the claim and other documents. He claims that he was never served with the documents for him to respond and also attend commission.

He instructed the firm of **Gichuki King'ara & Co. Advocates** to lodge a Judicial Review application and also seek leave to operate as stay of further proceedings by the 2<sup>nd</sup> Respondent. He later learned that the 2<sup>nd</sup> Respondent did not enter the purported ex parte judgment against him on 18<sup>th</sup> February as alleged.

The judicial review proceedings were dismissed and judgment entered against him. The Applicant claims he was not informed of the judgment and only came to learn later when he was served with a letter from the law society to attend the disciplinary committee for mitigation and sentencing.

The Applicant states that he is aggrieved by the orders given by the Disciplinary Committee and stands to suffer prejudice since the consequences of such sentence shall be adverse to his profession and practice as an advocate. He further claims that he has preferred and lodged an appeal which will be rendered nugatory if the application is dismissed.

The application is contested. The secretary of the Law Society swore a replying affidavit dated 6<sup>th</sup> November 2013. He stated that the issues raised by the Applicant were dealt with in **Judicial Review Application No. 1266 of 2007**. The application was dismissed on the 14<sup>th</sup> March 2013 by Justice Mumbi Ngugi. The Applicant through the firm of **Mulondo, Oundo, Muriuki & Company Advocate** filed an application to disciplinary committee seeking to be heard on the same issues raised in the judicial review application and dismissed by the honorable court on 14<sup>th</sup> March 2013. The disciplinary committee delivered a ruling on 1<sup>st</sup> July 2013, dismissing the application for reasons that the same issues were addressed in the Judicial Review application. The Applicant further filed a **Petition Number 396 of 2013** and **722 of 2013** whose issues basically revolved around the same issues already determined by this court, and the court directed that the matter be heard on 24<sup>th</sup> September 2013. The Applicant later withdrew the two applications after the same were deemed to be mischievously filed.

The Respondent claims that the decision being appealed against was not issued erroneously as the law is clear in that the High Court shall have original and supervisory jurisdiction, and as such the Disciplinary Committee does not have the power to overturn a High Court decision. The Respondent further claims that the Applicant is not appealing the judgment of Justice Mumbi Ngugi. They maintain that the Applicant was granted a fair opportunity to be heard and cannot be heard to say the doors of justice have been shut on him.

In a rejoinder, the Applicant denied the issues raised in the replying affidavit. He stated that the issues raised in his supporting affidavit were never raised in the judicial review application. He further stated that he appeared for the first time before the disciplinary tribunal on the 1<sup>st</sup> July 2013 and argued his application dated 25<sup>th</sup> June 2013. He stated that he was exercising his constitutional right and having the application dismissed should not be used against him.

He further stated that the forum he was supposed to attend and ventilate his defence and respond to the complaint was the disciplinary Commission and he appeared before it and now he is praying for an opportunity to put forward his defence. He further stated that the High Court never discussed the merits or demerits of the complaint before the Disciplinary Committee. The remedy of judicial review is concerned with resolving not the merits of the decision in respect of which the application for judicial review is made but the decision making process. The disciplinary tribunal still retained and had the original jurisdiction to give him a hearing and make a decision on the merits of the complaint. He further stated that there is need to interfere with the exercise of the disciplinary Tribunal discretion as its decision was wrong, it misdirected itself and acted on matters it should not have acted on.

I have considered the application, both the supporting and replying affidavit and the submissions.

The purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it. The conditions for granting a temporary injunction are provided for in the landmark case of **Giella Vs. Cassman Brown & Co. Ltd [1973] E.A 285-**

***“First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.” Also See EA Industries v Trufoods [1972] EA 420.***

In applying the principles set in the case above, on whether the Applicant has shown a prima facie case with probability of success, the Applicant submitted that the preferred appeal is arguable and unless the restraining orders are granted the appeal will be rendered nugatory. The Applicant stated that the Respondent and in particular the 2<sup>nd</sup> Respondent did commence the proceedings without his participation which amount to condemning him unheard. He argued that a litigant ought to be allowed to ventilate his grievances and he should not be driven from the judgment seat when the facts of the case are obvious.

The Respondent however, submitted that the Applicant was served through his last known address of service and therefore he was not denied the right to defend himself.

Can we then say that the Applicant has established a prima facie case with a probability of success? As stated by Bosire, JA in **Mrao Vs First American Bank of Kenya Limited & 2 others [2003] KLR 125**

***“a prime facie case in a civil application include but is not confined to a ‘genuine case’. It is a case which, on the material presented to the court, a case which, on the material presented to the court, a tribunal properly directing itself, will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” (Stress is mine).***

The issue which would in this case give the Applicant a right is his averment that he was not served with the summons to appear and defend himself before the Disciplinary Committee, the 2<sup>nd</sup> Respondent herein. The Respondent however, stated and the Applicant conceded that in his application to set aside the Disciplinary Committee’s original ruling, the issue was fully argued and it was found that the Applicant was actually properly and lawfully served with the summons to appear and defend himself, but did not attend. Furthermore, the same issue was placed before this court under **Judicial Review No. 1266 of 2007**.

This court thoroughly investigated the allegation by the Applicant that he was never served with the summons to appear before the Disciplinary Committee. It found as a fact that the Applicant had been properly served and had only decided to avoid attendance to defend himself. Hence the Committee had decided to proceed with the hearing of the complaint before it notwithstanding the absence of the Applicant. That same reason was later to be used to refuse the Applicants application to set aside the Committees Judgment.

The correct situation then is that the impugned judgment’s setting aside, was rejected both by the Committee and later by the High Court under a Judicial Review application. While the appeal before this court may be rightly before it, there is a question as to whether an issue which one way or the other has been decided by this court through a Judicial Review process can be placed before the same High Court though a different Division, to be determined afresh. Would this court, for example, now contradict the earlier ruling of the Judicial Review Court on service? Would this court have not acted in vain in the Judicial Review application and would this court not be sitting on appeal of the Judicial Review Court?

Choices, as they say, have consequences. The Applicant had a right and a choice to appeal the decision of the Disciplinary Committee in refusing to set aside its ruling. He instead decided to challenge the ruling through a Judicial Review process which itself was a form of appeal. It is only when he failed to get a favourable result that he now decided to pursue this appeal again in the same High Court. While this court will not, therefore say anything about the pending appeal at this stage, the Applicant in filing the judicial proceedings, made a choice which he knew or ought to have known has unavoidable consequences. He must or should be prepared to experience those consequences which to this court include: -

- a. **The fact that issues or disputes between parties have to be decided once and for all unless the law has provided ways of revisiting the issues by the same court, hence the principles of “Res Judicata” and “estoppels.”**
- b. **It is unhealthy and improper and totally unnecessary to set one court’s decision against**

**another's in respect of the same issue between the same parties, hence the Civil and Criminal Law's provision for the principle of "precedent."**

**c. Litigation has to come to a reasonable end hence the application of the above principles and of Section 1A and 1B of the Civil Procedure Act.**

Applying the above reasoning and principles and taking into account the facts and circumstances of this case, this court finds that the Applicant has not demonstrated a prima facie case as envisaged in the famous **Geilla Vs Cassman Brown Case** nor does this court think that the Applicant will suffer irreparable damage or loss if the Committee is given freedom to proceed with its lawful process of staging a sentencing process in accordance with the law under which it operates.

On the other hand, the long delay in preventing the Disciplinary Committee from finalizing this case may be against the interest of the members of the public and an obstruction of lawful process, thus leading to injustice of one kind or another. The balance of convenience would not favour the granting of the injunctions sought by the applicant therefore.

The upshot is that this application has no merit and is hereby dismissed with costs in the appeal. Orders accordingly.

Dated and delivered at Nairobi this 10<sup>th</sup> day of March, 2015.

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**D A ONYANCHA**

**JUDGE**