



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 578 OF 2013

JOHN OLAGO-ALUOCH.....APPLICANT/APPELLANT

VERSUS

LAW SOCIETY OF KENYA.....1ST RESPONDENT

DISCIPLINARY COMMITTEE/TRIBUNAL.....2ND RESPONDENT

COMPLAINTS COMMISSION.....3RD RESPONDENT

RULING

Before the court

for determination is the Notice of Motion dated 8th November 2013 brought under Section 1A, 3A of the Civil Procedure Act, Order 42 Rule 6(6) of the Civil Procedure Rules. The Applicant is seeking the following orders:

1. Spent
2. Spent
3. **There be stay of gazzement of striking-off the Roll of Advocates the name of John Aluoch (Advocate), pursuant to the decision of the disciplinary committee (tribunal) made on 28th October, 2013 at Nairobi pending the hearing and determination of the appeal.**
4. Spent.
5. **There be stay of implementation of the decision of the disciplinary committee (tribunal) made on 28/10/2013 at Nairobi pending the hearing and determination of the appeal.**
6. **That in the event the prayer or any of the prayer herein are /is granted, this honorable court direct that a copy thereof be served upon the registrar.**
7. **The cost of this application be provided for.**

The application is supported by the affidavit of John Alago-Aluoch, the Applicant. He states that on 28th October 2013 at Nairobi, the Disciplinary Committee struck his name off the Roll of Advocates for unspecified period of time. He claims that the complaint by Milka Adhiambo Ojwang had since been settled as at 12th October 2012. He explained that upon receiving the complaint documents he consulted the complainant and the dispute was resolved within the Law Society in-house dispute resolution mechanism. The Applicant paid the balance amount of the money which was due to her and a consent was recorded. The said consent was sent to the Respondent to record the matter was settled but they failed to do so. The Appellant claims that in the event the tribunal decision made on the 28/10/2013 is gazetted he will suffer prejudice, embarrassment and loss of reputation as a member of parliament and also as an advocate.

The application is opposed. The 1st and 2nd Respondents filed the following grounds of objection: -

1. The said application is totally incompetent, bad in law and misconceived and an abuse of this honorable court process.
2. That by virtue of Section 60 (4) of the Advocate Act, the orders of the disciplinary tribunal do not take effect by way of gazettelement but upon its issuance by the Disciplinary tribunal.
3. That the order of the disciplinary tribunal striking off the Applicant from the Roll of Advocates has already taken effect and there is nothing to be stayed.
4. That by virtue of Section 62 of the Advocate Act, the only remedy available to the Applicant is to prefer an appeal against the order of the disciplinary tribunal.

The 3rd Respondent also filed a replying affidavit dated 26th November, 2013 in opposition to the Notice of Motion sworn by Naomi Wagereka, the Commissioner for the Advocates Commission. She states that the complaint, subject of this application, was lodged with the Advocate's Complaints Commission by way of a letter from Milka Adhiambo Ojwang on 9th July 2009. She had instructed the Applicant to file a claim for both the general and special damages against one Martin Tiego following the death of her husband in a road accident involving motor vehicle registration number KYR 301 owned by the said Mr. Tiego. The Respondent claims that the Applicant did not disclose to her about the outcome of her case. The Respondent then complained to the Complaints Commission which investigated the complaint and the result revealed that the Applicant had committed gross acts of professional misconduct. The Commission also established that the Applicant had received a total of sum of Kshs.700,000/- for onwards transmission to the complainant. The Applicant had also issued two cheques on 15th January, 2007 and 8th September, 2007 to the Complainant which cheques were both dishonored upon presentation at the Applicant's bank. The Respondent further claimed that the Applicant had oppressively caused her to sign voucher that purported to discharge the applicant from his grievous act of professional misconduct by making to her a less payment of Kshs.500,000/- to the complainant . She claimed further that the Applicant has continued to withhold the balance of Kshs.200,000/- which has since accrued with interest to become Kshs. 872,000/-.

The Respondent argued that the fact that the Appellant made part payment and notified both the Advocates Complaints Commission and the Law Society of Kenya of the same as averred at paragraph 3 of the supporting affidavit, did not sanitize the applicants acts of professional misconduct and could only be used as mitigating factors. The Respondent maintained that the application does not meet the requisite legal threshold demand of applications seeking stay pending appeal since he has not demonstrated willingness to pay the outstanding amount he was ordered to pay.

In a rejoinder, through the replying affidavit sworn by the Applicant John Olago-Aluoch, the Applicant stated that the replying affidavit by the 3rd Respondent and sworn by the Naomi Wagereka have introduced new evidence contrary to the law. He claimed that the affidavit is full of speculation and he urged the court to confirm the stay pending appeal orders as previously issued and extended. He stated that the Commission was fully aware of the settlement made by the Applicant; therefore the 3rd Respondent was making allegations which are uncalled for. He maintained that the payments made were final and the allegations of a balance of Kshs.200,000/- cannot arise at this stage.

The application was prosecuted by way of written submissions. The Applicant submitted that once an advocate has qualified to become an advocate and signs the Roll of Advocates, his name is gazetted as such for purposes of notice and information to general public and for record purpose. Similarly when an advocate is struck-off the Roll of Advocates, it takes effect upon gazettelement of the same which serves as a notice to the public as well as the record. He further submitted that this court is clothed with the powers to stop the gazettelement of the same until the appeal is heard and determined.

The Applicant repeated further submitted that his appeal raises triable issues and stay should be granted. He stated that the proposed gazettelement of his being struck off the Roll of Advocates if not stayed shall have grave repercussion on the career of the Applicant who is both an advocate of 34 years standing and also a member of parliament for Kisumu West and that he will suffer substantial loss which cannot be

remedied by way of monetary compensation of loss of reputation or otherwise.

The Applicant further claims that the proposed gazettelement if successful will render the appeal nugatory and there will be a barren result unless the subject of the appeal is preserved in whatever way the court may deem fit. The Applicant will also suffer prejudice, hence the need to grant stay of the gazettelement pending the hearing and determination of the appeal.

The Applicant submitted that it is the role of this court to preserve the subject matter of the appeal which is inherent in the administration of justice. The Applicant argued that the issue whether there was a settlement between the Applicant and whether the Applicant owed monies, relied upon by the 2nd Respondent, is a triable issue deserving the courts consideration. In support of this position the Applicant relied on the court of appeal decision in the case OF **FTG HOLLAND VS AFAPACK ENTERPRISE LIMITED & ANOTHER, Civil Application No. 83 of 2013.**

The Applicant further argued that it is trite law that as long as a matter is appealable by law, a party can be granted stay pending a hearing and determination of the appeal in order to obviate any injustice or prejudice which the party would otherwise suffer in the event the appeal eventually succeeding.

The 1st and 2nd Respondent on the other hand submitted that the 2nd Respondent acted well within their mandate in finding and ordering that the Applicant be struck off the Roll of Advocates. They stated that the Applicant being removed from the Roll of Advocates took effect immediately upon the issuance of such orders on the 28th October 2013. They submitted that the act of gazettelement as also portrayed under Section 69 of Advocates Act, is merely to inform the general public of the removal from the Roll of Advocates of the Applicant, and in no way is the gazettelement the date upon which removal of the advocate from the roll then takes effect. The Respondents further argued that Parliament, in crafting and passing the Advocates Act, Parliament had found it fit to expressly bar under Section 62(3) of the said Act, any suspension of the effect and/or stay of execution of the order being sought by the Applicant not to be granted.

I have carefully considered the submissions above. It is the court's view that the only issue for determination is ***whether on the facts and circumstances of this case the Applicant is entitled to the orders sought, pending the appeal.***

Whether or not to grant the order is a matter of judicial discretion to be exercised in the interest of justice, which discretion is unlimited save that it should be exercised judiciously. In determining the question, the Court exercises its inherent power under Sections 1A, 1B and 3A of the Civil Procedure Act. In **Kenya Power & Lighting Company Limited Vs Esther Wanjiru Wokabi, High Court Civil Appeal No. 326 of 2013 [2014] eKLR Githua J** while referring to the **Ringera J** in the case of **Global Tours & Travels Limited**; Nairobi HC Winding Up Cause No. 43 of 2000, stated as follows: -

“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a) Whether the Applicant has established that he/she has a prima facie arguable case.**
- b) Whether the application was filed expeditiously; and**
- c) Whether the Applicant has established sufficient cause to the satisfaction of the court, that it is in the interest of justice to grant the orders sought.”**

I fully agree with that court and I will apply the said principles in this case. It is not disputed that a complaint was filed at the 3rd Respondent concerning the Applicant who is an advocate and a Member of Parliament for Kisumu west. What is in dispute is the allegation that the Applicant withheld Kshs.700,000/- plus interest. The Complainant had also complained that the Applicant issued to her cheques which were dishonoured and he also misled her by giving her false information regarding the

status of the matter. On the other hand the Applicant's claimed that the matter was fully settled by consent and was recorded as so before the 2nd and 3rd Respondent. He also claimed that despite the consent the 2nd Respondent continued with the hearing and made a decision to strike the Advocates name off the Roll of Advocates.

In my view there exists a dispute between the parties in this case. The Court of Appeal in the case of **UAP Provincial Insurance Company Ltd Vs Michael John Beckett, Civil Appeal No. 26 of 2000** observed as follows: -

“In interpreting that provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no “real dispute”. Lord Swinton Thomas LJ, captured the significance of the words “there is not in fact any dispute between the parties” as used in the 1975 English Arbitration Act, and which appear in our section 6(1) (b), in the English case of Halki Shipping Corpn Vs Sopex Oils Ltd [1998] 1 W L R 726 which presents striking similarity with the circumstances in the present appeal. We bear in mind that that case was decided under the 1996 Arbitration Act of England.”

In the instant case, I find that there is a real dispute which this court needs to determine during the Appeal trial. The Applicant has persuaded this court that he has a prima facie arguable case, with substantive issues to be investigated and resolved.

Applying the second principle in this case, the decision to strike out the Applicant from the Roll of Advocates was made on 28th October 2013. The Applicant filed the current application on 8th November 2013. In my view the application was filed expeditiously and without inordinate delay. On whether the Applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought, the Applicant had submitted that the proposed gazettelement if published, will have an effect on the Applicant's career as an advocate of 34 years standing and as a Member of Parliament, if the orders are not granted. The court accepts that he will likely suffer substantial loss which cannot easily be compensated by money if he finally succeeds in his appeal. The complainant's claim is monetary and therefore the Applicant can compensate her if the court decision is in her favour. In my view therefore, justice in this case will be served by granting conditional orders in favour of the Applicant as follow: -

ORDERS

1. ***Stay of execution in terms of prayers three (3), five (5) and six (6) on the following conditions***
 - a. ***That the applicant deposits in this court within 15 days, a total sum of Kshs.872,000/- plus court interest thereon from the date of the lower Tribunal's Ruling***
 - b. ***That this appeal shall be prosecuted within nine (9) months in default or both the stay shall automatically and without more stand discharged.***

2. ***Costs of this application are to the Respondents to be agreed upon or be taxed.***

Dated and delivered at Nairobi this 13th day of May, 2015.

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D A ONYANCHA

JUDGE