



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 161 OF 2015

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

IN THE MATTER OF AN APPLICATION BY THE APPLICANT, JOHN WACIRA WAMBUGU, FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION DIRECTED TO THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA (LSK)

RULING

Introduction

1. By a Chamber Summons dated 22nd May, 2015 filed in this Court the same day, the applicant herein, **John Wacira Wambugu**, seeks the following orders:

1. That the honourable court be pleased to grant the Applicant leave to apply for an order of certiorari to quash the decision of the Law Society of Kenya Disciplinary Tribunal issued on 12/5/2015 in cause No. 79 of 2013 which requires execution proceedings to issue against the Applicant for the recovery of the sum of Seventeen Million Nine Hundred and Eighty Four Thousand Seven Hundred and Eight Kenya Shillings (Kshs. 17,984,708/=) and the subsequent proclamation notices issued by Pyramid Auctioneers dated 18/5/2015.

2. That the honourable court be pleased to grant the Applicant leave to apply for an order of prohibition to prohibit the Law Society of Kenya Disciplinary Tribunal from proceeding further with execution pending the final determination of the Applicant application in disciplinary Cause 79 of 2013 dated 21/10/2014 seeking orders for review of the judgment delivered on 27/10/2014 of which the said application is currently slated for ruling on 20/7/2015.

3. That leave once granted do operate as a stay of execution of the judgment delivered by the Law Society of Kenya Disciplinary Tribunal in disciplinary cause No. 79 of 2013 on 27/10/2014, involving the Applicant pending the hearing and determination of the proceedings herein.

4. That the costs of this application be met by the Respondents.

Applicants' Case

2. The application was supported by a verifying affidavit sworn by **the Applicant** on 22nd May, 2015.
3. According to the Applicant, on 12th May, 2015 the intended Respondent, **Law Society of Kenya Disciplinary Tribunal** (hereinafter referred to as “the Tribunal”), issued execution proceedings against him for the recovery of the sum of Seventeen Million Nine Hundred and Eighty Four Thousand Seven Hundred and Eight Kenya Shillings (Kshs. 17,984,708/=) being part of the judgment delivered on 27th October, 2014 which judgement contained mistakes and errors apparent on the face of the record. Consequently he applied for review/setting aside the said judgment on 4th October, 2015 before the Tribunal which application was heard by way of written submissions whereby both parties complied and the application was slated for ruling on 16th March, 2015.
4. The applicant deposed that when the matter came up for ruling on the said date, the Tribunal sought for more time as the ruling was not ready and the matter was stood over to 20th July, 2015. The Applicant was however, shocked to learn that notwithstanding the pendency of the said decision execution proceedings were commenced by the Tribunal. In the Applicant’s view, the said execution proceedings are in bad faith as he was being proclaimed to pay sums of money which he did not receive. To the contrary it is the complainants who owe him.
5. The Applicant believed that his said application was meritorious and the actions by the Tribunal were a well calculated move to deny him a right to be heard on merit and defeat the cause of justice. To the Applicant, the delay by the Tribunal in failing to deliver a ruling was unreasonable and raised suspicion which suspicion was further buttressed by the fact that the Tribunal issued execution whereas they were well aware of the position.
6. The Applicant therefore asserted that the said decision was unreasonable and a gross procedural impropriety with a view to deny him a chance to be heard on merit and render the ruling on his application for review slated nugatory. He further believed that the Tribunal was biased as it has failed to make a decision on his application for review of the judgment delivered while commencing, execution proceedings despite the fact that parties filed their submissions in December last year. Since the complainant was indebted to him, the Applicant averred that the execution proceedings were instituted out of bias and in bad faith. Similarly the advocates for the beneficiaries/complainants were also accused of acting in bad faith as they have had the Applicant’s statement of accounts filed in Mombasa High Court Succession Cause No. 416 of 2006 which they never challenged but were instead claiming funds which were not held by the Applicant’s firm a fact that was within their knowledge.
7. It was further contended that the execution proceedings were illegal and *ultra vires* as the judgment delivered had not been registered in court for execution. He further deposed that the purported attachment was unlawful in that he was not the registered owner of the motor vehicle KBW 165W as per the copy of records from KRA.
8. To the Applicant as his statement of account provided and filed in the High Court at Mombasa succession Cause No. 416 of 2006 was never challenged, it followed that the decision by the intended Respondent tribunal to proceed on execution claiming a sum of Kshs 17,984,708/= was unreasonable, illegal and arose out of bias.

Interested Parties’ Case

9. In opposition to the application the Interested Parties herein **Monica Wanjiko Ngugi** and **Victoria John Ngugi** filed the following grounds of opposition:
 1. **The application is misconceived, frivolous, vexatious, incompetent and improperly before the court and an open abuse of the court process.**
 2. **The Applicant has vide Judicial Review Application 445 of 2013 already made a similar application which was declined by this court by the honourable Justice Odunga.**
 3. **The application is res judicata.**

4. The fact that there is a review application pending before the Disciplinary Tribunal of the Law Society of Kenya does not act as a stay and does not preclude the Interested Party from proceeding with execution.

5. A stay in the instant case should only be granted if the Applicant is ordered to deposit the entire decretal sum.

10. They also filed a notice of preliminary objection in which they averred that the matters raised in the present application are *res judicata* having been raised and been substantially in issue in Judicial Review Case Number 445 of 2013 between the same parties herein litigating under the same title.

Determinations

11. I have considered the instant application, the affidavits in support thereof and the ground filed in opposition thereto, as well as the submissions on record.

12. The Applicant's application in my view is based on two grounds.

13. The first ground is that the action of the Tribunal in issuing the execution process while a ruling on the application for review of the judgement, which application in his view was merited was unreasonable and was tainted with bias. It is not however contended the issuing of the said process was illegal or that the same was issued in breach of the rules of natural justice. As the interested parties rightly submitted, the mere fact that there was a ruling pending on the applicant's application for review did not mean that there was an automatic stay of the further process. It was incumbent upon the applicant to seek and obtain an express order that pending the determination of his application for review there ought to be a stay of further proceedings. Whereas prudence would have required that the execution proceedings be put on hold, the decision to do so was purely discretionary and this Court does not in judicial review substitute its discretion for that of a tribunal duly constituted to deal with disputes.

14. The other point taken by the Applicant is that the amount being claimed from the Applicant is not due. That issue however cannot be determined in these proceedings. That issue ought to be the subject of either a review or an appeal.

15. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. **See also Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.

16. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even

though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

17. This position was confirmed by the Court of Appeal in Meixner & Another vs. Attorney General [2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
18. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

19. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

20. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.
21. I have considered the Applicant's ground for seeking judicial review reliefs and I am not convinced that the Applicant has established *prima facie* grounds for the grant of the leave sought. It has not been contended that the Tribunal had no jurisdiction to issue the execution process. Since there was a judgement in place, the mere issuance of execution proceedings cannot in my view be termed unreasonable. It must be remembered that it is not mere unreasonableness that will invite the invocation of judicial review jurisdiction. The unreasonableness complained of must transcend ordinary subjectivity in decision making. In other words it must be such that no

reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. It is only then that the decision can be termed irrational and it is the irrationality which would justify the remedy rather than mere unreasonableness. In an application for judicial review where the ground relied upon is unreasonableness it is not enough to simply state that the decision is unreasonable but the Applicant must go further to outline the grounds upon which it is contended so. Without doing so, it is my view that a *prima facie* case cannot be said to have been made out. In this case I do not agree that the mere issuance of an execution process while a ruling on application for review is pending determination does *prima facie* amount to irrationality since there is nothing inherently wrong in adopting such a course. As was held by **Stephen Brown, LJ** in **R vs. Secretary of State ex parte Swati [1986] 1 All ER 717**, the onus is on an applicant to show that he has arguable grounds for challenging the decision complained of. It is not sufficient merely to express disagreement, however strong.

22. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** the Court held:

“Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest...The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations...There cannot be a cause of action based on a lawful exercise of the right of execution by interested parties since it is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from so doing because there are allegations of violations of the Constitution by the state or Government...The Constitution does assume the existence of a supportive Civil Procedure regime in so far as the same is not inconsistent with the constitution and there is nothing inconsistent with the constitution in the act or principle of setting aside *ex parte* orders for good reasons. If an order obtained in a constitution application is incompetent or is improperly obtained there cannot be any valid reason why the Courts would not have the jurisdiction to set it aside since setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy”

23. In this case, the Applicant, had he been properly advised would have obtained what he seeks through these proceedings in the proceedings before the Tribunal.

Order

24. In the premises I decline to grant the leave sought herein.

25. Consequently, the Chamber Summons dated 22nd May, 2015 fails and these proceedings are dismissed with costs to the Interested Party.

Dated at Nairobi this 2nd day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Arati for Mr Chege for the Applicant

Mr Mwagambo for the Interested Party

Cc Patricia