



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

**MISC CIVIL APPLICATION NO. 445 OF 2013**

**REPUBLIC..... APPLICANT**

**VERSUS**

**DISCIPLINARY TRIBUNAL**

**OF THE LAW SOCIETY OF KENYA.....RESPONDENT**

**MONICA WANJIKO NGUGI**

**& VICTORIA JOHN NGUGI.....INTERESTED PARTIES**

**EXPARTE**

**JOHN WACIRA WAMBUGU**

**RULING**

1. On 21<sup>st</sup> January, 2013, I directed that the leave granted in these proceedings do operate as a stay of the impugned proceedings pending the hearing and determination of the Motion herein or until further orders of the Court on condition that the ex parte applicant deposits the sum of Kshs 10 million in court within 14 days.
2. By an application dated 4<sup>th</sup> February, 2014 the applicant sought a review of the said decision and by a ruling dated 7<sup>th</sup> February, 2014, the application for review was dismissed save that the Court varied the said order and directed that the said sum be deposited in a joint interest earning account in the names of the advocates for the applicant and the interested parties within 5 working days from the date of the ruling and in default the stay would be deemed to have been declined. Liberty to apply was however given to the parties.
3. The applicant is back before this Court this time round vide an application dated 28<sup>th</sup> October, 2014 seeking substantially a temporary injunction restraining the respondent Tribunal from sentencing, executing and/or taking any other steps in the Disciplinary Cause No. 79 of 2013 pending the hearing and determination of these proceedings.
4. According to the applicant, he was unable to deposit the said sum as directed due to the delay on the part of the interested parties' advocates in signing account opening forms and complying with the Bank's instructions. However a joint account was eventually opened in the names of the advocates and a sum of Kshs 9,550,000/= deposited thereon. Despite what the applicant contends is substantial compliance with the Court order, the Tribunal insisted on proceeding with the disciplinary cause against the applicant and delivered its judgement on 27<sup>th</sup> October, 2014 in

- which it ordered the applicant to pay the interested parties a sum of Kshs 27,484,700/= yet according to the applicant there was no professional misconduct on his part.
5. The application was opposed by the interested parties vide a replying affidavit sworn by **Monica Wanjiko Ngugi** on 29<sup>th</sup> October, 2014.
  6. According to her the applicant is yet to comply with the conditions for stay as ordered by the Court and as such are undeserving of the orders sought in this application. According to the deponent the Tribunal was therefore within its rights and powers in proceeding with the Disciplinary matter and to render its judgement as it did and to proceed with the sentencing. According to the deponent due to the applicant's conduct he is not entitled to the discretionary remedy of injunction.
  7. In a further affidavit sworn on 30<sup>th</sup> October, 2014, the same deponent deposed that the delay in opening the account was occasioned wholly by the Advocate and despite the account being opened in March, the monies were only deposited sometime in August or September
  8. I have considered the application made herein and this is the view I form of the matter. Although the parties herein dwelt on several other issues, it is this Court's view that those issues are not material to the instant application since the said issues touch on the merit of the substantive motion. In this ruling the Court's only concern is whether it should injunct the Respondent from handing down its sentence in the subject disciplinary proceedings.
  9. In judicial review proceedings the orders which the Court is empowered to grant are well known and they are certiorari, prohibition and mandamus. I derive support for this holding from the decision of **Musinga, J** (as he then was) in **Republic vs. District Land Registrar Nandi & Another Ex Parte Tegerei & Another [2005] 1 KLR 521**, where he held:

**“The application dated 10<sup>th</sup> March 2004 was very unusual in that it was an application for an injunction made within an application for judicial review brought under Order 53 of the Civil Procedure Rules, and the judicial review matter had already been finalised when the orders of *certiorari* were granted as sought. Firstly, the Court became *functus officio* after it granted the orders for *certiorari* that had been prayed for and the matter could not be reopened so that injunctive orders could be granted. Secondly, it is common knowledge that under Order 53, the only remedies that can be granted are orders of *certiorari*, *mandamus* and prohibition. Injunctions cannot be sought in a matter commenced by judicial review.”**

10. Whereas the Court is empowered to direct that a grant of leave operate as a stay, the stay contemplated under Order 53 rule 1(4) of the ***Civil Procedure Rules*** is stay of the proceedings in question. In other words it is the stay of the proceedings against which the judicial review proceedings are directed. The proceedings in question in this matter were pending disciplinary proceedings before the Respondent. It would seem that the said proceedings have been substantially concluded with a judgement having been delivered. Therefore even if what was being sought was a stay, which it is not, it is highly improbable that this Court would be clothed with jurisdiction under the said rule to grant the stay. Perhaps it was due to the realisation that to seek an order of stay would have been futile that the applicant decided to seek for injunction.
11. As stated hereinabove this Court directed that the grant of leave would operate as stay of the Respondents' proceedings under certain conditions. It is clear that the said conditions were never complied with as directed. In fact there is no evidence that the same have been fully complied with. This Court gave the parties liberty to apply. Instead of moving this Court for appropriate orders if there were any difficulties in complying with the said order within the time stipulated the applicant instead chose to ignore the conditions granted by the Court. This Court's orders were specific. The Court did not order substantial compliance but full compliance. In the absence of an application before this Court seeking that extension to comply pursuant to the order granted on the application for review, the direction that the leave do operate as a stay is deemed to have been refused. The word “deem” has been interpreted by the Court and in **Gatete and Another vs. Kyobe SCCA No. 7 of 2005 [2008] 2 EA 135** it was held by the Supreme Court of Uganda that:

**“The word “deemed” is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for**

**the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to place beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”**

12. Apart from stating that the conditional order made by the Court has been substantially complied with no satisfactory reasons have been furnished why it was difficult to comply therewith. This Court having declined to review its conditional order, the applicant could only be heard on an application for extension of time to comply and not on an application whose effect would amount to a review or variation of the order declining stay since under Order 45 rule 6 of the ***Civil Procedure Rules*** this Court is expressly barred from entertaining an application to review an order made on an application for a review of a decree or order passed or made on a review.

13. Having considered the application herein I find the application dated 28<sup>th</sup> October, 2014 misconceived and the same is dismissed with costs to the interested party.

**Dated at Nairobi this 5<sup>th</sup> Day of November, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Ngige for the Applicant**

**Mr Mwangambo for the interested parties**

**Cc Patricia**