



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Case 942 of 2007

WAWERU MWANGI..... APPLICANT

VERSUS

THE DISCIPLINARY COMMITTEE

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

JUDGMENT

Waweru Mwangi, an advocate of the High Court of Kenya rendered some legal services to one Kinyua Gichohi after which he received some payment of Kshs.288,160.60 on behalf of the said client. The Applicant also made payments to the court on behalf of the said client in another suit MISC APP. 501/00 against the Attorney General. The amount was paid without the knowledge of the Applicant. Because of the legal services rendered the Applicant held onto the monies received as a lien. He has filed a bill of costs that is yet to be taxed. Meanwhile the client complained to the Complaints Commission which referred the matter to the Disciplinary Committee where the Applicant was charged with failing to account to the complainant and failing to respond to correspondence from the Commission. The Applicants seeks:-

1. An order of certiorari to remove into the court and quash the orders made by the Disciplinary Committee on 13/5/07
2. An order of mandamus compelling the Respondent to terminate the continued hearing of the proceedings in Disciplinary cases Nos. 198 and 220 of 2003.

The Application was opposed and the issues for determination are:-

1. Whether the Respondent breached the rules of natural justice
2. Whether the respondent's decision is illegal and whether the Respondent has abused its powers.

The Notice of motion is supported by a statutory statement dated 17/8/09, verifying affidavit of the Applicant dated the same date, a supplementary affidavit dated 9/6/08; and submissions dated 17/12/09. Betty Nyabuto the secretary to the Respondent swore an affidavit in reply and submissions both dated 28/2/08.

Brief facts of the Applicants case are that the Applicant rendered legal services to Kinyua Gichohi the complainant in the Disciplinary cases. He received Kshs.288,160.60 on behalf of the said Gichohi in SRMCC 4088/1987. The Applicant made respect of SRM

4088/87 and MISC. 501/00. MISC.501/00 was filed in the High Court against the AG when they failed to pay the decretal sum and costs. That after the Applicant filed the application against the Attorney General without his knowledge the Gichohi and the Attorney General agreed and the complaint was paid the sum of Kshs.236,577/= and he did not learn of that payment until he was contacted by the Disciplinary Committee. That the Applicant filed Advocate – client bill of costs. HMISC. 46, 47, 48 and 49/07 Which have not been heard and he is yet to file a bill in respect of the Kshs.236,577/= paid to Gichohi by the Attorney General. That Gichohi complained to the complaints commission which referred the matter to the Disciplinary Committee (DC) and he was charged. That the Disciplinary Committee made an order that their determination would await taxation of the Bill of costs. That, during the hearing, the Disciplinary Committee taxed the costs due without the Bill of costs. The taxed costs were deducted from the sum of Kshs.288,160.60/= received by the Applicant and convicted the applicant for failing to remit the balance of Kshs.138,160.60/=. It is the contention of the Applicant that the taxing of the bill was done without jurisdiction, that the taxation was done while the complainant had withheld material particulars from the Disciplinary Committee, that the taxation was oppressive and an abuse of due process by the Respondent because they did not wait for the filing of the bill and lastly that in so doing, the Respondent breached the rules of natural justice.

In opposing the Notice of Motion, Betty Nyambuto the then Secretary to the Respondent deponed that after Gichohi made a complaint to the Respondent on 5/3/03, the Respondent wrote to the Applicant the letter dated 6/3/2003, informing him of the complaint (BN-1) but the same yielded no reply and the Complaints Commission lodged a complaint with the Disciplinary Committee on 25/8/04 on two charges of failure to account Kshs.288,160/= to Gichohi and failure to respond to the correspondence by the Complaints Commission. The matter was set down for plea on 15/12/04 but the Applicant failed to appear. On 17/12/05, the records were rectified to indicate the proper sums owed and the Applicant was informed of the complaint and charges due for mention on 20/2/06 but the Applicant did not file any reply but was represented by Mwangi Advocates for the mention. On 14/9/06, the court directed that the bill of costs be taxed within 21 days but on 12/2/07. When the matter came up for taxation, the Applicant’s counsel sought adjournment to await taxation by the High Court. It was adjourned to 24/5/07 on which date taxation would proceed if the High Court had not taxed. On 24/5/07 the Disciplinary Committee went ahead with the taxation because the High Court had not taxed the Bills. A ruling was delivered on 13/8/07 and assessed the total fees for acting in SRCC 4088 of 1997 and HMISC No.501/00 at Kshs.90,000/= and the applicant was convicted of failing to account for Kshs.138,160/=. The respondent contends that in taxing, it took into account the provisions of the remuneration order 1993 and 1997 and acted within its power conferred by Section 60(7) and 60 A (a) of the Advocates Act. That in any event under Section 60 (7) the Disciplinary Committee can make an estimate of the costs and that all the allegations made against the Respondent are false and misconceived, and the Applicant is not entitled to orders of Judicial Review.

Under S 60 (7) of the Advocates Act, the Complaints Commission is empowered to assess the costs due to an Advocate if a bill of costs has not been taxed. The said section reads as follows:-

“S 60 (7) if a bill of costs has been filed in court by the Advocate against whom a complainant is being heard but has not been taxed, the committee may adjourn the complaint for such period as it considers reasonable to allow her taxation:

Provided that if at the expiry of such adjournment, the bill is still not taxed, the committee may make its own estimate of the costs due to the advocate and Make orders accordingly.”

Further to the above the Respondent has the jurisdiction to determine the costs due to an advocate under S 60 A (2) of the Advocates

Act. That section reads as follows:-

“ S 60 A (2) where, on the hearing of any application or complaint with respect to an advocate or firm of advocates, it appears to the Committee that the professional services provided by such advocate or firm in which such advocate or firm in connection with any matter in which such advocate or firm of advocates had been instructed by a client were, in any respect, not of the quality that could reasonably have been expected of an advocate subject to subsection (4), the Committee may, if it thinks fit, do one or more of the following things, namely:-

(a) Determine that the costs to which the advocate or firm of advocates is entitled, in respect of those services shall be limited to such amount as may be specified in its determination and by order, direct the advocate to comply, or to secure compliance with such one or more requirements falling within subsection (3) as appear to it to be necessary in order to give effect to its determination, or.

(b).....”

Before the Respondent invoked this jurisdiction it is on record that the Applicant had been notified of those charges he faced but he did not file any reply though he was represented by Mr. Wang. On 14/9/06 at a mention, the Applicant was ordered to have the bill of costs taxed within 21 days but on 12/2/07 the Applicant still asked for adjournment for purposes of taxing his bill and another adjournment was granted till 24/5/07 for taxation of the bill by the Respondent, if the bill was not taxed by the High Court. The Disciplinary Committee proceeded to tax the bill on 24/7/07 since the Applicant had failed to do so. The Applicant had been allowed time from 14/9/06 till 24/5/07 to have his bill taxed but he failed to seize that opportunity. The Respondent allowed him about 8 months. He has no basis for alleging that the Respondent exercised its discretion unfairly under the circumstances, the Respondent was very fair to the Applicant. As seen from sections, cited above i.e. S 60 (7) the Respondent can tax a bill of costs following a complaint against an advocate or under S 60 A (2) a bill can be taxed following a complaint if the committee finds the services rendered to be wanting or poor in professional standards. The Respondent acted within its mandate.

As to whether or not rules of natural justice were observed by the Respondent, I do find that the Applicant was allowed representation by counsel, he was allowed an adjournment to prepare his case and file a defence which he did not do. The Applicant was made aware of the charges that he faced and he can not turn around and allege breach of rules of natural justice. I find no substance in any of the allegations levelled against the Respondent. The applicant wants to make his defence to the complaints at this stage, but this court is not concerned about the merits of the case but whether the decision making process was fair. When given a chance he failed to take advantage of it. The other grounds of unreasonableness and arbitrariness have not been substantiated. This court finds no merits in this application. It is dismissed with costs going to the Respondent.

Dated and delivered at Nairobi this 2nd day of March, 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Shimenge for Applicant

