



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GICHERU, OMOLO & SHAH J.J.A
CIVIL APPLICATION NO. 163 OF 1999 (62/99 UR)
BETWEEN**

MOSES KIPNGETICH

KURGAT.....APPLICANT

AND

THE DISCIPLINARY COMMITTEE

OF THE LAW SOCIETY.....RESPONDENT

**(Being an application for stay of execution in an
intended appeal from the Ruling and Order of the
High Court of Kenya at Nairobi (Hon. Lady Justice Aluoch) dated 3rd June, 1999
in
H.C.Misc.A NO. 796 OF 1997)

RULING OF THE COURT**

The applicant, **Mr. Moses Kipngetich Kurgat**, who is an advocate of the High Court of Kenya, seeks stay of execution of the order of the superior court (Aluoch, J) made on 3rd June, 1999.

The facts pertinent to this application are that the applicant was the respondent before the **Disciplinary Committee of the Law Society of Kenya** in regard to a complaint lodged against him by his client Mr. Gordon Sichale. That was Disciplinary Committee Cause No. 2 of 1996. The complaint was that the applicant had failed to release to and account for the moneys received by him. The amount in question was Shs.700,000/=. The money was deposited with the applicant on behalf of a group called **Chesito Farm** to purchase a parcel of land for them. Cheques issued by the applicant to the advocate for the vendor of the said parcel of land were dishonoured. Similarly cheques issued to the complainant by the applicant in purported refund of the sum deposited were dishonoured. Only one cheque, for Shs.100,000/= which was a banker's cheque, was honoured. The applicant has yet to refund a sum of Shs.600,000/= to his client.

The Complaints Commission sought to know from the applicant, reasons for such dishonour. He responded saying that the moneys were deposited with Post Bank Credit Limited which bank went into liquidation and he was hence unable to pay. He produced no documents to the Commission to show that the money was deposited with that Bank.

The applicant duly appeared for plea before the Disciplinary Committee on 5th May, 1996 and pleaded not guilty to all the four counts he was then facing. The hearing date was fixed for 14th June, 1996. Although the applicant was fully aware of this date he preferred to go to Mombasa on that day to sit

as a member of the Kenya Industrial Property Office leaving it to his counsel Mr. Abuodha to apply for an adjournment. Mr. Abuodha was not adequately briefed then to conduct the defence.

The hearing proceeded in the absence of the applicant. Half way through the complainant's evidence Mr. Abuodha walked in to seek an adjournment saying he was delayed because he had a matter in the High Court to attend to.

It is a matter of regret that an advocate would prefer to attend to another business when his career as an advocate is at stake. He ought to know his options. We see no arguable point as regards the applicant's complaint of having been condemned unheard. Nor do we see any error on the part of the Disciplinary Committee when it declined to grant an adjournment. The Committee was entitled to grant or refused an adjournment. We do not think this is a particularly arguable point.

The applicant did not appeal against the decision of the Disciplinary Committee as provided in section 62(1) of the Advocates Act, Cap 16, Laws of Kenya but instead opted to move the superior court by way of a judicial review application under Order 53 rule 1(2) of the Civil Procedure Rules. That remedy was possibly available to him and we say no more about it at this stage as we are dealing with an application under rule 5(2)(b) of the Rules of this Court.

Mr. Gaturu for the respondent attempted to object to the application in limine. This objection was to the effect that as the applicant had appeared in a magistrate's court despite the superior court's order for stay of execution having been set aside, the applicant was not deserving of the exercise of the Court's discretion under rule 5(2)(b) of the Rules of this Court. If there is any contempt of the orders of the superior court the matter can only be raised in the superior court and not in this Court. We can only exercise our jurisdiction to punish for contempt of this Court.

Mr. Gaturu also raised the issue that an appeal under section 62(1) of the Advocates Act "shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order". As the applicant did not appeal under the provision in section 62(1) of the Advocates Act the issue need not be ruled upon by us.

However, on the facts as presented before the Disciplinary Committee and taking into account the behavior of the applicant, in not presenting himself before the said Committee, we are not inclined to exercise our discretion to order a stay of the orders of the superior court. This does not mean that we are shutting out the applicant from lodging and pursuing his intended appeal. This application is dismissed with costs.

Dated and delivered at Nairobi this 17th day of December,

1999.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR