Nyang'au v Law Society of Kenya & 2 others (Civil Appeal (Application) E118 of 2023) [2024] KECA 24 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 24 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E118 OF 2023

HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA

JANUARY 25, 2024

BETWEEN

LEO MASORE NYANG'AU ..... APPLICANT

AND

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

ADVOCATES DISCIPLINARY TRIBUNAL ..... 2ND RESPONDENT

SULEIMAN K. MURUNGA ..... 3RD RESPONDENT

(Being an application for stay of further proceedings before the 2nd respondent Disciplinary Tribunal Cause No. 61 of 2019 or in the alternative an injunction restraining the 2nd respondent from proceeding with mitigation and sentencing of the applicant pending the hearing and determination of the appeal against the ruling and order (M. Thande, J.) dated 17th February 2023 in HCCCP No. E051 of 2022)

RULING

1. Before us for determination is a Notice of Motion dated March 29, 2023, seeking the prayers that pending the hearing and determination of the appeal against the ruling and order of Thande, J. delivered on February 17, 2023 the Court do issue: a prohibitory injunction against the 1st respondent preventing it from impeding in any way the applicant's application for renewal of annual practicing certificate, as and when the same falls due on account of Disciplinary Tribunal Cause No. 61 of 2019; in the matter of Leo Masore Nyang'au Advocate; a stay of further proceedings before the 2nd respondent, being Disciplinary Tribunal Cause No. 61 of 2019; in the matter of Leo Masore Nyang'au Advocate; in the alternative to (b), an order of prohibitory injunction prohibiting further hearing and determination by the 2nd respondent in Disciplinary Tribunal Cause No. 61 of 2019; in the matter of Leo Masore Nyang'au Advocate.

2. A brief recap of what gave rise to the application is that the applicant herein represented a client in the Chief Magistrate's Court at Nairobi, Civil Case No. 1111 of 2018 and obtained eviction orders against the 3rd respondent, which were executed on March 3, 2018. The 3rd respondent filed an application seeking to set aside the said orders on the ground that there were pending proceedings between the parties in the Environment and Land Court Case No. 1559 of 2013, and that there existed a temporary injunction restraining the applicant's client from evicting the 3rd respondent. Subsequently, the applicant filed an application to cease acting for the client.

3. Further, the 3rd respondent filed an application for contempt of court proceedings against the applicant in the ELC case vide a Motion dated March 5, 2018, arguing that the applicant was aware of the injunctive orders but still moved the Magistrate's Court for eviction orders. The 3rd respondent subsequently filed a complaint with the 2nd respondent dated 15th August 2018, accusing the applicant of unprofessional conduct. The High Court in its ruling of February 25, 2019 dismissed the application for contempt on account that there was no evidence that the applicant was actually served with the court order. The applicant consequently filed an affidavit with the 2nd respondent annexing the ruling and urging it to down its tools. The 2nd respondent vide a judgment delivered on May 10, 2021 held that the applicant was guilty of unprofessional conduct as he knew that there were orders of injunction in force, but nevertheless sought eviction orders against the 3rd respondent.

4. Aggrieved, the applicant filed an appeal to the High Court, being HCCA No. E270 of 2021, together with an application seeking stay of execution of the 3rd respondent's judgment and proceedings which was dismissed on November 1, 2021 by Sergon, J. The learned Judge directed that the applicant do present himself for mitigation and sentencing, and that he should only invoke the court's jurisdiction once he had been sentenced.

5. Aggrieved, the applicant filed a Constitutional Petition No. E051 of 2022 in the High Court dated February 4, 2022 alleging violation of his constitutional rights and freedoms, together with an application for interim reliefs pending determination of the petition. In response, the 3rd respondent filed a preliminary objection dated February 22, 2022, decrying the court's jurisdiction. The court in its ruling upheld the objection and consequently dismissed the petition with costs.

6. Aggrieved by this ruling, the applicant has now filed an appeal to this Court together with the instant application.

7. The application is supported by an affidavit sworn on even date by the applicant, who avers that the intended appeal is arguable as it raises weighty constitutional and legal points, namely at what stage the High Court should exercise its jurisdiction and intervene in proceedings before specialized tribunals; and whether the High Court can dismiss proceedings for want of jurisdiction before it is yet to consider the substantive matter before it. He added that he was expected to appear before the 2nd respondent for mitigation and sentencing and if the orders sought are not granted, the substratum of the appeal will be defeated, thus rendering the appeal nugatory. He contends that his livelihood is on the line, as he stands to suffer untold hardship should he end up being sentenced; and that the converse is true as the respondents will not suffer any prejudice upon grant of the orders he seeks.

8. The application is opposed by the 1st respondent vide a replying affidavit sworn on July 14, 2023 by one Florence Muturi, its Chief Executive Officer and the secretary to the 2nd respondent. She deposes that the High Court rightfully found that the applicant had not exhausted redress process as provided for in section 62 of the *Advocates Act*, before moving it (the High Court); that the intended appeal lacks merit and should the applicant be dissatisfied with the tribunal's judgment and sentence, he can

rightly apply for stay and judicial review; and that the appeal will not be rendered nugatory nor will the applicant suffer irreparable loss if the orders sought are not granted.

9. The application proceeded before us virtually on the July 25, 2023. Learned counsel Mr. Kibari Masore appeared together with Mr. Muriithi for the applicant while learned counsel Mr. Muo appeared for the 1st and 2nd respondents. There was no appearance by the 3rd respondent. The applicant filed submissions dated July 18, 2023 while the 1st and 2nd respondents filed submissions dated July 2023. All counsel highlighted their respective submissions.

10. Mr. Kibari on a query from the Court, stated that the parties appeared before the disciplinary tribunal for mitigation and sentencing earlier in the month of July 2023, and that the applicant was practicing law pursuant to an order of Mrima, J., directing the 1st respondent to allow him unlimited access to virtual court platforms and not to hinder him from getting a practising certificate.

11. Counsel argued that the High Court summarily dismissed the applicant's application without hearing him on merit. On arguability of the appeal, grounds of appeal include: whether an inferior tribunal such as the 2nd respondent can find an advocate guilty of professional misconduct notwithstanding that the High Court, based on the same facts, held the applicant to be blameless for contempt of court; whether a superior court can shut its doors to an applicant who has demonstrated gross violation of his constitutional rights as well as denial of fundamental rights and freedoms, with reliefs that cannot be accommodated in a statutory appeal under section 62 of the *Advocates Act*; whether an inferior tribunal can admit fresh evidence at the mitigation and sentencing stage, contrary to binding decisions of the High Court that have expressly forbidden the tribunal from doing so; and whether the 1st respondent can be allowed to mount unnecessary and unlawful accusations against an advocate whose only fault is being a party to proceedings of a disciplinary nature before the 2nd respondent.

12. On the nugatory limb, counsel submitted that the applicant is an advocate who has been practising law for more than three decades, which practice is his only livelihood; that he has had several clients who will be left in disarray in the unfortunate event that he is surrendered to the 2nd respondent for mitigation and sentencing; and that giving way to sentencing will not only lower his esteem and repute in the eyes of the public and water down his illustrious career, but will also affect his livelihood, which is tantamount to a death sentence. In support of the submission, reliance was placed on the case of *Lucy Njoki Waithaka vs. Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association (Interested Party)* [2020] eKLR where this Court allowed an application of this nature based on similar grounds as ventilated herein. He argued that the interim orders sought are intended to protect the substratum of the appeal.

13. Mr. Muo in opposing the appeal submitted that the applicant claimed that his rights had been violated only after conviction; that this implies that the application was filed as an afterthought; further, that the superior court was correct in holding that constitutional remedies should be sought only against serious violations, and that an error occasioned by a tribunal does not necessarily give rise to a constitutional petition. To this end, he relied on the case of *Benson Ambuti Adega & 2 others vs. Kibos Distillers Limited & 5 others* [2020] eKLR, where the Supreme Court defined judicial abstention and held that a court should not interfere with proceedings of a legally established institution. It was submitted that the 2nd respondent is a legally established institution, and in hearing the disciplinary proceedings, it was performing its mandate as provided for in section 60 of the *Advocates Act*; and that disturbing those proceedings would not only affect the 3rd respondent's right to be heard, but that this Court would be violating the doctrine of judicial abstention.

14. On the nugatory limb, counsel submitted that after mitigation and sentencing, the applicant shall have the opportunity to either appeal or seek judicial review remedy, or better still file a constitutional petition, seeking to quash the orders of the tribunal; that consequently, the applicant stands to suffer no irreparable harm; and that interests of justice tilt towards a dismissal of the application.

15. In rebuttal, Mr. Muriithi submitted that the 3rd respondent having not filed a response to the application stands to suffer no prejudice if the orders sought are granted. Whilst acknowledging that the doctrine of judicial abstention is good law, he submitted that it is only applicable when proceedings before a tribunal are constitutionally compliant so that whatever remedy is available to an applicant is not fictitious; and that that opportunity can only be availed by granting the orders sought.

16. We have carefully considered the application, the affidavits in support of, and in opposition to, the application, the respective submissions and the law.

17. It is trite that the jurisdiction of this Court under rule 5(2)(b) of the *Court's Rules* is original, independent and discretionary. The discretion has to be exercised judiciously and with reason; not on the craze of impulse or pity. Further, for the applicant to succeed, he must first demonstrate that he has an arguable appeal, and secondly, that if the application is denied, the appeal, if successful, will be rendered nugatory. These principles were expounded in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.

18. On whether the appeal is arguable, it is not in dispute that the applicant has been found guilty of professional misconduct by the 2nd respondent, and that what is now pending is his presentation for sentencing. Though he argues that the 2nd respondent took evidence at the mitigation stage, no proof of the allegation was placed before us. And even if that happened, this is not proof that the alleged averments will be considered by the 2nd respondent during sentencing, or that they will have a bearing on the sentence to be meted. The prudent thing to do is to await the outcome of the sentencing process. Coming to this Court before the sentence is imposed, in our view, is to assume that the alleged additional evidence if accepted at that stage will be the rock bed upon which his sentence will be based upon.

19. For any trial or quasi-trial process to be concluded, the decision-making body must render a final decision, and it would be proper for the 2nd respondent to be accorded such an opportunity. It ought to be allowed to exercise its disciplinary jurisdiction against advocates. We further note that the applicant appears to be making all kinds of applications and waiting to see what will actually stick. He filed an application in High Court Civil Appeal E270 of 2021 which was dismissed, and which he subsequently on his own volition withdrew. He then filed a constitutional petition that gave rise to the instant application that was dismissed when the court upheld a preliminary objection, and he is now before this Court.

20. This Court in *Fleur Investments Limited vs. Commissioner of Domestic Taxes & Another*, [2018] eKLR held that:

> " Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect

of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

21. To our minds, the superior court did consider the matter }before it, and it found that the applicant had not raised any valid issue of the constitutionality of the 2nd respondent or that its proceedings contravened the rules of natural justice or it had violated his rights, and thus, it held that it lacked jurisdiction. Further, the argument by the applicant that the holding in ELC No. 1559 of 2013 should be binding on the 2nd respondent cannot stand, for the reason that the superior court was determining the issue of contempt of court whilst the 2nd respondent was determining if the applicant was guilty of professional misconduct. These are two clear and distinct issues that do not overlap. We then find and hold that the appeal is not arguable.

22. On the nugatory aspect, the 2nd respondent is yet to sentence the applicant. In so sentencing, it shall be guided by section 60(4) of the *Advocates Act* which states:

> 4. After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—
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> a. that such advocate be admonished; or
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> b. that such advocate be suspended from practice for a specified period not exceeding five years; or
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> c. that the name of such advocate be struck off the Roll; or
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> d. that such advocate do pay a fine not exceeding one million shillings; or
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> e. that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings; or such combination of the above orders as the Tribunal thinks fit.

23. Section 62 of the *Act* provides for the right of appeal against an order by the tribunal. The applicant has and will still have the right of appeal against the conviction and sentence, and may even seek stay of execution of such orders, pending appeal if he so wishes.

24. We underscore the fact that courts have the mandate to deliver justice to all in an efficient, timely and cost-saving manner, which we believe would be best achieved if the applicant if dissatisfied with the manner in which the proceedings were conducted, or with the decision of the tribunal, can appeal against both the conviction and sentence concurrently as opposed to separately. The applicant should await the completion of the process undertaken by the 2nd respondent for to halt the process would be unlawful. We are then not convinced that the appeal will be rendered nugatory should this Court not issue the orders sought.

25. In conclusion, we can do no better than adopt the sentiments of D. A. Onyancha, J. (as he was then) in *T. O. Kopere vs. The Disciplinary Committee Law Society of Kenya & Another* [2012] eKLR:

> " The Appellant's appeal before the scheduled end of proceedings for the disciplinary hearing, appears to me to be totally strange and one unknown to process and practice. It is clearly an interference of the lawful procedure laid down by the relevant Act and the rules of procedure promulgated to guide such proceedings. The Applicant's action of filing an appeal against incomplete proceedings cannot accordingly, be explained upon any other

reasonable hypothesis than for the purpose of scattering the sentencing with a view to earn a delay which clearly, the Applicant yearns for, to protect the status quo of his legal practice.

Furthermore, the judgment pronounced by the Disciplinary Committee, cannot by any known standard be considered as complete until the relevant sentence legally provided to flow from the judgment, is pronounced. No one, not even the applicant, in my view, has a right to anticipate what the sentence of the Disciplinary Committee will be, until it is legally pronounced. Indeed, to try to stop the Committee from completing carrying out its legal mandate under the relevant law, appears to me to be an illegal exercise which this court in its unfettered discretion, will not be willing to assist the applicant to achieve. The stay sought if granted, will without doubt assist the applicant in preventing a lawfully constituted tribunal from carrying out its lawful mandate."

26. Having failed to satisfy both limbs under rule 5(2)(b) of this *Court's Rules,* we conclude that the application is unmeritorious and the same is accordingly dismissed. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR