



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPLICATION NO. 41 OF 2017

BETWEEN

MARTIN TINDI KHAEMBA.....APPLICANT

AND

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

THE DISCIPLINARY COMMITTEE..... 2ND RESPONDENT

SALIM MWAROPHA MANENO.....3RD RESPONDENT

(An application for stay of proceedings in the Disciplinary Committee Tribunal Cause No. 155 of 2015

pending the hearing and determination of an intended appeal against the ruling of the

High Court of Kenya at Mombasa (Ogola, J.) dated 31st May, 2017

in

Judicial Review Misc. Applic. No. 22 of 2016.)

RULING OF THE COURT

[1] Whenever this Court is seized of an application under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules) it exercises its discretionary power where necessary to preserve the subject matter of an appeal by issuing either an order of stay of execution, stay of further proceedings and/or an injunction as the case may be. See **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR**. Although the discretion is unfettered it should be exercised within the established parameters. In that, before any of the above mentioned orders are granted, the Court should be satisfied that firstly, the applicant has demonstrated that he/she has an arguable appeal or that the appeal is not frivolous. Secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See this Court’s decision in **Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd. [2002] 1 EA 227**.

[2] Before us is such an application wherein the applicant seeks stay of the proceedings in **Disciplinary Committee, Cause No. 155 of 2015** between the 3rd respondent and himself at the Disciplinary Tribunal

pending the determination of an intended appeal against Ogola, J.'s ruling dated 31st May, 2017 in **Mombasa Judicial Review Misc. Application No. 22 of 2016.**

[3] The facts giving rise to the application that is before us are that the applicant rendered his professional services to Idd Ibrahim and Yusuf Nevi who instituted H.C.C.C No. 328 of 2010 on behalf of the 127 members of Mabirikani Village Land Committee (Mabirikani Committee) claiming entitlement to parcels MN/V/288 and MN/VI/855 (suit land) by virtue of adverse possession. At the end of the trial, judgment was entered in favour of the applicant's then clients. Be that as it may, payment of his legal fees proved difficult since the members of the Committee were embroiled in a tussle with respect to the apportionment of the suit land.

[4] Consequently, the applicant filed his bill which was taxed at Kshs.14,200,000 by the taxing master, Hon. Kimanga, and a certificate of taxation issued to that effect on 8th September, 2014. Thereafter, on 1st December, 2014 pursuant to an application being Misc. Applic. No. 27 of 2013 made under **Section 52** of the **Advocates Act** Kasango, J. not only granted the applicant a charge over the suit land but also awarded him 3 acres thereof in lieu of the taxed costs. On 19th August, 2015 the applicant was notified by the 1st respondent of a complaint lodged by the 3rd respondent with the 2nd respondent. The gist of the complaint was that he had acted unprofessionally by apportioning himself 3 acres of the suit land without the consent or knowledge of the members of the Mabirikani Committee. He was invited to respond to the said complaint which he did. Later on, he was served with a notice for plea taking scheduled for the 23rd November, 2015 at the Disciplinary Tribunal in the disciplinary cause.

[5] Nevertheless, before the plea could be taken the applicant filed judicial review proceedings against the respondents praying for: an order of *certiorari* to quash the proceedings in the disciplinary cause; and an order of *prohibition* prohibiting the respondents or any person acting on their behalf from continuing with the disciplinary cause. The basis of the judicial review was that in light of the certificate of taxation and the orders of Kasango, J. both of which had not been challenged, the complaint before the Disciplinary Tribunal was *res-judicata*; thus, in entertaining the same the 1st and 2nd respondents were acting *ultra vires* in other words, without jurisdiction.

[6] In response, the respondents contended that the judicial review proceedings were premature because the Disciplinary Tribunal had the requisite jurisdiction to hear the complaint; proceedings were yet to commence in the disciplinary cause and furthermore, no order(s) had been issued which was amenable to the judicial review remedies sought. The learned Judge (Ogola, J.) agreed with the respondents and by a ruling dated 31st May, 2017 he dismissed the judicial review application. It is this decision that the applicant is intent on challenging in an appeal to this Court as intimated by the Notice of Appeal lodged on 8th June, 2017.

[7] Going back to the application before us, the applicant contends that the intended appeal raises arguable points as set out in the draft memorandum of appeal annexed to the application. Principal among them was the issue of jurisdiction as pertaining to the Disciplinary Tribunal to entertain the complaint in issue. In addition, that the intended appeal would be rendered nugatory in the event the orders sought are not granted. This is because the disciplinary proceedings would be prejudicial to him.

[8] Resisting the application, Mr. Kimani learned counsel for the 1st and 2nd respondents, relied on the grounds of opposition filed on behalf of the said respondents. In his view, the said application deliberately misrepresented the manner in which the proceedings in the disciplinary cause were conducted; it was an afterthought and calculated to frustrate the proceedings in the disciplinary cause; following the delivery of the impugned ruling the trial court stayed the Disciplinary Tribunal proceedings for a period of 14 days pending a formal stay application by the applicant which he failed to file and/or give reasons for delay; and that finally the intended appeal was frivolous.

[9] Taking into account the parameters of our discretion in the application before us as well as being careful not to make final determination on the merit of the intended appeal, we are not convinced that the said appeal is arguable. We say so because while it is premised on the grounds that the Disciplinary

Tribunal lacked jurisdiction to entertain the complaint raised by the 3rd respondent, the Disciplinary Tribunal has its own mandate as prescribed under the *Advocates Act* of determining disputes between advocates and clients. Whether the Tribunal has acted outside this mandate cannot be established since the proceedings therein were yet to commence by the time this application came up for hearing.

[10] Moreover, we are not satisfied that the applicant has demonstrated that the intended appeal would be rendered nugatory unless the stay sought is granted. This is because the applicant's apprehension is based on presumption that the Disciplinary Tribunal will issue orders that are prejudicial to him. Certainly, the Court cannot exercise its discretion based on mere fear or suspicion of what a party thinks might happen. Our understanding of the essence of orders issued under *Rule 5(2)(b)* is to halt the occurrence of something which will indisputably happen in the absence of such orders.

[11] Accordingly, the applicant has failed to establish the twin principles that would warrant us to exercise our discretion in his favour. Therefore, we find that the application lacks merit and is hereby dismissed. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 6th day of December, 2018.

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR