



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OUKO & KIAGE JJA.)

CIVIL APPLICATION NO. NAI 242 OF 2013

BETWEEN

PROF. PAUL MUSILI WAMBUA.....APPELLANT

AND

THE DISCIPLINARY COMMITTEE.....1ST RESPONDENT

MUSYOKI KIMANTHI T/A KIMANTHI & ASSOCIATES....2ND RESPONDENT

(Being an application for injunction and stay of execution of the judgment of the High Court pending the lodging, hearing and determination of an intended appeal from the judgment

of the High Court of Kenya at Nairobi (Korir, J.) dated 7th August, 2013

in

JUDICIAL REVIEW CAUSE NO. 231 OF 2013)

RULING OF THE COURT

Of the six prayers in the applicant's notice of motion dated 11th September 2013, the only one that remains live and relevant is prayer 3 which is;

“THAT pending the lodging, hearing and determination of the applicant's intended appeal from the judgment of the Hon. Justice W.K. Korir in JR Case No. 231 of 2013, there be issued an injunction restraining the 1st respondent from commencing, hearing and determining the disciplinary proceedings before it against the applicant in respect of the complaint the subject in the said Milimani J.R Case No. 231 of 2013.”

The motion is brought under **rule 5(2) (b)** and is founded on grounds appearing on its face including;

5. The applicant has an arguable appeal with good prospects of success for the reasons inter alia:-

a. The learned judge erred in law and in fact by failing to find that the 1st respondent's decision to commence disciplinary proceedings against the applicant was not only irrational but was also laced with procedural impropriety in failing to observe basic rules of natural justice or procedural fairness.

b. The learned judge erred in law and in fact by failing to consider and appreciate the uncontroverted evidence contained in the statutory statement and applicant's verifying affidavit all dated 28th September, 2011 together with the applicant's supplementary affidavit sworn on 10th October, 2011 and further affidavits both sworn on 29th March, 2012 by George M. Muchai and Albert Mulindi and which showed the complaint before the 1st respondent was manifestly malicious, false, vexatious and instituted solely for purposes of maligning and scandalizing the applicant.

c. The learned judge erred in law and in fact by finding that the applicant's case was unmeritorious and proceeding to dismiss the same.

d. The learned judge erred in law and in fact by failing to appreciate and/or consider the circumstances surrounding the complaint before the 1st respondent the subject of the judicial review application aforesaid to enable him determine whether the decision of the 1st respondent to commence disciplinary proceedings against the applicant on the basis of the said malicious and false complaint was indeed irrational and constituted sufficient ground to allow the said application.

6. This appeal will be rendered nugatory if the stay is not granted as prayed for the reasons inter alia that:

a. The 1st respondent has proceeded to summon to applicant to appear before it for plea on 16th September, 2013 and indeed has resolved to commence the disciplinary process despite the intended appeal.

b. The 1st respondent is intent on proceeding to hear and determine the disciplinary proceedings against the applicant pursuant to the judgment aforesaid the subject of the intended appeal in which case the appeal will be rendered nugatory.

It is also supported by the affidavit of Prof. Paul Musili Wambua expressed as sworn on the same 11th September 2013 which, at paragraphs 6 and 8 addresses the issues of arguability and the nugatory aspect, respectively. Those twin limbs must be satisfied in order for an applicant to succeed in obtaining relief be it injunction or stay of execution, under **rule 5(2) (b)** of the Court of Appeal Rules. That affidavit was augmented by a supplementary affidavit filed by the applicant on 27th February 2015 with leave to court.

At the hearing of the application, **Mr. Martin Gitonga**, the applicant's learned counsel made brief submissions. He first conceded that the intended appeal was yet to be filed more than a year and a half after the judgment sought to be appealed against; blaming the delay on the typed proceedings yet to be availed by the High Court. In attempting to show that the intended appeal is arguable, counsel submitted that the learned judge of the High Court ought to have looked at the complaint placed before the Disciplinary Committee of the Law Society of Kenya (the first respondent) in order to determine whether or not its decision to proceed with the disciplinary proceeding, against the applicant was irrational, as the applicant contended. He asserted that had he done so, he would have seen that there were affidavits by the vendors of the property the sale of which engendered the complaint against the applicant in which affidavits the admitted receipt of the proceeds of sale, which should have absolved the applicant of any misconduct. Counsel contended that the learned judge ought to have interrogated the facts of the complaint-even on a *prima facie* basis – as it is not every complaint received by the Law Society of Kenya against advocates that gets to be referred to the first respondent. Some are plainly frivolous. On those premises, counsel urged us to find that the applicant does have an arguable appeal, and is not a

frivolous one.

On the nugatory aspect, **Mr. Gitonga** submitted that the disciplinary proceedings against the applicant had already commenced and should be proceeding further on a date in the month of April 2015. He cited the case of **DAVID MURTON SILVERSEIN Vs. ATSANGO CHESONI** [2002] 1 KLR 867, and **UAP PROVINCIAL CO. LTD Vs. JOHN BECKETT** [2004] e KLR.

Opposing the application, **Mr. Olembo** learned counsel for the 1st respondent disputed that the applicant has an arguable appeal. Referring to **Section 60** of the Advocates Act, counsel contended that the applicant was misconceived in asserting that the learned judge ought to have looked at the merits of the complaint against the applicant as that was a power reserved to the 1st respondent by statutory conferment. He pointed out that the 1st respondent was the proper forum at which the applicant ought to challenge the competence of the complaint against him, yet he has not as much as appeared to take a plea before it. He cited in aid the case of **WAWERU MWANGI Vs. DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA** [2010] e KLR.

As to whether the appeal would be rendered nugatory were the disciplinary proceedings to be conducted for want of stay, **Mr. Olembo** submitted that the Advocates Act at **Section 62** provided for a right of appeal from a decision of the

1st respondent and so, even in the worst case scenario, the applicant would suffer no injury. He went on to add that the applicant was the author of any situation he might find himself in as he failed, neglected or refused to provide any documents that might have been relevant to a consideration of whether or not disciplinary proceedings should be instituted and commenced against him. Instead, submitted counsel, the applicant invited the 1st respondent to go to his chambers to access those documents.

In a brief reply to those submissions, **Mr. Gitonga** reiterated that the learned judge ought to have considered the facts forming the basis for the complaint. He dismissed as irrelevant to this application the existence of a right of appeal.

Finally, he beseeched us to grant the application contending that the respondent would suffer no prejudice whatsoever were the same to be granted.

The principles upon which an application under **rule 5(2) (b)** of the rules of court is granted are notorious and have been the subject of numerous pronouncements by this Court. The applicant must first satisfy the court that his appeal or intended appeal is an arguable one, meaning one that is worthy of ventilation before the Court and not a frivolous one. It need not be one that must necessarily succeed, sufficing that it raises at least one *bona fide* point that will require to be answered by the respondent, and call for a decision on it from the Court.

Arguability alone is insufficient, however. The applicant must show also, and the burden is always on the applicant, that such arguable appeal is likely to be rendered empty, and of no consequence or, in the usual terminology of the Court, nugatory. Such is an appeal that turns out to have been a pyrrhic victory and an empty ritual because some loss, harm or prejudice will already have been suffered in the interim, such is where the subject matter of the appeal gets irrevocably lost and an injury is incurred that is beyond repair. See **SILVERSTEIN Vs. CHESONI**

(supra); **STANLEY KANGETHE KINYANJUI Vs. TONY KETTER & 20 OTHERS** [2013] e KLR; **RELIANCE BANK Vs. NORLAKE INVESTMENTS LTD** [2002] 1 EA 227.

Is the applicant's intended appeal arguable? We doubt that it is. We say this mindful that our view does not bind and is entirely irrelevant to the bench that will hear the appeal as and when it gets to be filed and heard. We are not satisfied as to arguability because the main thrust of the intended appeal, at least as far as it was urged before us, is that the learned judge erred in not going into an interrogation of the merits of the complaint made against the applicant before the 1st respondent. The learned judge rejected such an

invitation on the basis that as a judicial review judge, all he could properly interrogate was the process surrounding and not to delve into the merits of the complaint. He held that it was for the 1st respondent to consider and determine issues of sufficiency of any evidence to back up any complaint or charge against an advocate. In doing so, the learned judge appears at first blush to have decided consistently with a long line of cases that forms the corpus of judicial review jurisprudence. We are not persuaded that an arguable point has been raised regarding the learned judge's principled refusal to usurp the jurisdiction of the 1st respondent.

As to the nugatory aspect, we really need not go into it since we are unpersuaded about arguability. That notwithstanding, a consideration of this second limb also leaves us unpersuaded. A refusal of stay will only mean that the applicant will have to submit to an internal disciplinary process of the Law Society of Kenya before a body charged with maintaining professional and ethical standards. There is no suggestion that the applicant's rights to a fair hearing consistent with the tenets of natural justice will in any manner be abrogated. If, as he urges, the charges against him are spurious and evidence abounds to show he is not culpable, the disciplinary process provides the perfect opportunity and forum for him to confront and decimate the claims against him. **Section 60A** of the Advocates Act has elaborate provision that will ensure that his rights are safeguarded. It is also not in doubt that other remedies are available to him at the end or conclusion of the disciplinary process. We do not think it would conduce to the doing of substantial justice and the attainment of the aims and objects of the disciplinary process were we to issue orders that would truncate the said process and lead to unnecessary delays in the determination of the complaint against the applicant while awaiting the outcome of a yet-to-be-filed appeal.

The upshot is that we find this application to be unmeritorious. The same is dismissed with costs.

Dated and delivered at Nairobi this 8th day of May, 2015.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

