



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli 82 of 2009 (UR 51/09)**

**NYAMODI OCHIENG-NYAMONGO**

**WILLYS NYAMODI NYAMOGO .....APPLICANTS**

**AND**

**THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA**

**BEN ONYANGO OSUGA .....RESPONDENTS**

*(An application for stay of further proceedings in Disciplinary Cause No. 38 of 2006 pending the determination of the present appeal against the judgment of (Wendoh, J) dated 9<sup>th</sup> March 2009*

**in**

**H.C.Misc. Appl. No. 122 of 2007)**

**\*\*\*\*\***

**RULING OF THE COURT**

This application expressed to be brought under **rule 5(2)(b)** of this Court’s Rules seeks a stay of proceedings of the **Disciplinary Committee Cause No. 38 of 2006** pending the hearing and final determination of the **Civil Appeal No. 48 of 2009** already filed in this Court and costs thereof. The grounds which are set out on the face of the application form its basis. They are that the superior court’s decision which is the subject of the appeal arose from the ruling of the Disciplinary Cause as stated above, the said disciplinary cause was set down for mention on 23<sup>rd</sup> March 2009 with a view to fix a hearing date and in the event that the said disciplinary cause proceeds to hearing and is finally determined then the appeal will be rendered nugatory. That the appeal is arguable. The supporting affidavit to the application avers that sometime in 2006 the 2<sup>nd</sup> respondent filed a complaint with the Advocates’ Complaint Commission against the applicants which was determined. Upon such determination the same respondent filed a fresh complaint with the disciplinary committee of the Law Society of Kenya which the applicants aver had already been handled and determined by the Commission. This is why the applicants raised a preliminary objection to the fresh complaint. The preliminary objection was, however, dismissed by the disciplinary committee aforesaid. This dismissal gave rise to the application for review filed in the superior court requiring the court to quash the decision of the disciplinary committee and to prohibit the committee from proceeding with the fresh complaint by the 2<sup>nd</sup> respondent. That application was dismissed by the superior court. The applicants have appealed against the dismissal and aver that the appeal has high chances of success. The stay application is intended to prohibit the hearing of the disciplinary cause by the disciplinary committee of the Law Society of Kenya lest that hearing renders the decision of the appeal nugatory in the event the appeal succeeds.

At the hearing of this application in this Court on 19<sup>th</sup> May, 2009 **Mr. Nyamogo**, learned counsel for the applicants agreed that though the initial complaint was heard by the Complaint’s Commission its decision was not annexed to the application. Counsel’s submissions were that the disciplinary committee cannot deal with a complaint already determined by the Complaint’s Commission, hence the superior court was wrong in not ruling that the disciplinary

committee had no business proceeding with the complaint; thus giving the applicants an arguable appeal. According to counsel, since the dispute is still alive and no decision has been made on it by the complaint's commission, the disciplinary committee cannot take it over.

**Ms. Wambugu**, learned counsel for the respondent opposed the application on the basis of a replying affidavit filed herein on 28<sup>th</sup> April, 2009 and went on to submit that the applicants had not demonstrated that they had an arguable appeal to warrant the exercise of this Court's discretion to grant an order of stay of proceedings before the 1<sup>st</sup> respondent under **rule 5(2)(b)** of the Court's Rules. She stated that although the 2<sup>nd</sup> respondent had lodged a complaint before the Complaint's Commission there was no hearing thereon and no decision had been made on it. Instead the 2<sup>nd</sup> respondent was advised to seek relief in the High Court. He was not obliged to accept that advice but went on and lodged a similar complaint with the 1<sup>st</sup> respondent; the option counsel for the respondents submits the 2<sup>nd</sup> respondent had. This is why the applicants took a preliminary objection which the 1<sup>st</sup> respondent rejected, leading to the application for review before the superior court. Counsel for the applicants says this application for review was not necessary and that the 1<sup>st</sup> respondent has jurisdiction to hear the 2<sup>nd</sup> respondent's complaint.

The preliminary objection raised before the 1<sup>st</sup> respondent by the applicant was in the following terms:

1. ***The complainant is by law estopped from filing the complaint before the commission.***
2. ***The complaint as filed flies in the face of outrefois acquit hence exposing the advocate to double jeopardy***
3. ***The disciplinary committee has no jurisdiction to entertain the complaint.***

In his submission on the preliminary objection before the 1<sup>st</sup> respondent **Mr. Arthur Nyamogo** submitted as follows:

***“the committee has no jurisdiction to hear the complaint ... because the matter had already been considered by the complaints commission and a decision not to proceed with it made as it found no evidence of wrongdoing.***

***... He submitted that once a decision had been made by the complaint's commission an appeal only lay to the High Court.”***

**Mr. Nyamogo** then placed before the 1<sup>st</sup> respondent correspondence from the Complaint's Commission, copied to the 2<sup>nd</sup> respondent stating that the complaints commission had closed its file. The issue before the commission for determination was the effect of a decision by the commission not to pursue a complaint on the right of a dissatisfied complainant or if 1<sup>st</sup> respondent had the jurisdiction to hear a complaint which the commission had decided not to pursue. After the 1<sup>st</sup> respondent heard the submissions of counsel on the preliminary objection, it made its ruling as follows:-

***“We are satisfied that the note to the complainant's advocates by the commission was in the form of advice and was not a dismissal of the matter and or a decision or order as per section 53(8). As hereinabove explained we find that the complainant is not bound to follow the advice of the commission. There is no other conclusive evidence furnished by the respondents to show that the commission had determined the matter.***

***As we have found that the letter did not reflect a decision or order we are not persuaded by the respondent's arguments the appropriate redress for the complainant was to appeal to the High Court. In light of the above the authorities relied on by the respondents are not relevant. In re-solicitor [1934] 2 KB, 463 a complaint was made to the Disciplinary Committee, the complaint was heard and the committee and the committee, on finding that there was no professional misconduct, made no order. But in this matter, we are of the opinion that the same was not finally determined by the commission, the commission neither made an order or decision on the matter, nor did they exonerate the respondents of the complaint.***

***Accordingly, we find that the present complaint is properly before us and that we have jurisdiction to entertain it. We further direct that the matter be set for taking of the plea forthwith.***

This is the decision which gave rise to the application filed before the superior court by way of judicial review. The applicant's argument's before the superior court was that when the 2<sup>nd</sup> respondent filed a complaint with the Complaint's Commission, it was determined and that what was left open to the said 2<sup>nd</sup> respondent was either to appeal against or file a review with the disciplinary committee but not to file a fresh complaint as he purported to do. Counsel for the applicant submitted therefore that the Disciplinary Committee had no jurisdiction to entertain the fresh complaints or it

acted in excess of its jurisdiction. After hearing submissions of counsel for the applicants and those of the respondent who opposed the same on grounds that no determination had been made by the Commission on the 2<sup>nd</sup> respondent's complaint, the superior court said:

***“The question is whether the applicant can challenge the decision of the committee by way of judicial review on the question of jurisdiction when there is a ruling on the merits on the same issue. The only recourse that the applicant has is that of appeal against that ruling on jurisdiction. This is because Judicial Review is concerned, not with the merits of a decision but the process by which a decision is arrived at. Under section 62(1) of the Advocates Act, any Advocate aggrieved by an order of the committee under section 60 may appeal to the High court by giving Notice of Appeal to the Registrar. That section does not specify that only a final order made under section 60 of the Act is appealable. It therefore includes any order made by the committee following a complaint made under section 60 of the Advocates Act. The committee having ruled that it had jurisdiction to determine the matter, the only recourse the applicant has is an appeal against that decision to the High Court but not to challenge it by way of Judicial Review.*”**

***The next question for consideration is since the interested party had complained to the commission is he estopped from lodging the same complaint with the Disciplinary Committee?***

***As found above, the interested party's complaint was not determined on the merits by the commission. When the commission indicated that their file was closed the dispute was still alive and unresolved. Section 60(1) of the Act permits any person to make to the committee any complaint pertaining to the Advocates misconduct. In this case the commission did not make any order or determination either finding the applicants innocent or guilty of misconduct nor did it exonerate them from blame. That being the case it was still open to the interested party to seek redress from the committee.***

***This case is distinguishable from RE SOLICITOR (supra) because in that case a complaint was made to the Disciplinary Committee, it was heard and a finding was made that there was no professional misconduct and no orders were granted. That was a final determination unlike the present case. The Interested Party Complaint can only be heard, investigated or inquired into by the Disciplinary Committee. The court has no capacity to do so. If this Court were to quash Disciplinary Committee (cause) 38/06 it would be locking out the Interested Party from having his complaint considered on merit.***

***I will therefore find that the prayer for an order of certiorari to quash Disciplinary Committee 38/06 cannot be granted and a prohibition cannot be granted because the committee has not exceeded its jurisdiction. This court would not be prohibiting the Disciplinary Committee from performing its statutory duty: i.e. to deal with complaints from aggrieved persons against advocates. I find no evidence of the Respondents acting in excess of their powers or jurisdiction nor is there evidence of breach of rules of natural justice i.e. denial to a fair hearing. The hearing is yet to take place and it is premature for the applicant to bring this challenge. In the event the applicant is aggrieved at the hearing the applicant had a right of appeal under section 62(1) to the High Court, or seek Judicial Review if there are sufficient grounds to do so. I also found that their affidavit improperly on record contains evidence not available in the affidavit of 21<sup>st</sup> February, 2007.***

***For all the reasons given in this judgment I find that this application is premature, unmerited and is hereby dismissed with costs to be borne by the applicants.”***

It was important to set out the facts of the case in order to have a broad picture of what transpired at the commission, committee and the superior court. Otherwise for an order sought herein to be granted two conditions need to be established; first that the appeal is arguable, that is to say it is not frivolous and secondly that if the order is not granted and the appeal eventually succeeds, that decision will be rendered nugatory. As was rightly put by the learned Judge, when the commission advised the 2<sup>nd</sup> respondent that it had closed the file and the papers put away it had not determined his complaint on its merits neither was he bound to accept that advice. It is also true to say that Judicial Review is concerned, not with the merits of a decision, but the process by which the decision is arrived at. The preliminary objection before the Disciplinary Committee was fully heard and a determination thereof made on its merits. That committee fully utilized its functions under the Act to hear and determine the preliminary objection.

Under **section 60** of the Advocates Act Chapter 16 Laws of Kenya, any person with a complaint which touches on an advocate's disgraceful or dishonourable conduct has a right to file it with the Disciplinary Committee established under **section 57** of the Advocates. He is not barred from taking this course just because he lodged one with the complaints commission which closed the file without determining the issues raised therein on merits.

Given our evaluation of the proceedings, and the decisions of the committee and the superior court, we doubt the arguability of the pending appeal. The authorities cited before us by counsel for the applicants are not relevant to the facts at hand. And in view of our doubt as to whether there is an arguable appeal, we do not feel the nugatory aspect of

this application falls for our consideration. The application has no merit and we order that it be and is hereby dismissed with costs.

*Delivered and dated at Nairobi this 12<sup>th</sup> day of June 2009*

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**