IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & MAKHANDIA, JJ.A.)

CIVIL APPLICATION NO. NAI 15 OF 2016 (UR 9/2016)

IN THE MATTER OF AN INTENDED APPEAL

JOHN MAINA MBURU.....APPLICANT

VERSUS

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

JOHN FRANCIS NJOMO.....2ND RESPONDENT

*(An Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (**Korir, J.**) delivered on the 15th November, 2015*

in

Misc. Application No. 226 of 2015)

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RULING OF THE COURT

This is an application under **sections 3A** and **2B** of the **Appellate Jurisdiction Act** and **Rule 5(2) (b)** Court of Appeal Rules for the main order that further proceedings in the Advocates Disciplinary Tribunal, **Case number 44/15** be stayed pending the hearing and determination of the applicant's intended appeal from the judgment of the High Court delivered on 5th November 2015 in **High Court Miscellaneous Application No. 226 of 2015**.

The applicant filed Judicial Review application No. JR 226 of 2015 in the High Court seeking an order of certiorari to bring into the High Court and quash the decision of the Disciplinary Tribunal of the Law Society of Kenya (1st respondent) expressed vide a letter dated 26th June 2015 requiring the applicant to appear before the said Disciplinary Committee on 20th July 2015 to take plea on a complaint by **John Francis Njomo** – the interested party herein. By the same application the applicant sought an order of prohibition preventing the Disciplinary Committee from accepting, entertaining or making a ruling on the complaint lodged to the Disciplinary Committee by the interested party.

The complaint related to an agreement of sale of Massionette No. 9 standing on LR No. 209/359/2A

between the interested party and Tetezi Housing Limited – a company in which the applicant – an advocate of the High Court of Kenya was a shareholder.

The complaint by the interested party to the Disciplinary Committee was through an affidavit in which the interested party alleged, amongst other things, that; he owned the house jointly with his deceased wife Elizabeth Wanjiru Njomo; that to meet high medical bills for treatment of his wife who was undergoing treatment for cancer, he asked his lawyer Martin Kiai Nuthu to look for a buyer of the house; that ultimately, he signed an agreement of sale of the house with Tetezi House Limited owned by the applicant for the sale of the house at a price of shs. 13,500,000/-, that he was paid shs. 5,972,866/- , leaving a balance of shs. 7,527,134/-; that he later discovered that the house was transferred to the purchaser who was also given possession without payment of the balance of the purchase price and contrary to the provisions of the agreement of sale, that he never signed the transfer and that the house was fraudulently transferred to the purchaser.

The applicant filed a replying affidavit to the complaint in which he admitted the agreement of sale between the interested party and Tetezi House Limited in which he was a director, and further deponed that the purchaser has made full payment of the purchase price; the purchaser effected the transfer and the claim of forgery and fraud was untrue and that there never existed any relationship of Advocate/Client between him and the interested party.

The applicant and the interested party repeated the same averments in The Judicial Review Application. Further, the applicant contended that the disciplinary committee had no jurisdiction over him as there was no advocate/client relationship. **Apollo Mboya,** the Secretary and Chief Executive of the Law Society of Kenya filed a replying affidavit sworn on 5th August 2015 to the Judicial Review Application. He averred among other things that upon receipt of the complaint and the applicant's replying affidavit, the Disciplinary Tribunal determined that there was a *prima facie* case and fixed the matter for plea, that the applicant is an advocate of the High Court of Kenya and the Disciplinary Tribunal has jurisdiction to deal with issues relating to his conduct as an advocate and the issues raised in the interested party's affidavit relating to the transaction ought to be considered at the hearing in the Disciplinary Tribunal.

The High Court upon hearing the application made a finding in essence, that the application was premature, that the best forum of addressing the question of jurisdiction where the matter was not clear cut (as in the case before the Court) was the tribunal after which any error on the question of jurisdiction would be corrected either through an appeal or review additionally the court made a finding that it was not the business of a Judicial Review Court to make findings on the disputed evidence or question whether the full purchase price has been fully paid. The court ultimately dismissed the application.

The applicant filed a notice of appeal and later the present application.

The applicant has invoked the discretionary power of Court under **Rule 5(2)(b**). Before the Court can grant a stay of proceedings in favour of an applicant, the applicant is required to satisfy the Court, that intended appeal or appeal is arguable and that unless stay is granted, the intended appeal or appeal would be rendered nugatory. (**Silverstein v Chesoni** ***[2002] 1 EA 296***).

The applicant contends that the intended appeal is arguable. He has filed a draft memorandum of appeal containing nine grounds of the intended appeal which in a nutshell raise the issue of jurisdiction. As the draft memorandum shows the applicant would fault the High Court for finding that the Disciplinary Tribunal had jurisdiction and in not finding that the Disciplinary Tribunal had no jurisdiction.

The order of certiorari was intended to quash the decision of the Disciplinary Tribunal contained in a letter dated 26th June 2015 which states in the relevant part;

"RE: DISCIPLINARY COMMITTEE CAUSE NUMBER 44 OF 2015

The cause under reference has been fixed for plea before the Disciplinary committee sitting at 9.00 on Monday 20th July 2015 in the Council Chambers, 2nd Floor professional centre,

parliament road, Nairobi.

You have a right to instruct counsel but your personal preference is mandatory whether or not you instruct a counsel…"

The court said that there was no sufficient material before it to determine the question of jurisdiction and made a finding thus:

"In the case before me I find that the applicant's application is premature. There is need to test the evidence of the parties before a determination can be made as to whether the respondent has jurisdiction or not"

It is on the basis of the foregoing that the Court has to find whether or not the intended appeal is arguable, remembering of course that an arguable appeal does not mean that the appeal would ultimately succeed.

The impugned decision is merely a procedural one requiring the applicant to attend before the Disciplinary Committee for plea. By the said letter the Disciplinary Committee was merely giving the applicant an opportunity to appear before it pursuant to section 60(3).

By section 60(1) a complaint against an advocate could be made by any person.

The Disciplinary Committee had not embarked on the decision making process. The Disciplinary Committee had not ruled on its jurisdiction to entertain the complaint nor had it, needless to say, found the applicant guilty of professional conduct as alleged. In the premises the court made a finding that the best forum for raising the question of jurisdiction, was before the tribunal hearing the matter after which the applicant can appeal or apply for judicial review of the decision. Indeed section 62(1) and 67(1) of the Advocates Act gives the applicant an automatic right of appeal against the decision of a disciplinary tribunal to the High Court and from the decision of the High Court to the Court of appeal respectively.

In view of the finding by the High Court that there was no sufficient material on which it could make a finding on the question of jurisdiction, and considering that it is not the function of a judicial review court to resolve contentious facts, and more crucially in the absence of a substantive determination by the Disciplinary Tribunal either on the question of its own jurisdiction or on the question of professional misconduct, we have no doubt that the intended appeal is not arguable.

That being our finding, it follows that the applicant has failed to satisfy one of the two tests of grant of stay of proceedings and is thus unnecessary to consider the second test.

In the premises, the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 1st day of July, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. S. A. MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR