



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.69 OF 2012

DANIEL NDUNGU.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein, Daniel Ndung'u is an advocate of the High Court of Kenya admitted to the Bar on 17th February 1997. He practises Law solely in the name and style of M/s. D. Ndung'u & Co. Advocates.

By his Petition dated 5th March 2012, he has sought the following Orders;

“(a) A declaration that proceedings before the Disciplinary Committee established under the Advocates Act, Cap.19 Laws of Kenya are Judicial proceedings for purposes of the provisions of Article 50 (1) of the Constitution of the Republic of Kenya.

(b) A Declaration that any criminal proceedings such as those in Criminal Case No.5474/2005 commenced without strict observance of the provisions of the Advocates Act, are in breach of Article 50(1), of the Constitution of Kenya.

(c) A Declaration that Article 50(1) of the Constitution in its wording outlaws simultaneous prosecution based on the same facts in different legal proceedings such as the one facing the Petitioner.

(d) A Declaration that a conviction by the Disciplinary Committee based on the same facts is a proper conviction under Article 50(2)(0) and as such no other trial such in Criminal Case No.5474/2005 can be sustained based on the same facts without an infringement of the Constitutional protection enshrined under Article 50(2)(0).

(e) A Declaration that upon the Disciplinary Committee rendering its verdict pursuant to Section 60 of the Advocates Act, any other recommendation for prosecution amounts to double punishment in violation of Article 50(1) and (2), (0) and hence Section 80 of the Advocates Act is unconstitutional and as such a nullity.

(f) A Declaration that any further prosecution of Criminal Case No.5474/2005 is unconstitutional under Article 50 of the Constitution of Kenya.

(i) Any other orders, writs and declarations that this Honourable Court may deem fit and just to grant in the interest of justice.”

Petitioner's Case

2. The Petitioner's case is that in the year 2004, in the course of his professional duties, he was instructed to act in a transaction involving the sale and purchase of Land parcel No.L.R.No.209/407/25 and the Interested Party, Edith Nyambura Kingori deposited Kshs.1.1 Million with the Petitioner's firm as stakeholder.

3. The transaction collapsed for reasons that are contested but in any event, the Petitioner did not refund the money and a complaint was lodged against him both with the Kenya Police and the Advocates Complaints Commission.

Subsequently, the Disciplinary Committee of the Law Society of Kenya established under the Advocates Act, became seized of the dispute, and in a judgment delivered within Disciplinary Cause No.90/2006, the Petitioner was found guilty and was convicted of the professional offence of failure “to refund” to the Complainant (*the present Interested Party*), Ksh.1,100,000 being deposit held by him as stakeholder in the land transaction aforesaid.

4. Before those proceedings had been finalized, the Petitioner was arrested and charged in the Chief Magistrate's Court at Kibera jointly with one, Gurnam Singh alias Anthony Eugen Toscano, with the offence of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. During the Disciplinary Committee proceedings, he unsuccessfully sought to stay the criminal case (Criminal Case No.5475/2005 – Kibera) but the Committee on dismissing his plea stated partly as follows;

“The Law is clear as to when proceedings may be stayed. The remedy sought at this Committee is markedly different from that sought in the Court. In addition, the matter in issue before this Committee is different from the fraud case at Kibera Court. Accordingly, we find that the test necessary to substantiate a stay has not been met.”

5. It is the Petitioner's contention that upon conviction by the Disciplinary Committee, any criminal prosecution arising from the same matter can only be commenced pursuant to **Section 80** of the **Advocates Act** which entails a detailed report to the Attorney General before any such prosecution can be undertaken.

6. It is his further argument that the prosecution in the Criminal Court is in breach of **Article 50(1)** of the **Constitution** which guarantees protection of the Law and which also provides for autrofois convict situations.

7. To his mind, the criminal proceedings are a nullity as they amount to double prosecution to his prejudice and detriment.

Respondents' Case

8. The 1st Respondent filed ground of opposition on 10th May 2012 and also filed a Replying Affidavit sworn by James Njogu, State Counsel and in both the case for the DPP is stated to be as follows;

That the two proceedings elsewhere referred to above are independent of each other; one relates to professional misconduct, the other a purely criminal matter. In the latter, a complaint was lodged and investigations revealed that an offence may have been committed contrary to **Section 313** of the **Penal Code** and this Court should not hinder the Petitioner's trial which should be concluded within the Law.

9. The Interest party, by her Affidavit sworn on 9th May 2012 and 14th June 2012 deponed that to declare the Petitioner's trial unconstitutional would amount to stifling the administration of justice and also stifle her efforts in executing the decree obtained in Disciplinary Cause No.90/2006 aforesaid.

Further, that **Section 58(5)** of the **Advocates Act** provides for instances where proceedings of the Disciplinary Committee can be termed judicial proceedings and this is only with regard to the application of the **Evidence Act**.

10. It is also her case that the criminal trial has been proceeding without conclusion for over 7 years and the trial has started *de novo* on three occasions but she has always and faithfully so, appeared when required to tender her evidence.

11. That the Petition is intended to get the Petitioner reprieve without the Interested party getting any justice for the wrongs committed by the Petitioner and the Petition should be dismissed with costs.

Determination

12. I have read the Submissions on record and the first issue to address is whether the Disciplinary Committee proceedings are Judicial proceedings and whether a conviction in the former can amount to a bar to any proceedings in the latter. In addressing that issue, it must be borne in mind that the criminal proceedings were initiated earlier than the Disciplinary Committee proceedings but as at the time of conclusion of the hearing herein, they had not been concluded.

13. **Section 58 (5)** of the **Advocates Act** provides as follows;

“All proceedings before the Committee shall be deemed for the purposes of Chapter XI of the Penal Code to be judicial proceedings and for the purposes of the Evidence Act to be legal proceedings.”

Chapter XI of the **Penal Code** is headed. *“Relating to the Administration of justice”* and in **Sections 108 to 121**, it creates offences, such as;

- i) Perjury
- ii) False statements by Interpreters
- iii) Fabricating evidence
- iv) Destroying evidence
- v) Offences relating to judicial proceedings

14. The **Evidence Act, Cap.80** is an **Act** of Parliament *“to declare the Law of evidence”* and so the import of a clear reading of the above provisions would point to the fact that the Penal Code generally establishes a code of Criminal Law and its applicability to Disciplinary Committee proceedings is limited to offences that may be committed in the cause of or during such proceedings. Similarly, the **Evidence Act** is applied wherever evidence has to be taken during those proceedings.

15. Earlier in this judgment, I quoted from the decision of the Disciplinary Committee which in fact did find that the two proceedings are different and I quite agree that the ruling aforesaid should have put the matter to rest, but it has not. The Petitioner is now arguing that a conviction at the Disciplinary Committee is sufficient and that he ought not to be troubled with another trial and probable conviction at

the Criminal Court. *Can such a submission be sustained?*

16. On the facts before me, the criminal proceedings were commenced earlier and I have stated above that attempts at getting a stay before the Disciplinary Committee failed. The Petition before me is a reverse strategy to stop the criminal proceedings because the Committee proceedings have been concluded. *But has a double jeopardy situation arisen in this case?*

17. I read somewhere that the rule against double trial for the same offence is based on the ecclesiastical concept that “*God judges not twice for the same offence*” and is now applied to the conduct of trials by mortal judges. In the Law Reform Commission of Hong Kong's Double Jeopardy Sub-Committee Consultation Paper on Double Jeopardy, it was written as follows;

“The [double jeopardy] rule is grounded on the notion that a suspect should be left undisturbed following the final verdict, either to go and lead a normal life if acquitted or to face the appropriate punishment if convicted.”

18. It is not necessary to delve into what a “*trial*” and a “*prosecution*” mean (*as the Petitioner would want me to*) because it is generally agreed that proceedings before the Committee relate to “*professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocated*” – **Section 60** of the **Advocates Act**. Criminal prosecutions on the other hand relate to the “*determination of the guilt or innocence of a person charged with crime*” - Black's Law Dictionary, 5th Edition – page 1099.

19. Proceedings before the Committee cannot therefore by any shade of doubt be termed “*a criminal trial*” and the mere choice of the word, “*convict*” at the end of its proceedings cannot criminalize the actions of the Respondent in those proceedings. In fact the standard of proof is much higher in criminal proceedings; beyond reasonable doubt which is not the same standard as in the Committee.

20. The Petitioner has invoked the doctrine of *autrefois acquit* applicable to his situation. In Connelly vs DPP [1964] A.C. 1254, Lord Devlin stated as follows;

“For the doctrine of autrefois to apply, it is necessary that the accused person should have been put in peril of conviction for the same offence as that which he is charged. The word “offence” embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in Law”

He then added that;

“But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be circumstances which make it just and convenient in that case.”

21. I am well guided by the above statement and would only add that there was no “*crime*” that the Petitioner was charged with before the Committee and he was not there as an “*accused person*”. Those are terms properly applicable to him as the criminal Court and the doctrine of *autrefois acquit*, attractive to his ears as it may seem, is not applicable to the Petitioner's situation.

22. Having answered the main issue in the Petition, it follows that the invocation of **Article 50** of the **Constitution** is in vain. The criminal trial is on-going and there is no complaint that the Petitioner is not receiving a fair trial. It can also not be true that proceedings for disciplining of advocates for professional misconduct can be termed an unconstitutional act.

23. In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable. In the meantime, he should also comply with the decision regarding his professional failings and work towards upholding his oath in the future.

24. As for his Petition, the same is misguided, devoid of any merit whatsoever and is best dismissed with

costs to the Respondent and Interested Party.

25. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – Court Clerk

Mr. Wanjohi for Interested party

No appearance for Petitioner

No appearance for Respondents

Order

Judgment duly read.

**ISAAC LENAOLA
JUDGE**