Republic v Advocates Disciplinary Tribunal; Ngari (Interested Party); Momanyi (Exparte Applicant) (Judicial Review E020 of 2023) [2024] KEHC 14675 (KLR) (Judicial Review) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 14675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E020 OF 2023

JM CHIGITI, J

SEPTEMBER 25, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

ADVOCATES DISCIPLINARY TRIBUNAL .... RESPONDENT

AND

STEPHEN KAHOME NGARI .... INTERESTED PARTY

AND

ONGETA HESBON MOMANYI .... EXPARTE APPLICANT

JUDGMENT

1. The application that is before this court is the one dated 1st March 2023 in which the Applicant seeks for the following Orders-

    a. An Order of Certiorari to remove into this Court for purposes of being quashed the decisions in the Ruling issued on the 7th November 2022 and 6th February 2023 issued in the Advocates Disciplinary Tribunal Case No. 53 of 2014 which suspended the Ex-Parte Applicant for 1 year and later on striking him off the Roll of Advocates.

    b. An Order of Prohibition directed at the Respondent and the Interested Party prohibiting them either by themselves, or by their agents from enforcing the decisions contained in the ruling of 7th November 2022 and 6th February 2023 and contained in the Law Society of Kenya letter dated 10th February 2023.

Brief background;

2. In the year 2014, the Interested Party herein commenced disciplinary proceedings against the Ex-Parte Applicant vide the Advocates Disciplinary Tribunal Disciplinary Cause No. 53 of 2014 Stephen Kahome Ngari -vs- Ongetta Hesbon Momanyi (DC No. 53 of 2014).

3. After hearing the matter, on 7th December 2015, The Advocates Disciplinary Tribunal found the Ex-Parte Applicant guilty of professional misconduct and subsequently sentenced him as follows-

> " ...we therefore sentence the Accused Advocate as follows;
>
> 1. The accused advocate shall pay a fine of Kshs. 50,000.00/- within 60 days.
> 2. The accused advocate shall pay the Complainant costs as taxed by the tribunal.
> 3. The accused advocate shall pay further costs to the Law Society of Kenya in the sum of Kshs. 15,000.00 within 60 days.
> 4. The accused advocate shall pay the complainant the sum ofKshs.520,000.00 together with interest at the rate of 12% within 60 days..."

4. In order to realize the fruits of the Ruling issued in his favour, the Interested Party filed Milimani Misc. Application E468 of 2020 Stephen Ngari Kahome -vs- Ongetta Hesbon Momanyi for orders to have the Tribunal's Ruling issued on the 7th December 2015, converted into a Decree capable of been executed.

5. The Interested Party's application was allowed on the 23rd February 2021 and the Interested Party commenced execution proceedings against the Ex-Parte Applicant before the Advocates Disciplinary Tribunal.

6. When the Ex-Parte Applicant was served with a date for Notice to Show Cause,The Ex-Parte Applicant filed an application for stay of execution dated 14th February 2022.

7. When the matter came up, the Tribunal directed that both the Notice of Motion application and Notice to Show Cause application be heard together.

8. On the 7th November 2022 the Tribunal issued its Ruling wherein it held as follows-

> " We, accordingly, suspend the accused advocate for one year from the dated of this Judgment. The LSK is ordered to take necessary steps to enforce this order. We also order the accused advocate to honour the judgment of this Tribunal in full by depositing with the Law Society of Kenya, within sixty (60) days from the date hereof, the sum of Kshs. 540,000.00 together with interest calculated in the rate of 12% with effect from 12th February 2014, for onward transmission to the Complainant.
>
> Should the accused Advocate default in complying with the order under paragraph 10 above, a NTSC why he should not be struck off the Roll of Advocates to issue."

9. Instead of complying with Orders of 7th November 2022 the applicant filed an application dated 22nd November 2022 seeking to review or set aside the orders issued on the 7th November 2022.

10. However, although filed under a Certificate of Urgency the application dated 22nd November 2022 was not certified urgent.

11. After the expiry of the 60 days granted to comply with directions of 7th November 2022 the matter was fixed for Notice to Show Cause on the 6th February 2023.

12. When the matter came up the Ex-Parte Applicant had not complied with directions issued on the 7th November 2022 and consequently, he was struck off the Roll of Advocates.

Respondent's Case;

13. The Application is opposed through the Replying Affidavit of Florence Muturi.

14. The Interested Party commenced disciplinary proceedings against the Ex-Parte Applicant in the Advocate's Disciplinary Tribunal Cause No. 53 of 2014 (DTC No.53 of 14)

15. The Respondent heard DTC No. 53 of 2014 and issued a Ruling on the 7th December 2015; in which it found the Ex-Parte Applicant guilty of professional misconduct and subsequently sentenced him as follows -

 " ...we therefore sentence the Accused Advocate as follows;

 1. The accused advocate shall pay a fine of Kshs. 50,000.00/- within 60 days.

 2. The accused advocate shall pay the Complainant costs as taxed by the tribunal.

 3. The accused advocate shall pay further costs to the Law Society of Kenya in the sum of Kshs. 15,000.00 within 60 days.

 4. The accused advocate shall pay the complainant the sum of Kshs. 520,000.00 together with interest at the rate of 12% within 60 days..."

16. Aggrieved by the said Ruling the Ex-Parte Applicant appealed vide Milimani Civil Appeal No. 698 of 2016 Ogetta Hesbon Momanyi -vs-Advocates Disciplinary Tribunal and another.

17. He also filed Milimani Misc. Civil Application No. 71 of 2016 Ogetta Hesbon Momanyi -vs-Advocates Disciplinary Tribunal in which he sought stay of the Advocates Disciplinary Tribunal proceedings.

18. The High Court granted the Ex-Parte Applicant conditional stay of proceedings pending hearing of his appeal if he deposits the decretal sum of Kshs. 520,000.00 either in Court or in a joint interest earning account within 30 days of the Ruling.

19. He did not comply with the Ruling issued in Milimani Misc. No. 71 of 2016 and as such his conditional order of stay of proceedings in DTC No. 53 of 2014 lapsed.

20. The Ex-Parte Applicant's appeal in Milimani Civil Appeal No. 698 of 2016 which was dismissed for being fatally defective.

21. In Milimani Civil Appeal No. 698 of 2016, paragraphs 21 to 24 of the Ruling issued on the 24th November 2021, the High Court substantively and with finality dealt with the issue of whether the Ex-Parte Applicant was issued with the proceedings of DTC No. 53 of 2014 and whether the Respondent submitted the trial file to the High Court.

22. It argues that The Ex-Parte Applicant cannot raise the same issues again as they have already been determined in Milimani Civil Appeal No. 698 of 2016.

23. The Ruling issued on 7th December 2015 in DTC No. 53 of 2014 has not been overturned or faulted.

24. Since 7th December 2015 to date the Ex-Parte has neither complied with Ruling issued in DTC No. 53 of 2014nor complied with the Conditional Order for stay issued in Milimani HC Misc. No. 71 of 2016.

25. The Interested Party's application in Milimani Misc. Application E468 of 2020 Stephen Ngari Kahome -vs- Ongetta Hesbon Momanyi seeking to convert the Tribunal's Ruling issued on the 7th December 2015 into a Decree was allowed.

26. Nothing prevented the Respondent from hearing the Notice to Show Cause application filed by the Interested Party.

27. The Advocates Disciplinary Tribunal is bound by the provisions of Article 159 of the *Constitution*; it has to do justice for all persons before it, irrespective of status and further, ensure timely disposal of cases.

28. The applicant admits that he filed a response and submissions to the Notice to Show Cause application.

29. It is misleading to this Court for the Ex-Parte Applicant to allege that his application dated 14thFebruary 2022 was not heard, yet he confirms in paragraph h of his Chamber Summons that the Respondent directed that his application dated 14th February 2022, and the Notice to Show Cause application be canvassed by way of written submissions.

30. It is evident from the Ruling issued by the Respondent on 7th November 2022 in paragraphs *5* to *8*, that the Tribunal considered the application dated 14th February 2022 and found it to be devoid of any merit.

31. In its ruling issued on the 7th November 2022, the Respondent made a clerical error and quoted the said decretal amount as Kshs. 540,000.00. The foregoing is a clerical and can easily be amended pursuant to Section 99 of the *Civil Procedure Act*.

32. In the sentence issued on the 14th March 2016, the Respondent did not issue any orders suspending the Ex-Parte Applicant from the bar.

33. The Ex-Parte Applicant's allegation in paragraph 20 of his affidavit dated 1st March 2023 that his suspension was extended is false.

34. The suspension came as a result of the Notice to Show Cause proceedings on why he should not be struck off the Roll of Advocates.

35. When the matter came up for a mention to confirm compliance on the 6th February 2023, the Tribunal found that the Ex-Parte Applicant had ignored its earlier directions issued on the 7th November 2022.

36. As stated in its Ruling of 7th November 2022, the tribunal proceeded to strike off the Ex-Parte from the roll of advocates as stated in its ruling.

37. The Ex-Parte Applicant ignored the Court's directions issued on the 7th November 2022, instead he chose to file an application for review of the Ruling of 7th November 2022.

38. He ought to have complied with the Court directions, after which he could seek directions on hearing of his application for review.

39. The Ex-Parte Applicant cannot claim that he was ambushed by the proceedings of 6th February 2023, reason been that on the 7th November 2022, the Tribunal ordered him to comply with its directions within 60 days; and when the matter came up in Court on 6th February 2023, the 60 days had lapsed.

40. That the Ex-Parte Applicant cannot question the validity of the ruling issued on the 7th December 2015, which found him guilty of professional misconduct in these proceedings.

41. The Ex-Parte Applicant cannot question the validity of the Decree issued in Milimani Misc. No. E468 of 2020, which is a result of the conversion of the tribunal's ruling dated 7th December 2015 into a Decree.

42. In the case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C.374,410. Lord Diplock defined procedural impropriety as a situation wherein a public authority acts ultra vires (that is, beyond the power given to it by statute), fails to observe the rules of natural justice and or if it commits a serious procedural error.

43. In Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. Lord Diplock defined illegality as follows-

> "...By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it..."

44. In Nairobi Constitutional Petition No. E247 of 2021 Shivaji Simon v Advocates Disciplinary Tribunal; Neily Mutua Nafula & 2 others (Interested Parties) [2022] eKLR the learned Justice Mrima while dealing with a similar matter held as follows (paragraphs 167 to 168)-

> "In this case, the Tribunal issued a Notice to Show Cause why the Petitioner should not be struck off due to non-compliance. The Tribunal, however, opted not to charge the Advocate with the offence of non-compliance pursuant to Section 77 of the *Advocates Act*. The Tribunal was, therefore, subject to proof of service, right in issuing the Notice to Show Cause to the Petitioner before striking him off.
>
> It now comes to the fore that the Petitioner's argument that the hearing of the Notice to show cause was to be subjected to a repeat procedure under Section 60 of the *Advocates Act* in line with Section 77 of the *Advocates Act* does not hold. I say so because the initial proceedings before the Tribunal were already instituted under Section 60 of the *Advocates Act*. As said, the Tribunal, rightly so, issued a Notice to show cause to the Petitioner prior to striking him off."

45. The Respondent has power under Section 77 of the *Advocates Act* to enforce compliance of its orders and directions as per Section 60 of the Act. Under Section 60(4) of the *Advocates Act* the Respondent amongst other powers, it can suspend, fine and or strike off an advocate from the Roll of Advocates.

46. There was nothing illegal or ultra-vires with the Respondent's decision to strike off the Ex-Parte Applicant from the Roll of Advocates.

47. The impugned decision was arrived at after careful consideration of the Notice to Show Cause and the Ex-Parte Applicant Replying Affidavit.

48. In the aforestated case of Council of Civil Service Unions versus Minister for the Civil Service(1985)A.C.374.410. Lord Diplock defined irrationality as follows-

> "By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B.223). It applies to a decision which is so outrageous in its defiance of logic

or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

49. In Civil Appeal No. 84 of 2010 Republic v National Environmental Management Authority [2011] eKLR the Court of Appeal (Omolo, Onyango Otieno, & Visram, JJ.A)stated as follows;-

> " ...The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."

The Interested Party's Case;

50. The Advocates disciplinary Tribunal delivered a decision on 7th December, 2015 where the Applicant was found guilty of professional misconduct of unlawfully withholding a sum of Kshs 20,000 belonging to the Interested Party as legal fees wherein the Applicant was ordered to deposit the said amount with the Law Society of Kenya within 60 days from the date of Judgement together with interest at 12% from 22nd February, 2014 till payment in full.

51. A sentence was issued by the Tribunal on 14/3/2016 where the Applicant was ordered to pay the Interested Party a sum of Kshs 520,000 with interest at 12% per annum, fine of Kshs 50,000 Law Society of Kenya costs of Kshs 15,000 and my costs but the Applicant has never complied to date.

52. The Applicant was duly represented and his advocate informed the Court that there was a temporary stay order only up to 10.03.2016 when the matter was slated for interpartes hearing that was pushed to 16.03.2016 and informed the Tribunal that he did not know whether the orders were extended.

53. The Advocate filed an application in the High Court, Miscellaneous Case No. 71 of 2016 as a result of which on 17th October, 2018 the Applicant was granted a conditional stay.

54. The Applicant never obeyed the orders of stay and the stay thus lapsed by operation of the law and the Accused Advocate is guilty of contempt of a court order and Tribunal's order of 7/12/2015 and he should purge first to get audience from this Court.

55. The Applicant lodged High Court Civil Appeal No. 698 of 2016 in exercise of his right of appeal to challenge the judgment of the Tribunal which was dismissed for want of prosecution and for being fatally defective having been filed out of time without leave of the court.

56. The Interested Party filed Misc Application No. E468 of 2020, Nairobi, to convert the Tribunal's decision to a decree for the purpose of execution and the Court vide a Ruling of Justice Chitembwe on 23rd February, 2021 allowed the application and made a clear finding that the Accused Advocate

disobeyed orders of 17th October,2018 in High Court Misc 71 of 2016 granting him conditional stay of execution and the court vacated stay of execution.

> " It is also not disputed that the Respondent did not obey orders issued by Justice Thuranira on 17th October,2018 which was a conditional order…it therefore follows that the stay of execution pending the hearing and determination of the appeal is equally vacated"

57. Despite earlier securing stay pending appeal, the Applicant did not take any steps to prosecute the Appeal since 2016, he thus squandered a chance to protect his constitutional rights he now claims were violated.

58. In further exercise of his right of appeal the Applicant has filed Court of Appeal Civil Appeal No. E041 of 2015 which is merely seeking to set aside Orders of Justice Sergon issued on 24th November, 2021 that dismissed the appeal.

59. The Tribunal in exercise of its right proceeded to strike out the Applicant from the roll of advocates after directing the Applicant to pay the monies due from him in vain.

60. The Applicant has thus not exhausted his right of appeal provided by the *Advocates Act* but has chosen to file judicial review proceedings.

61. The Applicant is not challenging or seeking to quash the Orders and Judgment of the Tribunal of 7th December, 2015 that found the Applicant guilty of professional misconduct, the incidental orders from the Ruling of 7th November, 2022 are consequential orders that the Tribunal is permitted to grant under section 60(4) of the *Advocates Act* and are not illegal to warrant quashing.

62. The Applicant has a right of appeal to the Court of appeal under section 67 of the *Advocates Act* which provides as follows:

> " (1) Any advocate aggrieved by a decision or order of the Court made under section 64 may appeal therefrom to the Court of Appeal in the manner and within the time prescribed by the rules made from time to time by the Court relating to second appeals in civil matters."

63. The Applicant has posited that he is in the Court of Appeal, Civil Appeal No. E041 of 2022 challenging orders of Justice Sergon dismissing appeal, the Applicant therefore confirms that he has not exhausted his appellate rights provided by the *Advocates Act*.

64. The Application is in breach of Section 9(5) of the Fair Administrative Action (FAA) since the Applicant has a right to appeal against the Tribunal's decision up to the Court of Appeal and he cannot therefore invoke this Court's powers until he exhausts the right of appeal as permitted under Section 67 of the *Advocates Act*.

65. The Application offends section 9 (2) of the *Fair Administrative Action Act* since the Applicant did not apply for an exemption, as the law requires nor has it satisfied the exceptional circumstances requirement under section 9(4) of the *Fair Administrative Action Act*.

66. Section 9(2) of the *Fair Administrative Action Act* provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

67. Reliance is placed in the case of Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR, the court affirmed the requirement to file a formal application to apply or exemption from exhausting internal remedy which the Applicant herein flouted: -

> " …The second requirement is that on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the *Fair Administrative Action Act*. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of Justice that the exemption be given. Section 9(4) of the *Fair Administrative Action Act* postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the above provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstance."

68. It submits that the application is thus irregular for failure by the Applicant to exhaust internal remedy and to apply for exemption. The principles applicable in a judicial review application were considered by this Court extensively in the Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya [2017] eKLR. The Court noted as follows:

    39. For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights, or the merits of the decision being challenged but with the decision-making process.

69. The Applicant has made numerous contentions herein which goes to the merits of the decision which is beyond the scope of Judicial Review and which were considered by the tribunal before a decision of 6th December, 2015 was made and which can only be reversed by way of appeal, which appeal was dismissed for want of prosecution and being fatally defective for being filed out of time without leave of the court.

70. Issues that touch on merit and counter-arguments are highlighted as follows; -

    a. The Applicant alleges that he paid the Purchase price to the Vendor, but the Tribunal found that in the statement recorded by the Applicant with the police he stated that he paid the Vendor's wife, this was contrary to the agreement and amounted to professional misconduct. See the Applicant's witness statement, being

    b. The Applicant alleges that the Judgment of the tribunal of 7th December, 2015 is irregular but it is only an appellate Court that can reverse the judgement.

    c. Allegation that the Interested Party waived requirement of transfer is baseless as the same was raised before the Tribunal which proceeded to find the Applicant guilty of misconduct and only an appellate court can reverse this finding. It can only be reversed by the appellate Courts.

    d. The averments in paragraphs 2-8 of the Applicant's supporting affidavit goes to the merits of the Tribunal's decision, considered and could only be reversed by way of an appeal, which appeal, High Court Civil Appeal No. 698 of 2016 was dismissed and struck out.

71. The Applicant has argued that the Tribunal proceeded to strike him off while there is a pending appeal. We have produced evidence that High Court Civil Appeal was dismissed for want of prosecution and for being fatally defective. We have also produced evidence that Court of Appeal, Civil Appeal No. E041 of 2022 is merely seeking to set aside orders of Justice Sergon dismissing appeal.

72. Section 62(3) of the *Advocates Act* Provides that, an appeal shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order and the Tribunal did not breach any order in meting out sentencing and striking out the Applicant from the roll.

> "An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order."

73. The Tribunal did not breach any law or act illegally by suspending the advocate and striking him off the roll since it has powers under section 60(4) of the *Advocates Act* to , interalia, to order that such Advocate be suspended or to be struck off the roll or such combination of the orders provided for as the Tribunal deems fit.

> "After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—
>
> (a) ...
>
> (b) ... that such advocate be suspended from practice for a specified period not exceeding five years; or
>
> (c) that the name of such advocate be struck off the Roll; or
>
> (d) ...
>
> (e) ... that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit."

74. The Applicant has not tabled with precision evidence of breach of his constitutional rights and having been found guilty of professional misconduct and his appeal dismissed, the Tribunal cannot be accused of any wrong doing having exercised powers in accordance with the provisions of the *Advocates Act*.

75. The Applicant was accorded fair hearing under Article 50 before the verdict of 7/5/2015 and subsequent orders, being found guilty of professional misconduct does not in any way offend the Constitutional rights of the Applicant as pleaded.

Analysis and Determination;

76. Upon perusing the pleadings and the rival submissions of parties alongside the authority cited, this court finds the following to be the issues for determination:

    1. Whether or not the applicant is entitled to the orders sought.
    2. Who should be the cost?

77. In the case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that:

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985]

AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

78. Section 7 of the *Fair Administrative Action Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

79. In the Chamber Summons application dated 14th February 2023, the Ex-Parte Applicant confirmed that both the Interested Party's Notice to Show Cause and his Notice of Motion application dated 14th February 2023 were to be heard by way of written submissions.

80. The foregoing has been reiterated in paragraph 8 of the Ex-Parte Applicant Supporting Affidavit dated 14th February 2023.

81. At paragraphs 5 to 8 of the Ruling issued by the Respondent on the 7 th November 2022, confirms that the Application dated 14th February 2022 was considered.

82. When the matter came up for a mention to confirm compliance on the 6th February 2023, the Tribunal found that the Ex-Parte Applicant had ignored its earlier directions issued on the 7th November 2022.

83. As stated in its Ruling of 7th November 2022, the tribunal proceeded to strike off the Ex-Parte from the roll of advocates as stated in its ruling.

84. The Ex-Parte Applicant ignored the Court's directions issued on the 7th November 2022, instead he chose to file an application for review of the Ruling of 7th November 2022.

85. It is my finding and I so hold that the Respondent adhered and observed all the applicable procedural rules that govern the hearing of the advocates disciplinary matters to the letter in arriving at the decisions contained in the rulings dated 7th November 2022 and 6th February 2023 and letters dated 10th February, 2023 by Law Society of Kenya in Advocates Disciplinary Tribunal in DC 53 of 2014.

The Applicant has also sought orders of prohibition.

86. A writ of prohibition restrains a body exercising public power from exceeding its powers or usurping jurisdiction which it does not have. It prohibits the decision maker and those relying on the decision

from doing something which they are about to do, or from continuing a course of action already commenced, such as taking any further step in proceedings.

87. Before the order of Prohibition is issued there must be something done. It is issued at the stage when the proceedings are in progress to forbid the authority from continuing the proceedings. It is directly related to Certiorari since lies to quash the decision while prohibition lies to forbid from further continuing the proceedings.

88. In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, the Court rendered itself thus:

> "The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction."
>
> "Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

89. The applicant has not proven nor demonstrated that he is entitled to the order of prohibition.

90. It is my finding and I so hold that the Respondent.

Who should bear the cost?

91. The general rule flowing from Section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya is that costs should follow the event. That is to say, the successful party should be awarded its costs. This general rule is elaborated by Justice Kuloba in his book, Judicial Hints on Civil Procedure, Vol. 1 at p. 99 as follows:

> "The first question is what is meant by "the event" in the proviso to subsection (1) of this section? The words "the event" mean the result of all the proceedings incidental to the litigation. The event is the result of the entire litigation. .... Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action. (Emphasis provided).

92. The applicant shall shoulder the costs of the suit.

Disposition:

93. The applicant has not made out a case for the grant of the orders sought.

Order:

94. The application dated 1st March 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

..

J. M. CHIGITI (SC)

JUDGE