Wamalwa v Law Society of Kenya & another (Civil Appeal 161 of 2015)
[2023] KEHC 19649 (KLR) (Civ) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 161 OF 2015

CW MEOLI, J

JUNE 29, 2023

BETWEEN

FREDRICK N WAMALWA ..... APPELLANT

AND

LAW SOCIETY OF KENYA ..... 1ST RESPONDENT

AHMEDNASIR M ABDULLAHI ..... 2ND RESPONDENT

(Being an appeal from the ruling of Advocates Disciplinary Tribunal delivered on 16th March 2015 in the Disciplinary Tribunal Cause No. 153 of 2008)

JUDGMENT

1. This appeal emanates from the decision of the Advocates Disciplinary Tribunal (hereafter the tribunal) of 16.03.2015 in the Disciplinary Tribunal Cause No. 153 of 2008. The proceedings before the tribunal commenced by way of a complaint letter accompanied by an affidavit. Both lodged with the Law Society of Kenya (hereafter the 1st Respondent) on 19.09.2008 by Ahmednasir M. Abdullahi (hereafter the 2nd Respondent) the complainant before the tribunal against Fredrick N. Wamalwa, the respondent before the tribunal (hereafter the Appellant).

2. The 2nd Respondent's complaint against the Appellant was premised on grounds of misconduct and unlawful withholding of funds. It was averred that in the year 2006, the Appellant was representing a vendor in respect of a transaction for the purchase of LR No. 10046 (hereafter the property) pursuant to which the Appellant received the sum of Kshs. 3,200,000/- (hereafter the deposit of purchase price) as stakeholder pending registration of transfer of property in favour of the 2nd Respondent's client, who was the purchaser.

3. That the Appellant at the time was aware of the existence of an earlier sale agreement in respect of the same property but failed to disclose the fact while receiving the deposit of the purchase price in breach of his professional obligation as an advocate and stakeholder in the transaction. It was further averred that the earlier sale agreement was concluded and despite several demands made to the Appellant to refund the deposit of purchase price, the Appellant refused to refund the same without any lawful cause, prompting the filing of a suit before the High Court that was consequently compromised by way of a consent judgment. That the Appellant having held the deposit as stakeholder pending conclusion of the sale should have disclosed the existence of the earlier sale agreement and rejected the 2nd Respondent's deposit of purchase. That he appropriated the funds for his own use contrary to professional ethics and standards of the profession.

4. The Appellant responded to the complaint by way of a letter dated 09.10.2008 and equally sought that the affidavit dated 10.03.2011 accompanying a motion of even date be applied and or deemed as a response thereto. Therein, he ideally denied the averments in the complaint and disputed the tribunal's jurisdiction to entertain the complaint because of the suit before the High Court had conclusively settled the issues between the parties. By its decision dated 02.12.2013, the tribunal found in favour of the 2nd Respondent to the effect that the Appellant was guilty of professional impropriety by the continued withholding of funds paid out to him in trust defying demands for refund. He was accordingly convicted and directed to appear on 04.04.2014 to mitigate before sentencing.

5. The Appellant thereafter lodged a motion dated 04.04.2014 before the tribunal seeking inter alia that pending hearing and determination of the motion there be stay of sentencing; that the Appellant be provided with complete record of proceedings; those further proceedings be conducted by a panel excluding the late Mr. L. Onguto (as he then was) and Mr. A.O Weda; that the tribunal be pleased to set aside or review its judgment delivered on 02.12.2013; and that the tribunal be pleased to terminate or dismiss the complaint and or make any other orders deemed fitting for the ends of justice. The motion was expressed to be brought pursuant to Article 25, 27 & 50 of the *Constitution of Kenya* 2010. On grounds on the face of thereof as amplified in the supporting affidavit of the Appellant.

6. The 2nd Respondent opposed the motion by way of grounds of opposition dated 01.08.2014 to the effect that the prayers therein did not lie in law as the tribunal was functus officio , having finally disposed of the complaint and delivered a judgment on the 02.12.2013; that the only avenue available to the Appellant was an appeal to the High Court as envisaged by Section 64 of the *Advocates Act*, Cap 16; that the notice of motion was a disguised belated attempt to appeal against the judgment of the tribunal and failed to meet the conditions for review; that the constitutional provisions of the Constitution invoked by the Appellant were misplaced as the Appellant had an opportunity to ventilate his case before the tribunal.

7. On 16.03.2015 the tribunal dismissed the Appellant's motion with costs to the Respondents herein. Aggrieved with the outcome, the Appellant preferred the instant appeal, based on a plethora of grounds as follows;-

> " 1. That the Honourable members of the Disciplinary Tribunal misdirected themselves in law and in fact and made erroneous findings and misapprehended and misapplied the law.
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> 2. That the Honourable Members of the Tribunal failed to record and consider the substance and effect of two grounds of objection raised by the Appellant on 15.08.2011 urging disqualification of members of the Tribunal of 14.03.2011 alleging subjective and objective bias against all of them.

3. That the Honourable Members of the Tribunal erred in law and in fact in holding that the record of proceedings supplied to the Appellant is complete and or that there is no error or mistake apparent on the record of proceedings when proceedings of 15.08.2008 the date the Appellant's objection was heard and determined bears on the record exclusively Coram, submissions by the Appellant, submissions by the 2nd Respondent and no minute of the Honourable Mr. Majanja gracefully recusing himself from proceedings or any order giving effect to the Hon. Mr. Majanja's recusal or to the objection sustained by them.

4. That the Honourable Members of the Tribunal misdirected themselves in law and in fact in holding that there is no error on the face of the record and that the Record of proceedings supplied to the Appellant is complete when proceedings of 15.08.2011 the date the Appellant's objection was heard and determined do not in fact contain any minute or order relating to graceful recusal of Honourable Charles Kariuki on grounds that he was a candidate for appointment as a Judge.

5. That the Honourable Members of the Tribunal misdirected themselves in law and in fact with regard to proceedings of 24.10.2011 and the Appellant's objection to further participation by Mr. Weda Ambrose when they failed to find that having been part of the Tribunal of 14.03.2011 he could not participate on the basis of orders that should have been made but were erroneously not made on recusal of Hon. Majanja in proceedings of 15.08.2015.

6. That the Honourable Members of the Tribunal misdirected themselves on the scope and effect of the Preliminary Objection by the Appellant urging objective and subjective bias by members of the Tribunal of 14.03.2011 of whom Mr Weda Ambrose was of one mind with the other members.

7. That the Honourable Members of the Tribunal misdirected themselves in law and in fact in holding that there is no error apparent on the face of the record of proceedings conducted on 11.02.2013 when the record by reference to "proceedings for this session attached" explicitly points to proceedings not attached.

8. That the Honourable Members of the Tribunal misdirected themselves when with regard to proceedings of 24.10.2011 when they failed to hold that want on record of the willful recusal of Honourable Mr. Kariuki Charles on that date on the grounds that he was a candidate for appointment as judge and want of the record of orders the Tribunal should have recorded but failed to record as an order to give effect to the said recusal on grounds of candidature for appointment seeking appointment for judicial office was an error and a mistake on the face of the record.

9. That the Honourable members of the Tribunal should have found that the prevalent and systemic want of record of the substance of objections heard and upheld by the Tribunal and repetitive want of record of any orders made upholding those objections was an error on the face of the record calculated to defeat ends of justice.

10. The honorable members of the Tribunal in the result failed to find and should have found that the participation of Mr. Onguto a candidate before the Complainant at the Judicial Service Commission for appointment as Judge the very grounds on which Mr. Charles Kariuki had gracefully acceded to the Appellant's objection on 15.08.2011 was occasioned by

    a) the omission from the record of any minute of willful recusal of of Mr. Charles Kariuki on 15.08.2011.

    b) the absence of any minute expressing with clarity what the Appellant's objection was about

    c) the failure to record orders made on the objection and the failure to give directions to give effect to objections upheld by the Tribunal.

11. That the subsequent participation of Mr Joseph L. Onguto a candidate seeking appointment as Judge before the Complainant violated the Appellant's fundamental constitutional rights to be heard by a fair independent and impartial Tribunal.

12. That the Honourable Members failed to find and should on the basis of the record have found that the casual manner in which the Tribunal kept record of proceedings before them and the prevalent omission therefrom of minutes vital proceedings, objections taken therein and orders made thereof was of itself and of its effect an error on the face of the record prejudicial to a fair determination of the Appellant's defence.

13. That the Honourable Members of the Tribunal misdirected themselves in failing to hold that the unexplained omission from the proceedings of any record of oral submissions by both counsel for the 2nd Respondent and by the Appellant is explained by the Tribunal's reference to proceedings for this session attached and that reference explicitly pointing an accusing finger to the 1st Respondent as responsible for the absence of the full text of proceedings of the 11.02.2013.

14. That the Honourable Members of the Tribunal misdirected themselves in fact and in law in failing to infer from reference top line page 8 of proceedings of 11.02.2013 to the effect "Proceedings for this session attached" Was a direct acknowledgement of the extraneous existence of proceedings of 11.02.2013 to be attached.

15. That the Honourable Members of the Tribunal misdirected themselves in fact and in law in finding against the record supplied to the Appellant and to the Tribunal was complete record of proceedings of the session of Tribunal of 11.02.2013 when there is in fact unambiguous reference therein of proceedings thereof existing separately.

16. That the Honourable Members of the Tribunal misdirected themselves in law and in fact in holding that there was no error on the face of the record against direct evidence on record pointing to a separate and extraneous existence of proceedings of 11.02.2013 to be attached.

17. That the honourable Members of the Tribunal erred in law and in fact in holding that there was no error apparent on the face of the record against the backdrop of an explicit record of proceedings to be attached and the evident want of any minute of oral submissions by the Appellant and by the 2nd Respondent or by the Tribunal noted in reaction nor even of the date reserved by the Honourable Tribunal for Judgment on the Complaint.

18. That the Honourable Members of the Tribunal erred in law and in fact in failing to hold that the participation of Mr. Weda Ambrose in the consideration and determination of the Complainant without hearing the said Complaint and without regard to objection made by the Appellant on 24.10.2011 and upheld by the Tribunal not only occasioned a failure of justice but was an error and a mistake apparent on the face of the record linked to and explaining the reason for active displacement or disappearance of proceedings of 11.02.2013.

19. That the Honourable Members of the Tribunal misdirected themselves in fact and in law in refusing to consider the secluded proceedings of the Session of 11.02.2013 to overturn their judgment allowing the belated substituted charge in the Complaint and allow the Appellant's application for review.

20. That the finding by the Tribunal upholding its judgment allowing the 2nd Respondent's Complaint and of its ruling dismissing the Appellant's application for review are against the weight of evidence and of the applicable law.

21. That the finding of the Tribunal subjecting legal rights to a prism of imaginary moral values is against public policy and an affront to justice and to the Appellant's Constitutional rights to protection by the Law guaranteed by Article 27 (1) of the *Constitution* and an affront to independency of the judiciary

22. That the Tribunal acted arbitrarily in inviting Mr. Weda Ambrose to consider and determine the Complaint when he Mr. Weda had never heard the complaint and had never been afforded the benefit of the "Proceedings for this Session" (i.e. the hearing) which the 1st Respondent actively in bad faith excluded from the proceedings.

23. That having rightly considered and dismissed the charge by the Complainant alleging non-disclosure and misrepresentation of material facts and having acquitted the Appellant of all charges of fraud the Tribunal lacked the moral factual legal or juridical basis for finding on an imaginary substituted charge of withholding funds against.

24. That the Honourable Tribunal lacked jurisdiction to convict the Appellant of concocted imaginary substituted charges never pleaded to and which did not and could not on the facts and in law form any part of substituted charge of the dismissed charges of fraud.

25. That wily nilly subjection by the Tribunal of their judgment of legal contractual rights to moral standards was oppressive of the Appellant and an outrage to justice.

26. The Tribunal lacked jurisdiction to convict the Appellant on undated affidavit evidence as by law prescribed.

27. That in all the circumstances the conduct the recording and maintenance of the record of proceedings against the Appellant by the Tribunal and by the 1st Respondent is arbitrary actuated by bad faith ill will and a total disregard for the Rule of Law and designed to defeat justice.

28. That the decision of the Tribunal dated 2nd December 2013 upholding their judgment on an imaginary substituted Complaint on the same facts it had dismissed the charges of non-disclosure and misrepresentation against the complaint is an outrage to justice and to the Appellant's fundamental constitutional right to be heard by a fair independent and impartial tribunal." (*sic*)

8. The appeal was canvassed by way of way of written submissions. In his lengthy submissions before the court, the Appellant cited Section 57(3) and 58(1) of the *Advocates Act*, and the English decision in *O'Reilly v Mackman* (1983) 2 AC to the contend that the proceedings before the tribunal infringed on his fundamental rights and freedoms on grounds that there were vital omissions and or that the record of proceedings was incomplete as pertains to events that actually transpired before the tribunal.

9. He also complained regarding the participation of Mr. Onguto (as he then was) who was at the time a candidate for appointment to judgeship before a commission in which the 2nd Respondent sat, and the participation of Mr. Weda who was not a member of the tribunal which heard the complaint, in the preparation of the judgment. That further the participation of Mr. Weda was effectively antithetical to the Appellant's access to justice pursuant to the cardinal principle of natural justice that justice must not only be done but be seen to be done.

10. While calling to a host of decisions including *Republic v Disciplinary Tribunal of the Law Society of Kenya*; *Republic v Advocates Disciplinary Tribunal; Rosemary Chege Njambi (Interested Party) Ex parte Odhiambo Tom Anyango* [2019] eKLR, and *Francis Karioko Muruatetu & another v Republic* [2017] eKLR the Appellant submitted that the record of proceedings is scant with regard to occasions when the Appellant raised objections to the membership of the tribunal and reflects very little if anything of the crucial proceedings on the date the complaint was heard. That the omissions in the record of proceedings of the pertinent remarks of Mr. Onguto (as he then was), to the effect that there was equally misconduct on the part of the 2nd Respondent, with reference to the post-dating of the agreement was tantamount to a grave violation of principles of the rule of law, good governance, transparency, and accountability.

11. It was further submitted that the complaint was premised on two counts whereas the tribunal having dismissed the count on non-disclosure failed to address the second count. Instead conjured up other charges alleging withholding of funds which charge was not the subject of the plea or hearing before the tribunal. Consequently, the resultant decision was effectively an inquisition in contravention of the Appellant's fundamental rights to a fair hearing by an impartial tribunal, right to be informed of the charge and opportunity to prepare a defence. In summation, the court was urged to set aside the decision of the tribunal with attendant costs both before the tribunal and appellate court being awarded to the Appellant.

12. The 2nd Respondent naturally defended the tribunal's decision. Firstly, it was contended that the Appellant's motion dated 04.04.2014 though presented as an application for review was a belated attempt to appeal against the judgment of the tribunal delivered on 02.12.2013. And that the only remedy available to the Appellant once the judgment was delivered was an appeal to this court as envisaged by Section 62 of the Advocates Act.

13. While calling to aid the decisions in *Daniel Kibet Mutai & 9 Others v Attorney General* [2019] eKLR and *Republic v Kenya Revenue Authority exparte Althaus Management & Consultancy Ltd* [2015] eKLR counsel contended that the tribunal rightly held that no facts were demonstrated by the Appellant necessitating further testimony and cross examination and that he was granted leave to put in any further affidavit material in aid of his case and further granted leave to appeal the said decision.

14. Concerning the undated complaint affidavit, it was argued that the Appellant did not suffer any prejudice as a result of the same and that the court ought to invoke Article 159 of the *Constitution* by focusing on substantive justice rather than mere technicalities. That in any event the Appellant responded to the undated complaint affidavit and was therefore estopped from asserting that an injustice resulted from the tribunal's reliance on the said affidavit. The decision in *Nicholas Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR and *Hon. Martha Wangari Karua v The Independent Electoral & Boundaries Commission & 3 Others* [2018] eKLR were called to aid in respect of the foregoing.

15. Responding the Appellant's contention that trumped up charges were presented before the tribunal, counsel submitted that the tribunal's guilty finding on the act of withholding funds without a just cause was within the tribunal's powers the question being a matter before the tribunal for determination. Besides, the 2nd Respondent's complaint affidavit elaborated on the pertinent matters and could not amount to trumped up charges.

16. Concerning the alleged misconduct by the 2nd Respondent, citing the provisions of Section 107 & 108 of the *Evidence Act* and *Halsbury's Laws of England*, 4th Ed. Vol. 17, para. 13 & 14, counsel asserted that based on the material evidence tendered before the tribunal there was no proof of such misconduct. Dismissing the complaint of alleged glaring omissions in the record before the tribunal, counsel stated that this was an attempt to mislead the court as the tribunal rendered its decision on the basis of affidavit material before it. Further that the participation of J.L Onguto (as he then was) despite the fact that he was a candidate for the position of judge did not in any way affect the tribunal's impartiality as the decision was a unanimous one. Lastly, asserting that the appeal was without merit, counsel urged the Court to dismiss it.

17. The 1st Respondent did not participate in the instant proceedings.

18. The court has considered the record of appeal, the pleadings as well as the submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:-

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though

it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

19. It is settled that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. The appeal herein turns on the key question whether the tribunal's finding was well founded and justified.

20. Pertinent to the determination of the appeal are the pleadings outlined above, which formed the basis of the parties' respective cases before the tribunal. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

21. The Appellant has raised a litany of grounds in his memorandum of appeal. However, a perfunctory perusal of the said grounds reveals that the grounds are raised to challenge both the judgment of the tribunal delivered on 02.12.2013 and the ruling dated 16.03.2015, the latter which is the subject of the instant appeal. The key reliefs sought in the motion dated 04.04.2014 were the setting aside or review of the decision of the tribunal delivered on 02.12.2013; an order for the provision of the record of proceedings; an order excluding L. Onguto (as he then was) and Mr. A. Weda from conducting further proceedings in the matter; and that the termination or dismissal of the complaint.

22. In response the Respondent countered by his grounds in opposition that the tribunal was *functus officio* and the reliefs as sought by the Appellant were only available by way of an appeal to this court. The tribunal upon considering the respective parties material held as follows in its decision;

> "The tribunal has carefully perused and considered the motion and determined the issues raised, as follows:-
>
> 1. Is there an error on the face of the record, or is the record supplied to the Applicant by L.S.K incomplete?
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> In determining the complaint, the tribunal relied almost entirely on the documentary evidence filed by both the complainant and respondent/ applicant, as the complaint was heard under rule 18 of the *Advocates (Disciplinary Committee) Rules*. The Applicant has not stated anywhere in

his affidavit that any of the filed documents was missing. This tribunal has confirmed that all the documents in this matter are safely in place.

The tribunal therefore finds that the Applicant's assertion that there is an error on the face of the record, and that the Law Society of Kenya supplied him with incomplete record, to be untrue and incorrect.

2. The composition of the tribunal

The complaint was heard on 11.02.2013 by a panel of the tribunal composed of J.L. Onguto, D.S. Kitaa and G.W. Kinyanjui.

All these members of the tribunal were lawfully elected by the members of the Law Society of Kenya to the tribunal. The panel was therefore not "ad hoc" as described by the Applicant in his affidavit.

The fact that J.L. Onguto was then a candidate for the position of a judge of the High Court, did not in any way affect the tribunal's impartiality in determining the complaint, as the determination was rendered in a unanimous judgment.

3. Did the tribunal find the Applicant guilty on a trumped up charge of withholding funds?

In the affidavit of complaint sworn by Ahmednasir M. Abdullahi, in particular paragraph 6, 9, 10 and 11 the complainant clearly sets out the complaint of withholding the funds. And in the judgment, this tribunal has in great detail analyzed the facts and arrived at its finding that the Applicant indeed withheld Kshs. 3,200,000.00

The Applicant's allegation that he was found guilty and convicted on a trumped up charge is therefore not only untrue, but disrespectful to this tribunal.

For all the above reasons, the Applicant's application dated 4th April 2014 is hereby dismissed with costs." (*sic*)

23. The court proposes to contemporaneously deal with the Appellant's grounds of appeal. It is apposite to first deal with the Appellant's challenge seeking to set aside or review the judgment of the tribunal delivered on 02.12.2013. Review of a judicial decision is anchored on the provisions of Order 45 (1) of the *Civil Procedure Rules* as read with Section 80 of the *Civil Procedure* Rules. The former which provides that:-

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree

> or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

24. On the face of it, the grounds and issues raised in the Appellant's motion before the tribunal were primarily premised on the review ground of error apparent on the face of the record alongside other issues. The latter included alleged solicitation and incorporation of non-members and objectionable members in the tribunal at the hearing of the complaint; and omission of proceedings that had a direct bearing on issues in the complaint.

25. In *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited* [2020] eKLR the Court of Appeal stated that an application for review, involves exercise of judicial discretion. There is a long line of authorities on the principles that govern a motion brought under Order 45 (1) of the *Civil Procedure Rule*s.

26. Okwengu JA in *Associated Insurance Brokers v Kenindia Assurance Co. Ltd* [2018] eKLR, the Court of Appeal pronounced itself as follows: -

> "It is clear that Order 45 rule 1(1) of the *Civil Procedure Rules* provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> > "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis added)
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> In *Nyamogo and Nyamogo Advocates v Kogo* [2001]1 EA 173 this Court further explained an error apparent on the face of the record as follows:
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> > "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

27. Further, in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal held that:-

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, *Indian Civil Procedure Code*, 14th Edition pg 2335-36 as follows:
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> > " The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in Mulla, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [*State of Gujarat v Consumer Education & Research Centre* [1981] AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law *Chhajju Ram v Neki* [1922] 3 Lah. 127]..."

28. Had the Appellant demonstrated an error or mistake apparent on the face of the record in respect of the tribunal decision delivered on 02.12.2013? Drawing guidance from the dicta in *National Bank of Kenya Ltd* (*supra*), it is evident that the tribunal addressed the Appellant's foregoing contestation when it pronounced that:

> " The Applicant has not stated anywhere in his affidavit that any of the filed documents was missing. This tribunal has confirmed that all the documents in this matter are safely in place.... The tribunal therefore finds that the Applicant's assertion that there is an error on the face of the record, and that the Law Society of Kenya supplied him with incomplete record, to be untrue and incorrect".

29. Reviewing the record, this court must agree with that finding; the tribunal's record of proceedings before it was the official record and the Appellant could not properly assert his own version thereof, and secondly, it was not demonstrated by the Appellant that any document filed in the matter was missing in the tribunal's record. Moreover, the Appellant's contestation in respect of Section 57(3) and 58(1) of the *Advocates Act* challenged the composition of the tribunal at the hearing of the complaint and the decision thereon was made on 02.12.2013. In the court's estimation therefore, the Appellant did not demonstrate what is properly an error apparent on the face of the record.

30. The issues raised by the Appellant appear to belong to an appeal rather than a review motion. Recently, the Court of Appeal in *Solacher v Romantic Hotels Limited & another* (Civil Appeal 167 of 2019)

[2022] KECA 771 (KLR) cited with approval the decision of Bennett J in *Abasi Belinda v Frederick Kangwamu and Another* [1963] EA p.557 to the effect that: -

> " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."

31. Equally, concerning the remaining prayers in the motion before the tribunal, it is evident that the grounds therein were designed to challenge the process, composition, procedure, and final decision of the tribunal delivered on 02.12.2013. Section 62 (1) of the *Advocates Act* provides that:-

> " (1) Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal".

32. Ideally, an appeal challenging the decision of the tribunal delivered on 02.12.2013 ought to have been filed within 30 days, if the Appellant was aggrieved with the process by which the tribunal arrived at its decision, appropriate recourse was equally available. Reviewing in totality the grounds of appeal and arguments made before it, this court is of the considered view that the appeal herein presented is not specific to the ruling delivered on 16.03.2015 as purported in the memorandum of appeal but that it relates substantively to the tribunal's decision delivered on 02.12.2013.

33. The court therefore agrees with the 2nd Respondent's assertions that the motion in the tribunal constituted for the most part an invitation to have the tribunal sit on appeal in respect of its own decision delivered on 2.12.2013. Similarly in this appeal, the Appellant has crafted his grounds of appeal and submissions in a manner as to invite this Court to sit on appeal in respect of the decision of the tribunal in respect of which no appeal has been preferred. The court must decline the invitation. The appeal herein is without merit and is hereby dismissed with costs to the 2nd Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:-

Appellant: Mr. Wamalwa

For the 1st Respondent: N/A

For the 2nd Respondent: Ms. Wangui

C/A: Carol