REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICAL REVIEW DIVISION

MISCELLANOUS CIVIL APPLICATION NO. 96 OF 2018

REPUBLIC.....APPLICANT

-VERSUS-

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

ex parte: **ROSE OBAGA**

JUDGMENT

The motion before court is dated 6 April 2018 and is made under Order 53 Rule 3(1) of the Civil Procedure Rules, section 8 and 9 of the Law Reform Act, cap 26. The prayers in the motion have been framed as follows:

> ***"1. That an order of certiorari to issue to bring this Honourable Court for purposes of being quashed, the decision of the Advocates Disciplinary Tribunal delivered on 6/11/2017 finding the applicant herein guilty of two counts of professional misconduct in Disciplinary Case Number 40 of 2015.***
>
> ***2. That an order of Prohibition to issue to prohibit the respondent from in any way executing the order/decision of the Advocates Disciplinary Tribunal obtaining from the said judgement until the hearing and determination of the application for judicial review herein."***

The motion is based on the statutory statement dated 6 April 2018 and an affidavit sworn by the applicant on even date.

As the prayers in the motion show, the suit is against a decision by the Advocates Disciplinary Tribunal, which I will henceforth refer to as either the tribunal or the respondent, convicting the applicant of the offences of withholding and failure to account client's money. The complaint before the tribunal was lodged by one Samuel Oyam Ongongi whom I will refer to as the complainant.

The motion is based on the grounds that the proceeding before tribunal did not observe the rules of natural justice; that the applicant submitted extensive evidence before the tribunal yet the same was unduly disregarded; that the proceedings were in breach of Article 47 (1) of the Constitution of Kenya 2010 which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The applicant has also urged that the respondent took into account irrelevant considerations in arriving at its decision and that the decision was also unreasonable.

On the question of failure to account and withholding of the complainant's money, the applicant urged that the complainant signed a discharge voucher discharging the applicant of any liability yet the tribunal disregarded this evidence in its decision.

The applicant added that having duly represented the complainant in various suits both in the magistrates' court and in this court and having obtained judgements in favour of the complainant, it was her legitimate expectation that she would be paid her legal fees.

It was her case that she duly paid her client, the complainant, who received the payments without any duress and, to that end, willfully signed the discharge voucher.

The applicant admitted receiving instructions from the complainant to institute a suit for recovery of damages as a result of what I understand to have been a road traffic accident in which the complainant was involved. She obtained a judgment of Kshs. 763,964.89.

An appeal was lodged but the award was upheld by the High Court sitting at Kisii.

She reiterated that the complainant was bound by the discharge voucher he signed. Despite all these matters having been raised before the tribunal, it still convicted the applicant. It is the applicant's case that the tribunal acted arbitrarily and its decision is likely to cause irreparable damage to the applicant's practice as an advocate of this Honourable Court.

The respondent did not respond to the application. It does not, however, follow that the applicant would be entitled to the judicial review remedies of certiorari, prohibition or mandamus merely because the respondent did file any response to the application. The judicial review remedies are discretionary and, for this reason, it is always incumbent upon an applicant for these remedies to make a case for the exercise of discretion in his or her favour. It is from this perspective that I have to consider the applicant's motion.

I have had the opportunity to consider the proceedings before the respondent. The record of those proceedings shows that they commenced in earnest on 20 July 2015. On the material day, the applicant was absent though the members of the tribunal noted that she had notice of the proceedings. Despite her absence, a plea of not guilty was entered. The proceedings were adjourned to 5 October 2015. In the meantime, the applicant was directed to file and serve her replying affidavit and a statement, if any.

On 5 October 2015, the applicant was represented though she was absent. Initially, her counsel denied that the applicant had been served with the complaint. However, after he was confronted with the evidence that the applicant was served, he conceded that indeed she had been served. The applicant was then given 14 days to file her response. The hearing was adjourned to 7 December 2015.

The applicant appeared in person on 7 December 2015 but she had not filed her reply to the complaint. The tribunal reserved judgement for 11 April 2016. Even then, the applicant was still given leave to file a replying affidavit a month before judgment could be delivered.

Judgment was indeed delivered as scheduled but it was set aside at the applicant's instance. I gather she had not filed her replying affidavit by the time the tribunal made its decision, hence the application to set it aside and admit the affidavit that was apparently filed out of time. The tribunal indulged the applicant and admitted the affidavit.

Both parties were then directed to file and exchange written submissions and judgment was set to be delivered on 13 June 2016. On the material date, the applicant did not appear but her case was also not listed on the cause list of that date and therefore judgment was deferred to 19 September 2016. After several deferments, the tribunal's decision was eventually delivered on 6 November 2017. The applicant was found guilty on two counts of professional misconduct the first of which was withholding client's money and the second one was failure to account.

The applicant was also ordered to pay the complainant the sum of Kshs. 445,637/= with interest with effect from January 2009 till payment in full. The payment was to be effected within 45 days from the date of the judgment.

The record of proceedings at the tribunal is clear that the applicant participated in the hearing of the case against her. She was duly served with the complaint against her. She responded and eventually she and the complainant exchanged submissions on their respective cases before a decision was made.

The record also reveals that despite the applicant's recalcitrance, the tribunal was prepared to bend over backwards to accommodate her. For instance, she initially did not appear before the tribunal when it commenced its proceedings. It is on a later date that she appeared through her representative who only admitted that her client had been served after he was confronted with the evidence of service. It is also apparent from the record that despite being given several opportunities to file her response to the complaint against her, the applicant was reluctant to do so. The tribunal proceeded to write its decision without her response but it was accommodative enough to set aside its decision, at the instance of the applicant, in order to accommodate her affidavit that was filed out of time.

I cannot see how the applicant can complain, in these circumstances, that she was denied the opportunity to be heard or, generally speaking, she was not accorded a fair hearing. Going by the applicant's conduct, one may be forgiven for concluding that the applicant was out to avoid the proceedings to lay a foundation for the complaint that she was not accorded the opportunity to be heard and defend herself.

But the tribunal was not going to fall for this mischief; it gave the applicant the chance to put forth her case and as the decision of the tribunal would show, it took her defence into account in arriving at its decision.

In the decision delivered on 6 November 2017 the tribunal started by setting out the charges levelled against the applicant and these were first, withholding client's money; second, failure to account client's money; and, third failure to reply to the commission's letters respectively dated 10 September 2012, 29 October 2012 and 17 February 2014.

The tribunal noted that the applicant responded to the complaint and filed a response by way of a replying affidavit sworn on 5 April 2016 and a further affidavit sworn on 15 April 2016.

It analysed the applicant's case noting that it was the applicant's position that the complaint before the tribunal was maliciously instituted. That the complainant had made multiple complaints against the applicant to various people or entities.

The tribunal noted that it was the applicant's case that the complainant had been duly paid and that he had signed a discharge voucher to that effect. It also noted that it was the applicant's case that the complainant had suppressed material facts which she outlined as follows:

1. That the complainant had signed instructions and agreements on payments of the costs.

2. The complainant was paid all his dues and signed a discharge voucher after accounts had been taken.

3. The applicant handled five court cases on behalf of the estate of a deceased person on the instructions of the complainant.

It also noted that the applicant's case was that she had rendered professional services to the complainant and even represented him in appeals filed against the judgments arising from the subordinate courts.

Upon considering the complaint and the applicant's response, the respondent framed four issues for determination; they are couched in its decision as follows:

> ***"(a) What amount did the respondent actually receive under the complainant's claim from the insurance company.***
>
> ***(b) What was the respondent entitled to as legal fees from the received sums.***
>
> ***(c) Whether the respondent was entitled to charge interest on the costs.***
>
> ***(d) What is the import of all the agreements on the aspects of costs."***

In interrogating these issues, and upon considering the evidence before it, the tribunal established that the principal amount of money which the applicant received from the insurance company on behalf of the complainant was Kshs. 1,244,000/= and party and party costs of Kshs. 207,000/=. The applicant did not disclose having received this latter sum in her response to the complaint. According to the respondent, this showed lack of candidness on the part of the applicant.

The tribunal also established that the applicant had overcharged her client which act, the tribunal held, amounted to a professional misconduct. It further noted that there was no basis for the applicant to charge interest on fees. To quote the tribunal on this issue:

> ***"what the respondent wants to invent is a new strange concept for which were are unwilling to sanction."***

On allegations that that the applicant was entitled to be paid fees of Kshs. 461, 528.04 for representing the complainant in an appeal identified as appeal no. 269 of 2009, the tribunal established that no evidence was produced to demonstrate that such an appeal existed or that it was heard and determined. The tribunal established that the most that could have been done was that a memorandum of appeal was filed but that it was not even served.

Again, the applicant's claim for payment for representing the complainant in a certain succession cause was also dismissed by the tribunal because:

> ***"No documents have been placed before us in demonstration of the existence of the matter, and that the respondent rendered service in the matter and to what extent. We conclude she is not entitled to the Kshs. 35,000/=."***

On the applicant's alleged agreement with the complainant, the tribunal reproduced it in its decision. It was worded thus:

> ***"That the firm will retain a third of the total sum claimed/recovered as their fees and costs and the same shall not be subject to taxation under the remuneration order or other provisions of the law for the time being in force touching on the advocates' remuneration order."***

The tribunal's view on this agreement was as follows:

> ***"Clearly this agreement ousts the operation of the law. An agreement/contract that rendered the law impotent is an agreement that is unlawful and unenforceable. The agreement of 14th February 2014 fails (sic) under this category therefore."***

The tribunal then proceeded to consider the remuneration order and determined what the applicant was rightly entitled to as her fees; it determined that the applicant had withheld Kshs. 445,637/= as the sum due to the complainant.

It is clear from the proceedings and the decision of the tribunal that the latter considered matters pertinent to the complaint before it; there is no evidence, as suggested by the applicant, that it considered irrelevant matters in coming to its decision.

On the whole, I am not persuaded that any of the grounds of judicial review has been proved; there is no evidence of illegality, irrationality or procedural impropriety in the proceedings against the applicant or in the decision by the tribunal. These grounds were explained in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410.** Lord Diplock explained them as follows:

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under***

three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

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. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

There is no evidence, and neither has it been suggested, that the tribunal did not understand correctly the law that regulated its decision-making power or that it did not give effect to it. It cannot also be urged, and indeed there is no basis for the argument that the tribunal's decision can be described as '*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'*.

As for the propriety of the proceedings, I have already noted that the record shows that the applicant was given all the time to present her case and indeed she not only presented her case but it was also considered by the tribunal. In short, the rules of natural justice were applied to the letter.

My reading of the applicant's application is that she wants this Honourable Court to interrogate the evidence afresh and perhaps come to its own conclusion and also to interpret the law in a way that suits the applicant's case.

This being a judicial court cannot purport to evaluate afresh the evidence with which the tribunal was presented and come to its own conclusions. It does not matter that faced with the same facts, this court could probably have reached a different conclusion from that which the tribunal reached unless, of course, the decision is, on the face of it, so bizarre that it cannot stand to reason or common sense.

In **Energy Regulatory Commission versus S G S Kenya Limited & 2 others [2018] eKLR**, the Court of Appeal considered the issue whether this court erred in forming a view of the evidence and improperly substituting the decision of the Public Procurement and Administrative Review Board with his own. While allowing the appeal, the Court of Appeal faulted the court for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken. The appellate Court held it to be improper for this court to make value judgment regarding the evidence; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance. The Court found that this honourable court had occasioned room for abuse of its power, by usurping the competences of the Public Procurement Administrative Review Board.

It was further held that in a judicial review matter, the court's mandate is limited to procedural improprieties, and extends not to the merits of a decision.

The Court of Appeal cited its own decision in **OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR** where it was held that:

"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

In the final analysis, I am not satisfied that the applicant's motion dated 6 April 2018 has merits. It is hereby dismissed with no orders as to costs.

Dated, signed and delivered on 28th January 2022

Ngaah Jairus

JUDGE