



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E247 OF 2021

-BETWEEN-

SHIVAJI SIMON.....PETITIONER

-VERSUS-

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

-AND-

1. NELLY MUTUA NAFULA

2. ABRAHAM KIPKOECH KEMBOI

3. THE ADVOCATES

COMPLAINTS COMMISSION.....INTERESTED PARTIES

JUDGMENT

Introduction:

1. The legal profession is among the oldest professions in the world. It traces its origin in Greek and Roman city states. As early as the days of the Old Testament, the profession was already on course despite recorded setbacks.
2. The professional conduct of all Advocates of the High Court of Kenya is a regulated one. Advocates are at all times *inter alia* accountable to their clients, the Complaints Commission and to the Disciplinary Tribunal.
3. In instances where Clients are aggrieved by the conduct of their Advocates, they may assert their rights by lodging complaints before the Disciplinary Tribunal or Complaint's Commission where such matters will be accordingly dealt with.
4. The instant Petition examines the constitutionality of the legal regime governing the disciplinary process that culminated in the decision to strike off the Petitioner from the Roll of Advocates in Kenya.

The Petition:

5. Through the Petition dated 7th June, 2021 and filed under certificate of urgency, the Petitioner sought to challenge the decision of Disciplinary Tribunal, (hereinafter referred to as '*the Respondent*' or '*the Tribunal*'), the Respondent herein, striking him off from the Roll of Advocates.
6. The Petition is supported by the Petitioner's Affidavit sworn to on even date.
7. The factual background leading up to the striking off of the Petitioner is generally not in contest. A brief foundational background is,

however, necessary.

8. The Petitioner is an Advocate of the High Court of Kenya. He was admitted to the Bar on 12th April, 2001 where he signed the Roll of Advocates as number P.105/4468/2001.
9. In the course of discharging his professional duties, he acted for one *Nelly Mutua Nafula* and *Abraham Kipkoech Kemboi*, the 1st and 2nd Interested Parties herein respectively, in two distinct conveyancing transactions. The two were purchasers of properties.
10. In the said transactions, the Petitioner received monies for purposes of purchasing certain properties. The Petitioner, however, failed to remit the monies to the prospective Vendors and as such the transactions were not completed. The 1st and 2nd Interested Parties hence lost their money to the Petitioner.
11. Aggrieved, the 1st Interested Party (hereinafter referred to as '**the 1st Interested Party**' or '**Nelly**') escalated her case before the Respondent. It was registered as *Advocates Disputes Tribunal Case Number 136 of 2015* (hereinafter referred to as '**the 2015 case**'). Nelly prosecuted her case privately.
12. The 2nd Interested Party (hereinafter referred to as '**the 2nd Interested Party**' or '**Abraham**') also lodged his complaint before The Tribunal and his case was registered as *Advocates Disputes Tribunal Case Number 119 of 2016* (hereinafter referred to as '**the 2016 case**'). The 2016 case was lodged in the Tribunal by *The Complaints Commission* (hereinafter referred to as '**the 3rd Interested Party**' or '**the Commission**') on behalf of Abraham.
13. The two complaints against the Petitioner were heard and determined separately.
14. In the end, the Petitioner was found to be at fault in both cases. Accordingly, he was ordered to pay the 1st and 2nd Interested Parties their respective amounts due.
15. The Petitioner contended that he closed office and as a result was unable to receive correspondence from the Tribunal concerning the two matters even though the Tribunal kept mentioning the matters and making orders. The Tribunal made a decision on 7th May, 2017, striking the Petitioner off the Roll of Advocates.
16. It was, therefore, contended that the decision was arrived at without the Petitioner being accorded an opportunity to be heard.
17. In a bid to establish what transpired in the Tribunal before being struck off, the Petitioner posited that he sought copies of proceedings from the Law Society of Kenya.
18. He contended that it is at that point that he learnt that the Respondent had, under certificate of posting, sent him *Notices to Show Cause*. He further learnt that there were two Notices dated 9th April, 2018 and 18th April, 2018 respectively which were heard and determined on 7th May, 2018 and 21st May, 2018 respectively.
19. It is his case that the documentation relating to the two Notices reveal that they were issued on account of the alleged refusal of the Petitioner to comply with various orders of the Respondent.
20. The Petitioner's grievance stems from the contention that the two Notices were issued in violation of mandatory procedure as required under *Section 77* as read with *Section 60* of the *Advocates Act* and *Rule 8* of the *Advocates (Disciplinary Committee) Rules* thus denying him the opportunity to be heard.
21. It is his case that the Respondent engaged in an alien procedure that resulted in an illegality. He posited that it was incumbent upon the Respondent to serve him with a complaint supported by the affidavit deposed to by its Secretary inviting him to respond to the two notices.
22. It was his case that under *Section 77* the Respondent had no standing to prosecute the Notices to Show Cause because such hearing can only be exercised only by way of separate and or fresh proceedings.
23. On the foregoing, the Petitioner claimed violation of his right to fair administrative action under Article 47 of the Constitution, the right to fair hearing under Article 50(1) of the Constitution and the right to least severe punishment under Article 50(2)(p) of the Constitution.
24. As regard the proceedings of 21st May, 2018 the Petitioner claimed that they were conducted without jurisdiction on the part of the Respondent since he had already been struck off the Roll of Advocates on 7th May, 2018.
25. In the end, the Petitioner prayed for the following Orders: -

a. A declaration be made that the notice to show cause dated 9th day of April 2018, in Advocates Tribunal Case No. 136 of 2015 and 119 of 2016, as well as the Notice to Show Cause dated the 18th day of April 2018, in Advocates Disputes Tribunal Case Number 119 of 2016, were illegal, null and void ab initio as they violate section 77 of the Advocates Act as read with section 60 of Advocates Act and Rule 8 of the Advocates (Disciplinary Committee) Rules;

b. A declaration be made that both the proceedings for Notice to Show Cause entertained by the Respondent in the Advocates

Disputes Tribunal Case Number 136 of 2015, conducted on the 7th May 2018 and in the Advocates Disputes Tribunal Case Number 119 of 2016, conducted on the 21st of May 2018 were illegal null and void ab initio as they lacked both substantive and procedural basis under section 77 of the Advocates Act as read with section 60 of the Advocates Act and Rule 8 of the Advocates (Disciplinary Committee) Rules.

c. A declaration be made that the Respondent, by proceeding as it did on the 7th day of May 2018 in Advocates Disputes Tribunal Case No. 136 of 2015 and on the 21st day of May 2018 in Advocates Disputes Tribunal Case number 119 of 2016, breached the law and violated the fundamental rights of the Petitioner by denying him the right as contemplated under the Advocates Act as well as Article 47, 50(1) and 50(2)(p) of the Constitution of Kenya 2010.

d. A declaration be made that the Respondent lacked jurisdiction to conduct the proceedings on the 12th day of May 20218 in advocates Tribunal Case No. 119 of 2016 as it had already made an order striking out the Petitioner from the Roll of Advocates on the 7th Day of May 2018 in the Advocates Disputes Tribunal Case Number 136 of 2015.

e. A declaration be made that the two orders of the Respondent striking out the name of the Petitioner from the Roll of Advocates, as made on the 7th day of May 2018 in Advocates Tribunal Case Number 136 of 2015 – Nelly Nafula Mutua -vs- Simon Shivaji and on 21st day of May 2018 in Advocates Case No. 119 of 2016 Abraham kipkoech Kemboi -vs- Simon Shivaji, were illegal null and void and of no effect.

f. An order be made that the two orders of the Respondent striking out the name of the Petitioner from the Roll of Advocates, as made on the 7th day of May 2018 in Advocates Disputes Tribunal Case o 136 of 2015, Nelly Nafula Mutua -vs- Simon Shivaji and on 21st day of May 2018 in Advocates Case No. 119 of 2016 Abraham Kipkoech Kemboi -vs- Simon Shivaji, be discharged and set aside and that the Petitioner be restored to the roll of Advocates forthwith.

g. The Respondent be ordered to bear the costs of these proceedings.

26. The Petitioner filed written submissions dated 16th November, 2021. He mainly reiterated the averments in the pleadings.

27. The Petitioner submitted that Rules 17 and 18 of the Advocates (Disciplinary Committee) Rules 1990 are silent on Notices to Show Cause and as such the Respondent cannot rely on subsidiary legislation to override the express provisions of section 77 of the parent statute. He submitted that it would be an affront to section 31 (b) of Interpretation and General Provisions Act.

28. He found support on the decision in *SDV Transami Kenya limited and 19 Others -vs- Attorney General & 2 Others (2016) eKLR and Kenya County Bus Owners Association through Paul G. Muthumi – Chairman Samuel Njuguna – Secretary Joseph Kirimi- Treasure & 8 Others -vs- Cabinet Secretary for Transport and Infrastructure & 7 Others (2014) eKLR*.

29. As regards the period of time it took to file the Petition, the Petitioner submitted that there is no limitation of time within which the Petition may be filed.

30. He emphasized the fact that the Respondent's jurisdiction to strike him out under the circumstance of this case are undisputed, but the same could only have been exercisable in strict adherence of provision of Section 77 of the Advocates Act.

31. He submitted that the notices by the Respondent were illegal and the he could not participate in an illegal process. Reliance was placed on the decision in *Republic -vs- Complaints Commission, Media Council of Kenya & 2 Others (2013) eKLR*.

32. The Petitioner urged that the Petition be allowed.

The Respondents' case:

33. The Respondent opposed the Petition through the Affidavit of *Mercy Wambua* sworn to on 1st November, 2021. She then was the Secretary of Law Society of Kenya and by that virtue, the Secretary to the Respondent herein.

34. In stating that the Petition was incompetent, misplaced and bad in law, she deposed that the two disciplinary actions against the Petitioner were filed for professional misconduct.

35. It was her case that on 25th August, 2015, the Respondent received a letter dated 21st August, 2015 from the 1st Interested Party herein requesting action to be taken against the Petitioner for failure to remit to her the sum of Kshs. 6,500,000/- he received from the Purchaser upon selling her land, L.R No. 209/11378/64.

36. She deposed that on 25th August, 2015, the Respondent wrote to the Petitioner seeking his response on the complaint made against him.

37. The Petitioner through his letter dated 31st August, 2015 informed the Respondent that indeed he acted for the 1st Interested Party and was holding in his account Kshs. 6,500,000/- which he intended to remit to her on or before 4th September, 2015. On that basis he requested to have the disciplinary proceedings withheld.

38. It was her case that the Petitioner failed to honour his word. The Respondent then filed an Affidavit of Complaint on behalf of the 1st

Interested Party for professional misconduct.

39. Consequently, the Respondent through a letter dated 28th September, 2015 requested the Petitioner to respond within 14 days in order to process the complaint for purposes of placing it before the Tribunal.

40. She deposed that said letter did not elicit any response from the Petitioner. His case was subsequently placed before the Respondent where it was established that there was a *prima facie* case against the Petitioner.

41. On 23rd November, 2015 the Petitioner appeared before the Respondent where plea was taken. He pleaded not guilty. He was then ordered to file statement of accounts and hearing was scheduled for 11th April, 2016.

42. It was her deposition that the Petitioner did not file any response. That he requested the Respondent to render judgment and that he would mitigate during sentencing. He, however, requested for Respondent's indulgence to enable him raise the money between 30 and 60 days.

43. She stated that a plea of guilty was entered and the Petitioner was granted the 60 days to make payment from the day for the order with 12% interest payable from the date of receipt of the Kshs. 6,500,000/-.

44. On 11th July, 2016, the date for confirming compliance, the Petitioner failed to appear before the Respondent. As such, directions were made for execution to issue. Sentencing and mitigation was scheduled for 19th September, 2016.

45. She deposed that on 19th September, 2016 the Petitioner had still not remitted the sum. The Petitioner, however, appeared before the Respondent for mitigation and sentencing where he was given 30 days within which to make payment.

46. For his admission of guilt, she deposed that the Petitioner was admonished for not maintaining Client's Account as required by law, ordered to comply with payment of Kshs. 6,500,000/- with interest, fined Kshs. 50,000/- and costs of Kshs. 10,000/- for the complainant and Kshs. 5,000/- to the Law Society of Kenya.

47. On 16th January, 2016 the day slated for compliance of the foregoing orders, Wambua deposed that the Petitioner failed to attend the Respondent's session despite having been sent a mention notice and had not paid the Kshs. 6,500,000/-. In the premises, execution orders were issued and the Law Society of Kenya was ordered to attach any monies paid by the Petitioner to recover fines and costs.

48. She deposed that on further mention dates, that is 10th April, 2017, 4th September, 2017, 22nd January, 2018 and 7th May, 2018 the Petitioner failed to appear before the Respondent and failed to comply with the foregoing orders despite service of notices.

49. She deposed further that on 22nd January, 2018 the Respondent issued a Notice to Show Cause why the Petitioner should not be struck off the Roll of Advocates. Hearing on the Notice to Show Cause was fixed for 7th May, 2018.

50. It was her case that on 7th May, 2018 the Petitioner failed to appear despite service of Notice and was accordingly struck off the Roll of Advocates.

51. On the foregoing, she deposed that the Respondent observed all the principles of *Natural Justice* in dealing with the Petitioner. It was her case that it is the Petitioner who disregarded the principle by refusing to appear despite evidence of service of notices. As such he was liable under Section 77 of the Advocates Act for professional misconduct.

52. As regards the complaint by the 2nd Interested Party, Wambua deposed that the Petitioner admitted not entering appearance. Nonetheless, the Respondent followed the procedure as guided under Section 60 of the Advocates Act.

53. She deposed that the 3rd Interested Party received the 2nd Interested Party's complaint on 2nd November, 2015 in respect of which the Petitioner was instructed by the 2nd Interested Party to act for him for purchase of land of registration Tasia Block D97/2347.

54. To that end, the Petitioner received Kshs, 3,818,000/= as purchase price and Kshs. 70,000/- as legal fees. He failed to transfer the purchase price to the Vendor and neither did he refund the money to the 2nd Interested Party.

55. She deposed that particulars of the complaint were communicated to the Petitioner on 7th January, 2016 but failed to respond within the 30 days he had been given.

56. It was her case that a further communication was given to the Petitioner on 17th March, 2016 but no response was forthcoming.

57. She deposed further that an In-House Dispute Resolution session was arranged by the 3rd Interested Party to which the Petitioner agreed to refund the Petitioner the owed sum and legal fees but he did not honour the same.

58. He stated that the 3rd Interested Party proceeded to file an Affidavit of Complaint on behalf of the 2nd Interested party for professional misconduct.

59. In a similar fashion, the Petitioner failed to obey the communication to appear before the Respondent subsequent upon which plea was

taken. A plea of not guilty was entered whereupon the Respondent was directed to file and serve a response within 21 days. Hearing was slated for 20th March, 2017.

60. She deposed that on 20th March, 2017 the Petitioner failed to appear before the Respondent thus prompting the 3rd Interested Party to proceed under Rule 18 of the Advocates (Disciplinary Committee) Rules and judgment was scheduled for 12th June, 2017.

61. On the 12th June, 2017 she deposed that the Petitioner failed to appear. Judgment was delivered. Sentencing and mitigation date were scheduled for 9th October, 2017. On that date it was rescheduled for 22nd January, 2018. Notice to that effect was served upon the Petitioner.

62. On 22nd October, 2018, the Petitioner was absent and he was sentenced accordingly. The matter was slated for compliance on 16th April, 2018 where, on the said date, it was established that there was no compliance. A Notice to Show Cause was then issued as to why the Petitioner should not be struck off the Roll of Advocates.

63. On 21st May, 2018, she deposed that the Petitioner was struck off the Roll of advocates.

64. On the foregoing account of events, Wambua deposed that the Respondent adhered to the rules of natural justice and Rule 17 of the Advocates (Disciplinary Committee) Rules and that it was the Petitioner who disregarded participating in the proceedings.

65. It was her case that the Respondent acted within its mandate in reaching its decision. She urged this Court to dismiss the Petition with costs.

66. In its written submission dated 24th January, 2022 the Respondent isolated the issues for determination as: -

i. *Whether the Petitioner was given an opportunity to be heard as contemplated under Section 60(3) of the Advocates Act, Articles 47, 50(1) and 50(2)(p) of the Constitution.*

ii. *Whether the Notice to Show Cause was valid*

iii. *Whether the disciplinary process under the Advocates Act may be used when the Petitioner has since been struck off the Roll of Advocates.*

67. On the first issue regarding fair hearing, it was submitted that the Respondent complied with Section 60(3) of the Advocates Act that requires Advocates whom complaints have been made against to be given an opportunity to appear before the Tribunal, and be furnished with the complaint and supporting evidence.

68. It was submitted that the Petitioner admitted being served with all notices in accordance with Order 5 Rule 3(b)(iv) of the Civil Procedure Rules. As such the Petitioner's argument that he was not given the opportunity to be heard is baseless and in conflict with Section 80 of the Evidence Act placing the burden of proof on the person alleging.

69. The Respondent found support in the case of Judicial Review Miscellaneous Application No. 160 of 2019, *Republic -vs- The Disciplinary Tribunal & Others* to demonstrate that the Petitioner was accorded an opportunity to be heard. It was observed: -

... On the facts of the case, I would find that the applicant was afforded opportunity to be heard but did not wish to be heard. Unlike the holding in Miscellaneous application 31 of 2016 R.-vs- The Advocates Disciplinary Tribunal & Ano Ex-parte Japheth Savwa, there was evidence here that the applicant was given an opportunity of being heard by notices sent to his last known address.

70. With respect to violation of Article 50(2)(p) of the Constitution, it was submitted that Section 60(4) of the Advocates Act prescribes punishment for professional misconduct and in view of the fact that the Petitioner was subjected to due process, the punishment imposed did not change from the time the offence was committed to the time of sentence.

71. In submitting on the second issue that the Notices to Show Cause were valid, the Respondent stated that, in the two complaints, it adhered to the rules of natural justice. It stated that it did not want to make any adverse orders against the Petitioner hence the second hearing in Disciplinary Case No 119 of 2016 even after the Petitioner had been struck off in Case No. 136 of 2015.

72. To that end support was found in Nairobi High Court Miscellaneous Application No. 1298 of 2004 *Republic -vs- The Honourable Chief Justice of Kenya & Others Ex Parte Moijo Mtaiya Ole Keiwua* where it was observed that additional steps to supplement insufficient statutory procedure will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for observance of the rules of natural justice.

73. On the foregoing, it was submitted that the Petitioner's argument that the Notices to show cause were issued contrary to *Section 77* of the Advocates Act is misguided.

74. On the third issue as to whether the disciplinary process can be invoked when an Advocate has already been struck off the Roll of Advocates, it was submitted that judgment in the two cases were delivered in respect of professional misconduct of the Petitioner when he was still an Advocate of the High Court and as such he was liable for prosecution in Disciplinary Tribunal Case No. 119 of 2016 for acts undertaken when he was still an Advocate.

75. To buttress the foregoing, support was found in the case of Judicial Review Miscellaneous Application No. 160 of 2019 (supra) where it was observed: -

... The disciplinary proceedings are instituted for conduct as an advocate of the court and, consequently, whether struck out of the roll by reason of a judgment in previous case, he is liable for prosecution for his acts undertaken when he was a practising advocate. To hold otherwise would be to grant immunity for advocates for all culpable misconduct prosecuted or which he is liable to be prosecuted on discover or receipt of a complaint after a previous conviction and removal from the roll of advocates....

76. In the end, the Respondent submitted that the Petitioners case was for dismissal with costs.

The 1st Interested Party's case:

77. The 1st Interested Party opposed the Petition through the Replying Affidavit of *Nelly Nafula Mutua* sworn to on 21st September, 2021.

78. It was her case that the Petitioner acted for her in sale of Land Reference No. 209/11378/64 Nairobi where she sought to sell the said property to one Abdirazal Ahmed.

79. She deposed that the Petitioner failed to release funds to her despite the Purchaser's Advocates having paid the purchase price.

80. She stated that as a result of the Petitioner's failure to release the funds to her, she has suffered physical and psychological torture for the last 6 years. She deposed that she intended to use the funds to purchase Apartment No. 703 Block A on L.R No. 209.7326 to generate income for his family during her retirement.

81. She deposed that she lodged a complaint before the Respondent that eventually culminated in him being found guilty of *withholding client's funds, failing to account, rendering inadequate professional services and failing to comply with client's instructions*.

82. She reiterated the sequence of events that eventually led to the striking off of the Petitioner from the Roll of Advocates. It was her case that the Petitioner waived his right to file a Replying Affidavit in the case before the Respondent and instead opted to get judgment where he would mitigate.

83. She deposed that the Petitioner failed to honour the orders of the Respondent and she pursued execution against the Petitioner in High Court Miscellaneous Application No. 47 of 2017, *Nelly Nafula -vs- Shivaji Simon* where she sought the High Court to adopt and enforce the Order of the Respondent.

84. It was her case that the High Court in its Ruling of 3rd May, 2017 adopted the Respondent's Order and accordingly enforced it as judgment of the Court. As such, she deposed that the High Court proceedings are not distinct from the case before the Tribunal.

85. She deposed further that it was proper for her to pursue criminal proceedings against the Petitioner as his actions constituted a criminal offence and the proceedings before the High Court could run concurrently with the criminal proceedings.

86. In rebutting the contention by the Petitioner that he did not receive correspondence for having wound up his firm, she deposed that the Petitioner had an obligation to make alternative arrangement to receive correspondence from former clients, failure which it was deemed that any documents or correspondence served through his postal address were duly served.

87. She deposed that the Petitioner is estopped from alleging that he was not served with any documents having failed to demonstrate that the postal address was closed at any point during the proceedings.

88. She prayed that the Petition be struck out with costs.

89. In her written submissions dated 10th December, 2021 the 1st Interested Party submitted that the Notices to Show Cause were valid and lawful. It was their case that Section 60 on procedure and conduct of proceedings and the orders the Respondent can issue if a case of professional misconduct is made out.

90. In challenging the Petitioner's argument that the order striking him off the roll was illegal, it was submitted that proceedings envisaged under Section 60 as read with Section 77 of the Advocates Act can only arise pursuant to a fresh complaint which has not been heard and determined by the Tribunal.

91. It was submitted, therefore, that the provision of Section 77 does not apply in circumstances of this case as it would mean that the Respondent is required to hear the complaint afresh and issue the order striking off the Petitioner from the Roll of Advocates which is akin to urging the Court to hear a suit on merits after a party has conceded to judgment on admission.

92. In arguing that the Respondent had no obligation to issue a Notice to Show Cause before issuing the order striking off the Petitioner, reference was made to *Republic -vs- The Honourable the Chief Justice of Kenya & Others Ex-Parte Moijo Ole Keiwua (supra)*. It was reiterated that serving the Notice to Show Cause was in effect granting the Petitioner an opportunity to be heard before the Respondent could make adverse orders against him.

93. On whether the Petitioner was denied the opportunity to be heard it was submitted that the Petitioner was given enough chances to make

his case which he failed. As such, his claim of violation to right to fair administrative action is unfounded in law for having deliberately failed to appear for hearing.

94. In conclusion, it was submitted that this Court returns a verdict that the decision to strike off the Petitioner was proper.

The 3rd Interested Party's case:

95. The 3rd Interested Party opposed the Petition through the Replying Affidavit of *George Nyakundi* sworn to on 29th September, 2021. He is the Secretary to the Commission.

96. It was its case that, pursuant to statutory mandate of providing users of legal services a timely, effective, fair and reasonable means of redress for complaints, the 3rd Interested Party received a complaint from the 2nd Interested Party concerning the instructions he had given Petitioner for conveyancing transaction where the Petitioner failed to transfer the purchase price to the Vendor.

97. He deposed that upon conducting an inquiry, it wrote to the Petitioner on 7th January, 2016 informing him of the particulars of complaint against him but there was no response even after a reminder was sent out on 17th March, 2016.

98. He deposed that the 3rd Interested Party settled for an In-House Dispute Resolution on 22nd June, 2016 and the Petitioner attended and executed an agreement with the 2nd Interested Party to pay back Kshs. 3,888,800/- and legal fees. The 3rd Interested Party witnessed it.

99. It was his deposition that the Petitioner failed to honour the agreement after which he was referred to the Respondent herein and was charged and convicted of the counts of *withholding client's money, failing to respond to the 3rd Interested Party's correspondence and failing to honour terms of In-house Dispute Resolution Agreement.*

100. He deposed that despite service of Notice to Show Cause, the Petitioner failed to appear for hearing and was struck off the Roll of Advocates on 21st May, 2018.

101. In rejecting the appropriateness of the instant Petition, Nyakundi deposed that according to Section 62 of the Advocates Act, the Petitioner had recourse by way of an Appeal against the orders of the Respondent.

102. He deposed that it did the right thing in serving the Notices to last known address of the Petitioner. He stated that the Petitioner had an obligation to inform the Law Society of Kenya of any change in his address. He stated, therefore, that the notices were deemed effectively served.

103. It was his case that the Petitioner was the author of his own misfortune and that the 3rd Interested Party's actions were in accordance with Section 77 as read with Section 60 and Rule 8 of the Advocates Act in issuing and hearing the Notice to Show Cause.

104. It further stated that it acted in conformity with Section 53 of the Advocates Act and Rule 6(1) of the Advocates (Complaints Commission) Rules 1991.

105. In the end, he deposed that the Petitioner had not demonstrated how his constitutional rights had been violated. He urged that the Petition be dismissed.

106. In its written submissions dated 29th November, 2021 the 3rd Interested Party reiterated its arguments as in the Replying Affidavit and as urged by the Respondent and the 1st Interested Party.

107. The new issues raised in the submissions include the claim that Petitioner did not provide any proof on how his rights and fundamental freedoms were violated, infringed or contravened. The decision in *Anarita Karimi Njeru* (1976-1980) 1 KLR 1272 and in *Kamal Jadvia Vekaria v Director General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR are relied on. In the latter, it was observed that: -

... I note in that regard that the Petitioner alleges that the Respondent's actions and/or omissions violated his rights articulated in Articles 27, 28, 29, 38, 39, 41 and 47...Further, the Supporting Affidavit sworn by the Petitioner is silent on these alleged violations and it is impossible to specifically tell how these rights are applicable to his Petition. Without more than merely stating those rights, I have no material to delve into them...

108. It was submitted that the Respondent did not violate the Petitioner's rights, but acted in accordance with the law. It was posited that the Petitioner failed to comply with the orders of the Tribunal to repay the amounts due to the 1st and 2nd Interested Parties and fines and costs and as such, the Respondent had to rely on the provisions of Section 77 of the Advocates Act.

109. The 3rd Interested Party reiterated that if the Petitioner felt aggrieved by the decision of the Tribunal, he had the chance to file an appeal against the decision as stipulated under Section 62 of the Advocates Act.

110. As regards the process leading up to striking the Petitioner off the Roll of Advocates, it was submitted that Rule 17 of Advocates Disciplinary Committee Rules gives the Committee the discretion, upon proof of service on a party of the notice of hearing, to proceed to hear and determine a complaint or application in such party's absence.

111. On the foregoing, it was contended that the Tribunal under Section 60(4) of the Advocates Act meted out lawful orders against the Petitioner.

112. In conclusion, it was urged that the Petition was without merit, a waste of judicial time and should be struck out and or dismissed with costs.

Issues for Determination:

113. In view of the peculiar circumstances of this dispute, the issues that emerge for this Court's scrutiny and resolution are as follows:

- i. *A general overview of the disciplinary processes against Advocates in Kenya.*
- ii. *Whether the Petitioner's rights under Articles 47 and 50 of the Constitution were violated.*
- iii. *Remedies, if any.*

114. I will deal with the issues in seriatim.

Analysis and Determination:

(a) A general overview of the disciplinary processes against Advocates in Kenya:

115. The Constitution of Kenya does not expressly provide for the disciplinary processes against Advocates in the country. Such is the preserve of the Advocates Act, Cap. 16 of the Laws of Kenya and some subsidiary legislation.

116. That is, however, not to say that the Constitution has no room in the disciplinary processes of Advocates. Indeed, the Constitution being the highest law of the land, applies across all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

117. As creatures of the law, the processes governing the disciplinary procedures for Advocates must, therefore, firmly adhere to the Constitution and the law. That is the essence of the rule of law and constitutionalism as espoused in Article 10 of the Constitution. Needless to say, under Article 3, the Constitution obligates every person to respect, uphold and defend the Constitution.

118. Having underpinned the constitutional imperative in the processes in issue, I will now look at the existing processes under the law.

119. The guiding statute is the **Advocates Act**. There is also the **Advocates (Disciplinary Committee) Rules, 1990** vide Legal Notice No. 458 of 1990 and the **Advocates (Complaints Commission) (Structure and Procedure) Rules, 2003** under Legal Notice No. 213 of 2003.

120. There are two main ways in which complaints against Advocates, firms of Advocates, or any member or employees thereof may be lodged. The ways are through the Complaints Commission and the Disciplinary Tribunal.

The Complaints Commission:

121. The Complaints Commission (hereinafter referred to as '**the Commission**') is established under Part X (Sections 53 and 54) of the Advocates Act. Its purpose is to enquire into complaints against any Advocate, firm of Advocates, or any of their members or employees.

122. For ease and completeness of understanding the Commission, I will, herein below, reproduce verbatim the provisions of Part X of the Advocates Act.

53. Establishment of Complaints Commission

(1) There is hereby established a Complaints Commission (in this Part referred to as "the Commission") which shall consist of such commissioner or commissioners as shall be appointed by the President for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof.

(2) If a single commissioner is appointed under subsection (1) he shall be a person who is qualified to be appointed as a Judge of the High Court under Chapter IV of the Constitution, and if more than one commissioner is appointed then one commissioner shall be so qualified.

(3) The Commission may require any person, whom it considers necessary for the purpose of carrying out its duties under this section, to assist it in so doing.

(3A) Any person who, without lawful excuse, fails or refuses to assist the Commission when required to do so under subsection (3) shall be guilty of an offence.

(4) It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof; and—

(a) if it appears to the Commission that there is no substance in the complaint it shall reject the same forthwith; or

(b) if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XI; or

(c) if it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification; or

(d) upon the expiration of the period specified under paragraph (c), the Commission shall proceed to investigate the matter for which purpose it shall have power to summon witnesses, to require the production of such documents as it may deem necessary, to examine witnesses on oath and generally take all such steps as it may consider proper and necessary for the purpose of its inquiry and shall, after hearing any submissions made to it by or on behalf of the complainant and the person or firm against whom the complaint has been made, make such an order or award in accordance with this section as it shall in the circumstances of the case consider just and proper; or

(e) if it appears to the Commission that there is substance in a complaint but that the circumstances of the case do not disclose a disciplinary offence with which the Disciplinary Committee can properly deal and that the Commission itself should not deal with the matter but that the proper remedy for the complainant is to refer the matter to the courts for appropriate redress the Commission shall forthwith so advise the complainant.

(5) In all cases which do not appear to the Commission to be of serious or aggravated nature, the Commission shall endeavour to promote reconciliation and encourage and facilitate an amicable settlement between the parties to the complaint.

(6) If the Commission considers that the complainant has suffered loss or damage by reason of the advocate's conduct, the Commission may, by order, award such complainant compensation or reimbursement not exceeding one hundred thousand shillings.

(6A) An order made under subsection (6) shall be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect.

(6B) Where the matter before the Commission relates to surrender of funds or property by an advocate to a client, the Commission may order the surrender of all refunds or property which the advocate does not dispute:

Provided that this subsection shall not apply where the complainant has filed a civil suit against the advocate in respect of the same funds or property.

(6C) An advocate against whom an order is made under this section and who has not appealed against such order under section 62 may apply to the Disciplinary Committee for a review of the Order.

(6D) The Commission may, in hearing a complaint against an advocate, order such advocate to produce to the Commission a detailed fee note for purposes of taxation of the bill of costs:

Provided that where the advocate fails to produce such fee note within 14 days from the date of such order, the Commission may assess the advocate's fee in such sum as it deems fit.

(6E) The Commission may investigate the accounts of an advocate against whom a complaint has been made and for that purpose may order such advocate to produce all relevant books and documents to the Commission or to an accountant engaged before the Commission in that behalf.

(7) The Commission may issue a warrant for the levy of the amount of any sum ordered to be paid by virtue of this section on the immovable and movable property of the person or firm by whom the compensation is ordered to be paid by distress and sale under warrant, and such warrant shall be enforced as if it was a warrant issued by the Court.

(8) Any party aggrieved by a decision or order of the Commission under this section may appeal to the High Court and the determination of any such appeal shall be final.

(9) The Commission shall publish a quarterly report as to the complaints dealt with by it in that quarter and the report shall be made in such manner and be in such form as shall be prescribed by rules made under subsection (3) of section 54.

53A. Remuneration of Commissioner

(1) There shall be paid to the Commissioner such remuneration by way of salary, allowance, pension or gratuity as shall be determined by the President.

(2) The remuneration referred to in subsection (1) shall be paid out of moneys provided by Parliament.

54. *Secretary and staff of Commission and rules relating thereto*

(1) *There shall be a secretary to the Commission who shall be appointed by the Attorney-General.*

(2) *The Attorney-General shall provide such public officers as are necessary for the proper and efficient exercise of the duties and functions of the Commission.*

(3) *The Attorney-General may make rules regulating the structure and operation of the Commission and for the carrying into effect its functions under this Part.*

123. In a nutshell, once the Commission receives a complaint, it considers it and if it finds no substance in the complaint, the Commission rejects the same forthwith. However, if the Commission finds some merit in the complaint, two things shall happen.

124. The first is, if in the opinion of the Commission, the matter complained of constitutes or appears to constitute a disciplinary offence, the Commission refers the matter to the Disciplinary Tribunal.

125. The second is, if it *prima facie* appears to the Commission that there is substance in the complaint but that the complaint does not constitute a disciplinary offence, the Commission proceeds to investigate the complaint. The Commission carries out an inquiry by conducting a hearing where evidence is adduced, witnesses heard and submission made.

126. Once the investigations are complete, the Commission may find out that the complaint raises a disciplinary offence. In that case the Commission shall refer the matter to the Disciplinary Tribunal. If the Commission finds that the complaint is not of serious or aggravated nature, it may make appropriate orders including awarding compensation or reimbursement, as the case may be. The Commission may also advise the complainant to institute Court proceedings.

127. If in the opinion of the Commission the complaint does not appear to be of serious or aggravated nature, the Commission promotes reconciliation, encourages and facilitates an amicable settlement between the parties to the complaint.

128. The order made by the Commission upon carrying out its inquiry is then registered with the Court and is enforced in the same manner as an order of the Court.

129. In the event any or all the parties are dissatisfied with the outcome of the complaint, an appeal may be lodged before the High Court. The outcome of the appeal at the High Court is final. Additionally, a dissatisfied Advocate may apply for review of any order of the Commission to the Disciplinary Tribunal.

The Disciplinary Tribunal:

130. The Disciplinary Tribunal (hereinafter referred to as '**the Tribunal**') is established under Part XI (Sections 55 to 80) of the Advocates Act.

131. The Tribunal is comprised of 8 members being the Hon. Attorney General, the Solicitor General or a person deputed by the Attorney-General and six Advocates (other than the President, the Vice-President or Secretary of the Law Society of Kenya) of not less than ten years' standing.

132. The Tribunal may, at times, require the President or the Vice-President of the Law Society of Kenya or both or any other member of the Council of the Society, to sit as an additional member or members of the Tribunal to constitute the Tribunal for the purposes of any complaint or matter where, on the grounds of availability or convenience, a Tribunal would not otherwise be available.

133. The Tribunal is chaired by the Hon. Attorney General.

134. The Tribunal is also devolved into Regional Committees or Tribunals. These are representative regions and they are five in number, other than Nairobi, as identified by the Law Society of Kenya.

135. One of the main functions of the Tribunal is to deal with complaints against Advocates. Such complaints may be lodged by or on behalf of **any person** or by the **Commission** or by the **Council** of the Law Society of Kenya.

136. The procedure in dealing with the complaints is provided for under Sections 58, 59, 60, 60A and 61 of the Advocates Act. It is further enriched under the Advocates (Disciplinary Committee) Rules, 1990.

137. Suffice to point out that under Section 58(5) and (6) of the Advocates Act, proceedings before the Tribunal are akin to legal proceedings. The said section provides as follows: -

(5) All proceedings before the Tribunal shall be deemed for the purposes of Chapter XI of the Penal Code (Cap. 63) to be judicial proceedings and for the purposes of the Evidence Act (Cap. 80) to be legal proceedings.

(6) The Tribunal may make rules for regulating the making to the Tribunal, and the hearing and determination by the Tribunal, of applications or complaints under this Part or with respect to matters incidental to or consequential upon its orders.

138. The Tribunal may, at the end of a hearing, dismiss a complaint. However, once an Advocate is found culpable, the Tribunal has powers to admonish the Advocate or suspend the Advocate from practice for a specified period not exceeding five years. The Tribunal may also order that name of such Advocate be struck off the Roll of Advocates.

139. The Tribunal is further empowered to order an Advocate to pay a fine not exceeding one million shillings or that the Advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings. The Tribunal may also make any further orders depending on the nature of the case.

140. The Tribunal may, as well, make a combination of the above orders as it finds appropriate.

141. An appeal against the decision of the Tribunal lies to the High Court. A further appeal lies to the Court of Appeal.

142. Having set out the prevailing legal regime governing the disciplinary processes, I will now venture into the next issue.

(b) Whether the Petitioner's rights under Articles 47 and 50 of the Constitution were violated:

143. The Petitioner vehemently posited that the documentation relating to the two Notices to show cause revealed that the notices were issued on account of the refusal of the Petitioner to comply with various orders of the Respondent.

144. The Petitioner then contended that the two Notices were issued in violation of mandatory procedure as required under Section 77 as read with Section 60 of the Advocates Act and Rule 8 of the Advocates (Disciplinary Committee) Rules thus denying him the opportunity to be heard.

145. It is his case that the Respondent engaged in an alien procedure that resulted in an illegality. He posited that it was incumbent upon the Respondent to serve him with a complaint supported by the affidavit deposed to by its Secretary inviting him to respond to the two notices.

146. It was his case that under Section 77 the Respondent had no standing to prosecute the Notices to Show Cause because such hearing can only be exercised only by way of separate and or fresh proceedings.

147. On the foregoing, the Petitioner claimed violation of his right to fair administrative action under Article 47 of the Constitution, the right to fair hearing under Article 50(1) of the Constitution and the right to least severe punishment under Article 50(2)(p) of the Constitution.

148. The Respondent's and Interested Parties' positions in answer to the foregoing were well captured in the parties' cases.

149. In order to aid the Court in this discussion, I will reproduce verbatim the provisions of Sections 60 and 77 of the Advocates Act.

60. *Complaints against advocates*

(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.

(2) Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Tribunal, accompanied by such fee as may be prescribed by rules made under section 58(6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.

(3) Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:

Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.

(4) 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) that such advocate be admonished; or

(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) that such advocate do pay a fine not exceeding one million shillings; or

(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.

(5) The Tribunal may make any such order as to payment by any party of any costs or witness expenses and of the expenses of the Tribunal or the members thereof in connection with the hearing of any complaint as it may think fit, and any such order may be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect.

(6) Where an advocate against whom the Tribunal is hearing a complaint relating to fees and costs has not filed a bill of costs in Court, the Tribunal may upon the request of the complainant, order such an advocate to produce before it a detailed fee note:

Provided that where the advocate fails to comply with an order of the Tribunal under this subsection, the Tribunal may determine the fee payable to the advocate in such sums as it deems fit.

(7) If a bill of costs has been filed in Court by the advocate against whom a complaint is being heard but has not been taxed, the Tribunal may adjourn the complaint for such period as it considers reasonable to allow such taxation:

Provided that if at the expiry of such adjournment, the bill is still not taxed, the Tribunal may make its own estimate of the costs due to the advocate and make orders accordingly.

(8) A determination of the Tribunal under subsections (7) and (8) shall be deemed, for all purposes, to be a determination of the Court.

(9) In any case where the complainant has not filed a civil suit against the advocate in respect of the sum in dispute, the Tribunal may order the advocate to pay to the complainant such sum as it finds to be due from the advocate.

(10) An order made by the Tribunal under this section—

(a) shall be in the name of the advocate or firm of advocates in respect of whom or which the order is made;

(b) may be filed in the civil registry of the Court by any party thereto who shall, within twenty-one days of the filing, give a notice to all other parties in writing of the filing of the order, which shall bear the date, the cause number and the registry in which it has been filed and a return of service of the order.

(11) If no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favour of whom the order is made may apply *ex parte* by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the Court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the Civil Procedure Rules (Cap. 21, Sub. Leg.).

(12) The Tribunal may issue a warrant for the levy of the amount of any sum ordered to be paid by virtue of this section on the immovable and movable property of the advocate by distress and sale under warrant, and such warrant shall be enforced as if it were a warrant issued by the Court.

150. Section 77 states as follows: -

77. Penalties for failure to comply with order of Committee

Any person who, without good and lawful excuse, contravenes or fails to comply with any order, notice or direction of the Committee or the Complaints Commission shall be guilty of an offence and, in the case of an advocate, shall, alternatively or in addition, be liable to proceedings under section 60.

151. There is no doubt that there were two complaints against the Petitioner. The complaints were by the 1st and 2nd Interested Parties.

152. The 1st Interested Party lodged the complaint against the Petitioner by herself. She wrote a letter to the Respondent.

153. On receipt of the letter, the Respondent initiated correspondences with the Petitioner. The Petitioner duly responded to the complaint by admitting receipt of the purchase price and sought for time to make good the claim against him.

154. When the Petitioner was not living true to his word, the Respondent filed an Affidavit of Complaint on behalf of the 1st Interested Party for professional misconduct and the matter was formally placed before the Tribunal.

155. The Tribunal complied with the requirement of informing the Petitioner of the complaint laid before it. There was no response and the Petitioner was formally charged before the Tribunal.

156. The Petitioner entered a plea of not guilty, but did not file any response to the complaint despite being accorded time to file statement of accounts. The Petitioner then asked the Tribunal to enter judgement against him as he was going to tender mitigations. The Tribunal obliged.

157. The Tribunal, out of the Petitioner's own admission of guilt, admonished the Petitioner for not maintaining Client's Account as required by law and ordered him to comply with payment of Kshs. 6,500,000/- with interest to the 1st Interested Party. The Petitioner was also fined Kshs. 50,000/- and costs of Kshs. 10,000/- for the complainant and Kshs. 5,000/- to the Law Society of Kenya respectively.

158. The record has it that the Petitioner on several occasions sought for time within which to comply with the orders off Tribunal in vain. In the long run, the Tribunal issued a Notice to Show Cause why the Petitioner should not be struck off the Roll of Advocates. The notice was subsequently allowed and the Petitioner struck off.

159. It is worth-noting that it took a period of close to 3 years from the lodging of the complaint and when the Petitioner was struck off. A larger part of that time lapse was, however, on the Petitioner's request for time to make good the claim.

160. I will now ascertain whether the circumstances surrounding the complaint lodged by the 1st Interested Party called for compliance with Section 77 of the Advocates Act to the extent that a process under Section 60 ought to have been initiated.

161. A look at the averments by the Respondent reveal that the proceedings it carried out were in two parts. The first part was an attempt to settle the matter amicably. The second part was after the failure of the attempt to settle the dispute amicably. On failure aforesaid, the Respondent then initiated the process under Section 60 of the Advocates Act. It is that process that culminated with the striking off of the Petitioner.

162. From the plain reading of Section 77 of the Advocates Act, it is clear that the provision was mainly intended to create an offence against any person who, without any lawful justification, fails to comply with any order, notice or direction of the Tribunal or the Complaints Commission. Further, if the failure is by an Advocate, the provision states that such an Advocate shall be liable to proceedings under section 60 either in the alternative or in addition to the orders in force.

163. It, therefore, means that any proceedings against an Advocate under Section 60 which are brought up pursuant to Section 77 of the Advocates Act will only be sustainable if the initial proceedings against the Advocate before the Tribunal or the Commission, where the Advocate is accused of failure to comply, were not initiated under Section 60 of the Advocates Act. If the initial proceedings were already brought under Section 60 of the Advocates Act, then Section 77 applies strictly to the extent of creating an offence for failure to comply and nothing more. An argument that a similar and fresh process under Section 60 must be undertaken in line with Section 77 of the Advocates Act, would in such circumstances, defeat logic, be a repeat and can only be superfluous.

164. Of emphasis, this Court hereby finds and hold that the proceedings under Section 60 of the Advocates Act contemplated in Section 77 of the Advocates Act, do not apply to instances where the initial proceedings were under Section 60 of the Advocates Act.

165. Having so found, there is no doubt that an Advocate who has been prosecuted before the Tribunal, found guilty and sentenced, but not struck off the Roll of Advocates, will have to be heard if the Tribunal intends to issue a further order including to strike off the Advocate for the reason that the Advocate has failed to comply with the orders of the Tribunal. There are two reasons thereto being that, it is only the Tribunal which has the sole power to strike off an Advocate from the Roll of Advocates and that no one should be condemned unheard.

166. In such a case, the Tribunal will have to invite the Advocate to respond to whether the intended order to strike off the Advocate ought to issue. The Tribunal may also call upon the Advocate to answer to the offence on failure to comply under Section 77 of the Advocates Act.

167. 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.

168. 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.

169. On the basis of the foregoing, the next important issue for consideration is whether the Petitioner was accorded an opportunity to present his case before the Tribunal including the opportunity to be heard on the Notice to Show Cause.

170. The Respondent clearly set out all the steps taken during the hearing of the complaint. It contended that the Petitioner was duly served in all occasions.

171. The Petitioner, however, argued that he did not receive the correspondences in issue including the Notice to show cause as he had wound up practise and closed his office.

172. This Court has carefully perused the record. It did not come across any evidence that the Petitioner had wound up his practise and closed the office. Even if it were true that indeed the Petitioner eventually closed his office, there is no evidence that the Petitioner also closed the postal address as well. Had the Petitioner closed his postal address, then all correspondences addressed to him through that address would have been returned to the senders, and, in this case, the Tribunal and the Tribunal would have endeavour other means of service. However, there is no such evidence.

173. At this point in time, it is imperative to point out that an Advocate who opts to either wind up practise or close or change the known mode of communication has an unequivocal obligation to, in the first instance, inform the Law Society of Kenya of such status and then, to make alternative arrangement to receive correspondence including from former clients and the Society.

174. As the Petitioner neither informed the Law Society of Kenya of the alleged closure of his office nor made any efforts to follow up the matters before the Tribunal, he is, hence, estopped pursuant to Section 120 of the Evidence Act, Cap. 80 of the Laws of Kenya, from contending that he never received the Tribunal's documents or correspondence served through his known postal address.

175. Section 120 of the Evidence Act provides as follows: -

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

176. This Court also takes note of the fact that the Petitioner conceded to the 1st Interested Party's complaint and also allowed the Tribunal to enter judgment against him. Further, the Petitioner was accorded enormous time by the Tribunal to make good the complaint and the decision thereof in vain. Eventually, a Notice to show cause was issued, duly served on the Petitioner and acted upon accordingly.

177. I now deal with the complaint laid on behalf of the 2nd Interested Party. The record has it that the said complaint was initially dealt with by the Commission. There is uncontroverted evidence to the effect that the Petitioner took part in the proceedings before the Commission. The Petitioner did not deny the complaint and was accorded time to make good the claim in vain.

178. In view of the continued non-compliance on the part of the Petitioner, the Commission referred the dispute to the Tribunal under Section 53(4)(b) of the Advocates Act.

179. The Tribunal initiated the process under Section 60 of the Advocates Act. There is evidence that the Petitioner was duly served on every step the Tribunal intended to take. The proceedings were, hence, conducted in line with the Advocates Act as well as the Advocates (Disciplinary Committee) Rules, 1990.

180. Given the foregoing scenario, this Court will now ascertain whether the Petitioner's rights under Articles 47 and 50 of the Constitution were infringed.

181. **Article 47** of the Constitution states as follows: -

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
 - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and*
 - (b) promote efficient administration*

182. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. Section 4 thereof provides that: -

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.*
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-*
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
 - (b) an opportunity to be heard and to make representations in that regard;*
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
 - (d) a statement of reasons pursuant to section 6;*
 - (e) notice of the right to legal representation, where applicable;*
 - (f) notice of the right to cross-examine or where applicable; or*
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-*

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

183. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’ and an ‘administrator’ as follows: -

‘administrative action’ includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

184. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** Court of Appeal addressed itself on Article 47 of the Constitution. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

185. The South African Constitutional Court in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

186. The right was further discussed in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoitii [2018] eKLR**. The Court had the following to say:

25. In **John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano [39]** the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. **Illegality** - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

b. **Fairness** - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. **Irrationality and proportionality** - The Courts must intervene to quash a decision if they consider it to be demonstrably

*unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -*

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

187. Article 47(2) of the Constitution obligates a Petitioner to demonstrate which, and to what extent, his/her/its rights or fundamental freedoms were likely to be affected for the right to a fair administrative action to accrue. In this case, the Petitioner contended that the decision to strike him off the Roll of Advocates affected his right to be heard under Article 50 of the Constitution.

188. There is, therefore, no doubt that the Respondent's decision to strike off the Petitioner from the Roll of Advocates was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioner. As such, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

189. In relation to the **lawfulness** of the impugned decision, there can be no hesitation that the Advocates Act accorded the Tribunal the power to strike off the Petitioner.

190. As to whether there was **procedural fairness** in reaching the impugned decision, there is evidence that the Tribunal fully complied with the constitutional and legal procedural requirements during the hearing of the complaints. The Tribunal further accorded the Petitioner a lot of leeway in the hope that the Petitioner would settle the two claims. Unfortunately, the expectation did not come to pass. The Petitioner did not point out how the Tribunal flouted the procedural aspect of the process. The record is clear that the Tribunal kept within the procedural confines. This Court cannot, therefore, fault the Respondent on the limb of procedure.

191. There is the issue of **reasonability** in the decision making. In order to prove that a decision was unreasonable, a party must demonstrate that the impugned decision was so unreasonable that no reasonable authority could ever have come to it. In other words, the party ought to prove that the decision was arbitrary.

192. Speaking to the concept of arbitrariness, the Court of Appeal in **Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** made reference to the **Black's Law Dictionary 8th Edition** that defined arbitrariness in the following manner: -

in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.

193. The High Court in **Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR** referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -

the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.

194. The Supreme Court of China in **Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188** had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

195. The term 'arbitrariness' had earlier on been defined by the Court (Supreme Court of China) in **Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212** when it comprehensively observed as follows;

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

196. A careful consideration of this matter yields that the Tribunal acted on the evidence before it and the law. The Tribunal gave reasons for each of its decisions including the decision to strike off the Petitioner. The Tribunal cannot, therefore, be faulted for want of reasonableness in its decisions.

197. The upshot is that the Petitioner's claim that Article 47 of the Constitution was infringed cannot hold. The claim is hereby rejected.

198. On the strength of the foregoing, even the claim that any of the rights under Article 50 of the Constitution were infringed, in the circumstances of this case, cannot hold. There is no evidence that the Tribunal either acted unfairly or impartially on the complaints.

199. There is also evidence to the effect that the Petitioner was accorded quite lenient sentences in the first instance, but he remained

unperturbed. The Petitioner took no steps to comply with any of the orders of the Tribunal. Finally, the Tribunal, without any other option, rendered the last available order which was to strike off the Petitioner from the Roll of Advocates.

200. Likewise, this Court returns the verdict that the Petitioner did not demonstrate the infringement of Article 50 of the Constitution in this matter.

201. In the end, this Court finds and hold that none of the Petitioner's rights under Articles 47 and 50 of the Constitution were infringed.

202. The issue is, hence, answered in the negative.

Disposition:

203. As I come to the end of this judgment, I must state that whereas the Tribunal has the power and discretion to make orders striking off an Advocate on the basis of every single complaint laid before it, any subsequent order to strike out the Advocate can only be held in abeyance since an Advocate cannot be struck off more than once at the same time. If the Advocate is successful in challenging the first order striking him or her from the Roll, then the subsequent order striking the Advocate off the Roll of Advocates would then take effect.

204. Suffice to say so, given that the Petitioner has failed to prove that any of his rights were infringed under Articles 47 and 50 of the Constitution, the matter has to come to an end. The Petitioner still has other ways to challenge the impugned decisions including preferring appeals.

205. The final order of this Court is that the Petition dated 7th June, 2021 be and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mudanya, Counsel for the Petitioner.

Mr. Bhanji, Counsel for the Respondent.

Mr. Muthee, Counsel for the 1st Interested Party.

Miss Chibole, Counsel for the 3rd Interested Party.

Elizabeth Wanjohi – Court Assistant