



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E 1112 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA.....RESPONDENT

AND

PATRICK MWEU MUSIMBA.....INTERESTED PARTY

EXPARTE: JOHN WACIRA WAMBUGU

RULING

1. The Applicant herein, John Wacira Wambugu, is an advocate of the High Court of Kenya, and he has brought an application by way of a Chamber Summons dated 25th September 2020, seeking leave to apply for orders of Certiorari to quash the decision of the Law Society of Kenya Disciplinary Tribunal (the Respondent herein) in Cause No. 160 of 2019 issued on 17th August, 2020 denying the Applicant stay of proceedings pending taxation of bills of cost dated 6th August, 2020. Further, that the grant of leave do operate as a stay of the direction of the Respondent herein directing the matter to proceed for hearing on 12th October, 2020. The said cause No 160 of 2019 arises from a complaint made by Patrick Mweu Musimba, the Interested Party herein.

2. On 25th September 2020 this Court directed that the said application be canvassed *inter partes*, particularly on the issue as regards whether this court as a judicial review court is the proper forum to address the Applicant's grievance. The Court further directed the parties to file and serve their respective submissions on the Chamber Summons dated 25th September 2020. The parties' respective cases in this regard are summarised in the following sections.

The Applicant's case

3. The application is supported by a Statement and the Applicant's verifying affidavit both dated 25th September, 2020. The Applicant averred that the decision of the Respondent emanated from a complaint made by the Interested Party on 2nd May, 2019 in Disciplinary Tribunal Cause Number 160 of 2020. He contended that in the said complaint, the Interested Party herein claims the sum of Kshs. 54,518,006.50/= which sums the Interested Party states that the Applicant, through the firm of Wacira Wambugu & Co. Advocate held in trust on his behalf. He stated that indeed, he did not dispute having held monies in trust of the Interested Party and that in total, the Interested Party deposited into the firm's account the sum of Kshs. 631,412,400/= through the Co-operative bank of Kenya Limited and KCB Bank and on diverse dates, the firm released to the Interested Party, his wife and the Interested Party's affiliated companies the sum of Kshs. 620,133,114/= leaving a balance of Kshs. 11,279, 286/= which the firm held as lien for unpaid legal fee.

4. The Applicant added that following the complaint by the Interested Party to the Respondent, his law firm filed various bills of costs (Misc. Case no.s E941 of 2020, E942 of 2020, E943 of 2020, E944 of 2020, E945 of 2020, E946 of 2020, E947 of 2020, E948 of 2020, E949 of 2020, E950 of 2020, E951 of 2020, E952 of 2020, E953 of 2020, E954 of 2020, E955 of 2020, E956 of 2020, E957 of 2020, E958 of 2020, E959 of 2020, E960 of 2020, E961 of 2020, E962 of 2020, E963 of 2020, E964 of 2020, and E966 of 2020, all dated 6th August, 2020 at the

Commercial and Admiralty Division of the High Court at Milimani so as to ascertain the actual professional fee owed to the firm for the services rendered in the various matters handled on behalf of the Interested Party.

5. The Applicant's case is that when the time the disciplinary matter came up for hearing before the Respondent on 17th August, 2020, the said bills had not yet been allocated with dates for taxation, and he instructed his advocates orders of stay of the disciplinary proceedings pending the taxation of the bills of costs. However, that the said prayers were denied by the Respondent who directed that the Applicant may also file the said bill of costs at the Disciplinary Tribunal. He added that at the time the Tribunal gave the said directions, the bills were only pending allocation of taxation dates, and had since been allocated taxation dates of 19th October, 2020 and 27th October, 2020 respectively, and that the Respondent therefore acted irrationally and/or unreasonably by denying the Applicant herein orders of stay of the proceedings pending the taxation of the bills of costs, which would professionally determine the amounts owed to the firm in terms of legal fee by the Interested Party and also effectively determine Disciplinary Tribunal Cause Number 160 of 2020. He further contended that it is not in the interest of justice and fairness to proceed with the hearing of the complaint before the said bills are taxed.

6. The Applicant annexed copies of his statement of accounts, of the proceedings and orders of the Respondent dated 17th August, 2020, his Bill of Costs and of the taxation notices.

The Respondent's case

7. The Respondent filed a Replying Affidavit dated 12th October, 2020 sworn by Collins Harrison Odhiambo its Acting Secretary. He stated that the Respondent is established under section 57 of the Advocates Act for purposes, *inter alia*, of dealing with professional misconduct on the part of Advocates, and that the Interested Party herein lodged a complaint against the Applicant on 2nd May 2019 for failing to transmit funds held in trust on his behalf. He added that on the 11th November, 2019, the Applicant entered a plea of not guilty and the Applicant's Preliminary Objection dated the 8th November 2019 was admitted and served on the complainant. Further, that the Respondent Tribunal delivered its ruling dismissing the said Preliminary Objection on 13th July, 2020, wherein it dismissed the Preliminary Objection, Copies of the complaint and said ruling were annexed.

8. With regard to the orders of stay sought by the Applicant at the Respondent Tribunal on 17th August 2020, it was stated that the grant of a stay order is a discretionary remedy given by a Court or Tribunal depending on the facts adduced before it and is not mandatory, and that the Respondent Tribunal in its ruling dated the 13th July, 2020 advised the Applicant to file any Bills of Cost before it as provided under Sections 60(6)(7) and (8) of the Advocates Act. However, that instead of filing the Bills of Cost before the Respondent Tribunal, the Applicant chose to wait until 13th August, 2020, to then file the same at the High Court, 4 days before the matter was to come up before the Respondent Tribunal on the 17th August, 2020. Further, that the Applicant having been declined the stay orders on 17th August 2020, then waited until the 25th of September, 2020, to file the instant application, while the matter before the Respondent Tribunal was scheduled for hearing on 12th October 2020.

9. In conclusion, the Respondent contended that the Applicant has not provided any cogent reason within the purview of judicial review for this Court to interfere with the discretion exercised by the Respondent Tribunal, and that section 62 of the Advocates Act provides that an accused Advocate aggrieved by an order of the Disciplinary Tribunal may appeal to the High Court by filing a civil appeal.

The Interested Party's case

10. The Interested Party filed a Replying Affidavit dated 9th October, 2020 and averred that the application is an attempt to mislead the Court and a forum-shopping strategy by the Applicant to avoid being held accountable for client funds that he has misappropriated. He contended that the Applicant had received a total of Kshs 650,272,400/- and not Kshs 631,412,000/= as pleaded in the application, the money was to be held in the Applicant's Client account in his trust and to his Order. He stated that sometime in 2018, the Applicant had communicated to him that after all necessary deductions from the funds held in trust including his fees, he was holding Kshs 54,518,006.50 to his trust and order. The Interested Party deponed that he thereafter requested for the release of the balance being held in the Client Account and made numerous follow-ups, but the Applicant declined and/or refused to release the funds. The Interested Party and annexed various demand letters and correspondence in this regard.

11. The Interested Party further deponed that owing to the unprofessional, disgraceful and dishonorable conduct of the Applicant, he decided to file a formal complaint with the Respondent on 6th May, 2019, and that the matter successfully passed the prima facie stage and was later fixed for plea on 11th November, 2019. In addition, that the Applicant filed a Preliminary Objection in the resultant disciplinary proceedings, on which the Respondent delivered a ruling on 13th July 2020 dismissing the same, and directed that the matter be substantively heard on 17th August 2020. The Interested Party stated that on 14th August 2020, the Applicant filed a replying affidavit to the complaint, and annexed to it copies of Bills of Costs that had been filed a day before on 13th August 2020, an act which he reasonably believes was a delay tactic to avoid being reprimanded for his actions by the Respondent.

12. It was further averred that on 17th August, 2020, the Applicant sought to have a stay of the proceedings pending the taxation of the pending bills. The Interested Party contended that the Respondent declined to stay the proceedings after observing that there was an element of mischief in the conduct of the Applicant who had filed his Bill of Costs 4 days before the Complaint against him was scheduled to be heard. He also contended that the Respondent noted that since it had powers to determine the issue of costs between the Advocate and Client, it was in the interest of justice to deal with the issue of costs and the complaint together.

13. It was thus the Interested Party's case that the Respondent did not act irrationally and/or unreasonably by denying the Applicant orders of the stay of proceedings. It was also contended the bills had been fabricated by the Applicant in a clear act of mischief in order to avoid being held accountable for misappropriation of Client funds. He asserted that the Applicant is not entitled to any prayers sought for and should not be allowed to try and delay the determination of the complaint that is active before the Respondent, which is competent enough to handle all

issues before it.

The Determination

14. *Order 53 Rule 1* of the Civil Procedure Rules provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

15. At this stage, the only issue before this Court is whether the Applicant has made out an arguable case for leave to commence judicial review proceedings to issue, and if so whether he merit the stay orders sought. The *ex parte* Applicant filed its submissions dated 6th October, 2020 wherein he reiterated that the Respondent acted illegally and/or unreasonably in denying the Applicant stay of proceedings pending the taxation of bill of costs as the bills form the substratum of the complaint. He relied on the grounds for judicial review as set out in **Council For Civil Service Unions vs Minister for Civil Service, [1985] A.C. 374**, and the purpose of judicial review was stated in **Municipal Council Of Mombasa vs Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001**.

16. The Respondent filed submissions dated 13th October, 2020, wherein it stated that the Applicant herein has filed this case for the mere reason that he was denied a stay order before the Respondent Tribunal. Further, that the granting of an order of stay is discretionary and not mandatory, and is based on the facts presented before the Tribunal at the time of exercising its discretion. It was also the Respondent's submission that the Applicant concealed material facts in that they failed to inform the Court that the Respondent Tribunal had made a detailed ruling on the issue of the filing of the Bills of Cost on the 13th of July 2020. Reliance was in this regard placed on the case of **Sigei K. Hillary and Another vs. The Law Society of Kenya Disciplinary Tribunal and Another J.R. Misc. Civil Application No. 325 of 2019** and **Republic vs. Disciplinary Tribunal of the Law Society of Kenya & 2 Others Ex-parte John Wacira Wambugu [2015] eKLR**.

17. The Respondent therefore submitted that it is the proper forum for handling disciplinary matters of Advocates, has carried out its mandate as provided by law, and the only avenue that is available to the Applicant is an appeal as provided under Section 62 of the Advocates Act, and as upheld in **Paul Musili Wambua vs. Disciplinary Committee & Another [2015] Eklr**.

18. The Interested Party filed submissions dated 9th October, 2020 and contended that the instant application is an appeal clothed in judicial review clothing, as the order issued by the Respondent was discretionary and consequently, the Applicant should have adopted the provisions of section 62 of the Advocates Act which provides for appealing of orders of the Respondent. Further, that if the discretion of the Respondent was not utilized within the parameters of natural justice, then the recourse of the Applicant would be to file an Appeal against the decision.

19. The Interested Party further submitted that the application has not established grounds to warrant the leave sought, and cited the cases of **Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others (supra)** and **Meixner & Another vs A.G [2005] eKLR**, that the leave of court is required with a view to filtering out frivolous applications and the test to be applied is whether the applicant has an arguable case. Lastly, the Interested Party contended that the Applicant's only ground of challenging the decision of the Respondent is that they had filed various bills of costs before the High Court and this by itself is not sufficient enough to deem the decision of the Respondent as being illegal.

20. It is trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

21. In the present application, the *ex parte* Applicant has provided evidence of the impugned decision by the Respondent, and the grounds why it considers the Respondent's decision to be illegal. The only issue that this Court needs to clarify is whether, and the extent to which, the exercise of a discretion granted to a judicial or administrative body is subject to judicial review. The concept of discretion in its legal context implies power to make a choice between alternative courses of action or inaction. K.C. Davis in his text **Discretionary Justice (1969)** explains in page 4 that "a public officer has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction". If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty.

22. It is in this regard an established ground of judicial review that if in the exercise of its discretion in the performance of a public duty, an authority takes into account improper considerations then in the eyes of the law it has not exercised its discretion legally. Considerations that are relevant to a public authority's decision are of two kinds: mandatory and discretionary. Therefore, to say that somebody has a discretion presupposes that there is no unique legal answer to a problem. There may, however, be a number of answers that are wrong in law for taking into account the wrong considerations,

23. The improper exercise of a discretion being an illegality, also means that it can be effectively challenged by other forms of remedies. In the present case, there is a remedy expressly provided for in the Advocates Act section 62 of direct appeals from orders of the Respondent as follows:

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

(2) The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days' notice of the date of hearing.

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

24. Section 60 of the Act deals with the hearing of complaints made against an Advocate, and therefore any order made in the course of that hearing is subject to appeal. The grounds raised by the Applicant in the present application as regards the unreasonable decision by the Respondent can therefore also be adequately and more effectively addressed by way of appeal.

25. More importantly, the limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, Therefore, to the extent that the prayer seeking stay of the Respondent's decision has the effect of overturning the Respondents substantive decision refusing a similar stay, the said prayer makes is not amenable to judicial review.

26. I accordingly decline to exercise my discretion in the Applicant's favour for the foregoing reasons, and to this extent also find that the Applicant has not met the threshold of an arguable case, and is therefore not entitled to the leave sought to commence judicial review proceedings against the Respondent.

The Disposition

27. The *ex parte* Applicants' Chamber Summons application dated 25th September 2020 is accordingly denied, and is hereby dismissed with costs to the Interested Party.

28. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12th DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the Applicant's, Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE