REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1103 OF 2020

BETWEEN

REPUBLIC ……...…….…….APPLICANT

VERSUS

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

DISCIPLINARY TRIBUNAL ..... 2ND RESPONDENT

AND

MARIANNE JEBET KITANY.....INTERESTED PARTY

EX-PARTE APPLICANT: NEDDIE EVE AKELLO

JUDGMENT

The Application

1. Neddie Eve Akello, the *ex parte* Applicant herein, is an Advocate of the High Court of Kenya. The *ex parte* Applicant is aggrieved by the decisions of the Law Society of Kenya and the said Society's Disciplinary Tribunal, who are the 1st and 2nd Respondents herein, to issue a notice dated 24th August 2020. The said notice required the *ex parte* Applicant to appear before the 2nd Respondent with respect to Disciplinary Tribunal Cause Number 188 of 2020, for purposes of taking plea to a complaint made by Marianne Jebet Kitany, the Interested Party herein.

2. By a Notice of Motion dated 1st October 2020, the *ex parte* Applicant accordingly sought the following orders:

> **a) An order of certiorari to remove into this Court and quash the entire decision of the 1st and 2nd Respondents' communication vide letter dated 24th August 2020 notifying the *ex parte* Applicant of a plea to be taken by the *ex parte* Applicant before the Disciplinary Tribunal in Cause No. 188 of 2020 and requiring the attendance of the *ex parte* Applicant to attend together with all such proceedings subsequent or related.**
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> **b) An order of certiorari to remove into this Court and quash the entire decision of the 1st Respondent to refer the complaint by the Interested Party to the 2nd Respondent without according the *ex parte* Applicant and opportunity to respond to the complaint as lodged by the Interested Party culminating in the decision of the 2nd Respondent contained in the aforementioned notice communicated vide letter dated the 24th August 2020 notifying the Applicant that plea will be taken before the Disciplinary Tribunal in Cause No. 188 of 2020 and requiring the *Exparte* Applicant to attend together with all such proceedings subsequent or related.**
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> **c) An order of Prohibition to prohibit the Respondents from proceeding any further in acting upon the decision of the 1st Respondent dated 24th August 2020 and in taking any further step in the proceedings in Disciplinary Cause No. 188 of 2020.**
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> **d) The Costs of this Application be provided for.**

3. The grounds upon which the application is based are in a Statutory Statement dated 14th September 2020, a verifying affidavit sworn on the same date, and a supplementary affidavit sworn on 24th November 2020 by the *ex parte* Applicant. The *ex parte* Applicant averred that she is an Advocate of the High Court of Kenya of more than ten (10) years of good reputation and standing and without any adverse complaint and or disciplinary record or conviction whether previous or pending. Further, that on or about November 2018, the Interested Party, instructed the *ex parte* Applicant's law firm namely MS Advocates LLP, which was formerly trading in the name and style of Messrs. Triple A Law LLP, to represent a company she had an interest in a commercial dispute in **Barons Estates Limited vs Atticon Limited, Nairobi HCC No. E138 of 2018.** The *ex parte* Applicant gave a detailed background and explanation as regards the change in the law firm's partnership in this regard.

4. That subsequently, the *ex-parte* Applicant was also instructed in various matters concerning related parties and companies, two of which were in progress and were instituted by H. Kago and Company Advocates namely, **Marianne Jebet Kitany vs. Franklin Mithika Linturi, Nairobi CMCC Misc. Application No. 1044 of 2018:** and **Barons Estates Limited vs Emily Nkirote & CMC Motors, Nairobi CMCC No. 9391 of 2018** both filed in Court in October 2018. During the course of her engagement, the *ex-parte* Applicant stated that she raised reservations in continuing to represent the Interested Party and asked the Interested Party to seek alternative Counsel to represent her and to take over the said matters. That the Interested Party proceeded to instruct another Counsel who took over the matters from the *ex-parte* Applicant.

5. Subsequently, that the *ex parte* Applicant's firm proceeded to hand over all files to the Interested Party and contemporaneously raised its fee notes for the matters handled, which fee notes the Interested Party refused, neglected and failed to pay for, constraining the ex-parte Applicant's firm of advocates to move the Court to tax its bills of costs, in respect of all the matters in which services had been duly rendered and enjoyed by the Interested Party. However, that immediately upon the filing of the bills of cost and the ensuing taxation and without notice to the *ex parte* Applicant, the Interested Party lodged complaints against Triple A Law LLP with the 1st Respondent. Furthermore, that the said complaints were neither brought to the attention of the *ex parte* Applicant at the material time, nor did she have an opportunity to be heard on her defense to the complaints raised before the 1st Respondent taking of further action on the complaint, thereby violating her rights to natural justice.

6. It was only much later on 21st August 2019 after the 1st Respondent had significantly advanced in the processing of the complaint by referring the same to the 2nd Respondent for disciplinary action, that the *ex parte* Applicant was made aware of the complaint vide a letter from the 1st Respondent authored by the its Programme Officer. In addition, that the said letter un procedurally advised the Interested Party on how to frame her complaints as against the *ex parte* Applicant, and in the process and without solicitation, wrongfully and maliciously advised the complainant that the *ex parte* Applicant herein had been practicing in a name and style that the 1st Respondent's Council had recommended be "deregistered", a fact which the 1st Respondent knew or ought to have known was untrue.

7. Arising from the foregoing, the Interested Party who had at the onset made complaints that the *ex parte* Applicant's firm of advocates knowingly and or willfully misadvised her in matters taken over from the firm of H. Kago and Company Advocates, now purported to reframe her complaints against the *ex parte* Applicant, largely based on the unsolicited advice from the 1st Respondent and went ahead to mix the issues with the arguments on the name and style of practice of the Firm, a matter which was only relevant to the *ex parte* Applicant and the 1st Respondent. That even though the *ex parte* Applicant did duly respond to the baseless complaints made by the Interested Party, and raised reservations to the 1st Respondent with the manner in which the complaints had been handled, the 1st Respondent's Programme Officer capriciously, noted that with what had transpired, the *ex parte* Applicant should now proceed with the disciplinary matter before the 2nd Respondent.

8. The *ex-parte* Applicant was accordingly served with a notice to appear before the 2nd Respondent on the 21st September 2020 in respect to Disciplinary Tribunal Cause Number 188 of 2020 for purposes of taking plea, which presupposed that the 2nd Respondent had established that there is a *prima facie* case raised by the Interested Party, despite the 1st Respondent failing to hear the *ex parte* Applicant before making the decision to refer the matter to the 2nd Respondent.

9. It is therefore the *ex parte* Applicant's position that the decisions of the 1st and 2nd Respondents, culminating in the 2nd Respondent's notice requiring her to take plea pursuant to the complaints by the Interested Party, were arrived at in bad faith, irrationally, capriciously, arbitrarily and with open bias and without due regard to the law and the facts in question. Further, that the impugned decision was in contravention of the law and ultra vires the powers donated to the said Respondent by statute. Lastly, that the 1st and 2nd Respondents' actions have been taken at the behest, and in collusion between the 1st Respondent's Programme Officer and the Interested Party, with a view to prejudice the *ex parte* Applicant and her practice as a member of the 1st Respondent, and to suppress and defeat the ongoing taxation and payment of the *ex parte* Applicant's costs for services rendered to the Interested Party.

The Responses

10. The Respondents filed a replying affidavit sworn on 9th June 2021, by Mercy Wambua, the 1st and 2nd Respondent's Secretary, in which they urged that the application purports to obstruct the Respondents from carrying out their lawful mandate as stipulated under Section 57 and 60 of the Advocates Act. It was the Respondents' case that on 8th May 2019, the 1st Respondent received a letter from the Interested Party requesting it to take action against the *ex parte* Applicant's law firm for having negligently handled her matter, namely, Miscellaneous Application No. 1044 of 2018,. Further, that on 26th July 2019, the 2nd Respondent received an Affidavit of Complaint on behalf of the Interested Party for professional misconduct of the *ex parte* Applicant. Consequently, that Disciplinary Cause No. 188 of 2019 was preferred against the *ex parte* Applicant. The Respondents annexed a copy of the Interested Party's letter and of the Affidavit of Complaint.

11. The Respondents averred that on 7th August 2019, the 1st Respondent wrote to the ex parte Applicant requesting for her response within 14 days regarding the complaint made against her, who deliberately refused to comply within the said 14 days and instead filed her response

on 6th September 2019. Consequently, that the complaint was placed before the 2nd Respondent for its further action, which Respondent proceeded to find that there was a *prima facie* case and the matter was fixed for plea taking on 21st September 2020, and a notice dated 24th August 2020 sent to the *ex parte* Applicant.

12. According to the Respondents, the 2nd Respondent complied with Section 60(3) of the Advocates Act which provides for the proper procedure in summoning the *ex parte* Applicant to appear before it, and the allegations of procedural irregularity are not true and without justification, as the *ex parte* Applicant was accorded sufficient time within which to respond to the complaint made against her but elected not to. Furthermore, that, if the 2nd Respondent would have failed in its mandate under section 60 of the Advocates Act if it did not consider the complaint made against the *ex parte* Applicant. The Respondents contended that the allegations that the 1st Respondent disclosed to the Interested Party the fact that the *ex parte* Applicant was practicing under the name and style of Triple A Law LLP, which name she had been directed to change, were false, and that the letters relied on by the *ex parte* Applicant to that effect do not relate to the Interested Party herein or to parties in this matter.

13. In addition, that the complaint that is the subject of the instant application does not raise any concerns relating to change of name of the ex-parte Applicant's legal practice and or the name and style, Triple A Law LLP. Lastly, that the contention that the Interested Party filed Disciplinary Tribunal Cause Number 188 of 2020 in an attempt to frustrate the pending taxation, is not true, as there was no Bill of Costs filed in respect of Miscellaneous Application No . 1044 of 2018.

14. The Interested Party on her part filed a replying affidavit she swore on 19th October 2020, wherein she averred that she instructed the *ex parte* Applicant's law firm in four matters namely: **Barons Estate Limited vs Atticon Ltd, Nairobi HCCC No. 138/2018; Marianne Jebet Kitany vs Franklin Mithika Linturi, CMCC Misc. App. 1044/2018; Barons Estate Ltd vs Emily Nkirote & CMC Motors, CMCC No. 9391/2018;** and **Barons Estates Ltd v Emily Nkirote & CMC Motors, HCCC No. 412/2018.** She further deponed that the *ex parte* Applicant never raised reservation on the representation, but that being dissatisfied with the services rendered she requested the *ex parte* Applicant to release her files in a letter dated 7th January 2019. Furthermore, that she wrote another letter dated 26th February 2019 expressing her dissatisfaction with the *ex parte* Applicant's service, which letter the *ex parte* Applicant declined to receive.

15. According to the Interested Party, the *ex parte* Applicant did not release the files but instead raised an ambiguous fee note, and only released the documents she held in custody on behalf of the company. Consequently, that the Interested Party sought the help of the police to get the documents the *ex parte* Applicant was holding. The Interested Party further stated that her complaint, which was lodged on 18th March 2019, is not related and the taxation matter which is dated 10th April 2019. In addition, that the 1st Respondent was right in letting her know of the deregistration of the *ex parte* Applicant's firm since it was a clear indication of malice and untrustworthy on the part of the *ex parte* Applicant, and did their duty in guiding her on how the matter should proceed through affidavits.

16. The Interested Party's case is that the *ex parte* Applicant had approached the Court prematurely since the 2nd Respondent has not given any decision in **Disciplinary Tribunal Cause no. 188 of 2020** and was therefore seeking to rip the 2nd Respondent of their mandate and powers and not to follow the due process. Further, that there was no collusion between the Interested Party and the Respondents, who were under duty to give the Interested Party guidance on how they should proceed, and therefore did not act ultra vires, nor with bias or bad faith. Lastly, that the *ex parte* Applicant's law firm never indicated that they had changed their practicing name, which indicate that they are not of good standing and not acting in good faith.

The Determination

17. It is not in dispute that the Interested Party made a complaint to the 2nd Respondent, and that the 1st and 2nd Respondent have certain roles and powers under Advocates Act as regards the discipline of Advocates. The main issue in this application is whether the 1st and 2nd Respondents acted illegally and unfairly in the process of giving the *ex parte* Applicant the Notice dated 24th August 2020 to take plea before the 2nd Respondent on the Interested Party's complaint.

18. Oraro & Company Advocates, the *ex parte* Applicant's advocates on record, filed submissions dated 18th January 2021 and addressed this issue on various fronts. It was submitted that the Respondent's impugned action and decision is void ab initio on the account of procedural impropriety, bias and in abuse of power and ultra vires. On procedural impropriety**,** the ex parte Applicant's counsel submitted that section 60 of the Advocates Act as contrasted with Part X of the Act contemplates that complaints to the tribunal being made by the Complainant, and does not provide for the complaint being made through the 1st Respondent. In any event, if it was the 1st Respondent's position that it was entitled to receive complaints and to consider the same before determining whether to forward the same to the 2nd Respondent, then it was under duty to hear the *ex parte* Applicant's side of the story before making the determination of forwarding the complaint to the 2nd Respondent, and failed to do so.

19. The *ex parte* Applicant further submitted that the 1st Respondent assumed a quasi-judicial role with respect to the complaint forwarded by the Interested Party's letter of 9th April 2019, and it was under duty to accord the *ex parte* Applicant a fair hearing before referring the matter to the Disciplinary Tribunal. Therefore the procedure prescribed was not followed nor the rules of natural justice and right to be heard as enshrined in the Constitution. Reliance was in this regard placed on the decisions in **R vs Vice Chancellor JKUAT, Misc. Appl. No 30 of 2007; Republic vs National Police Service Commission Ex parte Daniel Chacha [2016] eKLR;** and **Republic vs Principal Secretary, Ministry of Transport and Urban Development ex parte Soweto Residents Forum CBO [2019] e KLR**.

20. Lastly, that despite the *ex parte* Applicant explaining that there was a delay in receipt of the complaint lodge by the Interested Party, the 1st Respondent did not consider the explanation, nor did it give the *ex parte* Applicant an opportunity to defend herself against the complaints, and responded by stating that a response was not necessary as the matter was now before the Disciplinary Tribunal.

21. On bias , the *ex parte* Applicant submitted that the 1st Respondent by advising the Interested Party on how to present its complaint to the

2nd Respondent compromised its neutrality, and cited the decision by the Court of Appeal in **Kenya Revenue Authority & 2 others vs Darasa Investments Limited [2018] eKLR** and the decision in **Law Society of Kenya vs Centre for Human Rights and Democracy & 13 others [2013] eKLR** for the position that the 1st Respondent had a duty and obligation to confine itself to the complaint and not to introduce matters extraneous to the complaint and which were pending dispute between itself and the *ex parte* Applicant. Therefore, that the sequence of events and the conduct of the Interested Party led to the irresistible conclusion that the lodging of the Complaint was calculated to serve the purpose of evading payment of the fees due to the *ex parte* Applicant by abusing process and power.

22. In conclusion, the *ex parte* Applicant submitted that the 1st Respondent abused its power and acted *ultra vires* by introducing extraneous matters which were between it and the *ex parte* Applicant to the complaint and assumed a role in section 60 of the Advocates Act. Reliance was placed on the decisions in **Republic vs Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & another Ex parte Robert Njoka [2019] eKLR** and **Republic vs Principal Secretary, Ministry of Transport, Housing and Urban Development Exparte Soweto Residents Forum CBO [2019] eKLR.** for the proposition that illegality arises where a public authority is not empowered to take action or make the decision it did, or where the authority does not exercise its discretion properly.

23. Nyiha Mukoma & Company Advocates filed submissions dated 9th June 2021 on behalf of the Respondents. On the aspect of procedural impropriety, the counsel, while relying on the definition of procedural impropriety in **Wangui Kathryn Kimani vs The Disciplinary Tribunal of the Law Society of Kenya & Anor, Miscellaneous Application No. 113 of 2016** submitted that the 1st Respondent, upon receipt of the complaint filed by the Interested Party against the *ex parte* Applicant, duly observed the rules of natural justice as it gave notice of the same to the *ex parte* Applicant vide the letter dated 7th August 2019 and advised her to respond within 14 days. However, that the *ex parte* Applicant in disregard of the above directions, instead filed her response on 6th September 2019, a month later. Therefore, the allegation that the *ex parte* Applicant was not given notice of the complaint, is baseless and must fail. Further, that the 1st and 2nd Respondents adhered to all the procedural steps as provided in Section 60 of the Advocates Act when handling the complaint in Disciplinary Cause No. 188 of 2019, all the way to plea taking.

24. On whether the Respondents acted illegally, the counsel submitted that the *ex parte* Applicant's allegations are baseless since the 1st Respondent did not disclose to the Interested Party herein that the *ex parte* Applicant was practicing under the name, Tripple A Law LLP and the letters referred to by the *ex parte* Applicant in her affidavit as annexture NEA 24 and NEA 25 refer to Collins Kipchumba Ngetich, who is not a party to the instant Application and or Disciplinary Tribunal Cause No. 188 of 2019. Equally, that the allegation that the Interested Party was advised on how to craft their complaint is without basis as no evidence was produced in support thereof.

25. On the allegations of acting in bad faith and irrationally, the Respondents submitted that all complaints against advocates are made to the 2nd Respondent as per Section 60(1) of the Advocates Act, and the decision by the 1st Respondent to refer the complaint to the 2nd Respondent is a process clearly provided for by the law. Therefore, that the same was not arrived at by any bias, bad faith and or tainted with irrationality as alleged, and was simply a procedural step that had to be undertaken by the 1st Respondent. Further, the allegation that the said decision was a move to interfere with the purported ongoing taxation is without evidence, as no Bill of Costs was ever filed in CMCC 9391 of 2018. In conclusion the Respondents submitted that the *ex parte* Applicant is using the Court processes to interfere with the lawful mandate of the Respondents and avoid the statutory laid down process.

26. Musyoki Mogaka & Company Advocates for the Interested Party filed submissions dated 12th April 2021, wherein it was urged *that* the application by the *ex parte* Applicant is bad in law under the doctrine of exhaustion for reasons that it is premature having failed to exhaust the redress at the Disciplinary Tribunal, which is established under Section 57 of the Advocates Act. Reliance was placed in this respect on the provisions of Section **9** of the Fair Administrative Action Act and the decisions by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** and **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR**. Further, that the allegation of ulterior motives cannot lie as the complaint and the taxation matter in court are unrelated, and the complaint was lodged before the ex parte Applicant instituted her taxation matters, in which the Respondents herein are not parties.

27. I will commence with a consideration of the arguments on the propriety of the *ex parte* Applicant's application for want of exhaustion of alternative remedies. It is notable that the decision that is impugned was made by the Respondents in the course of the application of the alternative remedy provided for in the Advocates Act under section 60. This Court is not only properly seized of the matter in the exercise of its supervisory **jurisdiction under Articles 47 and 165(6) of the Constitution**, but is also not divested of jurisdiction in such circumstances, as was noted by the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR:**

> **"Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."**

28. I also need to clarify at the outset that the remit of this Court as a judicial review Court does not extend to considering the substance and merit of arguments made by the parties as regards the complaint made by the Interested Party. In particular, a consideration of the status and nature of the *ex parte* Applicant's law firm is a merit review that will be beyond the standards set in judicial review as set out in the Fair Administrative Action Act, as it is a fact-finding and fact resolution exercise that is normally suitable in the first instance for the normal civil process in a court, or a body with statutory authority to undertake such an exercise such as 2nd Respondent.

29. The standards of merit review set out in section 7 (2) of the Act are as follows:

> (**2) A court or tribunal under subsection (1) may review an administrative action or decision, if-**

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

30. It was noted by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that even though** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator or to** usurp the roles of the administrator.

31. Coming to the issue at hand, I will start by considering the arguments made on whether there was procedural impropriety b the Respondents in arriving at the decision to require the ex parte Applicant to take plea before the 2nd Respondent. It is also necessary at this stage to restate the applicable constitutional and statutory provisions that provide the framework within which the proceedings of the appeals Board were to be conducted. Article 47 of the Constitution provides as follows in this regard:

"(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."

32. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

"(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."

33. At the core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. The question of whether failure to observe any of these steps renders the decision making by an administrator unfair, will depend on how it effects a party's ability to make representations.

34. The *ex parte* Applicant in this regard admits that the 1st Respondent wrote a letter dated 7th August 2019, informing her of the complaint against her by the Interested Party, and seeking her comments and response within fourteen days for tabling before the 2nd Respondent. The ex *parte* Applicant claims she received the said letter on 21st August 2019, but does not explain why she delayed to respond until 6th September 2019, given that there were specified timelines as regards the said response.

35. It is therefore difficult for this Court to fathom any defect in procedure employed by the 1st Respondent, as the ex parte Applicant was clearly accorded notice and an opportunity to be heard on the Interested Party's complaint before the plea taking, and the *ex parte* Applicant cannot be allowed to rely on her own acts of omission and default to lay blame on the Respondents' doorstep in this regard. Any resulting unfairness is therefore of the ex parte Applicant's own making, and she must bear the consequences.

36. It is also notable *ex parte* Applicant still has an opportunity to state her case before the 2nd Respondent, should the substantive hearing of the Interested Party's complaint proceed. Lastly, as regards the that the *ex parte* Applicant's contention that had she been accorded the opportunity to address the complaints raised there would be no reason to escalate the complaint to the 2nd Respondent, the applicable legal provisions on the 1st Respondent's role do not give it any powers to make such a decision, as is demonstrated later on in this judgment.

37. On whether the Respondents decision to require the ex parte Applicant to take plea is tainted with illegality, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, in **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**,Lord Pearce held as follows on when a public body may lack jurisdiction:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its

purported decision to be a nullity.

38. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application the 2nd Respondent is in this respect established under section 57 of the Advocates Act, and the role and powers of the 1st Respondent in relation to the discipline of advocates arises from the provisions of section 58 of the Advocates Act which prescribes the proceedings before the 2nd Respondent. Subsection 3 of the said section provides that the secretary of the Law Society of Kenya shall be the secretary of the Tribunal and his remuneration, if any, shall be paid by the Society. In addition, the Tribunal may, in the case of absence or inability to act of the secretary, appoint any person entitled to act as an advocate to act as secretary to the Tribunal during the period of such absence or inability to act and in such case the remuneration, if any, of the person so appointed shall be paid by the Society.

39. Section 60 (1) to (3) of the Advocates Act provides for the submission of complaints against advocates to the 2nd Respondent as follows:

> **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.**
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> **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.**
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> **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:**
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> **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.**

40. It is evident from these provisions that the 1st Respondent, as the secretariat of the 2nd Respondent, has the necessary and incidental powers to receive and process a complaint made against an advocate, for purposes of decision making by the 2nd Respondent. The 2nd Respondent on the other hand is the primary decision maker as regards such complaints, and is the authority that makes the decision on whether a complaint merits to proceed to hearing, including the impugned decision. It is therefore the finding of this Court that the 1st and 2nd Respondents that were acting within their powers in receiving and acting on the Interested Party's complaint, including when making the impugned decision, in light of and pursuant to the provisions of sections 58 and 60 of the Advocates Act.

41. On the allegations of bias and ulterior motive in the making of the impugned decision, it is notable that there two types of bias. In the case of actual bias, which arises where a decision maker is influenced by some direct or indirect interest in the proceedings, pecuniary or otherwise, disqualification and recusal is automatic, without there being any "question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case" as stated by Lord Goff in the English case of **R. v. Gough (1993) 2 All E.R. 724.**

42. In the case of apparent bias, which arises as a result of conduct, association or information or knowledge of the decision-maker, the perception of impartiality is measured by the standard of a reasonable observer, and the English House of Lords in ***Magill v. Porter (2002) 2 AC 357***, stated that the test for recusal is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased". This test has been adopted by the Kenyan Courts. in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge**,**[1995-1998] 1 EA 134** and **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR** where the Supreme Court stated that disqualification of a decision maker was imperative even in the absence of a real likelihood of bias or actual bias, if a reasonable man would reasonably suspect bias.

43. In the present application, no evidence was brought by the *ex parte* Applicant of any interest, conduct or association of the Respondents, and particularly the 2nd Respondent as the primary decision maker, which would lead to a likelihood or apprehension of bias in favor of the Interested Party. Lastly, no evidence was also brought of the Respondents involvement or participation in the taxation proceedings relied upon as evidence of an ulterior motive in the decision requiring the *ex parte* Applicant to take plea.

The Disposition

44. All in all, it is my finding that the *ex parte* Applicant's application by Notice of Motion dated 1st October 2020 is not merited for the foregoing reasons. The said application accordingly dismissed with no order as to costs, and the stay orders granted herein on 18th September 2020 are accordingly vacated.

45. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF NOVEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021

A. NDUNG'U

JUDGE