



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

JUDICIAL REVIEW NO. 8 OF 2019

REPUBLIC.....PLAINTIFF

-VERSUS-

THE ADVOCATES DISCIPLINARY TRIBUNAL.....DEFENDANT

AND

PERPETUAL WANGECHI WAITERE.....INTERESTED PARTY

EX PARTE AGNES WAITWIKA ZAMBETAKIS

RULING ON THE NOTICE OF MOTION DATED 29TH MARCH 2019.

1. Leave to bring this Judicial Review application, pursuant to provisions of **Order 53 Rule 3 (1) of the Civil Procedure Rules 2010** was granted to the Ex parte applicant on the 28th March 2019.

2. By a Notice of Motion application dated 29th March 2019, and filed on even date. **Waitwika Zambetakis** the Ex parte Applicant sought the following **Orders**:

*(1) That an Order of **Certiorari** do Issue to remove into the High Court and quash the decision of the Advocate's Disciplinary Tribunal, the Respondent, Contained in a judgment dated 18th March 2019 in **Agnes Waitwika Zambetakis Vs- Perpetual Wangechi Waitere Disciplinary Cause No. 26 of 2017** Ordering that the Interested party's Bills of Costs be taxed or assessed on 20th May 2019.*

*(2) That an Order of **Prohibition** do issue to prohibit or stop the Advocates Disciplinary Tribunal, the Respondent, from taxing or assessing any of the Interested Party's Bills of Costs on 20th May 2019 or thereafter without the Interested Party first complying fully with the Court's Orders made on the 10th October 2017.*

(3) That the Respondent pays the Ex parte Applicant's costs of this application.

3. The grounds for the application are set out in the Statutory Statement and Verifying Affidavit of the Applicant sworn on the 27th March 2019 accompanying the application for leave, and a further affidavit filed on the 24th July 2019.

4. The application was opposed by a Replying Affidavit sworn by the Secretary to the Respondent, Mercy

K. Wambua, and filed on the 26th July 2019.

5. To urge the application, parties filed written submissions. The Interested Party Perpetual Wangechi Waitere also filed her submissions through her Advocates, Githui & Co. The Ex parte Applicant is represented by Magatta & Njogu Advocates while the Respondent's advocates are Gordon Ogola, Kipkoech & Company Advocates.

6. **Brief background to the application**, as may be discerned from the filed documents is that at all material times the Ex parte Applicant was a client of the Interested Party, an Advocate of the High Court, who represented her in both non contentious and general court cases, among them **Nakuru High Court Succession Cause No. 96 of 2000** and **Court of Appeal Civil Appeal No. 221 and 222 of 2007** that emanated from the High Court decision. In its Judgment delivered on the 18th December 2014, the Court of Appeal redistributed the Applicant's mother's estate.

7. Of concern here is that property known as **Nakuru Municipality Block 7/258** was sold and the proceeds of sale deposited in the High Court which then distributed the proceeds amongst the various beneficiaries, including various properties. The Applicants share of Shs.16,120,459/= was received for transmission to the applicant by her Advocates, (the Interested Party herein) as well as five title documents that were given to her.

Out of the five land parcels, the Applicant sold two through her Advocates (I.P). It is her contention that the Advocates failed to pay all the monies received on her behalf by the Advocates and wilfully withheld three title documents to the properties despite requests for their release.

8. As a result, the applicant filed and obtained Orders from this court in the **Succession Cause No. 96/2000 resulting to Orders dated the 10th October 2017**.

In the meantime, the Advocates (I.P) filed her Bills of Costs in **Nakuru High Court Misc. Appl. No. 428/2016** seeking, among others, Orders barring distribution of the proceeds of the estate pending taxation of the Bills of Costs.

In the said **ruling dated 10th October 2017**, the court made Orders in favour of the Applicant, among them that a sum of Shs.6,102,450/= was ordered to be deposited in court within 60 days, and a further sum of Shs.7,395,000/= received from the sale of two properties be also deposited in court by the Advocates pending taxation of the Bill of Costs.

9. It is stated by the Ex Parte Applicant that the Advocate did not fully comply with the court Orders but withdrew the Bills of Costs and the Originating Summons, then proceeded to file the same before the Advocates Disciplinary Tribunal (Respondent) on the 31st July 2018 vide **Misc. Cause No. DTC 26 of 2017**, prompting her to file a complaint against the Advocate before the Respondent.

10. The Applicant's complaint before the Tribunal vide an Affidavit of Complaint sworn on the 3rd February 2017 and received on same date was over the conduct of the Advocate in respect of the handling of the Succession Cause and noncompliance with Court Orders. She prayed for Orders that:

· Perpetual Wangechi Waitere's conduct amount to disgraceful conduct and incompatible with her status as an advocate, and that the said Advocate be admonished, and ordered to pay Kshs.14,134,730/= and further be fined for her disgraceful conduct, including payment of costs of the complaint.

11. In its judgment delivered on the 18th March 2019, the Advocates Disciplinary Tribunal (Respondent) ordered the advocate to file her Bills of costs for taxation on the 20th May 2019. It is this Tribunal's decision that prompted the Ex parte Applicant to file these JR proceedings seeking to quash the decision, and prohibit the Tribunal from taxing or assessing any of the Advocate's Bills of Costs, pending hearing

and determination of the application.

12. I have considered the parties affidavit evidence and written submissions. The facts to the application are largely uncontested. It is evident that there existed an Advocate-client relationship between the Ex parte Applicant and the Advocates which relationship is governed by provisions of the **Advocates Act, Cap 16 Laws of Kenya and the Advocates Remuneration Order**, among others that regulate the conduct and business of Advocates.

13. **The Advocates Disciplinary Tribunal** (the Respondent) is established under the **Advocates Act, Cap 16 Laws of Kenya**.

Section 60(7) thereof empowers the tribunal to assess costs due to a complainant if a bill of costs has not been filed or taxed.

The Advocates costs in this matter had not been taxed though filed at the time this application was filed.

14. **Ex parte Applicant's Submissions and case**

While the Applicant admits that the Tribunal has jurisdiction to tax bills of costs, it submits that the rule of law dictates that it cannot exercise that jurisdiction in violation of a court order.

It submits that the tribunal's decision is illegal, irrational and unreasonable and ought to be quashed through an order of *Certiorari*, and further *prohibit* it from effecting its decision to have the bills of costs taxed, stating that to do so would result to an illegality, and citing the decision in **Teachers' Service Commission V. Kenya National Union of Teachers & 2 others Petition No. 23/2013** to the effect that court orders ought to be obeyed failure to which chaos and anarchy may result, and that if there is dissatisfaction, avenues for challenging it are set out in the law. For the Ex parte Applicant, JR is the avenue.

15. **Respondent's Submissions**

It is submitted that the whole case before the court is the question of quantum of professional fees due to the Advocate for professional services rendered to the Ex parte Applicant, and thus its order for filing and taxation of the Bills of Costs was rational and reasonable.

It is further submitted that in making the orders being challenged, the Tribunal had the necessary jurisdiction, as the Ex parte Applicant rightfully averred in her affidavit that the draft bills of costs were outrageous, and overcharged.

16. It is further submitted for the Respondent that in its Judgment, the Ex parte Applicant conceded that the Advocate had a right of lien over the titles of her properties, but accuses the Advocate for not filing and/or taxing the Bills.

The Respondent Tribunal submits that the issues hereto are not available for Judicial review as such an application seeks to restrain and arrest the Respondent from performing its statutory mandated obligations, yet it is the Applicant who invoked the Tribunal's Jurisdiction by filing the complaint, and once it did what was expected, the applicant faults its decision.

17. Several cases were cited in support of the submissions, among them **Republic –V- Chief Magistrate Milimani Commercial Court & 2 others Ex-pare Violet Ndamu Mutinda & 5 others (2014) e KLR, Ex- parte Kimaiyo Arap Sego, Misc. Appl. No. 1266/2007, R –V- Chairman Business Premises Rent Tribunal & 2 others (2017) e KLR**, all to the effect that judicial review is concerned with the decision making process, not with the merits itself, and whether the persons affected by the decision of the tribunal ere heard before the decision was made, and therefore leading to the decision.

18. In totality, the Tribunal submits and urges the court to find that it cannot be invited to stop a statutory

body from performing its mandate provided by an Act of Parliament as contemplated in the law.

19. **The Interested Party's Submissions**

This party the Advocate, submits that the Court ought to intervene with the tribunal's decision only where there is evident abuse of discretion, the decision is irrational, made in excess of jurisdiction with improper motive, being an abuse of the rules of natural justice and made in error of law – as laid down in the case **Hillary Kipruto Bett V. DPP & 2 others (2016) e KLR and R-V –County Government of Kiambu Ex parte Robert Gakiru & another, (2016) e KLR.**

20. It is further submitted that the entire proceedings before the Respondent Tribunal were devoid of irrationality, unreasonableness or outrageous.

The third party Supports the tribunal's findings on the Applicant's complaint that the dispute between the Advocate and the erstwhile client was clearly a question of quantum of professional fees due to the advocates and thus deemed it fit to order filing and taxation of the Advocates Bill of Costs, for the determination of the Advocates fees, as the most reasonable decision. The court is urged to dismiss the application as lacking in merit.

21. **Analysis and Determination**

In **Republic –v- Kenya Revenue Authority, Ex parte Yaya Towers Ltd (2008) e KLR**, the court rendered that:

“... the remedy of Judicial review is concerned with reviewing not the merits of the decision of which what application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of Judicial review is to ensure that he individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the Judiciary or that of Individual Judges for that of the authority constituted by law to decide the matter in question.”

22. Judicial Review Orders are discretionary. In deciding what relief to grant, the court will look at the conduct of the party applying, and consider whether it has not disentitled itself to the relief, by its conduct.

All parties to this application, that the Ex parte Applicant's desire is to lock out the third party Advocate from her legal and professional fees, by blocking or, arresting execution of the Respondent's Judgment upon her complaint against the advocate.

23. It is on record that the main complaint was what the Ex parte Applicant termed as outrageous and overcharged bills of costs in her affidavit in support of the application.

It is the Ex parte Applicant who invoked the Tribunal's/Respondent's Jurisdiction as mandated under **Section 60 and 67 of the Advocates Act.**

For the remedy of Judicial review to be granted, the applicant must show, in line with the decision **Hillary Kipruto Bett (Supra) and County Government of Kiambu Ex Parte Robert Gakuru (Supra)** that the process in arriving at the decision sought to be quashed and/or prohibited, as in the case hereof, was an abuse of discretion, irrationally arrived at, was actuated by improper motives, an abuse of the rules of natural justice, fettered discretion and the tribunal had not the necessary Jurisdiction.

24. The applicant has not demonstrated any of the above against the Tribunal. It has not shown that the Judgment of the Tribunal was outrageous or was in defiance of logic or acceptable moral or legal standards – **Civil Servants Union V. the Minister for Civil Service (1985).**

Review by a court of the reasonableness of a decision made by a Tribunal with repository power is

concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and the law – **Republic –vs- Betting Control and Licensing Board & another V. Ex parte Outdoor Advertising Association of Kenya (2019) e KLR.**

25. The Ex parte Applicant’s complaint against the Interested Party Advocate was clearly on the matter of legal fees to the Advocate and Titles to properties pending taxation of the Advocates Bill of Costs to determine the professional fees due to the Advocate for services rendered to the applicant.

In the premises, and the only reasonable, rational legally viable and binding manner, and process of resolving the dispute between the applicant and the Advocate was for the Tribunal hear the complaint, upon which it pronounced its decision by a judgment delivered on the 18th March 2019, directing that the Advocate’s Bills of Costs be filed for taxation before the Tribunal as mandated and empowered under **Section 60(7) of the Advocates Act.**

26. In the entire Judicial review application, the Ex parte Applicant has not faulted and/or questioned the process that lead to the decision of the Tribunal as having been unreasonable, irrational, in excess of Jurisdiction or an abuse of the rules of natural justice – **R. V Anti-Counterfeit Agency & 2 others, Ex parte Surgipharm Ltd (2011) e KLR.** No procedural flaws were pointed out.

27. For the foregoing, I find and hold that there are no grounds for granting the Orders of Certiorari or prohibition as sought by the Exparte applicant.

The Notice of Motion dated 29th March 2019 and filed on even date is dismissed with costs to both the Respondent and the Interested Party.

Orders accordingly.

Delivered, signed and dated at Nakuru this 30th day of January 2020.

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J.N. MULWA

JUDGE