



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 3A OF 2017

IN THE MATTER OF: AM APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: AN APPLICATION BY JOHN MUNEENI MAKAU ADVOCATE FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION AND CERTIORARI AGAINST THE DISCIPLINARY TRIBUNAL

AND

IN THE MATTER OF: PROCEEDINGS BEFORE THE DISCIPLINARY TRIBUNAL DISCIPLINARY TRIBUNAL CAUSE NO. 75 OF 2016

AND

IN THE MATTER OF: SECTIONS 57 AND 60 OF THE ADVOCATES ACT

AND

IN THE MATTER OF: SECTION 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTION 4 & 7 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

JOHN MUNEENI MAKAU.....EX PARTE APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

MARY NZEMBI SIMON.....INTERESTED PARTY

RULING

1. Pursuant to leave granted on 17.2.2017, the Ex parte applicant filed a Notice of Motion dated 25/5/2017 seeking the following orders:

a) An order of certiorari do issue to quash the proceedings in Disciplinary Tribunal Cause Number 75 OF 2016.

b) The costs of this application

2. The Application is premised on the grounds set out in the Statement dated 17.2.2017, the accompanying Verifying Affidavit sworn on 25/5/2017, and the Supplementary Affidavit sworn on 15/11/2019 by Ex parte Applicant.

3. The Ex parte Applicant states that his services were retained by the Interested Party in Mombasa CMCC No.2021 of 2010, **Mary Nzambi Simon & anor vs. Kilatya Theophilus & 2 Others.** (hereinafter referred “**CMCC 2021 OF 2012**”). Judgment in the suit was delivered on the 26/6/2013 at Kshs. 916,440/= plus interest and costs.

4. On the 13/11/2011, the Ex parte Applicant received a letter from the Respondent’s informing him that the Interested Party had lodged a complaint based on unpaid proceeds arising out of **CMCC 2021 of 2012**, when in fact, the failure to release the proceeds in time was out of a misunderstanding between the Plaintiffs, and that contrary to allegations by the Interested Party at the disciplinary tribunal that Kshs.806,440/= remained unpaid, according to the Ex parte Applicant and the remaining balance being Kshs.283,960/=, was later on cleared vide cheque dated 21/9/2016 and the Interested Party has no more claim against the Ex parte Applicant.

5. The Ex parte Applicant’s case is that during the pendency of the complaint before the Respondent’s Discipline Tribunal Cause 75 of 2016, the Interested Party had already filed **Mombasa HCCC 27 of 2016(O.S) Mary Nzambi Simon vs. JM Makau & Company Advocates** seeking delivery of cash account in CMCC No. 2021 of 2012, and as such matter being *sub-judice*, the proceedings before the Respondent were void and also bad in law. The two matters proceeded simultaneously until **Mombasa HCCC 27 of 2016(O.S)** was dismissed on the 28/10/2016. The Ex parte Applicant avers, therefore, that the continuance of the proceedings before the Respondent’s tribunal is unjust, unreasonable and prejudicial to the Ex parte Applicant.

Response

6. The Respondent opposed the applications vide Replying Affidavit sworn on the 25/10/2018 by **Mercy Wambu** who is the Respondent’s Secretary and Chief Executive Officer. The Respondent states that the cause before the tribunal was lodged by one **Beautah Siganga** on the 25/6/2016 on the behalf of the Interested Party accusing the Ex parte Applicant of failing to remit funds to the Interested Party after a successful case, and failing to account for funds received. Prior to that, the Interested Party had lodged a complaint with the Complaint’s Commission by virtue of Section 60 of the Advocates Act, and that upon receipt of the Interested Party’s Affidavit, the tribunal found that a *prima facie* case had been established. Consequently, the cause was set down for plea taking on the 19/9/2016.

7. The Respondent states that the Ex parte Applicant was notified of the complaint and that he was required to take plea vide letter dated 29/8/2016. On the 19/9/2016, a plea of not guilty was entered on behalf of the Ex parte Applicant when he failed to show up and the same was communicated to the Ex parte Applicant vide letter dated 16/11/2016. Further, the Respondent states that within the said letter, the Ex parte Applicant was advised of the hearing date of the complaint scheduled on the 5/12/2016. Upon full trial, the Ex parte Applicant was found guilty of professional misconduct in the nature of withholding client’s monies; failing to account for client’s monies; and failing to respond to the Commission’s correspondence.

8. The Ex parte Applicant was advised of the judgment vide letter dated 27/6/2017. He was also advised of the date for mitigation and sentencing. A reminder was issued vide letter dated 10/10/2017 for the mitigation and sentencing scheduled on the 6/11/2017. Further, on the 20/2/2018, the Ex parte Applicant was notified that the disciplinary cause had been fixed for mention on 19/3/2018.

9. It is the Respondent’s case that in spite of service, and notices, the Ex parte Applicant refused and/or ignored and chose not to appear before the tribunal to respond to the complaints raised against him. Consequently, the Respondent’s tribunal followed the due process as mandated under the Advocates’ Act. The Respondent states that it has not in any way been biased or unfair, or condemned the Applicant unheard, or made an error of fact or law, or committed procedural flaw, acted in bad faith and /or abused the fundamental rights of the Ex parte Applicant. Further, the Ex parte Applicant has not by way of Affidavit demonstrated that the Respondent’s action of commencing disciplinary proceedings in Disciplinary Cause 75 of 2016 has occasioned a breach of natural justice or *is ultra vires*.

10. The Respondent states that whereas the proceedings before the Disciplinary Cause No. 75 of 2016 were concluded, and judgment delivered on the 19/6/2017, the tribunal was only made aware of the Judicial Review proceedings on 21/3/2018, when they received a letter forwarding the Ex parte Applicant pleadings in the action.

The Rejoinder

11. The Ex parte Applicant in response to the Replying affidavit filed Supplementary Affidavit sworn on the 15/11/2019. In the said Affidavit, the Ex parte Applicant avers that the Co-Plaintiff in Civil Suit No. 2021 of 2010 one **Joseph Patrick Mutia** did grant consent to the Interested Party herein but only to pursue the said claim in HCCC 27 of 2016(O.S). Aside from that, the Co-Plaintiff did not give any consent in respect to the complainant against the Ex-parte Applicant before the Advocates Complaint commission, owing to the fact that the balance acknowledged as at the time of the proceedings was settled immediately after the said proceedings. Therefore, the Advocate Complaints Commission failed in its duty to carry out due diligence to ascertain whether there was another matter pending before any other Court of competent jurisdiction before instituting and prosecuting the disciplinary case, and whether all the Plaintiff’s in Civil Suit No. 2021 of 2010 had been consulted and had consented to the launching of the complaint against the Ex-parte Applicant.

12. The Ex parte Applicant states that on the 17/2/2017, he made an Application to stay the proceedings in respect of Tribunal Case No. 75 of 2016 drawing attention of the Court to the illegalities tainting the said proceeding. A stay order was issued on the 14/6/2017, and inadvertently served upon the Advocate Complaint Commission instead of the Disciplinary Tribunal on the 16/6/2017. Further, the Ex parte Applicant states that the Advocate Complaint Commission as the complainant on behalf of the Interested Party ought to have drawn the attention of the tribunal to the Court’s order issued against it as it never protested the service of the Court order upon it, and the act of non-disclosure of the existence of the stay orders was mischievous, in bad faith and amounted to sharp practice and was intended to mislead the Disciplinary tribunal to continue indulging in an illegality.

Submissions

13. The Application was dispensed with via written submission, which I have considered. **Mr. Munyoki** Learned Counsel for the Ex parte Applicant identified three issues for determination which are as follows: **whether the decision making process was fair to the Ex parte**

Applicant;whether the Respondent put into account relevant matters before convicting the Ex parte Applicant and whether the decision of the Respondent should be quashed.

14. On whether the decision making process was fair to the Ex parte Applicant, **Mr. Munyoki** reiterated the content of the Ex parte Applicant's Supplementary Affidavit and submitted that the Ex parte Applicant appreciates that the Interested Party had a right to raise issues of professional misconduct. However, under Section 60(9) of the Advocate Act, it is implied that where the substance of a complaint against an advocate is in respect to a sum of monies, then orders shall only issue against the advocate from the Respondent in respect to sum in dispute where the complainant has not filed a civil suit against the advocate.

15. **Mr. Munyoki** further submitted that it is not in contest that HCCC 27 of 2016 was dismissed on a technicality, and if aggrieved, the Interested Party ought to have appealed or reviewed the decision of the High Court and not proceeding with the disciplinary cause in contempt of Stay orders by this Court. Further, Counsel submitted that the Respondent has not explained how it became aware of these Judicial Review proceedings. Therefore, the Interested Party and the Respondent colluded in proceeding with an illegality against the Ex parte Applicant.

16. **Ms. Onyango** Learned Counsel for the Respondent submitted that the Respondent is mandated under Section 60(i) of the Advocates' Act to receive complaint against an advocate for professional misconduct and if in the opinion of the tribunal, the complaint does not disclose a *prima facie* case of a professional misconduct, the tribunal may dismiss such a claim without requiring the appearance of the accused advocate.

17. On *subjudice*, **Ms. Onyango** submitted that Order 52 rules 4 and 7 does not bar a Party who has suffered from invoking the Court's jurisdiction and lodging a professional misconduct claim against an Advocate in the same transaction before the tribunal. Counsel cited **Republic vs. Disciplinary Committee and Anor Ex parte Daniel Kimunda Njue [2016] eKLR** where the Court stated as follows:

“This Court has had occasion to deal with the issue of the concurrency of proceedings before the Respondent Tribunal and in a civil case and held that the mere fact that a party who has suffered a loss as a result therefor is entitled to invoke the Court's jurisdiction under Order 52 rule 7 of the Civil Procedure Rules does not bar a complaint being lodged with the Tribunal on the same issue. “

18. Counsel also submitted that the nature of the complaint before the High Court and the Tribunal though arising from the same transaction, were different in nature, and cannot be said to be similar as to breach the doctrine of *subjudice*. Further, **Ms. Onyango** submitted that Section 60 (9) of the Advocate Act only comes in on the issue of order to make payment.

Determination

19. I have considered the application, the evidence adduced in the form of affidavits, and the submissions filed on behalf of the parties herein. In my view, the following issues arise for determination.

i. Whether the Respondent had jurisdiction to entertain the Interested Party's complaint.

ii. Whether the disciplinary cause no. 75 of 2016 was sub judice.

20. In **George Maina Kamau vs. The County Assembly of Murang'a and 2 others [2016] eKLR** the Court stated:

“Nevertheless, the court is not setting a hard rule that its jurisdiction is limited to only an inquiry into procedural matters. The rule the court is setting is that it will consider all cases where illegality is alleged both in matters of substance and procedure. The court says that it would have to look into merits of the grounds for removal in an appropriate case where a petitioner may seek to show illegality founded upon the county assembly moving against the petitioner under the said section 40 upon illegal grounds; such that illegality would be founded upon the principle of unreasonableness per Lord Greene in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683 thus, “It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”

21. The Ex parte Applicant's complaints are hinged on alleged procedural impropriety, irrationality, and illegality. It is the Ex parte Applicant's case that the Respondent ought not to have entertained the disciplinary proceedings in light of the pending civil proceedings in HCCC No. 27 of 2016(O.S). The broad grounds upon which the Court grants judicial review remedies were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, in which the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** where the Court expressed itself as follows:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is

tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

1. Whether the Respondent had jurisdiction to entertain the Interested Party's complaint.

22. The fact that the Respondent has jurisdiction to entertain the complaint against advocates cannot be doubted. The Advocates Act establishes the Respondent under Section 57(1) of the Act and under Section 60(3) of the Act, the locus of persons who can file a complaint against the Advocate is provided. The said Section 60(3) reads as follows -

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

23. By virtue of Section 60 (4) of the Advocates Act the Ex Parte Applicant herein is brought under the jurisdiction of the Respondent and cannot in any way run away from that jurisdiction as **Section 55** of the Advocates Act provides as follows:

"Every Advocate and every person otherwise entitled to act as an Advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Tribunal."

24. It is the finding of the Court that the Interested Party did not need the consent of the other Plaintiff in Civil Suit No. 2021 of 2010 to file a complaint before the disciplinary tribunal and that the Respondent has jurisdiction to entertain the Interested Party's complaint.

2. Whether the disciplinary Cause No.75 of 2016 was subjudice.

25. In **R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013**, the Court held as follows:

"the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

26. Similarly, in **Republic vs. Disciplinary Committee and Anor Ex parte Daniel Kimunda Njue (supra)** the Court held as follows:

"if the applicant's conduct amounted to a professional misconduct, the mere fact that a civil suit was yet to be determined did not bar the Respondent from entertaining the complaint. Therefore the issues of the Respondent sitting on appeal on a decision of the Court and casting aspersions at the Court do not arise."

27. It is noteworthy that the Ex parte Applicant was notified that he was required to appear before the Respondent Tribunal for plea taking on the 19/9/2016. The Ex parte Applicant was also notified of the hearing date scheduled for the 5/12/2016 vide letter dated 16/11/2016. And vide letter dated 27/6/2017 he was advised of the Judgment and further advised on the date for mitigation and sentencing. Although a sentence is yet to be passed, I note that the Ex parte Applicant has not denied being served with the aforesaid notices. In fact, the Ex parte Applicant avers that on the 17/2/2017, he moved this Court via Application seeking to stay the proceedings in respect of Tribunal Case No. 75 of 2016 and stay orders were issued on the 14/6/2017. Having found that the Respondent has jurisdiction to entertain a claim before it in spite of there being a pending suit, the allegation that the proceedings before the Respondent were *sub judice* is untenable, is without merit and it is the finding of this Court that the issue of whether the disciplinary proceeding were substantially in issue with the issues raised in HCCC No. 27 of 2016(O.S) would have been best handled by the Respondent herein.

28. Lastly, the Ex parte Applicant had made allegations of contempt of court against the Respondent. This Court on the 26/7/2017 directed the Applicant to take the appropriate action in relation to the said contempt. Since there is no formal application on the issue of contempt of Court, I will not say any more, except to observe that there is an admission by the Ex parte Applicant that the order staying the Respondent's proceedings was inadvertently served upon the Advocate Complaint Commission instead of the Respondent.

29. From the foregoing, this Court finds and holds that the Ex parte Applicant has not demonstrated why this Court should issue an order of certiorari to remove into the Court and quash the proceedings in Disciplinary Tribunal Cause Number 75 of 2016. The orders sought, therefore, cannot be granted. The judicial review application is refused, and is dismissed with costs to the Respondent.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 29th day of July, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

M/s. Baraza holding brief Ms. Onyango for Respondent

Mr. Munyoki for Applicant

Mr. Kaunda Court Assistant