REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 384 OF 2018

IN THE MATTER OF: AN APPLICATION FOR THE ORDER OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

ROSEMARY CHEGE NJAMBI.....INTERESTED PARTY

EX PARTE: ODHIAMBO TOM ANYANGO

JUDGMENT

1. Pursuant to leave granted on 19th September, 2018, the ex-parte applicant filed a Notice of Motion dated 19th September, 2018 seeking the following orders:

> **a) An order of Certiorari be and is hereby issued to bring the decision of the Advocates Disciplinary Tribunal, the Respondent, as read and dated the 16th day of July, 2018 into this court for the purposes of it being quashed.**
>
> **b) The costs of these proceedings be borne jointly and severally by the Respondent and the Interested Party.**

The application is supported by the grounds set out in the Statement dated 14th September, 2018, the accompanying affidavit of ODHIAMBO TOM ANYANGO sworn on 14th September, 2018 and his further affidavit of 18th September, 2018.

2. The Ex-parte applicant alleges that at all material times the firm of **Ochieng', Onyango, Kibet & Ohaga Advocates** was instructed to act for Echuka Country Estates Limited (herein after to be referred to as "the client") in their sale to the Interested Party of unit No. 1.1 that is being constructed by Echuka Country Estate Limited at Tigoni, the said property being on LR No. 155/20 Kiambu. However, the ex-parte applicant alleges that he was never instructed to act for the client in his personal capacity and there has never been a client-advocate relationship between him and the Interested party.

3. The ex-parte applicant claims that there was no written agreement between the Interested Party and the client except an acknowledged letter of offer dated 25th November, 2009 drawn by Ryden International where the Purchaser/Interested Party's advocates were shown as Joyce W. Njoroge, Advocates and the client's advocates were shown as Kaplan & Stratton Advocates. This being the case, the ex-parte applicant states that no funds as between the Interested Party and the Client were ever received, disbursed or handled by him in his personal capacity.

4. The ex-parte applicant alleges that on 6th October, 2015, the Interested Party filed a complaint before the Respondent claiming that on 6th September, 2018 she had paid a total of Kshs. 3,800,000/= to the firm of **Ochieng', Onyango, Kibet & Ohaga Advocates** following an offer by the client vide a letter dated 25th November, 2009 to sell her specific property. However, following disagreements with the Client she had withdrawn her interest in the property but the firm has since refused to refund her monies.

5. According to the Ex-parte Applicant, the interested party did not make any allegations of professional misconduct, which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate against the firm or himself as provided for under Section 60(1) of the Advocates Act.

6. The then secretary of the **Law Society of Kenya** drew the Ex-parte Applicant's attention to the said affidavit requiring him to give his written comments on the same within 14 days.

7. The ex-parte applicant responded to the allegations vide a replying affidavit sworn on 20th July, 2016 setting out the manner in which he had handled the transaction and filed it with an affidavit sworn by the client's director who acknowledge receiving the amount in question from the firm.

8. It is the ex-parte applicant's case that he was never called upon to attend any hearing before the Respondent but judgment was delivered on 16th July, 2018 finding him guilty of professional misconduct for withholding the Interested Party's money. He was subsequently required to refund the said amount within 60 days and thereafter appear before the Respondent on 17th September, 2018 for mitigation and sentencing.

9. The Ex-parte Applicant who claims to have had an illustrious and unblemished legal career spanning over three decades finds his professional standing and reputation now in serious jeopardy by this finding defined as disgraceful or dishonorable under Section 60(1) of the Advocates Act, when there was no complaint made against him; and furthermore when there was an affidavit by the client that the firm had actually paid the money to it as agreed by the Interested party and it was making arrangements to refund the Interested party after it withdrew from the transaction.

10. The ex-parte applicant alleges that the jurisdiction of the Respondent under Section 60(1) and (2) of the Advocates Act is invoked where it is shown that there exists a client-advocate relationship between the complainant and the advocate. According to the ex-parte applicant, there was no client-advocate relationship between him and the Interested Party.

11. Further, under Section 60(4) of the Act, a decision that an advocate committed professional misconduct can only arise after the Respondent has heard both the complaint and the advocates. The Ex-parte Applicant laments that he was never accorded an opportunity to be heard by the Respondent thus his rights under **Sections 4(3) and (4) of the Fair Administrative Action Act** were violated.

12. It is the ex-parte applicant's case that the Respondent made a finding of professional misconduct against the Applicant where no such prayer was sought by the applicant. Further, the findings of the Respondent were riddled with irrationality and unreasonableness as no person or entity addressing its mind to the provisions of Section 60 of the Advocates Act would reach such decision with the facts and circumstances laid before it.

13. The decision was delivered by among others, one Professor M. N Wabwile, who had been elected by the Law Society as a member in March, 2018, when the matter had been pending for judgment for close to two years, which is inconceivable.

14. Also, the ex-parte applicant claims that the impugned decision dated 16th July, 2018 was written, read and signed by one Ocharo Kebira who at the material time was not a member of the Respondent as his membership had ceased on 22nd February, 2018.

15. The Respondent responded to the application by way of a Replying Affidavit sworn on 21st November, 2018 by MERCY WAMBUA, its Secretary.

16. The Respondent avers that upon receipt of a complaint against the Applicant dated 15th April, 2015 from the Interested Party on the 6th October, 2015, the Respondent proceeded to inform the applicant and fixed the matter for plea taking on 11th January, 2016 and the applicant responded vide two affidavits dated 20th July, 2016.

17. The Respondent went on to aver that the Applicant in a letter dated 7th January, 2016 informed them that there had been efforts to settle the matter with Echuka County Estates and sought to have the plea deferred. That he annexed an affidavit sworn by a Mr. Cege to confirm this. The Applicant is said to have filed a replying affidavit dated 20th July, 2016 and another from Mr. Cege Thuo.

18. The Respondent claims that the Ex-parte applicant was informed of the hearing of the complaint-**Disciplinary Cause No. 17 of 2016** slated for 20th February, 2017 vide letter dated 30th January, 2017. On the said day, the Respondent heard the matter and subsequently delivered its judgment on 16th July, 2018 and informed the applicant of the orders issued by the Respondent vide a letter dated 18th July, 2018. A copy of the judgment was enclosed in the same.

19. The Respondent contents that **Section 4 of the Law Society of Kenya Act, Cap 18 Laws of Kenya,** is established to protect and assist members of public in matters touching, ancillary or incidental to the law, hence has the mandate to receive, hear and determine complaints lodged against advocates such as the one lodged against Ex-parte Applicant herein. And that, **Section 57 of the Advocates Act,** establishes the Respondent to deal with professional misconduct on the part of Advocates.

20. The Respondent contends that under **Section 60 of the Advocates Act,** the Respondent has the mandate to receive a complaint from any person against an advocate accused of disgraceful and dishonorable conduct incompatible with the status of an advocate and **Section 60A (c) of the Advocates Act** allows a complaint to be brought by any person before the Disciplinary Tribunal.

21. As for whether the ex-parte applicant was granted a fair hearing, the Respondent avers that the applicant was allowed to file responses to the complaint and therefore participated in the hearing. The Respondent went on to state that **Rule 18 of the Advocates Disciplinary**

Tribunal Rules allows a tribunal to determine a matter by affidavit evidence and that at no point did the ex-parte applicant request for the complaint to be determined by way of viva voce evidence nor make an application to cross examine the complainant, hence the Disciplinary Tribunal was in perfect order to proceed with the hearing as it did.

22. As for the participation of one Ocharo Kebira as a member of the Respondent despite her term running out, the Respondent avers that **Section 57(3) of the Advocates Act** provides that before any changes are made in the respondent during the period of elections, the panel handling various matters would finalize their pending judgments and rulings before exiting and thus no prejudice was occasioned on the Applicant by this.

23. As for Prof. Wabwile who the ex-parte applicant claimed had been recently elected to the Respondent after the complainant was initiated, the Respondent states that Prof. Wabwile signed the impugned judgment as a witness of the panel and not as a member of the Respondent who had written the judgment.

24. The Respondent claims that the ex-parte applicant has already complied with the Respondent's judgment as he has refunded the Interested Party the Kshs. 3,800,000/=as shown in the letter dated 11th September, 2018.

25. It is the Respondent's case that if the ex-parte applicant is aggrieved by the judgment he should file an appeal as provided for under Section 62 of the Advocates Act.

26. The application was canvassed by way of written submissions.

THE EX-PARTE APPLICANT'S SUBMISSIONS.

27. The ex-parte applicant filed his submissions on 20th November, 2018. Mr. Masika, learned Counsel for the ex-parte applicant submitted that the decision of the Respondent was tainted with illegality, irrationality and procedural impropriety. Counsel stated that the complainant in her affidavit of complaint needed to show that there existed a client-advocate relationship between her and the ex-parte applicant and that the ex-parte applicant exhibited professional misconduct. Counsel argued that the only advocate-client relationship that existed was between **Ochieng' Onyango, Kibet & Ohaga Advocates** and the **Interested Party** and not the ex-parte applicant and the Interested Party. Therefore, Counsel opined that the monies complained of were paid to the firm of M/s Ochieng' Onyango, Kibet & Ohaga Advocates and not personally to the ex-parte applicant.

28. Mr. Masika faults the Respondent for finding that the ex-parte applicant committed professional misconduct yet he did not receive any money from the Interested Party. Counsel suggested that the ex-parte applicant was a mere agent of a disclosed principal to whom funds were paid to and who later transmitted the funds to the client, which client was willing to reimburse the paid sums to the Interested Party.

29. Mr. Masika submitted that the ex-parte applicant's right to be heard was breached by the Respondent. Counsel pointed out that under **Section 60(4) of the Advocates Act,** the Respondent can only reach the decision that an advocate has committed professional misconduct after hearing both the complainant and the advocate. In this case, the ex-parte applicant was never invited to the hearing before the Respondent. According to Counsel, the Respondent's contention that the affidavit evidence submitted to it was sufficient to enable the Disciplinary Tribunal determine the matter cannot stand as the Respondent ought to have subjected the ex-parte applicant to an oral hearing, in adherence to the right of fair trial.

30. Mr. Masika submitted that the decision of the Respondent was illegal and singled out that one of the persons who delivered the impugned decision was one Professor M.N. Wabwile who was elected to the Respondent this year despite the complaint having been in pendency before the Respondent for close to two years. Also, Counsel pointed out that one Ocharo Kebira was among the members who participated in delivering of the impugned judgment yet she had ceased to be a member of the Respondent. Counsel concluded that the impugned decision was illegal as it was written, read and signed by persons who ought not to have sat as required by the provisions of Section 57 of the Advocates Act.

THE RESPONDENT'S SUBMISSIONS.

31. The Respondent filed its submissions on 22nd November, 2018. Mr. Olembo, learned Counsel for the Respondent submitted that under **Section 57 and 60 of the Advocates Act,** the Respondent acted within its mandate to entertain the complaint by the Interested Party. Further, Counsel contended that the Respondent afforded the applicant an opportunity to be heard as he was allowed respond to the application by way of a replying affidavit. Alternatively, Counsel submitted that **Rule 18 of the Disciplinary Tribunal Rules** allows the Respondent to determine a complaint by way of affidavit evidence. However, Counsel opined that the ex-parte applicant waived his right to be heard as he neither requested the Respondent to proceed by way of viva voce evidence nor did he seek to cross examine the complainant.

32. Mr. Olembo submitted that the applicant being aggrieved by the decision of the Respondent ought to have challenged the same by way of a civil appeal and not judicial review. Counsel contended that the ex-parte applicant in purporting to challenge the decision of the Respondent through these proceedings, which is a wrong forum is misconceived as this court has no jurisdiction re-evaluate the decision of the Respondent.

33. On the issue of Ms Ocharo and Mr. Wabwile sitting as members of the Respondent during the delivery of the judgment, Mr. Olembo submitted that although Ms. Ocharo was not a member of the Tribunal as at the date of delivery of the judgment, Ms. Ocharo who had been involved in the complaint through since its institution as member of the Respondent and by virtue of **Section 57(3),** was allowed to with the sole purpose of remaining in office to deal with complaints she was involved in until the same are disposed of. As for Mr. Wabwile, Counsel asserted that he was elected to serve in the Tribunal on 23rd March, 2018 and on the day of the impugned judgment, being a member of the panel sitting on that day, he signed the judgment as witness to it being read out and not as an author of the judgment.

DETERMINATION.

34. In considering the Ex-parte Aplicants' application, I have read through the pleadings, submissions, cited authorities and the law. I find that the following issues arise for determination.

(a) Whether the Ex-parte Applicant exhibited unprofessional conduct as alleged by the Interested Party;

(b) Whether the Advocates Disciplinary Tribunal accorded the Ex-parte Applicant the right to be heard;

(c) Whether this court sitting as a judicial review court has the mandate to review the decision grant the order of certiorari sought by the Ex-parte Applicant;

(d) Whether the Tribunal was properly constituted at the time of decision;

(e) Who is to pay costs?

35. On the issue of whether the Ex-parte Applicant exhibited unprofessional conduct, the ex-parte applicant seeks an order of certiorari to quash the decision of the Respondent dated 16th July, 2018. The ex-parte applicant contends that the said decision was tainted with illegality, irrationality and procedural impropriety and that the said decision breached the applicant's right to be heard. The Respondent on its part claims that the decision was well within its mandate and if the applicant is aggrieved by the same he should file a civil appeal.

36. An order of certiorari is issued where a public authority has acted without or in excess of its jurisdiction, where the decision is based on some illegality or where the authority relied on irrelevant matters in reaching the decision.

37. In the complaint lodged before the Respondent filed on 6th October, 2015, by way of affidavit sworn on 15th April, 2015, one Mr. Tom Onyango is mentioned at paragraphs 5 and 6 as the advocate who received payments from the Interested Party, which Mr. Tom Onyango is the ex-parte applicant herein. The Ex-parte Applicant alleged that the Interested Party instructed the firm of M/s Ochieng Onyango, Kibet & Ohaga Advocates and not him in his personal capacity.

38. The ex-parte applicant claims that the Respondent had no jurisdiction to entertain the complaint as there was no advocate-client relationship between him and the said Interested Party. The Ex-parte applicant relied on Section 60(1) of the Advocates Act which provides that "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".

39. It is not in dispute that the firm of Ochieng', Onyango, Kibet & Ohaga Advocates was instructed to act for both the Interested Party and the Client. There was therefore an advocate-client relationship between the firm and the Interested Party.

40. In my understanding, the ex-parte applicant was practicing under the firm name of Ochieng', Onyango, Kibet & Ohaga Advocates and he was the advocate who dealt with the transaction leading up to this matter. The ex-parte applicant was therefore acting on behalf of the firm. The registration of advocate's firms is by way of business names which place liability upon the owners of the business name. The rationale here is not for the Act to target members in their individual capacity but is aimed at making them jointly and severally responsible. The Tribunal is therefore required to determine whether the advocate acted outside of the law firm to the exclusion of the other members of the company to make the advocate singly liable to the exclusion of other members. For example, it ought to be shown that the said advocate was running a transaction against the interest of the law firm to the exclusive benefit to himself. Such was not the evidence and the said money was refunded to the interested party on the instructions of the law firm through its bankers.

41. Also, the ex-parte applicant contended that the complainant did not establish that the ex-parte applicant exhibited professional misconduct as the complainant did not reveal any action by the ex-parte applicant that was disgraceful or dishonorable incompatible with the status of an advocate. The ex-parte applicant went on to explain in detail how the money complained of was forwarded to the client and that after the transaction failed, the client undertook to refund the money to the Interested Party.

42. From the above, it is quite evident that the ex-parte applicant is making an attempt at re-evaluating the merits of the complaint. The ex-parte applicant seems to suggest that the Respondent arrived at the wrong decision having failed to appreciate the evidence or facts brought out by the ex-parte applicant. It has been held that Judicial Review is not concerned with the merits of the decision but rather the process by which the decision was reached. This was the finding of the court in **REPUBLIC VS. ATTORNEY-GENERAL & 4 OTHERS, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014]**;

> **"Judicial review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether decision-maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters."**

43. However, this then takes me to the issue of whetehr the Judicial Review court coukld eneterain this application. The mandate of a court sitting as a Judicial Review court has been expanded by the Constitution of Kenya, 2010 and the Fair Administration Actions Act. The position that the Respondent has a mandate to investigate complaints of professional misconduct lodged against advocates and if it finds the complaint is merited, goes ahead to have a hearing, and this court cannot come in to stop the Respondent unless the complaint is properly before it no longer obtains in the new dispensation of justice. The notion that this court cannot be concerned with whether the decision reached is right or wrong as this is a preserve of a court exercising its appellate jurisdiction, is a position that was obtaining before the promulgation of the Constitution 2010. Article 23(3)(f) gives this court as a Constitutional court power to make judicial review orders where

proceedings are brought under Article 22 of the same Constitution where individual rights and freedoms are threatened. Judicial Review procedure has been expanded so as to fill the vacuum that existed in the former Constitution, where citizens would only challenge the decision and not how it was arrived at. In the old dispensation, justice was founded more in procedural actions, hence the need to protect the process.

44. Under Article 47(1)(2) and (3) of the Constitution, 2010, the role of the court has been expanded when sitting a Judicial Review court. The elements listed under Article 47(1) allow the court to go beyond procedure and determine the legality of the process and the decisions. It has therefore opened the door for parties to elect fora to ventilate their grievances and so the remedy is not restricted.

45. Section 67 of the Advocates Act Cap 16, gives the right of appeal to an aggrieved advocate. That right is not shared by the complainant because the complainant continues to enjoy the orders given and therefore cannot have his cake and eat it! The submissions by the Respondent that the Ex-parte Applicant ought to have appealed is not correct because there is no bar to parties applying for remedy by way of Judicial Review to afford them a second chance if they lose because they also continue to enjoy their rights ante.

46. As for whether the Ex-parte Aplicant was accorded a right to be heard, the ex-parte applicant submitted that his right to be heard was violated. He stated that under Section 60(4) of the Advocates Act the Respondent must hear both the complainant and the advocate. He further submitted that if he had been afforded an opportunity to be heard he would have provided the Respondent with crucial information that was not in the documents before the Respondent which would have enabled the Respondent to reach an informed decision.

47. The Respondent claims that vide a letter dated 30th January, 2017, the ex-parte applicant was informed of the hearing of the complaint vide **Disciplinary Cause No, 17 of 2016** which would be heard on 20th February, 2017. Further, the Respondent urged the court to take cognizance of Rule 18 of the Advocates Disciplinary Tribunal Rules which allows a Tribunal to determine a matter by affidavit evidence. Alternatively, the Respondent stated that the ex-parte applicant ought to have requested that the complaint be canvassed by way of viva voce evidence or to cross examine the Interested Party.

48. I have carefully read through the replying affidavit by the Respondent filed on 22nd November, 2018. The Respondent at paragraph 3.7 purports to have annexed the letter dated 30th January, 2017 and marked the same as "MW-6". However, a close perusal of the annexures reveals "MW-6" to be the impugned decision. I could not find the letter dated 30th January, 2017 allegedly sent to the ex-parte applicant by the Respondent informing him of the date of hearing of the complaint.

49. Section 60 (4) of the Advocates Act provides the following consequences when the Respondent finds an advocate to have committed professional misconduct:

> **"After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—**
>
> **(a)that such advocate be admonished; or**
>
> **(b)that such advocate be suspended from practice for a specified period not exceeding five years; or**
>
> **(c)that the name of such advocate be struck off the Roll; or**
>
> **(d)that such advocate do pay a fine not exceeding one million shillings; or**
>
> **(e)that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit."**

50. The consequences of being found guilty of professional misconduct are very dire. They include an advocate being struck off the Roll. In my opinion, and bearing in mind these consequences, the Respondent ought to have ensured that the ex-parte applicant is granted an opportunity to be heard so that he can defend himself against the allegations of the Interested Party. As stated above, there is no evidence to show that the Respondent did inform the ex-parte applicant of the date of the hearing of complaint to enable him elect to have the Disciplinary Tribunal rely on his affidavit evidence or be heard viva voce. The purported letter dated 30th January, 2017 is not on record. The court cannot conclusively state that the applicant was informed of the date of the hearing.

51. Be that as it may, the Respondent opted to rely on the provisions of Rule 18 of the Advocates Disciplinary Tribunal Rules which provide that the Tribunal has the discretion to determine a matter on affidavit evidence. While the Respondent had the right to exercise its discretion, it also ought to have considered the implications of its decision. A decision of the tribunal may have the effect of taking away an advocate's livelihood. This being the case it would only be fair that the Respondent affords an advocate against whom a complaint is lodged an opportunity to be heard.

52. In my view, the right to be heard commences with informing the advocate of the date of hearing so as to enable him or her to be present. If the advocate chooses not to attend, then he or she cannot claim that their right to be heard was infringed. In this case there is no evidence that the ex-parte applicant was informed of the date of the hearing. But vide a letter dated 18th July, 2018, he was informed of the decision of the Respondent.

53. It is an accepted rule of law that no person should be condemned unheard. The ex-parte applicant with the approval of this court cited the case of **Russel v. Duke of Norfork [1949] 1 ALL ER** where the court opined that:

> **"Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case".**

54. I therefore find that the Respondent did not afford the ex-parte applicant the right to present his case before the Respondent and defend the claim lodged against him by the Interested Party.

55. Another ground for the application was that the Respondent was not properly constituted as at the time of making the decision. The ex-parte applicant took issue with the participation of Mr. Wabwile and Ms. Ocharo in the decision making.

56. The issue of participation of Ms. Ocharo can be conclusively dealt with by applying Section 57(3) of the Advocates Act which reads as follows:

> **(3)In the event of there being any complaint or matter pending before the Tribunal at the date of retirement of any member and such member being a member of a tribunal thereof which had, prior to such date, entered upon the hearing thereof in accordance with section 60, that member shall, in the event of his not being re-elected, be deemed to remain in office for the purpose only of such complaint or matter and shall so remain until such complaint or matter has been finally disposed of.**

M/s. Ocharo was a member of the Respondent when the complaint was lodged. However, at the time of reaching of the decision, July 2018, Ms. Ocharo had not been re-elected to the Respondent in the elections held in March, 2018. However, Section 57(3) above allows a retired member to remain in office for the purpose of disposing of matters that were pending from when the person was a member of the Respondent. The ex-parte applicant does not dispute that Ms. Ocharo was a member of the Respondent during the pendency of the complaint. Therefore, Ms. Ocharo was allowed to sit in the Tribunal and participate in the writing, reading and signing of the judgment.

57. As for Mr. Wabwile, he was recently elected to the Tribunal in the elections that were held early this year. The Respondent argued that Mr. Wabwile did not participate in writing of the judgment but rather signed the said judgment as a witness. Under Section 58 of the Advocates Act, during its proceedings the Tribunal can be constituted of three or five members. I have carefully examined the decision dated 16th July, 2018. The impugned decision is signed by Ocharo Kebira, E. Wanjama and A. Weda. Below the said signatures is the signature of I believe Mr. Wabwile. The name of Mr. Wabwile is handwritten unlike the other three. While Mr. Wabwile was not a member of the Tribunal at the institution of the complaint and during its pendency, I am inclined to believe that he only signed the judgment as a witness and not as one of its authors. Therefore the ground that the Respondent was not properly constituted fails.

58. I do note, however, that the ex-parte applicant did attempt to comply with the impugned decision. Annexed to the application is a letter dated 11th September, 2018 addressed to the Chief Manager, Prime Bank Limited requesting the said bank to transfer a sum of Kshs. 3,800,000/= to the Interested Party. This court can conclusively find that the money was indeed transferred to the Interested Party.

59. Be that as it may, and to the extent that the ex-parte applicant's right to be heard was breached by the Respondent, the decision issued by the Respondent on 16th July, 2018 cannot stand. The right to be heard is a fundamental right under Article 50 of the Constitution and is one of the rights that cannot be limited as per Article 25(c) of the Constitution.

60. For these reasons, the application dated 19th September, 2018 is allowed. Orders are issued as follows:

> **a) An order of certiorari be and is hereby issued to bring into this court the decision of the Respondent dated 16th July, 2018 for the purpose of it being quashed and the same be and is hereby quashed.**
>
> **b) Costs of this application to be borne by the Respondent.**

Dated, Signed and Delivered in Nairobi this 29th Day of March 2019.

_____

D. CHEPKWONY

JUDGE.