REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 132 OF 2018

PETER GICHUKI KING'ARA.....PETITIONER

VERSUS

THE ADVOCATES DISCIPLINARY

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

MICHAEL MUCHUI CHEGE.....2ND RESPONDENT

JUDGMENT

BACKGROUND

1. This petition originates from a suit that was filed by the 2nd respondent before the Environment and Land Court (ELC) in **case No.535 of 2008**, **Michael Muchui Chege-vs- David Mburu Githere** wherein the 2nd respondent alleged that the defendant therein one **David Mburu Githere** (vendor) agreed to sell to him land reference **No. LRN 36/1/329/1** (hereinafter **"the suit land"**) and that he paid to the said vendor the sum of Kshs. 2,197,000. The 2nd respondent further alleged that the vendor soon thereafter breached the terms of their said contract by selling the suit land to other parties. The 2nd respondent thereafter instructed the petitioner herein to act for him in the said ELC matter but later claimed that the suit was dismissed for want of prosecution due to the failure on the part of the petitioner to list the suit for hearing thereby prompting the 2nd respondent to file a complaint to the 1st respondent being Disciplinary Case No. 16 of 2015.

2. The petitioner filed a response to the complaint and also filed an application before the ELC seeking to set aside the order dismissing the 2nd respondent's suit for want of prosecution. The petitioner then requested the 1st respondent to stay its proceedings so as to await the determination of the application seeking the setting aside of the dismissal order. The petitioner claims that his request for stay of proceedings was allowed by the 1st respondent but alleges that while the ruling before the ELC was still pending, the 1st respondent entered judgment against him thereby precipitating the filing of this petition. **Petitioner's case**

3. Through this petition the petitioner challenges the proceedings and verdict of the 1st respondent in the said Disciplinary Case No. 16 of 2015 and seeks the following orders:

> ***1) A declaration that Rule 18 of the Advocates (Disciplinary Tribunal) Rules is unconstitutional and contra statute- to wit the Advocate Act and the Fair Administrative Actions Act and the same be quashed.***
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> ***2) A declaration that all complaints to the Disciplinary Committee must first be processed through the complaints commission in view of the express provisions of Section 53 (1) and (4) of the Advocate Act and the proceedings and Judgment in Disciplinary Cause No. 16 of the 2015 be quashed.***
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> ***3) An order directing the first respondent to set up the Regional Committee of the Disciplinary Tribunal as mandated by Act No. 7 of 2007 or Section 58A of the Advocates Act to enable the Disciplinary Tribunal get more time to conduct its affairs with the provision of the Constitution and the Fair Administrative Actions Act.***
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> ***4) A declaration that the complaint filed by the 2nd respondent to the 1st respondent was not a complaint against an advocate for Professional Misconduct and the decision by the 1st respondent to summon to take a plea and to enter judgment dated 11th July 2016 against the petitioner was a violation of the petitioners constitutional rights to a fair trial, fair administrative action, access***

to justice and dignity as provided in Articles 28, 31, 47, 48, 50 and 159 of the Constitution of Kenya(2010).

5) A declaration that 2nd respondent conduct of the Disciplinary Cause No. 16 of 2015 is null and void and in breach of the Rules of natural justice and fair hearing under 27, 28, 31, 47, 48, 50 and 159 of the Constitution of Kenya(2010). Section 58 of the Advocates Act and Section 4-7 of the Fair Administrative Actions Act and the entire proceedings relating to Disciplinary Cause No. 16 of 2015 relating to the petitioner be quashed and nullified.

6) A declaration that the judgment of the 1st respondent violated the rights of the petitioner under Articles 40, 47 and 50 of the Constitution of Kenya and is null and void.

7) A permanent injunction be issued restraining the 1st respondent from proceeding with the mitigation and sentencing and prohibiting the Law Society of Kenya by itself or and/or Disciplinary Committee from continuing taking out any disciplinary Committee Cause No. 16 of 2015 or continuing with the proceedings in Disciplinary Committee Cause No. 16 of 2015.

8) Costs of this petition.

9) Any or further order that this Honourable Court may deem just and fit to grant.

4. The petitioner's case is supported by his affidavit sworn on 9th April 2018 in which he states that the proceedings in the disciplinary cause flouted the law were in breach of his fundamental rights and freedoms. In this regard, the petitioner contends that the letter which initiated the impugned disciplinary process before the 1st respondent was authored by the secretary of the Law Society of Kenya and not the 2nd respondent which, according to him, was not procedural as it amounted to hijacking of the entire disciplinary process by the 1st respondent who did not make any enquiry into the complaint.

5. The petitioner contests the guilty verdict that was entered against him by the 1st respondent and challenges the procedure that was adopted by the 1st respondent in dealing with the 2nd respondent's complaint against him. He states that the 1st respondent proceeded to fix the complainant for hearing before exhausting the other procedures set out in the Advocates Act contrary to the provisions of Article 159 (1) (c) of the Constitution which provides for alternative forms of dispute resolution. He states that the 1st respondent denied him an opportunity to cross examine the 2nd respondent while citing the provisions of Section 18 of the Advocate (Disciplinary Tribunal) Rules which Rules, he maintains, is unconstitutional and contravenes Section 4(4) (c) of the Fair Administrative Actions Act.

6. He further states that the 1st respondent frustrated his efforts to present his case by denying him an opportunity to present his case, through oral evidence and further affidavit and, by proceeding with the case in his absence. He further states that the 1st respondent prosecuted the complaint exparte and rendered a verdict even after the 2nd respondent had abandoned the complaint. He contends that the actions of the 1st respondent violated his constitutional rights under Articles 10, 24, 26, 27, 28, 29, 35, 46 and 47 of the Constitution.

7. The petitioner also challenges the composition of the 1st respondent's panel which he argues, was not properly constituted and kept on changing at every hearing. At the hearing of the petition, the petitioner submitted that the tribunal did not grant him a fair hearing and proceeded to grant the 1st respondent an award of kshs 2 million yet the 2nd respondent/ complainant did not make any claim to that effect.

The 1st respondent's case

8. The first respondent opposed the petition through the replying affidavit of its secretary and Chief Executive Officer sworn on 7th June 2018 wherein she avers that the 1st respondent received a complaint against the petitioner alleging that the petitioner had committed acts of professional negligence by failing to execute the instructions that he had given to him in the Environment and Land Court case and by not taking steps to prosecute the said case thereby leading to its dismissal for want of prosecution.

9. She states that the 1st respondent considered the complaint and arrived at the verdict that the 2nd respondent did not receive sufficient and/or adequate professional services despite the fact that he had paid legal fees, whereupon the 1st respondent ordered the petitioner to pay to the 2nd respondent the sum of kshs. 2,197,000 which he had lost as a result of the petitioner's professional misconduct.

10. She concedes that the 1st respondent proceeded under Rule 18 of the Advocates (Disciplinary Tribunal) Rules in its proceedings whereby only the parties' affidavits were considered and a decision arrived at based on the said affidavits. She avers that the tribunals proceedings were based on the law and that the members of the panel performed their duties as was required by the law.

11. At the hearing of the petition, Mr. Mwinzi learned counsel for the 1st respondent submitted that the petitioner was duly represented by an advocate at the hearing before the Tribunal when the matter was heard by way of affidavit evidence in line with the provisions of Rule 18 of the Rules and that the petitioner's advocate did not object to the procedure adopted by the Tribunal. Counsel further submitted that the petitioner did not request to cross examine the 2nd respondent during the Tribunal's hearing.

Analysis and determination.

12. I have considered the pleadings filed herein, the parties' respective submissions together with the law and the authorities that they cited. The main issues that fall for determination are as follows:

a) Whether in handling the complaint lodged by the 2nd respondent, the 1st respondent violated the petitioner's constitutional rights.

b) Whether Rule 18 of the Advocates (Disciplinary Tribunal) Rules is unconstitutional.

c) Whether the petitioner is entitled to the orders sought in the petition.

13. From the outset I wish to point out that in arriving at the issues for determination, this court is alive to the fact that this is a constitutional petition and will confine itself to determining only the issues touch on the constitution or its interpretation. In this regard, I will not delve into determining the issue of whether or not the Tribunal was properly constituted as this is an issue which the petitioner should have pursued on an appeal.

14. The petitioner alleges that the respondents violated his constitutional rights under Articles 27, 28, 31, 47, 48 and 50 of the Constitution. It is now trite law that anyone who alleges a violation of fundamental and constitutional rights must set out, with precision the nature of the rights violated and the manner of such violation. Article 27 and 28 of the Constitution provides for equality and freedom from discrimination and right to dignity respectively while Article 31 provides for the right to privacy. In the present case, I am unable to find that the any of the petitioner's rights under Articles 27, 28 and 31 of the Constitution were violated. No material was placed before me to show that the petitioner was mistreated, discriminated against or had his right to privacy violated by the 1st respondent during the hearing of the disciplinary case filed against him.

15. Article 47 grants every person the right to fair administrative action that is efficient, expeditious, lawful and procedurally fair. The said Article 47 stipulates that 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.

16. Article 48 and 50 on the other hand provide for the right to access justice and the right to fair hearing respectfully. Article 159 provides, inter alia, that judicial authority is derived from the people and vests in the court and the tribunal established under the constitution.

17. The petitioner challenged the manner in which the 1st respondent conducted the disciplinary proceedings. His case was that the 1st respondent hijacked the impugned disciplinary proceedings by authoring the complainant letter against him when the letter ought to have been written by the 2nd respondent/complainant. The petitioner also contended that he was not accorded a fair hearing before the Tribunal as he was denied the opportunity to cross examine the complainant (2nd respondent) on the contents of his affidavit and further, that the 1st respondent proceeded with the hearing in his absence. The petitioner also took issue with the manner in which the 1st respondent kept on changing the membership of its panel throughout the impugned proceedings and argued that it was irregular for the impugned verdict to be issued by member (5) who did not participate in the hearing.

18. A determination of whether or not the manner in which the impugned proceedings were conducted breached the petitioner's fundamental constitutional rights will require a perusal of the said proceedings. It is also worthy to note that in determining this petition, this court will not go into the merit of the decision that was made against the petitioner by the 1st respondent but will confine itself to determining whether the manner in which he impugned proceedings were conducted violated the petitioner's constitutional rights.

19. I have carefully perused the proceedings that were undertaken before the Tribunal (1st respondent) of great importance to this petition are the proceedings of the of 23rd November 2015 when in its order, the 1st respondent stated:

"Since we have no position on the status of the ruling, this matter shall proceed for hearing. It shall proceed under Rule 18. Judgment on 11/4/2016. Parties to file written submissions by end of March 2016."

20. Rule 18 of the Advocates(Disciplinary Tribunal) Rules, which the petitioner has also challenged as being unconstitutional, stipulates that:

"The committee may in its discretion either as a whole of the case or as to any particular fact or facts, proceed or act upon evidence given by affidavit."

21. As I have already stated in this judgment, the petitioner contends that his right to fair hearing was violated as he was not accorded an opportunity to cross examine the 2nd respondent on the contents of his affidavit. A perusal of the impugned proceedings does not indicate if the petitioner applied to cross examine the 2nd respondent on the contents of the affidavit that he filed before the tribunal. My take is that even though Rule 18 of the Rules shows the 1st respondents committed to act on evidence given by affidavit, affidavit evidence must not be adopted wholesale without challenge/question or inquiry through cross examination.

22. The crux of the petitioner's case is that he was not afforded an opportunity to cross examine the complainant in the proceedings that were conducted by the 1st respondent since the respondent opted to invoke the provisions of Rule 18 of the Advocates (Disciplinary Tribunal) Rules that allows it to accept affidavit evidence. He argues that since he was not given the opportunity to cross examine the 2nd respondent, he was denied the right to be heard in violation of his rights under Articles 47, 48 and 50 of the Constitution. These Articles guarantee the right to fair administrative action, access to justice and right to fair hearing respectively and are in the following terms:

47 (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.

(3) …

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

49…

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

23. The 1st respondent on its part maintained that the petitioner was afforded an opportunity to be heard, and was granted ample time to file his response which was duly considered by the 1st respondent in making a finding on the complaint. It was the 1st respondent's case that an application by the petitioner to review its decision was determined in the petitioner's favour.

24. In considering the opposing arguments of the parties, I will start by underscoring the pre-eminence of the right to a hearing in the adjudication of disputes. In the case of **Malloch vs Aberdeen Corporation [1971] 2 All ER 1278** this right was underscored in the following observation by Lord Reid at page 1283 as follows:

"An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard. I would not find it difficult to imply this right"(*Emphasis added****)***

25. In **Kanda vs Government of Malaya (1962) AC 322** it was held that:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them ... it follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

26. In this case, the 1st respondent was exercising powers under section 58 of the Advocates Act, which deals with proceedings of the Disciplinary Tribunal and provides that:

(5) All proceedings before the Tribunal shall be deemed for the purposes of Chapter XI of the Penal Code (Cap. 63) to be judicial proceedings and for the purposes of the Evidence Act (Cap. 80) to be legal proceedings.

(6) The Tribunal may make rules for regulating the making to the Tribunal, and the hearing and determination by the Tribunal, of applications or complaints under this Part or with respect to matters incidental to or consequential upon its orders.

27. Like all judicial or quasi-judicial proceedings, I find that the proceedings of the Tribunal under the above provision must be conducted in accordance with the rules of natural justice, which presupposes the right to be heard. That right requires that a party be given an opportunity to present his case, and section 60(3) of the Act makes provisions as follows:

60(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:***

28. In the present case, I note that following the lodging of a complaint against him, the petitioner was required to take a plea before the Tribunal on 20th April 2015 on which date the petitioner was absent and a plea of not guilty was entered after which an order was issued that the petitioner files a replying affidavit and necessary accounts within 21 days. The matter was then mentioned on several occasions to confirm the filing of the replying affidavit and on 23rd November 2015, the Tribunal fixed the matter for judgment on 11th April 2016 upon being informed by the petitioner's counsel, Mr. Lagat, that the replying affidavit had been filed. The Judgment was however not delivered on 11th April 2016 as scheduled but was deferred to 11th July 2016 in the presence of the petitioner. Judgment was delivered on 11th July 2016, even though one Ms Mwangi informed the Tribunal that the Law Society had rejected the petitioner's attempts to file a replying affidavit. My perusal of the proceedings taken before the Tribunal on 11th July 2016 does not indicate the nature of the replying affidavit that the petitioner intended to file or the response of the tribunal to the information given to it by Ms. Mwangi.

29. As I have already stated in this judgment, the accusation levelled against the petitioner before the Tribunal stemmed from the claim of professional negligence that led to the dismissal of the 2nd respondent's case before the ELC for want of prosecution. I note that on 21st September 2015, the petitioner's advocate informed the Tribunal that the petitioner had filed an application before the ELC to set aside the order of dismissal of the 2nd respondent's suit that had given rise to the complaint and the said advocate sought the indulgence of the Tribunal to stay its proceedings pending the outcome of the application before the ELC. The Tribunal then adjourned the case to 23rd November 2015 but on the said date, upon noting that the ELC had not delivered its ruling, proceeded with the hearing under Rule 18.

30. Having regard to the chronology of the proceedings that were conducted before the Tribunal, I am not satisfied that the petitioner was accorded a fair hearing. Firstly, it is clear to me that the Tribunal proceeded to take the plea in the absence of the petitioner. Secondly, it was not contested that the petitioner's case was pegged on the outcome of an application to set aside the dismissal of the 2nd respondent's case before the ELC. Under the above circumstances, I find that it would have only been fair and just that the Tribunal awaits the decision of the ELC since a positive verdict setting aside the dismissal would have had the effect of ameliorating the complaint before the Tribunal. While I am in agreement that the petitioner was given a chance to respond to the 2nd respondent's complaint against him, and thus given a hearing, I am not convinced that the hearing process was fair and free from bias as can be seen in the manner that the plea was taken. It is also worthy to note that the Tribunal insisted on listing the complaint for judgment despite the fact that there was no objection by complainant, who was all this while absent from the Tribunal's sittings, to the petitioner's request that the Tribunal awaits the determination of the ELC on the setting aside application. My take is that by shutting out the petitioner from presenting the verdict of the ELC, the Tribunal prevented the petitioner from presenting his case fully thereby denying him the right to a fair trial in proceedings that were akin to criminal proceedings and could have the far reaching effect of ending his long and illustrious career as an advocate of the High Court of Kenya.

31. Considering the totality of the evidence presented before this court, I find that the petitioner was not given reasonable opportunity to present his case. In the case of **Union Insurance Co. of Kenya Ltd. vs Ramzan Abdul Dhanji**, **Civil Application No. Nai 179 of 1998** the Learned Judge observed that:

> ***"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once the opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it***."

32. In this case, it is quite apparent to me that the Tribunal was in a hurry to deliver its judgment at the expense of the petitioner who stood to be greatly disadvantaged by such a judgment in the absence of the ruling by the ELC. In my view, taking all the facts and circumstances of this case together, the 1st respondent could have done more than it did to accord the petitioner the right to be heard. To my mind, according the petitioner a further indulgence would not have prejudiced the complainant's case or amounted to abuse of process but could have assisted the Tribunal to arrive at a just decision.

33. Turning to the issue of the constitutionality of Rule 18 of the Advocates (Disciplinary Tribunal) Rules, I wish to point out that when considering the constitutionality of the Act, one must bear in mind the rebuttable principle of presumption of constitutionality of statutes. The principle states that statutes should be presumed to be constitutional until the contrary is proved. The philosophy behind this principle is that Parliament as a peoples' representative legislates laws to serve the people they represent and therefore, as legislators, they understand the problems people face and enact laws to solve these problems. In the case of **Hambardda Dawakhana v Union of India Air (1960) AIR 554**, the Supreme Court of India aptly highlighted the principle of constitutionality of statutes thus;

> ***"In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation."***

34. A person alleging constitutional invalidity of a statute or statutory provision is therefore required to prove that indeed the statute or any of its provision(s) are unconstitutional. (See **Ndyanabo v Attorney General of Tanzania [2001] EA 495)**.

35. The Court must also consider whether the purpose and effect of implementing the statute or statutory provision would result into unconstitutionality. In **Olum and another v Attorney General [2002] 2 EA** 508, the Constitutional Court of Uganda stated;

> ***"To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional…"***

36. Considering the principle of constitutionality of statutes and the requirement that that legislation must be read in conformity with the Constitution, I now turn to consider the issue of Constitutionality of the impugned Rule 18 of the Advocates (Disciplinary Tribunal) Rules. The said Rule Stipulates as follows:

> ***The committee may in its discretion either as to the whole of the case or as to any particular fact or facts, proceed or act upon evidence given by an affidavit.***

37. The petitioner sought an order of declaration that the said section is unconstitutional as it is the provision that was used by the 1st respondent to deny him an opportunity to cross examine the 2nd respondent thereby violating his right to a fair hearing. My finding is that firstly; the impugned Rule is not couched in mandatory terms as the operative words are that '***the committee may in its discretion'*** procced by way of evidence given in an affidavit. My understanding of the said Rule is that it gives the committee the latitude or discretion to determine the manner in which it can conduct its proceedings in as far as taking evidence is concerned. Secondly, I am of the view that the mere fact that evidence is given through an affidavit does not preclude an opposing party from cross examining the deponent of the said affidavit on the contents thereof. In the instant case, a perusal of the proceedings does not show that the petitioner sought leave to cross examine the complainant and I am therefore unable to find that his right to a fair trial was violated by impugned Rule. Consequently, I do not find that the said Rule is unconstitutional.

38. In conclusion and having found that there was violation of the petitioner's right to fair hearing in the proceedings before the 1st respondent. The petition is therefore, in my view, merited and I allow it in the following terms:

> ***1) A declaration that 1st respondent's conduct of the Disciplinary Cause No. 16 of 2015 is null and void and in breach of the Rules of natural justice and fair hearing under 47, 48 and 50 of the Constitution.***
>
> ***2) The entire proceedings relating to Disciplinary Cause No. 16 of 2015 relating to the petitioner are hereby quashed and/or nullified.***
>
> ***3) Each party shall bear its/his own costs of this petition.***

Dated, signed and delivered in open court at Nairobi this 31st day of May 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Muiruri for the petitioner

No appearance for respondents

Court Assistant - Ali