



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 87 OF 2018

EDWARD THIONG'O WACHIRA.....PETITIONER

VERSUS

THE DISCIPLINARY TRIBUNAL

ESTABLISHED

UNDER THE ADVOCATES ACT, 1989.....RESPONDENT

JUDGMENT

1. **EDWARD THIONG'O WACHIRA**, the Petitioner, filed this petition against the Disciplinary Tribunal established under the Act Cap Act, the Respondent. The Petitioner avers that on or about 20th February 2017 he presented a complaint for professional misconduct against **Mahinda Geoffrey Gathara**, an Advocate to the respondent being Disciplinary Cause No. 41 of 2017.

2. The Petitioner further avers that on 22nd May 2017 the Advocate plea of not guilty was entered and the respondent directed the advocate to file a replying affidavit within 21 days and fixed the matter for hearing on 11th September 2017, but the advocate failed to comply with the directions; and that again the advocate had failed to comply with an order of 2nd August 2017 to serve the Petitioner with a list of documents he, the advocate, intended to rely on in the disciplinary cause.

3. The Petitioner states that on 11th September 2017, the respondent arbitrarily, illegally, inefficiently without giving parties adequate prior notice and without giving parties an opportunity to be heard, directed that the complaint be decided on the basis of affidavit evidence and set the judgment for 4th December 2017.

4. The Petitioner further states that on 4th December 2017, the respondent delivered judgment dismissing the complaint which he contends contravened the Constitution in that the respondent held that it lacked jurisdiction to hear the complaint; that the respondent refused to order that the advocate be suspended; or that his name be struck off the Roll of advocates and that the respondent refused to order the Advocate to pay compensation to him.

5. The Petitioner avers that the advocate together with Margaret Wakonyo Njogu and Washington Nderitu Komu, Advocate are colluding to defraud his father, a mental patient, by falsely claiming to have a fictitious association with his father and that on 1st March 2018 the Advocate filed a fraudulent a statement of grounds of opposition in the High Court Case without the approval of a guardian ad litem of the patient.

6. The Petitioner faults the Respondent's directions made on 11th September 2017 and the judgment delivered on 4th December 2017, arguing that they are likely to compel the patient to join an association with the advocate; that the decision of 4th December 2017 arbitrarily deprives the patient of property through fraudulent claim of legal fees as the advocate and deny the patient a fair hearing to the Environment and Land Court Petition, the ELC Petition,

7. He avers that the Respondents' unlawful administrative actions is likely to deny the Petitioner compensation for financial losses incurred as a result of the advocate's professional misconduct and deny the Petitioner a fair hearing in the disciplinary proceedings and the ELC Petition. The Petitioner therefore sought the following reliefs:

1. Judicial review by way of an order of certiorari to remove into the court and quash the orders issued by the respondent on 11th September 2017 directing that the case be delivered upon affidavit evidence and 4th December 2017 dismissing the Petitioner's complaint in /disciplinary tribunal Case No. 41 of 2017.

2. The respondent do pay the Petitioner costs of this Petition

3. The respondent do bear costs of the Petition or other orders as the court shall deem fit.

Response

8. The respondent filed a replying affidavit by Mercy Wambua, the **CEO** of The Law Society of Kenya, sworn on the 24th April 2018. Ms Wambua deposes that the Respondent received a complaint from the Petitioner against an advocate raising a number of allegations and sought a prayer that the advocate be ordered to pay him Ksh. 240,000/= together with future rent expenses incurred in CMCC No. 17 of 2015 at Milimani.

9. She further deposes that advocate entered a plea of not guilty on 22nd May 2017; that he presented his reply to the complaint by way of affidavit sworn on the 8th September 2017 and that the Respondent rendered its decision on 4th December 2017. She states that the Respondent adhered to laid down rules of procedure and ensured that both the accused advocate and the complainant, the Petitioner, were accorded a hearing.

10. With regard to paragraph 14 of the Petition, Ms. Wambua states that the Respondent was not privy to what transpired in the ELC Petition; that in arriving at its decision, the Respondent followed the laid down procedural rules and that at no time did the Respondent act **ultra vires**, unreasonably or illegally.

Petitioner's submissions

11. The Petitioner who appeared in person, submitted highlighting his written submissions dated 21st September 2018, that the Petition challenges the orders made on 11th September 2017 and 4th December 2017; that the final judgement dismissed the complaint he had lodged on grounds that the Respondent did not have capacity whether a person was mentally ill to the extent of requiring a guardian.

12. He contended that the Respondent had capacity to call witnesses and determine the issue of mental capacity. In his view, the Respondent could have called evidence including a medical report to determine that issue.

13. He submitted that the Respondent's decision threatened the Patient's right to property; the patient's freedom of association and his right to fair administrative action. He relies on **Republic v Disciplinary Committee & another Ex Parte Daniel Kamunda Njue** [2016] e KLR

Respondent's submissions

14. Miss Mwinzi, learned counsel for the Respondent submits highlighting their written submissions dated 15th October 2018, that in order for the court to decide whether or not to quash the Respondent's decision it should consider whether there was abuse of power, whether the decision was fair, reasonable or lawful.

15. Counsel contends that the respondent acted lawfully, fairly and arrived at a rational decision. She argues that the decision the Petitioner was relying on was made on 22nd December 2017 but was received on 13th November 2018. According to counsel, the respondent was in order to proceed by way of affidavit and has such discretion under rule 18 of the Advocates Disciplinary Committee Rules. For that reason, counsel submits, the Respondent exercised its discretionary powers conferred on it by law and that the Respondent could not deal with a party's mental capacity since sections 53 of the Advocates Act limits its jurisdiction.

16. It is counsel's contention that the person said to be of unsound mind was not a party before the Respondent and, therefore, the Respondent could not deal with that issued as the matter was already before the High Court. counsel relies on **Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex Parte Cecilia Mwathi & another** [2008] e KLR

Determination

17. I have considered the Petition, the response and submissions by parties. I have also considered the authorities relied on. The Petition challenges the Respondent's decisions made on 11th September 2017 and 4th December 2017. In its decision of 11th September, the Respondent directed that the Disciplinary Cause be determined on the basis of affidavit evidence, while in its decision of 4th December 2017 the Respondent dismissed the complaint on grounds that it did not have jurisdiction to determine the issue before it. The directions and judgment aggrieved the Petitioner leading to the filing of the present Petition.

18. The Petitioner faults the Respondent's decisions contending that it acted unreasonably and **ultra vires**. He wants this court to exercise its powers of judicial review and set aside both the directions of 11th September 2017 and the judgment delivered on 4th December 2017.

19. I have carefully gone through the record of proceedings of the Respondent and the judgment delivered on 4th December 2017. From the record, on 11th September 2017, the Respondent directed that Cause would proceed under Rule 18 of the rules. Rule 18 allows the Respondent to decide complaints on the basis of affidavit evidence. For avoidance of doubt rule 18 provides that **"The Committee may, in its discretion either as to the whole case or as to any particular fact or facts, proceed and act upon evidence given by affidavit"**

20. First, it is clear from the above rule that the Respondent acted within its lawful discretion when it directed that the cause be determined through affidavits. Second, when that order was made, the Petitioner neither raised an objection nor indicated his desire to cross-examine the advocate on his affidavit or on any other issue. That being the case, there would be no legal basis to fault the Respondent in deciding the

matter through affidavits. It is my finding, and I so hold, that in so far as the directions of 11th September 2017 were concerned, the Respondent acted within the law. The Petitioner's complaint on this aspect lacks basis.

21. The Petitioner's other complaint relates to the judgment delivered on 4th December 2017. The Petitioner's agitation is that the Respondent was wrong in dismissing his complaint on grounds that it did not have jurisdiction to determine the issue before it. According to the Petitioner, the Respondent could have called evidence to enable it determine that issue.

22. In its decision, the Respondent analyzed the facts of the complaint and made a determination, stating;

“We have carefully analyzed the complaint before us and the response thereto. With absolute respect to the complainant, the substance of this complaint is difficult to sustain. There are proceedings before the High Court in ELC No. 852 of 2016 where the complaint has raised a raft of allegations against a firm of advocates, the Chief Magistrate's Court and his father. Prominent, in our view of these allegations are matters touching on the mental capacity or otherwise of his father, Duncan Kireri Wachira.”

23. The Respondent then went on to state:

“We cannot for strite reasons engage in determining whether or not this is so and we have no jurisdiction or capacity to do so. The Judge before whom these matters are pending will undoubtedly make finding and conclusions in these matters. On our part, we are unable to find any fault with the advocate. We think the complainant is ill-motivated, malicious and baseless. We dismiss it without hesitation.”

24. The Petitioner has not appealed to this court against the Respondent's decision. He has filed a Constitutional Petition challenging what he considers to be the illegality of that decision and asks this Court to exercise its judicial review jurisdiction and vacate the Respondent's decision. He argues that the Respondent was wrong in holding that it had no jurisdiction. He contends that the Respondent could summon witnesses or medical evidence to determine the issue before it.

25. First and foremost, the substance of the Respondent's decision was that it did not have jurisdiction to deal with the issue of mental incapacity of the Petitioner's father. It explained in its decision that the matter was before the superior court which would in any case deal with whatever issues the petitioner had.

26. Second, the jurisdiction of the Respondent flows from the Advocates Act Cap 16 Laws of Kenya. The Respondent does not decide which cases to hear or which it should not. Cases are referred to it by the Complaints Commission, established under Section 53 of the Act. Section 53(4) provides that ***It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof.***

27. The section goes on to provide that (a) ***if it appears to the Commission that there is no substance in the complaint it shall reject the same forthwith.*** (b) ***If it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XI.***

28. This shows that the Respondent hears cases investigated by another organ and its jurisdiction is to deal with complaints that are of ***a disciplinary nature***. It does this by considering pleadings and any other facts placed before it.

29. In this regard, the Respondent considered the complaint referred to it and concluded that it had no jurisdiction to deal with it. More importantly, it made it clear that the issues raised in the complaint were pending before a superior court which would deal with them. I have on my part perused the decision and I am unable to fault it. Indeed the Petitioner has alluded to the fact that there is a Petition before the ELC and that there is another matter before the Family Division on the guardianship of his father.

30. When called upon to exercise its judicial review jurisdiction, this Court inquires into the legality and reasonableness of the decision complained of. The court has also to determine whether the tribunal acted outside its powers or whether the decision is ***ultra vires***. The Petitioner has not shown that the Respondent acted outside its mandate or that its decision is unreasonable to summon this court's judicial review jurisdiction..

31. As the Respondent correctly pointed out, the Petitioner had a case pending before the ELC, a superior Court before which he had made a raft of allegations against the firm of advocates, the Chief Magistrate's Court and his own father. The Respondent further observed, and correctly in my view, the ELC is bound to make determinations on those allegations. The Respondent would have taken a huge risk to attempt to deal with matters that were live before a superior Court and would at best be acting ***ultra vires*** its powers.

32. The Respondent is a creature of statute whose jurisdiction and mandate flows from that statute. It cannot engage in matters that are clearly outside its mandate. It has often been pointed out by the Supreme Court, that courts and tribunal as creatures of the Constitution, the law or both must exercise only that jurisdiction as conferred on them by the Constitution and the law. They cannot confer jurisdiction to themselves through the craft of interpretation. (See ***Samuel Kamau Macharia v Kenya Commercial Bank & another*** [2012] e KLR and ***Re The Matter of Interim Independent Electoral and Boundaries Commission*** [2011] e KLR.

33. The Court of Appeal was even more emphatic when it stated in ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 others*** [2018] eKLR, that;

“[44]...a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and ... confer jurisdiction.... Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...”

34. Taking into account the facts of this Petition, the response and submissions, considering the Constitution and the law as well as the impugned decision, I do not find merit in the Petition. Consequently, the Petition dated 9th March 2018 is declined and dismissed. Each party shall bear their own costs.

Dated, Signed and Delivered at Nairobi this 21st day of June, 2019.

E C MWITA

JUDGE