



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 94 OF 2017

IN THE MATTER OF AN APPLICATION BY NDOMBI TOM WACHAKANA

OSOLIKA FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI,

MANDAMUS, AND PROHIBITION.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT, CAP 18 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

LAW SOCIETY OF KENYA.....RESPONDENT

KENYA MEDICAL RESEARCH INSTITUTE....INTERESTED PARTY

NDOMBI TOM WACHAKANA OSOLIKA.....EXPARTE APPLICANT

JUDGMENT

1. The exparte applicant Ndombi **Tom Wachakana Osolika** is an advocate of the High Court of Kenya and an active legal practitioner in the name and style of Wachakana and Company Advocates.
2. By his notice of motion dated 21st March 2017 pursuant to leave of court granted on 15th March 2017, the exparte applicant seeks from court the following orders:

1) That an order **certiorari** do issue to bring this court (sic) for quashing the decisions of the respondent, the Law Society of Kenya and expressed vide the letter dated 1st February 2017 refusing to approve the issuance of a practicing certificate or refusing to issue the applicant with a practicing certificate for the year 2017.

2) Spent

3) That an order of **mandamus** compelling the respondent to approve the issuance of a practicing certificate or to issue the applicant with a practicing certificate for the year 2017.

4) That this court be pleased to grant such other orders that are analogous and or necessary adjuncts to the reliefs being sought that may deem fair and just to grant in the circumstances.

5) The cost of this application be borne by the respondent.

3. The application is predicated on the grounds on the face of the motion and supported by the statutory statement and verifying affidavit of the applicant sworn on 28th February, 2017 accompanying the chamber summons for leave and the annexures/exhibits thereto.

4. The exparte applicant's case is that he was admitted to the Roll of Advocates on 13th October, 1986 and is a member of the Law Society of Kenya.

5. That as a practice of law, pursuant to Section 22 of the Advocates Act Cap 16 Laws of Kenya, every advocate who wishes to practice as an advocate must apply to the Registrar of the High Court through the Law Society of Kenya for the issuance of a practicing certificate for the year for which the application is made.

6. It was claimed that on 9th January 2017, the applicant herein lodged an application with the Law Society of Kenya (LSK) for issuance of a practicing certificate for the year 2017 and submitted the requisite documents including a statutory declaration and payment for the full fees set by the respondent for the practicing certificate.

7. That on 15th February 2017 the respondent wrote to the applicant communicating its decision to refuse to issue the applicant with a practicing certificate for the year 2017 allegedly on the grounds that the applicant had inter alia disobeyed the Disciplinary Tribunal orders which was impacting negatively to the legal profession.

8. That the applicant was never called upon by the Law Society of Kenya to deliberate on the issue before a decision to deny him the practicing certificate for the year 2017 was made.

9. The applicant claims that the matter subject of Disciplinary proceedings was resolved by consent of the parties namely, DTC 36/2015 wherein he was accused of withholding kshs 4,000,000.

10. Further, that the orders of the Disciplinary Tribunal are subject of appeals to the High Court and that appeal No. CA 29/2011 is still pending in the Court of Appeal. It is therefore claimed that refusal to issue the applicant with a practicing certificate is in bad faith and is ultra vires the mandate of the respondent Laws Society of Kenya as it disregarded the ongoing court proceedings where conclusive determinations were yet to be made on the issues which the respondent purported to be the basis for the decision to refuse to issue him with the 2017 practicing certificate.

11. It was further averred that the refusal to issue the applicant with a practicing certificate for the year 2017 had the effect of rendering the applicant destitute and prejudicial to his right to earn a living and that he stands to suffer irreparable harm as he was being locked out of gainful employment as a career lawyer which is his sole source of income and livelihood.

12. According to the applicant, the respondent will suffer no prejudice if the orders sought are granted, in order to protect the sanctity of the law.
13. The respondent opposed the notice of motion and filed a replying affidavit sworn by its Chief Executive Officer/Secretary Mercy Wambua on 28th March 2017 contending that on 12th May 2015 the Disciplinary Committee of the Law Society of Kenya received a complaint against the ex parte applicant (accused advocate) presented vide an affidavit sworn by Professor Solomon Mpoke which complaint was forwarded to the ex parte applicant on the same day and that the applicant responded to the complaint vide a letter dated 15th June 2015 written by S.M. Keyonzo advocate.
14. That the complaint related to the conduct of the applicant acting deceitfully and without instructions and withholding client's money plus interest.
15. That on 13th June 2016 the Disciplinary Tribunal delivered its judgment which found the applicant guilty of dishonorable conduct of withholding client's funds and failing to account for the said funds.
16. That on 3rd October 2016 the matter was scheduled for mitigation and sentencing and the applicant advocate was sentenced to refund the full amount, interest and costs within 30 days; in default, the advocate to show cause why he should not be suspended from the Roll of Advocates for a period of 24 months and a notice to show cause was scheduled for 23rd January 2017.
17. That when the matter came up for notice to show cause on 23rd January 2017, the Advocate had not paid the money hence he was suspended for 2 years as stipulated in Section 55 and 60(4) (b) of the Advocates Act.
18. Further, that Section 22(1) and (2) of the Advocates Act only permits the Registrar to issue practicing certificates to applicants who are on the Roll of Advocates and who are not for the time being suspended from practice.
19. According to the respondent, it had all along acted within its statutory limits hence the application does not disclose any cause of action for Judicial Review orders sought hence it should be dismissed with costs.
20. The parties' advocates agreed and filed written submissions to canvass the application.
21. The interested party Kenya Medical Research Institute also filed written submissions, albeit it did not file any replying affidavit or grounds of objection to the ex parte applicant's substantive notice of motion.
22. The ex parte applicant filed written submissions on 2nd October 2017 reiterating the grounds set out in the statutory statement and verifying affidavit and the history of the matter as stipulated in his application. The applicant maintained that as there was no suspension prior to 23rd January 2017, there was no reason why the respondent declined to issue him with a practicing certificate for the year 2017 or to recommend to the Registrar to issue him with such practicing certificate for the year 2017 as applied for by the applicant on 9th January 2017 and paid for but that the respondent withheld or 'sat on' the application with a predetermined mindset while waiting for a decision made long after the application was lodged to use it as an excuse to decline the applicant's request for issuance of a practicing certificate.
23. In the applicant's view, the conduct of the respondent smacks of bad faith, malafides and self-imposed limitations to justify the predetermined mindset hence malicious and ultra vires its mandate and prejudicial to the applicant's right to earn a living. It was submitted that disregarding the existence of court cases is a sign of bad faith as the applicant had challenged the decision of the Disciplinary Tribunal Committee by way of an appeal which appeal was yet to be determined. The applicant relied on no law whether statutory or case law in his submissions which reiterate his depositions.

24. The respondent filed submissions on 14th October 2017 contending that Judicial Review is only available where a public body has acted in excess of jurisdiction or in breach of the rules of natural justice or contrary to the law and is concerned with decision making process and with regard to certiorari, it was submitted that it brings into the High Court a decision of an inferior court, tribunal or public authority or other decision to be quashed.

25. As far as mandamus is concerned, it was submitted that it compels a party against whom the application is made is legally bound to perform. That where a general duty is imposed, a mandamus cannot require it to be done at once. Further, that where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out on a specific was as was held in **Republic vs Chief Land Registrar & 3 Others [2014] e KLR**.

26. It was submitted that if the complaint is that the duty has been wrongly performed, ie that the duty has not been performed according to law, then mandamus is a wrong remedy to apply because like an order of prohibition, an order of mandamus cannot quash what has already been done. It was submitted that Section 55 of the Advocates Act places all the advocates under the jurisdiction of the of Advocates Disciplinary Tribunal hence the Tribunal had jurisdiction over the disciplinary cause subject matter of these proceedings and therefore decisions of the Tribunal must be obeyed. Reliance was placed on the case of **Re Edward Mutinda Ndeti & 15 Others [2015] e KLR**.

27. The respondent submitted in contention that the letter of 15th January 2017 was merely giving effect to the decision of the Advocates Disciplinary Tribunal, which decision is not contested, and that the applicant had not demonstrated the grounds for interfering with a decision made by the tribunal, for him to merit the Judicial Review orders to issue. Reliance was placed on the case of **Republic vs The Chancellor Jomo Kenyatta University & Technology exparte Dr Cecilia Mwathi & Another [2008] e KLR**.

28. It was therefore submitted that the application by the applicant is an abuse of the court process hence it should be dismissed with costs to the respondent.

29. The interested party Kenya Medical Research Institute also filed submissions on 13th November 2017 contending that on 23rd January 2017 the Disciplinary Tribunal suspended the exparte applicant for 24 months as stipulated in Section 60(4) of the Advocates Act and that as a result, the Law Society of Kenya could not allow issuance of a practicing certificate to the applicant.

30. That the applicant's attempt to stay the suspension order issued against him by the Tribunal was not successful as it was dismissed by Honourable Justice Mboghli Msagha on 7th March 2017 in **Tom Wachakana t/a Wachakana & Company Advocates vs Kenya Medical Research Institute[2017]eKLR** (ruling attached). It was also submitted that under Section 22(2) of the Advocates Act, the Registrar could not issue the applicant with a practicing certificate as the applicant was suspended for 2 years by the Disciplinary Tribunal and that that information as to suspension came to her attention while she was processing the applicant's application for the 2017 practicing certificate for the exparte applicant.

31. Further, that Section 9 of the Advocates Act stipulates that a practicing certificate shall be deemed not to be in force at any time while the advocate is suspended by virtue of Section 27 or by an order under Section 60(4) of the Advocates Act.

32. Therefore it was submitted by the interested party that even if the applicant was to be issued with a practicing certificate when he was on suspension, the practicing certificate would be deemed not to be in force and that it would be a mere piece of paper hence it serves no purpose to compel the respondent to issue a document which will have no legal force or purpose. The interested party urged the court to dismiss the applicants motion for Judicial Review.

DETERMINATION

33. I have carefully considered the ex parte applicant's notice of motion, the opposition thereto by the respondent and the written submissions filed and adopted by all the parties' advocates canvassing the motion.

34. I have also considered statutory and case law relied on and in my humble view, the main issue for determination and which is very simple is whether the applicant is entitled to the Judicial Review orders sought.

35. From the history of this matter as deposed by the respondent's Chief Executive Officer Mercy Wambua, and which position was not controverted by the applicant, the ex parte applicant advocate underwent disciplinary proceedings before the Disciplinary Tribunal following a complaint raised by the interested party Kenya Medical Research Institute. The ex parte applicant was found guilty of acting without instructions of the 'client' withholding 'client's funds. Later, the Tribunal did, after mitigation and sentence, fine the applicant to pay kshs 100,000 and ordered him to pay to the client kshs 530,000 with interest at 12% till payment in full and cost of kshs 20,000 to the Law Society of Kenya. This was in DIC 8/2015.

36. In another Disciplinary Tribunal proceeding, No. DTC 36/2015, the applicant advocate was found guilty of withholding client's funds to the tune of kshs 4 million and after mitigation, the tribunal did on 23rd January 2017 suspend him from practice for 24 months with immediate effect.

37. The applicant lodged his application to be issued with a practicing certificate for the year 2017 year but the Law Society of Kenya by its letter dated 15th February 2017 reminded him that he was on suspension in DTC 36/2015 and that he had not complied with the Tribunal's orders in Disciplinary Tribunal Committee proceedings which disobedience was "impacting negatively on the legal profession" and that in view of the above, the society was unable to process his practicing certificate for the year 2017, and referred him to Section 25 of the Advocates Act.

38. From the said letter perused, it is therefore not true for the applicant to claim that he was denied the practicing certificate for the year 2017 as applied because "it was impacting negatively on the legal profession", but that the society was unable to process the practicing certificate for 2017 because the applicant was serving a 2 year suspension sentence meted out to him in DTC 36/15 and that he had disobeyed the orders of the Disciplinary Tribunal as ordered in DTC 8/2015 which disobedience was impacting negatively on the legal profession.

39. In this application, the applicant seeks certiorari to quash the decision of the Law Society of Kenya to refuse to approve the issuance of a practicing certificate or for refusing to issue him with a practicing certificate for the year 2017.

40. It must be noted that the Law Society of Kenya has no legal mandate to issue advocates practicing certificates. The Law Society of Kenya can only receive and process the application forms from advocates and recommend for issuance of practicing certificates by the Registrar of the High Court. The LSK can therefore not be compelled to issue a practicing certificate to an advocate. Moreso, the letter of 15th February 2017 written by the Law Society of Kenya is clear that the Law Society of Kenya was unable to process the issuance of the practicing certificate for the applicant because of the disciplinary proceedings leading to his suspension, and not that it had refused to issue the applicant with a 2017 practicing certificate.

41. It is the Registrar of the High Court who issues practicing certificates on advice of the Law society of Kenya pursuant to Section 22 of the Advocates Act, Cap 16 Laws of Kenya. And as stipulated in Section 9 of the Advocate Act, where an advocate is on suspension, a practicing certificate issued to him would be invalid. In other words, where an advocate is serving a suspension, unless that suspension is lifted by the court or by the Tribunal, even if an advocate was holding a practicing certificate for the year of practice, that practicing certificate would stand suspended. It therefore

follows that the Law Society of Kenya cannot, as correctly submitted by the respondent and interested party's counsels, process issuance of a practicing certificate to an advocate who is facing suspension as that would be illegal as the practicing certificate would be deemed not to be in force.

42. In this case, the applicant had, after the suspension by the Disciplinary Tribunal, attempted to seek to lift the suspension vide **HCC CA 444/2016 Tom Wachakana T/A Wachakana & Company Advocates vs Kenya Medical Research Institute (KEMRI) [2017] e KLR** arising from DTC 36/2015 wherein Kenya Medical Research Institute had complained against the applicant herein for acting without instructions and withholding client's funds. The applicant then sought for a stay of execution of the judgment, decree and orders of the Disciplinary Tribunal pending the hearing and determination of the said appeal but in a ruling delivered on 7th March 2017, the learned Hon. Mbogholi Msagha J dismissed the applicant's application for stay with costs.

43. The applicant approached this court on 2nd March 2017 seeking leave of court to institute Judicial Review proceedings against the Law Society of Kenya while the application for stay of execution in CA 444/2016 was pending before the Civil Division of the High Court at Nairobi.

44. That was before sentence was passed against him by the Disciplinary Tribunal. As at the time of hearing this matter, the applicant had not demonstrated to this court that there were any orders lifting his suspension or even staying enforcement of the sentences imposed on him by the Disciplinary Tribunal in the two Disciplinary causes. The applicant did not even disclose to this court that those facts existed. He is thus guilty of non-disclosure, and consequently, his conduct therefore disentitles him to the discretionary orders of Judicial Review.

45. The above notwithstanding, this court notes that the Judicial Review orders as sought by the applicant have been overtaken by events and are no longer tenable such that even if the applicant were to demonstrate that he was entitled to the orders sought which he has failed to do, the orders if granted would be incapable of implementation. This is because the applicant challenged the Law Society of Kenya's decision to fail to issue him with a practicing certificate for the year 2017. Therefore, as the suspension of the applicant had not been lifted, it would be erroneous to quash the decision to refuse to approve the applicant's application for a 2017 practicing certificate.

46. In addition, a practicing certificate is issued on the basis of an application for the following year, it cannot be issued for a previous year. 2017 is long gone and therefore a practicing certificate for 2017 if issued retrospectively for purposes of these judicial review proceedings would serve no purpose. Accordingly, it would be useless to compel the respondent to approve an application for a practicing certificate for the year 2017 which year is spent.

47. For the above reasons, I find and hold that the exparte applicant's notice of motion dated 21st March 2017 is not merited. The same is hereby declined and dismissed with an order that each party shall bear their own costs of these judicial review proceedings.

48. Those shall be orders of this court.

Dated, signed and delivered in open court at Nairobi this 15th day of January 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mrs Sirai h/b for Mr Mwangi for the exparte applicant

Mr Angwenyi for the Respondent

Miss Mwinzi for the Respondent

Court Assistant: Kombo