REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 639 OF 2006

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

IN THE MATTER OF AN APPLICATION BY DAVID RN ODHOCH FOR

JUDICIAL REVIEW PROCEEDINGS AGAINST THE DISCIPLINARY

COMMITTEE ESTABLISHED UNDER THE ADVOCATES

ACT 1989 (NO 18 OF 1989) BY WAY OF ORDERS OF

CERTIORARY AND PROHIBITION.

BETWEEN

REPUBLIC.....APPLICANT

AND

DISCIPLINARY COMMITTEE

LAW SOCIETY OF KENYA.....RESPONDENT

AND

DAVID IUENI JENKINS.....1ST INTERESTED PARTY

AMBROSE RACHIER &

AMOLO ADVOCATES.....3RD INTERESTED PARTY

HARDEW SIGH PALI.....4TH INTERSTED PARTY

LAW SOCIETY OF KENYA.....5TH INTERSTED PARTY

ATTORNEY GENERAL.....6TH INTERESTED PARTY

EX-PARTE: DAVID R N ODHOCH

JUDGEMENT

Introduction

1. By a Notice of Motion dated 6th November, 2006, the *ex parte* applicant herein, **David R N Odhoch,** seeks the following orders:

> **1) THAT the Applicant herein DAVID RN ODHOCH ADVOCATE be granted Judicial Review orders of certiorari and prohibition.**
>
> **2) THAT the Applicant herein DAVID RN ODHOCH ADVOCATE be granted a Judicial Review order by way of certiorari to bring before this court and quash the disciplinary proceedings and judgment in DISCIPLINARY CAUSE NO. 4 OF 2006 before the Disciplinary Committee of the Law Society of Kenya.**
>
> **3) THAT the Applicant herein DAVID RN ODHOCH ADVOCATE be granted a Judicial Review order by way of Prohibition restraining and /or prohibiting the Respondent and the 5th Interested Party from continuing with the proceedings in DISCIPLINARY CAUSE NO. 4 OF 2006 their decision against the Applicant or implementing made on the 12th of October 2006 or instituting any other proceedings pursuant to the provisions of Section 61 (1) and Section 69 (1 & 2) of the Advocates Act Cap 16 Laws of Kenya in respect of the same facts or allied facts in respect thereof.**
>
> **4) THAT the grant of the said orders to prohibit the 5th Interested Party or the Respondent from publishing the Applicant's name in its minutes or any other publication in respect of the same facts or allied facts in respect of the disciplinary proceedings and judgment in DISCIPLINARY CAUSE NO. 4 OF 2006 before the Disciplinary Committee of the law Society of Kenya save as informing the public that they have been quashed.**
>
> **5) THAT the cost of this application be awarded to the Applicant.**

2. The applicant's case was that on or about 20th January 2006, a **Mr. Hamisi** whom he had met earlier at Makadara Law Courts and whom he had assisted in a traffic case came to his office and told him that he wanted to refer to the applicant a client by the name **Harder Singh Pall** whom the applicant was to act for in a sale transaction. Two days later, the said **Mr. Hamisi** in the company of two Asian Sikhs went to the applicant's office and introduced themselves as **Harder Singh Pall** and **Sheik Hammed** who informed the applicant that they were business men from UK and that **Mr. Hamisi** would be acting on their behalf.

3. According to the applicant, on or about 20th day of January 2005 (sic), he was instructed by **Harder Singh Pall** to act as his advocate in the sale of L.R. No. 17/275 and 17/276 and some days later they brought instruction letters to the applicant's office and signed agreement in respect of the applicant's fees.

4. It was averred by the applicant that he later received a letter from M/S Rachier & Company Advocates requesting him for the draft sale agreement which he duly drafted and after approval by **Mr. Pall** and **Mr. Hamisi**, forwarded the same to M/S Rachier & Company Advocates. The applicant however received a letter from Rachier & Company Advocates informing him that their client had disapproved the draft and that they had made their own draft which was then forwarded to the applicant for study and approval of his client. The applicant averred that **Mr. Hamisi** went and picked the drafts and returned the same the following day duly approved by **Mr. Pall**.

5. The applicant averred that on 29th day of January 2005 at about 10:00 o'clock in the morning he was called by **Mr. Hamisi** on his cell phone and requested to attend to a meeting at **Mr. Rachier's** offices where all parties were to be present for the signing of the sale agreement. On arrival, the applicant deposed that he found a white man who introduced himself as **Mr. Jenkins** and his daughter **Nicole Jenkins** and **Mrs. Jackline Omollo**, a lawyer from Rachier's office. The applicant was informed by **Mr. Jenkins** that **Mr. Pall** had arrived from London and was on his way to the office and after 20 minutes **Mr. Pall** arrived accompanied by **Mr. Hassan**.

6. According to the applicant **Mr. Jenkins**, his daughter **Nicole** and **Mr. Pall** executed the said agreement in the same boardroom in the presence of the applicant and **Mrs. Jackline Omollo**. The applicant however denied that he carried away the draft agreement to be signed by his client as alleged by **Mr. Jenkins**. He however averred that he forwarded the duly stamped sale agreement and other transfer documents to Rachier and Company Advocates who acknowledged the receipt thereon after which **Mr. Rachier** forwarded to him a cheque of Kshs.4,050,000/= being 30% deposit. According to the applicant, **Mr. Pall** then informed him through a letter that they had agreed with **Mr. Jenkins** to be given the deposit to reconstruct a servant quarter and renovate the main house and for the construction of a perimeter wall and that **Mr. Rachier** was to confirm this in writing to the applicant.

7. It was disclosed that that same evening the applicant received a letter from Rachier and Company Advocates confirming that position at which point the applicant drew a cheque of Kshs. 4,050,000/= in favour of **Mr. Harder Singh Pall** who later went for the money and informed the applicant that he only needed about 1.7 million and not the entire sum. According to the applicant they then proceeded together to the bank so that the applicant could give him a payment voucher and acknowledgement receipt to sign which the said client signed and placed his thumbprint on the slip. They then proceeded together to the bank where they talked to the manager who paid the applicant in cash.

8. The applicant further averred that **Mr. Pall** went on different days for other monies and the same procedure of signing the voucher was followed and that all the vouchers are with the CID.

9. The applicant admitted that he got a letter from Rachier and Company Advocates talking of a letter about from a **Mr. Ben Omollo** and that the applicant forwarded another letter to them which was received from the said **Ben Omollo** whom the applicant deny knowing. He however disclosed that the said letters were forwarded to his clients by himself, to which they duly responded and the copy of their response was forwarded to Rachier and Company Advocates while the original copies are currently with the police. The applicant also forwarded to Rachier and Company Advocates copies and originals of the duly paid bills as given to the applicant by his client and that the bills did not reflect non-payment.

10. According to the applicant, in the month of April, he received a letter from Rachier and Company Advocates informing him that his

client had transferred the balance of the purchase price directly to the applicant's account with co-operative Bank. Upon enquiring from the bank the applicant was informed that the sum of sterling pound 63,775.20 came from London and was transferred back due to misspellings in his firm's name and that the bank could not credit his account until the corrections were made by the sender herself. It was deposed that it took one week for the corrections to be made whereby the money was sent back and was credited to the applicant's account.

11. The applicant however averred that it was that time that his client was threatened to terminate the contract due to undue delay on the part of the vendor and that completion day had expired. The applicant averred that **Mr. Pall** went to his office with a copy of a letter from **Mr. Jenkins** for the applicant to release the money to him after forwarding all the remaining completion documents to Rachier and Company Advocates. The following day, the applicant received a letter from Rachier and Amollo Advocates authorizing the applicant to release the money after forwarding all the remaining documents together with the conveyance. However when **Mr. Pall**, **Sheikh Mohammed** and **Hamisi** went to the applicant's office with a aim of being paid, the applicant informed them to go back in the afternoon as the applicant had not forwarded the remaining documents. He then sent his messenger with the documents to Rachier and Company Advocates whereby the Secretary acknowledged by signing and stamping a copy which duly signed and stamped letter is with the CID.

12. It was averred by the applicant that later at about one o'clock the three **Mr. Pall**, **Sheikh Mohammed** and **Hamisi** went to his office where **Mr. Pall** signed payment vouchers and they all left for the bank where they were paid cash by the manager in his office after which they then left for the Charter House Bank for exchanging the money to Euros.

13. It was deposed by the applicant that after one to two days he was informed by **Jacqueline Omollo** that the letter to pay the applicant's client was not a genuine letter since it wasn't written by **Ms Rachier** and **Amollo** prompting the applicant to report the matter to Gigiri CID where they later referred him to CID headquarters. At the CID headquarters, he recorded a statement and was asked to provide copies of the relevant documents. After some days that two CID officers went to the applicant's office and informed him that **Mr. Jenkins** and his daughter had recorded statements with them and that they wanted the original documents.

14. According to the applicant, he was not properly charged and the first time he knew of the charges was when he received a hearing notice that the matter was to be heard on the 15th of May 2006. Upon receipt of the said hearing notice he wrote to the respondent and informed them he was not aware of the complaint but they did not respond to the said letter until the applicant went for hearing at the at Professional centre and it was whilst attending the hearing of the alleged complaint that he was given a copy of the complainant's affidavit but was unable to discern what he was charged with even after perusing the complaint's affidavit. He disclosed that it was also at that time that he was surprised when the respondent asked the 2nd interested party (**Mr. Rachier**) to prosecute the complaint.

15. The applicant however stated that he raised a preliminary point that no charge was ever read to him, that he was not given chance to plead to any charge and that he was not given any charge sheet and therefore did not know what charges he was facing. The respondent however bruled that it could proceed by way of the complainant's affidavit only. Upon requesting for some time to enable him get his documents from the police to facilitate the filing of his replying affidavit in response to the complaint, the applicant averred that he was given a hearing date for 7th of September 2006 and told to file an affidavit which he did albeit without getting the documents from the police as they refused to release them to him on the grounds that it was a very serious matter which was still being investigated. He however did not attend the hearing of the alleged complaint on the 7th of September 2006 as he was taken ill and instead his advocate **Mr. Onindo** attended on his behalf and the matter was adjourned for only 3 days later for hearing i.e. on the 11th of September 2006 despite being given the applicant's medical report and being informed that the applicant was to see the doctor again on 11th September 2006.

16. The applicant averred that on the 11th of September 2006, he was still unwell and was advised to see the doctor for further check up, however his advocate, **Mr. Odhiambo** attended, but left on being informed that the case was not in the cause list. Accordingly, he was informed by the said advocate that the matter was not listed in the cause list hence did not proceed. The applicant lamented that though he applied for a copy of the said cause list, the registry staff refused to supply him with the same for reasons that they are yet to get authority from the respondent.

17. It was contended by the applicant that on the 20th of September 2006 he was very surprised and shocked when he received a letter dated 13th September 2006 from the respondent intimating to him that the matter was fixed for judgement, mitigation and sentence on the 5th of October 2006. On that date he attended the judgement, mitigation and sentence as directed by the respondent only to be served with a copy of the complainant's submissions filed on the 27th day of September 2006 to which was annexed two affidavits sworn by the 1st interested party herein and **Jacqueline Omollo** on the 11th day of September 2006. Upon seeking a clarification as to why he was being served with supplementary affidavits on the judgement day and how he was to reply to the affidavits now that the matter had already been fixed for judgement, mitigation and sentence, he was told by the respondent's chairperson that he could not reply but was told to come personally for the judgement, mitigation and sentence on the 12th of October 2006.

18. The applicant averred that when his Advocate **Mr. Onindo** attended judgement, he was informed by the respondent on the 12th day of October 2006 that a judgement has been made that the applicant be struck off the roll of advocates, a decision which was arrived on by the respondent without giving him time to responded to the complainant's supplementary affidavits or documents in the possession of the police in order to defend myself and tender the same before the disciplinary committee.

19. Based on information from the applicant's advocate, **Mr Onindo**, the applicant averred that the respondent had decided that he be struck off the roll of advocates a decision which was arrived on by the respondent without hearing viva voce evidence of the applicant despite the circumstances of the case demanding that the same be adduced. He lamented that though he applied for certified copies of proceedings and judgement, the same have not been supplied to him to date for reasons that the respondent's chairman is still holding the file. In his view, the delay by the respondent to surrender the file to the registry is because they are in the process of implementing their arbitrary, unlawful, unjust, unfair and unconsidered decision hence the more need for stay.

20. The applicant insisted that he was not properly charged and the first time he knew of the charges was when he received a hearing notice

that the matter was to be heard on the 15th of May 2006. He was however apprehensive that if the decision is implemented he would suffer a great deal unless this Court intervened as he no longer had any means to his livelihood and his clients stood to suffer as they did not have reasonable time to enable them get other counsel having already having paid him substantial instruction fees for their matters.

21. The applicant therefore prayed that the Intended Respondents Decision be quashed for being:

i. ultra vires the contrary to the provisions of section 60, 80, of the Advocates Act, Cap. 16 of the laws of Kenya, section 77 of the constitution.

ii. decided contrary to the well known principles of natural justice.

iii. decided whilst reducing the burden of proof contrary to the well established principles of adduction of evidence and was otherwise unreasonable, and founded on irrelevant considerations.

iv. reached upon after the complaint was prosecuted by an incompetent person.

v. unlawful as the provisions of rule 9 of the advocate's practice rules were breached.

vi. error of law and being unlawful for want of jurisdiction.

22. In support of his submissions, the applicant relied on this Court's decision in High Court JR Misc. Application. No 158 of 2009 - **Stephen Mwenesi Advocate vs. The Law Society of Kenya and Others.**

23. It was submitted on behalf of the applicant that the need to file further affidavits in defence and for cross examination of witnesses arose from the facts that two new affidavits, one by **Jacqueline Omollo**, an advocate from the firm of the 3rd respondent who herself was part of this transaction was filed on the day when the case was being closed for judgment, mitigation and sentence. It had several annexture including that of a purported document examiner who himself had not been called to appear before the respondent. The said document examiner was privately sourced for and paid by the 1st, 2nd and 3rd interested parties and the ex parte applicant was not given time to look for a document examiner of his own. The qualifications and credibility of the private document examiner was never tested as the respondent refused to allow for more time to call him to appear before it. The other supplementary affidavit was filed by the complainant himself though through the law firm of the 3rd respondent. It also raised completely fresh issues which had not been raised earlier and the ex parte applicant had no time to either respond to them or to cross examine him on the issues raised. To the applicant this violated the legal principle that a person cannot be condemned unheard. He therefore relied on this Court's decision in High Court Misc. Civil Application No. 8 of 2015 - **Thomas Letangule & 3 Others vs. Law Society of Kenya** in which it was stated as follows:

> **"in my view for one to say that a prima facie case has been made out, it is only fair that the person against whom adverse allegations are made be given an opportunity to respond thereto. This is exactly what the 1st respondent set out to do. However before the lapse of the period given to the applicants, the 1st respondent decided to table the matter thus denying the applicants the opportunity to respond to the allegations made against them."**

24. The applicant also relied on **Maganlal vs. King Emperor AIR 1946 Nagpur 126** where it was held that:

> **"The examination of a witness by the adverse party shall be called his cross-examination. The purpose of the cross-examination is to test the veracity of the witness. No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination".**

25. The applicant also relied on section 60(4)(e) of the ***Advocates Act*** **Cap 16 Laws of Kanya** which provides that**:**

> ***(4) After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Committee 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 Committee may order-***
>
> ***(a) That such advocate be admonished; or***
>
> ***(b) That such advocate be suspended from practice for a specific 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***
>
> ***(f) Such combinations of the above orders as the Committee thinks fit.***

26. The applicant disclosed that indeed one of the panelists, **Mr. G.K. Kimondo**, concurred with the ex parte applicant that the monetary jurisdiction of the respondent as at that time was only Kshs 5,000,000/= and therefore they could not handle and/or make orders with regard to a matter where the sum of Kshs 13,500,000/= was involved. He was however overruled by the then chairman, **Dr. Githu Muigai**, who insisted that they had to proceed. He then indicated that he was uncomfortable hence he withdrew from the panel. He never appeared again, but the proceedings and judgment indicate that he was a member and he duly signed the judgment.

27. It was submitted that the investigations by the police later cleared the ex parte applicant of any criminal acts, but nothing could be done to reverse the negative decision against the ex parte applicant. The police indeed said they could not charge the ex parte applicant with any of the crimes for which he had been maliciously accused and unlawfully indicted and sentenced by the respondent. Investigations by the police commenced after another Advocate, **Mr. Shikand** claimed that he too was representing another person by the same name as that of the 4th interested party. He claimed to have learnt about this case from the caretaker of the suit premises after the 1st interested party started to renovate the premises. The same caretaker was however present all along when the parties were viewing the property before the sale transaction commenced. He claimed that his client too was residing in London and he had left him with the original of the Title documents. He claimed that those original documents were stolen from his offices and that someone who purportedly had a spare key of his post office box was monitoring communications between his client and him. He went further to file a Land civil suit in the High Court against the 1st interested party and the Registrar of Lands and got temporary orders restraining the registration of the transfer, after the transfer documents were lodged by the 2nd and 3rd interested parties. He however failed to present his client before the police to record statements to assist in the investigations.

28. According to the ex parte applicant, this was a case of gross injustice which this honorable court must be called in to intervene and to ensure that justice is done to the applicant by calling into this court and quashing the decision of the respondent against the ex parte applicant.

29. It was further submitted that the ex parte applicant was a young advocate of less than five years standing. He had previously never been charged by any offence the respondent. They were three all young lawyers of less than five years in their firm. There are provisions for admonishing, suspension and warning in the Advocates for any offence facing an advocate. A principal has been set up by judicial officers or by persons charged with the responsibility punishing offenders or the public for various offences. There is sometimes the need to temper justice with mercy especially for first and young offenders. Assuming that the ex parte applicant was duly convicted, and that all procedures were properly followed, and that the rule of Natural justice was properly applied (all which were not), it was submitted that there could have been a lesser offence given the fact that everyone deserves a second chance for first offences and the fact there is far reaching economical, social and psychological implications coming with the striking off of an advocate from the roll.

30. The applicant disclosed that this case has been pending for over ten years. The file could not be traced despite the efforts by the ex parte applicant and his advocates. At some the respondent moved ahead to prematurely taxed his bill before the case is even concluded. The file lay with Deputy Registrar during that time and could not be found. The other reason given by the registry is that there was misfiling especially caused during the movement of the files from the previous High Court in the CBD, currently the Supreme Court to the new court in Milimani. During these ten years the ex parte applicant was in the cold as he could not practice as an advocate of the High Court. This is the right time for this Honorable court to intervene and redeem the applicant from the cold back to life. Indeed the law states that an advocate shall be struck off if convicted of a gross professional misconduct for a period of not less than five years, meaning there was an intention that after five years, one can be reinstated back to the roll.

31. The applicant's case was therefore that this case and more particularly the Notice of Motion dated 6th November, 2006 and filed on 7th November, 2006 has merits and the prayers sort should therefore be granted with costs.

Respondent's Case

32. In response to the Application, the Respondent averred that a complaint was received by the Respondent after the 1st interested party herein complained against the professional conduct of the Applicant and consequently Disciplinary Cause Number 4 of 2006 was preferred against the Applicant herein. The Respondent's averred that under section 4 of the ***Law Society of Kenya Act*** (Chapter 18 Laws of Kenya) the objects for which the 5th interested party is established are, *inter alia*, to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. It therefore falls within the objects of the 5th interested party through the respondent to receive hear and determine complaints lodged against advocates such as the Applicant herein. The Respondent herein is, on the other hand established under section 57 of the ***Advocates Act*** (Chapter 16 of the Laws of Kenya) for purposes, *inter alia*, of dealing with professional misconduct on the part of advocates. Further, under section 60 of the ***Advocates Act*** the Applicant herein is empowered to receive complaint by any person as against an advocate for professional misconduct.

33. According to the Respondent, the Applicant herein knew all along that the complaint lodged against him by the 1st interested party concerned, *inter alia*, conniving to cheat the 1st interested party of his money, releasing the purchase price to a fictitious person with a view of cheating the 1st interested party of his money which acts amount to professional misconduct on the part of the Applicant and which acts are punishable by the Respondent herein.

34. While the Respondent admitted that the Applicant raised a preliminary objection to the said complaint, it averred that the same was found to be without merit as the same could be raised in the substantive hearing without prejudice to either party.

35. According to the Respondent:

a) That the Applicants averments are contradictory, inconsistent and full of untruths since in paragraph 6 the Applicant states that on or about the 20th January 2005 he was instructed by Harder Singh Pall to act for him in the sale of L.R. No. 17/275 and 17/276 whereas in paragraph 7 the Applicant states that on or about the 20th January 2005 a **Mr. Hamisi** informed the Applicant that he

(**Mr. Hamisi**) was to give the Applicant a client.

b) That further and in addition to the foregoing, the Applicant proceeds to state in paragraph 8 that two days later two Asian Sikh men visited his offices whereas he has already averred that he had received instructions from the said **Harder Singh Pall** and thus the said harder Singh Pall was no longer a stranger to him.

36. In the Respondent's contention, the aforesaid contradictions, inconsistencies and untruths in the Applicant's affidavit reveal his ill motive and connivance with the said **Harder Singh Pall** to cheat the 1st interested party of his money and that the Applicant was deeply involved in the said acts of connivance.

37. According to the Respondent, section 60(3) of the ***Advocates Act*** provides, *inter alia*, where a complaint has been referred to the Respondent, the Respondent shall give the Advocate an opportunity to appear before it and shall furnish him with a copy of the complaint. In this case it was the Respondent's contention that it supplied the Applicant with a copy of the Complaint as required by law and thus the allegations contained in paragraph 26 are denied in toto. It was contended that when the Applicant appeared before the Respondent on 15th May 2006 the hearing of the matter was adjourned at the instance of the Applicant stating that he had not been served with the Affidavit and annexure and the same were supplied to him and thus the contents of paragraph 26 are misleading and the same are denied in toto. In addition to the foregoing, the Applicant was served with a Notice for plea taking on the 23rd February 2006. However, when the matter came up for purposes of Plea taking on the 3rd of April 2006 the Applicant was absent and thus a plea of not guilty was entered.

38. It was contended that as a result of the absence of the Applicant at the time of taking plea and further pursuant to the entering of a plea of not guilty the Applicant was directed to file a replying affidavit within twenty one days of service and a hearing notice was issued giving the Applicant notice that the complaint was to be heard on the 15th May 2006. However, on 19th April 2006 the Applicant wrote to the Complaint Commission protesting that the matter had been referred to the Disciplinary Committee without his being given Notice. To the Respondent, the Applicant's protestation was totally misplaced misguided since the complaint against the advocate had been lodged with the Disciplinary Committee and was not referred to the Disciplinary Committee by the Complaints Commission.

39. It was however disclosed that when the matter came up for hearing on 15th May 2006 the same was adjourned at the instance of the Applicant who was ordered to file his Replying Affidavit within 21 days of the order and the Applicant duly filed his replying affidavit on 4th September 2006. However, when the matter came up for hearing the Applicant was absent and thus the matter was adjourned to enable the Applicant be present at the hearing of the complaint. Further, when the complaint came for hearing the Applicant was still absent but his advocate was present and thus the matter proceeded for hearing and a notice was issued to the Applicant informing him that the matter had been fixed for judgment, mitigation and sentence on 5th October 2006.

40. According to the Respondent, under Rule 17 of the ***Advocates (Disciplinary Committee) Rules*** if any party fails to appear at the hearing, the committee may at its discretion proceed to hear the matter and determine the complaint his absence notwithstanding. Rule 18 thereof Rules allows the Respondent to proceed and act upon evidence given by affidavit thus doing away with *viva voce* evidence. The Applicant herein having filed a replying affidavit was given an opportunity to be heard and he was not denied an opportunity of giving *viva voce* evidence as alleged by the Applicant.

41. The Respondent accused the ex pate applicant of having totally misconstrued the objectives integrity and conduct of the Respondent which consists of Advocates who are of not less than ten years standing and are persons are of high moral and professional integrity and as such the Applicant should not be in trepidation of the disciplinary cause facing him.

42. It was the Respondent's case that the Applicant herein should have attended the Disciplinary proceedings in the Disciplinary Committee and raise the issues he has raised herein rather than disregard the Disciplinary Process of the Respondent and when judgment has already been entered against him, rush to this Honourable Court seeking to quash proceedings which he participated in fully. In the Respondent's view, the application for judicial review has been brought with a view of abusing the process of this Honourable court and the process of the Respondent since it will defeat the logic behind the establishment of the Respondent if persons whom it is meant to receive complaints against refuse to participate in the disciplinary process and only rush to this Honourable Court once judgment has been entered against them. The Respondent's position was that the the Applicant herein is trying to substitute this Honourable court for the Respondent and this should be discouraged by dismissing the Application for Judicial Review filed by the Applicant.

Determinations

43. I have considered the application, the evidence adduced in the form of affidavits and the submissions filed on behalf of the parties herein.

44. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with**

procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

45. In this case, the first ground raised by the applicant is that of procedural impropriety in that the applicant was never notified of the charge facing him before the date he appeared for hearing.

46. The general position on the right to a hearing was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."**

47. In **Geothermal Development Company Limited vs. Attorney General & 3 Others (2013) eKLR,** it was held that:

> **"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See** *Donoghue v South Eastern Health Board***[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action***, *Thomson Reuters 2nd edition, at page 272,* notes that, '*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision*'…Article47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including '*(c) responsive, prompt, effective, impartial and equitable provision of services' and '(f) transparency and provision to the public of timely, accurate information*'…Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in***TV3 v Independent Radio and Television Commission* [1994] 2 IR 439)…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See* *Charkaoui v Canada***[2007] SCC 9,** *Alberta Workers' Compensation Board v Alberta Appeals Commission* **(2005) 258 DLR (4th), 29, 55 and** *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"**

48. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

49. Section 4(3) of the ***Fair Administrative Action Act, 2015,*** a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(b) an opportunity to be heard and to make representations in that regard;***
>
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
>
> ***(d) a statement of reasons pursuant to section 6;***
>
> ***(e) notice of the right to legal representation, where applicable;***
>
> ***(f) notice of the right to cross-examine or where applicable; or***

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

50. It is however my view that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the ***Fair Administrative Action Act*** provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR,** the court held the view that;

> **"The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners' claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing."**

51. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

> **"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."**

52. The rationale for service of process was restated in **Bett vs. Electoral Commission of Kenya & 2 Others (No. 2) [2008] 2 KLR (EP) 461** where it was held that:

> **"The general rule is that service of any process serves the purpose of bringing to the notice or knowledge of the party being served that such a process is in existence and that the party to be served is concerned with it and is required to respond to it. Knowledge of a court process is the core of the whole issue of personal service."**

53. Similar position was adopted in **Nanjibhai Prabhudas & Co. Ltd vs. Standard Bank Ltd. [1968] EA 670** where **Harris, J** held that:

> **"The defect of which the defendant complains in regard to the service of the summons constitutes, at most, an irregularity capable of being waived, and, secondly, that irregularity has been waived…It does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. The practical difference between an irregularity and a nullity is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgement on a writ which has never been served and one in which there has been a defect in the service but the writ had come to the knowledge of the defendant…Here there is no doubt that the summons, which on the face states that a copy of the plaint was annexed to it came to the knowledge of the defendant and that the latter's subsequent course of conduct was adopted and followed in the light of the information so conveyed to it. Therefore, there can be no doubt that any defect there may have been in the service constituted an irregularity only, capable of being waived."**

54. As per **Newbold, P**:

> **"Although it was incorrect to put on the summons the seal of the Resident Magistrate's Court, the summons itself purports to issue from the High Court and is signed by the Deputy Registrar of the High Court. The defendant entered appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was incorrect. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The court cannot regard the incorrect placing of the seal of one court on a document, instead of the seal of another court, as an act so fundamental that it transforms what would otherwise be an effective document into a complete nullity…Although the service of the summons on the defendant instead of a notice was incorrect, the courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature and matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as of so fundamental a nature that it results into a complete nullity and vitiates everything following would appear to be completely unreal unless there is a good reason for this distinction between the service of the summons and the service of the notice. It would seem therefore that there is nothing in this mistaken service of the summons instead of the notice of summons as could or should be regarded as so fundamental a nature as to result in a nullity…Where the defendant enters an unconditional appearance to an action it has always been regarded as an act which waives any irregularity."**

55. In this case, it is clear that when the applicant appeared for hearing he sought for and was granted an adjournment. Whereas he complains that the adjournment was too short, the decision to grant an adjournment and for how long is discretionary and this Court exercising its judicial review jurisdiction will not interfere with the exercise of such discretion unless it is satisfied that the decision was unreasonable. In

this case I am not satisfied that this was so. As to whether the failure to adjourn the matter the second time was wrongful, that in my view a matter for an appellate court rather than this Court.

56. What has caused me anxiety is the allegation, which allegation was not expressly controverted, that on the day when the matter was scheduled for judgement, further affidavits were filed and admitted on behalf of the complainants without the ex parte applicant being afforded corresponding opportunity to deal with the same. This Court had occasion to deal with similar circumstances in High Court JR Misc. Applic. No 158 of 2009 - **Stephen Mwenesi Advocate vs. The Law Society of Kenya and Others** where the Court held that:

> **"To give a party to a disciplinary proceedings an opportunity to respond to allegations made against him while at the same time listing the matter for judgment, mitigation and sentence in my respectful view defies logic and amounts to gross unreasonableness. To do so also amount to failure to act fairly as it is an indication that the authority concerned has made a decision for it does not make sense to decide that mitigation and sentence would be necessary before hearing a party's case. In the premises it is my view and I so hold that the impugned proceedings were tainted with procedural irregularities. In the circumstances, one may be tempted to agree with the Applicant's contention that the 2nd Respondents reaction evinced exasperation with the Applicant."**

57. It is similarly my view that to admit fresh or new or further evidence on the date when a matter is scheduled for judgement, mitigation and sentencing without affording an opportunity to the party charged to controvert the same amount to a gross unfairness on the part of the Tribunal before whom the matter is being determined and such course cannot be excused. If this is the course that was adopted by the Respondent herein, and there is no attempt to controvert the same, then clearly the Respondent must be indicted for having conducted its proceedings in a manner not expected from a Tribunal of the Respondent's stature. Such conduct can only be a lesson to students of law on how not conduct legal and quasi-legal proceedings.

58. It is therefore clear that the manner in which the Respondent conducted the proceedings against the Applicant was tainted with procedural impropriety. To my mind the conduct of the proceedings by the Respondent amounted to substantive unfairness to the ex parte applicant which is now one of the grounds for granting judicial review reliefs.

59. It therefore follows that this motion is merited.

Order

60. In the result an order of certiorari is hereby issued bringing before this court and quashing the disciplinary proceedings and judgment in Disciplinary Cause No. 4 of 2006 before the Disciplinary Committee of the Law Society of Kenya. Having done so it is nolonger necessary to issue the other prayers since a decision that has been quashed can nolonger be implemented.

61. The costs of these proceedings are awarded to the Applicant to be borne by the Respondent.

62. It is so ordered.

Dated at Nairobi this 21st day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Owalla for Mr Agina for the applicant

Miss Nakato for the Respondent and the 5th interested party

CA Ooko