



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 684 OF 2017

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE LAW SOCIETY OF KENYA.....RESPONDENT

AND

MERCY MORAGWA MOGUSU.....INTERESTED PARTY

EX PARTE: STEPHEN MOGAKA T/A MUSYOKI MOGAKA & CO. ADVOCATES

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st December, 2017, the ex parte applicant herein, **Stephen Mogaka T/A Musyoki Mogaka & Co. Advocates** seeks and order of *mandamus* compelling the Respondent to update its website and records to reflect that the interested party herein, **Mercy Moragwa Mogusu's** address/work place since May, 2017 has been **Momanyi & Associates Advocates**, Windsor House, 6th Floor, Suite No. 600, Muindi Mbingu Street, University Way Junction, P. O. Box 10479-00100, Nairobi. The applicant also seeks an order that the costs of the application and interests thereon be provided for.

Applicant's Case

2. According to the applicant, the firm of **Musyoki Mogaka & Co. Advocates** was duly registered under the **Registration of Business Names Act**, Cap 499 Laws of Kenya on 14th August, 2008 and that since its inception the applicant neither been into partnership with any advocate nor has he ever changed the nature of the business operations into a partnership.

3. The applicant averred that on 6th September, 2017 he did file an Election Petition in Nyamira High Court in which on 9th November, 2017, the 2nd Respondent in the said Election Petition did file a Notice of Motion Application under Certificate of Urgency seeking to strike out and expunge from the court records the Petitioner's Supporting Affidavit as well as 6 of the Petitioner's witnesses' Affidavits which application was extensively argued on 20th November, 2017 and 21st November, 2017 with the ruling therefor being slated for 14th December, 2017.

4. According to the applicant, he did file a Notice of Motion Application dated 5th December, 2017 under Certificate of urgency seeking to arrest the said ruling.

5. According to the applicant, he has on several occasions written, emailed and even personally visited the Respondent and informed it that **Mercy Moragwa Mogusu**, the interested party is not an Advocate at **Musyoki Mogaka & Co. Advocates** and has similarly on several occasions written, emailed and even personally visited the Respondent and instructed it to update its record to indicate that **Mercy Moragwa Mogusu** practices law at **Momanyi & Associates Advocates**. However, the Respondent has deliberately failed, refused and/or neglected to portray the true address of one Advocate **Mercy Moragwa Mogusu** in its records and website, to the detriment of the Applicant's practice of law. Instead, in response to the applicant's emailed to the Respondent on 22nd November, 2017 and 8th December, 2017, the Respondent by its email of 8th December, 2017 informed the applicant to update the said information online as he applies for the 2018 practicing certificate. According to the applicant, it is the Respondent and the applicant who is in a position to update the Respondent's records and website.

6. The applicant lamented that the continued portraying of **Mercy Moragwa Mogusu** an Advocate at **Musyoki Mogaka & Co. Advocates** yet her employer **Hon. Ben Momanyi** has indicated in his letter dated 29th November, 2017 that **Mercy Moragwa Mogusu** has been his employee since May 2017 is injurious to the Applicant's practice of law. To the applicant, he has no other way of ensuring that the Respondent corrects **Mercy Moragwa Mogusu's** Address other than through these judicial review proceedings.

7. In his rejoinder, the ex parte applicant averred that he was dismayed that that the Interested Party has actually obtained Practicing Certificates for 3 years in a row since 2015 on the basis of false declarations that she is an Associate of Musyoki Mogaka & Co. Advocates. The applicant averred that a perusal of the Statutory Declaration purportedly made by the Interested Party on 26th January 2015 and her Application for a Practicing Certificate state at paragraph 3 of the Statutory Declaration, that she was "*Litigating as an Associate with Momanyi & Associates*". He also noted that there is another Declaration Form made by the same Advocate on the same date in which her "firm/employer" has been curiously altered to read Musyoki Mogaka & Co. Advocates. The applicant therefore found it curious and disturbing that the Respondent could proceed as it did to issue a Practicing Certificate to the said Advocate under the firm of Musyoki Mogaka & Co. Advocates. Further, a 3rd Statutory Declaration allegedly made by the Interested Party on 27th January 2015 indicates an address of P. O. Box 9700-00200 yet the firm of Musyoki Mogaka & Co. Advocates has never used the said address.

8. The applicant averred that there is no valid Statutory Declarations by the Interested Party that have been filed in Court to support the Respondent's contention that the Interested Party ever filed valid Statutory Declarations to have her issued with Practicing Certificates in the name of Musyoki Mogaka & Co. Advocates least of all in the year 2017.

9. It was also averred that in the absence of a valid Statutory Declaration made in 2017, the Respondent had no business issuing the interested party with any practicing certificate let alone in the name of Musyoki Mogaka & co Advocates where in any event she was not working and or she has never worked. It was the applicant's case that the proceedings herein are targeted at expunging from LSK records fraudulent entries and or entries made by LSK pursuant to false and/or in valid Statutory Declaration in 2015, 2016 and 2017 without prejudice to the Respondent's Disciplinary steps or his right to pursue criminal action for perjury, personating, obtaining briefs through false pretence, civil proceedings against the Interested Party for a claim for damages etc.

Respondent's Case

10. The application was however opposed by the Respondent, the **Law Society of Kenya**.

11. According to the Respondent, it is created under section 3 of the **Law Society of Kenya Act** No. 21 of 2014 and mandated to perform the functions enlisted under section 4 of the said Act.

12. It was averred that the interested party herein is an advocate of the High Court of Kenya, her admission number being P105/4951/03. It was disclosed that since the year 2015 to 2017, the interested party has been making her application for her practising certificate and her declarations for the said years have all been indicating that her place of work is **Musyoka Mogaka & Company Advocates** and that at no point in the year 2017 did she declare that she worked elsewhere other than in the said firm of advocates.

13. However on 15th November, 2017, the Respondent received a letter from the ex parte applicant alleging that the interested party has never worked for the firm of **Musyoki Mogaka & Company Advocates**. Further on 16th November, 2017, the Respondent received a letter from the applicant informing the former that he was required to respond to an application in court which was coming up for hearing on 20th November, 2017 and reiterating the contents of the said letter of 15th November, 2017.

14. According to the Respondent, the purpose of the said letters was to have the Respondent unilaterally remove the interested party's declared details from the Respondent's website and records which could not be done without the input of the interested party and a declaration to the effect that the interested party had moved from the firm of **Musyoka Mogaka and Company Advocates** to a different place of work as is required by law.

15. It was averred that upon receipt of the said letters. The Respondent wrote to the interested party forwarding the letter from the applicants and demanding that the interested party furnishes the Respondent with an explanation and/or reason why disciplinary proceedings ought not to be instituted based on the allegations levelled against her, and giving the interested party twenty-one (21) days within which to respond. The said 21 days, it was averred, were lapsing on 13th December, 2017 as both the Respondent and the Advocates Disciplinary Tribunal were preparing to close down for Christmas holidays.

16. However as the Respondent was preparing to take action against the interested party, the applicant served the Respondent with the pleadings herein, thus giving the Respondent no time to pursue the relevant processes available to deal with the complaint.

17. It was averred that on 16th January, 2016, the Respondent received a letter from the interested party, in which she confirmed that she had a working arrangement **Stephen Musyoki Mogaka** and had even been working on a partnership. It was however denied that the interested party commissioned the documents in the election petition handled by the ex parte applicant.

18. It was the Respondent's case that it is tied to only publishing that which an advocate has declared hence it would be irregular and against the law to act on information given by the applicant without involving the advocate who submitted a declaration which indicated that she works for the applicant's firm.

19. It was therefore contended that this application is an abuse of the court process as the Disciplinary Committee should be allowed to determine the complaint. It Respondent's case that the applicant had failed to establish a case against the applicant hence the Court should dismiss the same with costs.

Interested Party's Case

20. The application was similarly opposed by the interested party.

21. According to the interested party, she is an advocate of the High Court having been admitted to the Roll of Advocates, her admission number being P105/4951/03 while her 2017 Practice Number being LSK/2017/739.

22. In the interested party's view, the applicant appears to have filed this matter pursuant to an outcome in Election Petition No. 2 of 2017 at the High Court in Nyamira which went against him, a petition in which

the interested party's name featured prominently. The interested party however contended that the applicant did not approach her when a contention arose regarding her commissioning of the supporting affidavits as well as the witness affidavits therein. She insisted that she was not asked to respond to the issues raised in the said petition by way of affidavit but only heard the issues therein through the media and letters written by the applicant to **Momanyi & Associates Advocates**.

23. Equally, it was averred that the petitioner did not approach the interested party prior to filing this matter in court and only became aware of the matter when the documents were served on Momanyi & Associates Advocates, despite the fact that neither the said firm nor the interested party were parties to the said petition. Despite that fact the interested party attended court on 18th December, 2017 when the matter was slated for hearing, on which date the interested party was formally joined to the matter.

24. According to the interested party, at some point M/s Momanyi & Associates Advocates and Musyoki Mogaka & Co. Advocates were practicing from the same office at Uganda House, 4th Floor Door 19, Kenyatta Avenue, Nairobi with the former having been the first to occupy the office. It was the interested party's case that she was practicing from the said office. However at some point Momanyi & Associates Advocates moved to Winsor House leaving **Musyoki Mogaka & Co. Advocates** thereat.

25. The interested party averred that it was in fact the applicant herein, who was the proprietor of **Musyoki Mogaka & Co. Advocates** who advised her to take out her practicing certificate through his law firm in the years 2015, 2016 and 2017. In her evidence, **Stephen Musyoka Mogaka**, has never had a problem and has never complained about that fact except by way of these proceedings. With respect to the letters referred to by the applicant, the interested party averred that none of them was brought to her attention included those which were indicated as having been copied to her.

26. It was the interested party's case that the only time that **Stephen Musyoka Mogaka** get in touch with her over the issue of the place of practice was sometimes in mid-November. 2017 when he sent her text messages asking her to sign an affidavit saying that her place of practice is not **Musyoki Mogaka & Co. Advocates** without disclosing to her that there was a serious issue regarding her alleged commissioning of affidavits filed in the said petition. However in one of her text messages the interested party asked **Stephen Musyoka Mogaka** to return her commissioner for oath's rubber stamp to her as the same had been used by somebody in his office in witnessing documents that turned out to be forgeries.

27. Upon discovering that the said petition had been struck out, the interested party secured copies of the said affidavits, which, according to her were not commissioned before her as the signature appearing hereon was not hers. Similarly the Commissioner for Oaths rubber stamp appearing therein was not hers. It was her case that neither the applicant nor any advocate who drew the said affidavits sought her permission to use her old rubber stamp thereon hence the use thereof was a forgery and impersonation.

28. It was the interested party's case that had **Stephen Musyoka Mogaka** expressly notified her that he did not want the interested party to use the applicant's physical address in applying for her practicing certificate, the interested party could have notified the Respondent of the same issue promptly. It was therefore the interested party's case that the applicant filed this matter before notifying her that she should not use the applicant's physical address in taking out her yearly practicing certificate. The interested party wondered why the applicant changed his mind on the arrangement of working together.

29. Nevertheless the interested party asserted that since the applicant had, by his conduct, withdrawn his consent, the interested would no longer take out the said certificate using the applicant's physical address.

Determinations

30. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.

31. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte**

Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. 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 in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done”.

32. In Commissioner of Lands & Another vs. Kithinji Murugu M’agere [2014] eKLR the Court held that:

“It has further been held that *Mandamus* is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that *mandamus* may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “anybody of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, *mandamus* may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of *mandamus* against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the Tanzania Court of Appeal decision in Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others [1999] 2 EA 245.

It is now trite that the order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform.

33. In Haji Yusuf Mutenda & 2 Others vs. Haji Zakaliya Muguyiasoka & Others [1957] E.A. 391 it was held that:

“In cases where there is a duty of a public or quasi-public or nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest, the court has jurisdiction to grant a mandamus to compel the fulfilment.”

34. In Republic vs. Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah [2015] eKLR the court stated that:

“As already pointed out, in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be executed. However, there is an exception to this rule as was pointed out by Panganiban, J in the Philippines case of First Phillippine Holdings Corporation versus Sandiganbayan, 253 Scra 30, February 1, 1996 that:

“Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is ‘gross abuse of discretion, manifest injustice or palpable excess of authority’ equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue.”

35. It is therefore clear that for an order of *mandamus* to go forth the applicant must satisfy the Court that the Respondent has a legal duty whether statutorily or at common law which the applicant expects the Respondent to fulfil and the Respondent has failed to do so. In other words *mandamus* cannot issue against a person or authority for performance of a duty that the Respondent is not mandated or obliged to perform.

36. In this case none of the parties has addressed me on the existence or otherwise of a duty imposed on the Respondent to update its records when requested by third parties. With due respect to learned counsel, they concentrated their efforts in addressing issues related to the Nyamira High Court Petition which issues are largely immaterial to the determination of this application instead of addressing the real elephant in the house – the existence of a duty.

37. In this case, the applicant’s case, if I understand him correctly is that the records kept by the Respondent with respect to the place of business of the interested party are incorrect. The Respondent’s position however is that the said records are as per the particulars furnished to it by the interested party. The interested party on her part has not denied that she did supply the same. To the contrary, she seems to maintain the position, though not as clearly as one would have expected, that she is rightfully using the particulars relating to the ex parte applicant’s firm.

38. In those circumstances, it is only reasonable that the Respondent considers the said complaint, while affording the interested party an opportunity of being heard. However to seek that this Court compels the Respondent to update its website and records to reflect that the interested party’s place of business is a place other than the one indicated by her to the Respondent, without first affording the interested party an opportunity of being heard would be clearly unfair. In this case, I am not satisfied that the Respondent has taken inordinate delay in dealing with the said matter.

39. It is not denied that the Respondent has the power to hear and determine the applicant’s grievances the subject of these proceedings.

40. It is therefore my view that whereas I cannot compel the Respondent to update its website by removing the interested party’ name from that of applicant, the Court can however compel the Respondent to hear and determine the complaint.

41. Under section 5 of the *Fair Administrative Action Act*, some of the grounds for seeking and granting judicial review orders are that there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.

42. Section 11 of the *Fair Administrative Action Act, 2015* provides as follows:

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in a particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

43. Pursuant to this, the applicant is also seeking an order for pecuniary compensation. In my view pecuniary compensation for the purposes of judicial review does not necessarily mean an award of general damages under the common law. Suffice it to say however that there is no material placed before me on the basis upon which I can award compensation. In any case the applicant has indicated that the proceedings herein are targeted at expunging from LSK records fraudulent entries and or entries made by LSK pursuant to false and/or in valid Statutory Declaration in 2015, 2016 and 2017 without prejudice to the Respondent's Disciplinary steps or his right to pursue criminal action for perjury, personating, obtaining briefs through false pretence, civil proceedings against the Interested Party for a claim for damages etc. Clearly the applicant appreciates that he can seek orders in civil proceedings for compensation and judicial review reliefs being remedies of last resort ought not to be invoked in circumstances where a party may seek the same through alternative dispute resolution mechanisms including civil proceedings.

Order

44. Accordingly the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the Respondent to determine the applicants complaint within the sixty (60) days from the date of service of this order.

45. As the orders issued are not exactly what the applicant sought in these proceedings, there will be no order as to costs.

46. It is so ordered.

Dated at Nairobi this 13th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mumia for Miss Mwinzi for the Respondent

CA Ooko