REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

IN THE JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 499 OF 2016

IN THE MATTER OF AN APPLICATION BY NELSON HAVI FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE ACT, CAP. 21 OF THE LAWS OF KENYA, THE ADVOCATES ACT CAP. 16 OF THE LAWS OF KENYA AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF NELSON HAVI

BETWEEN

REPUBLIC.....APPLICANT

AND

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

ADVOCATES DISCIPLINARY TRIBUNAL.....2ND RESPONDENT

CHIEF JUSTICE.....3RD RESPONDENT

SECRETARY LAW SOCIETY OF KENYA, DISCIPLINARY

TRIBUNAL & COMMITTEE OF THREE.....4TH RESPONDENT

AND

AHMEDNASIR MAALIM ADBULLAHI.....INTERESTED PARTY

EX-PARTE: NELSON HAVI

JUDGMENT

Introduction

1. By a Notice of Motion dated 21st October, 2016, the applicant herein, **Nelson Havi,** seeks the following orders:

> **a) An Order of *certiorari* be and is hereby issued to remove into the High Court and quash the entire decision of the 1st and 2nd Respondents made on the 27th day of September, 2016 directing the commencement and hearing of Disciplinary**

Tribunal Cause Number 95 of 2016 against the Ex-Parte Applicant.

b) An Order of *prohibition be and is* hereby issued to prohibit the 1st, 3rd and 4th Respondents from entertaining any disciplinary complaint against the Ex-Parte Applicant in respect to matters pending in Court, being H.c.c.c. No. 46 of 2015, Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others, Civil Appln. No. 21 of 2016 Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others and Civil Appeal No. 259 of Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others.

c) An Order of *mandamus be and is* hereby issued to compel the 1st, 3rd and 4th Respondents to constitute a Committee of Three under Section 19 of the Advocates Act, Cap. 16 of the Laws of Kenya, to consider and determine all disciplinary complaints against the Interested Party, pending before the said 1st, 3rd and 4th Respondents in particular, the complaint dated the 21st day of May, 2016 by the Ex-Parte Applicant.

d) The costs of this suit be paid by the 1st and 4th Respondents together with the Interested Party.

Applicant's Case

2. The facts relied upon by the Applicant, an Advocate of the High Court of Kenya practicing in the name and style of Havi & Company Advocates, are that he is an Advocate of the High Court of Kenya of good reputation, standing and without any pending disciplinary record or conviction.

3. The applicant disclosed that there are pending before the High Court and Court of Appeal, H.C.C.C. No. 46 of 2015 - **Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others**, Civil Appln. No. 21 of 2016 - **Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others** and Civil Appeal No. 259 of 2015 - **Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others**, in which the directors of Tatu City Limited and Kofinaf Limited are feuding over the sale of the companies' properties. According to the applicant, he acts for all the Plaintiffs, Applicants and the Appellants in the three pending cases respectively, whilst the Interested Party acts for the Respondents directly or indirectly through law firms associated with him.

4. It was averred that in February, 2015, the Interested Party was consulted, briefed and instructed by the applicant and a director of Tatu City Limited and Kofinaf Company Limited, **Mr. Nahashon Ngige Nyagah**, to act for the Plaintiffs in H.C.C.C. No. 46 of 2015 but jumped ship, sought the Defendants and was thereafter instructed by them to infiltrate the legal representation for Plaintiffs and terminate the suit with a view to countermand orders made against the Defendants on the 6th day of March, 2015, the 28th day of April, 2015 and the 12th day of June, 2015, directing that an in-depth forensic audit in respect to the loans of the 1st and 2nd Plaintiffs be conducted to resolve the disputed sales of properties and reconciliation of the financial accounts.

5. It was the applicant's case that the Interested Party has, in an effort of scuttling, interfering, compromising and terminating the three matters pending in the High Court and the Court of Appeal infiltrated the legal representation for the Plaintiffs, the Applicants and the Appellants in H.C.C.C. No. 46 of 2015, Civil Appln. No. 21 of 2016 and Civil Appeal No. 259 of 2015 respectively, with a view to terminating them.

6. According to the applicant, on the 16th day of March, 2016, the Applicant acting on instructions of Tatu City Limited, notified one **Superior Homes (Kenya) Limited** not to contract the purchase of a property of Tatu City Limited on the offer by the Defendants in H.C.C.C. No. 46 of 2015, in view of the orders aforesaid and the pendency of the three matters aforesaid. However the said letter dated the 16th day of March, 2016 was not responded to.

7. It was deposed that on the 16th day of August, 2016, the Interested Party made a demand of US$. 24,000,000.00 from the applicant, alleging that the applicant had unlawfully procured the breach of a contract for the sale of the property to **Superior Homes (Kenya) Limited**, with a threat to commence disciplinary action against the applicant for the reason that the applicant was not instructed by **Tatu City Limited** to write the letter of the 16th day of March, 2016. To this, the applicant responded on the 31st day of August, 2016.

8. However, on the 23rd day of August, 2016 and the 6th day of September, 2016, the Interested Party lodged complaints with the 1st and 2nd Respondents, falsely and maliciously alleging that the applicant was not authorized to act in the said pending suits and to write to **Superior Homes (Kenya) Limited** as the applicant did, when the issue of the Interested Party's claimed representation for **Tatu City Limited** and **Kofinaf Company Limited** in place of the Applicant in the three pending cases is yet to be determined. The complaints dated the 25th day of August, 2016 and the 6th day of September, 2016 were addressed to the 2nd Respondent with directives that the same "be fixed for the taking of a plea as soon as possible."

9. It was averred that the directions from the 1st and 4th Respondent dated the 30th day of August, 2016 and the 7th day of September, 2016 respectively, indicated that the applicant's response was required to enable a determination as to whether there was a *prima facie* case on the complaints to warrant further action. On 19th day of September, 2016, the applicant responded to the two complaints and on the 27th day of September, 2016, the 1st and 4th Respondents wrote to the applicant, directing that the applicant appears before the 2nd Respondent on the 24th day of October, 2016 to answer to charges of professional misconduct in Disciplinary Tribunal Cause Number 95 of 2016.

10. It was however averred that the 1st, 2nd and 4th Respondents did not indicate any reasons upon which a decision for the claimed *prima facie* case had been made.

11. The applicant disclosed that he had consulted several past and present members of the 1st Respondent's Council as well as two Secretaries, who advised him that the Council and/or a Committee considers a complaint and makes a decision as to whether or not a *prima*

facie case had been made.

12. It was therefore the applicant's case that from the 1st and 2nd Respondents' actions, as demonstrated by the speed in which the complaints were processed, it was clear that the same were not subject to any *prima facie* considerations and that the 1st, 2nd and 4th Respondents merely acted on the directions of the Interested Party and "fixed for the taking of a plea as soon as possible" as directed.

13. It was therefore the applicant's case that the 1st, 2nd and 4th Respondents had acted on the instructions and directions of the Interested Party and without due regard to the law and the facts, directed that there is a *prima facie* case against the applicant and summoned the Applicant to take plea on 24th October, 2016 in respect to Disciplinary Tribunal Cause Number 95 of 2016 on the directions of the Interested Party and without any factual or legal basis. The applicant therefore was of the view that the 1st, 3rd and 4th Respondents' actions have been taken at the behest, directions and control of the Interested Party, with a view to suppress complaints of misconduct made against the Interested Party on 3rd May, 2012, 12th October, 2015 and 21st May, 2016 whose progression the 1st, 3rd and 4th Respondents have actively hindered and suppressed.

14. The applicant disclosed that there is credible undisputed evidence that the Interested Party did not undertake pupillage as he was away on study at Cornell University in the USA, at the time he is claimed to have undertaken pupillage, a position which the late **Peter Simani** confirmed in an Affidavit sworn on the 27th day of January, 1993 that he did not take out Practicing Certificates for the years 1991 and 1992.

15. Accordingly, on the 3rd day of May, 2012, complaints were lodged with the 1st, 2nd and 4th Respondents by **Michael Osundwa Sakwa** and **Bryan Yongo** in respect to the falsehoods of the Certificate of Completion of Pupillage. A letter dated the 15th day of May, 2012 from the 1st and 4th Respondents' indicate that the complaints were forwarded to the 1st Respondent's Council for consideration before the Interested Party was required to respond to them. However, the Interested Party did not respond to the complaints but instead, compromised **Bryan Yongo** to withdraw his complaint.

16. It was averred that on the 25th day of May, 2o12, **Osundwa Sakwa** requested to peruse the files of the Interested Party and his claimed master. Further the same day, **Osundwa Sakwa** wrote to the 1st and 4th Respondents, protesting the attempted withdrawal by **Bryan Yongo**, of the complaint against the Interested Party kept at the office of the Chief Registrar of the Judiciary. By a letter dated the 11th day of June, 2012 by the 1st and 4th Respondents, the said Respondents purported to notify of the withdrawal of the complaint against the Interested Party and suggested that one of the complainants, **Bryan Yongo**, be prosecuted for perjury.

17. The applicant however deposed that on the 12th day of June, 2012 and the 27th day of June, 2012 whilst acting for **Osundwa Sakwa**, he protested the attempted withdrawal of the complaint against the Interested Party and sought confirmation from the 1st Respondent on whether the late **Peter Simani** had Practicing Certificates for the years 1992 and 1993. On the 3rd day of July, 2012, **Bryan Yongo** confirmed and notified the 1st, 2nd and 3rd Respondents that he had been bribed by the Interested Party to withdraw his complaint. On the 12th day of July, 2012, the applicant wrote to the 3rd Respondent seeking intervention to peruse the Interested Party's and his claimed Pupil master's file but the Chief Registrar was not cooperative. However, on the 18th day of July, 2012, the 1st and 4th Respondents notified the applicant that the late **Peter Simani** did not take out a Practicing Certificate for the year 1992.

18. According to the applicant, between the 23rd day of July, 2012 and the 8th day of August, 2012, he engaged the 3rd Respondent who through excuses, refused and/or failed to respond or act upon his request to peruse the files of the Interested Party and his claimed Pupil Master.

19. It was therefore the applicant's case that there were deliberate, determined and successful efforts by the then holders of the offices of the 3rd and 4th Respondents to suppress the complaints against the Interested Party and conceal any evidence in their possession in respect thereof. In the intervening period, the Interested Party was made Senior Counsel and therefore, escaped disciplinary action by the 2nd Respondent.

20. The applicant deposed that on the 21st day of October, 2015, he requested the 1st, 2nd and 4th Respondents to attend to and deal with the long outstanding complaint against the Interested Party but the 1st, 2nd and 4th Respondents never responded to or acted upon his said letter. At the same time, on the 21st day of October, 2015, he reported a criminal complaint of forgery of the Certificate of Pupillage against the Interested Party with the Directorate of Criminal Investigations ("DCI") and on the 27th day of April, 2016, the 1st and 4th Respondent forwarded to the DCI, information and documents, which confirmed the suppression of the complaints made against the Interested Party in May, 2012 from which it transpired that the 1st and 4th Respondents acted in collusion with the Interested Party to suppress complaints made against him in May, 2012 by procuring an evidently falsified letter from the late **Peter Simani** to falsely suggest that the Certificate of Completion of Pupillage was signed by him and that the Interested Party undertook pupillage.

21. Accordingly, on the 29th day of April, 2016, the applicant renewed his request to the Chief Registrar of the Judiciary to peruse and obtain copies of documents pertaining to the Interested Party and his claimed Pupil Master but his said letter was not responded to or acted upon. In the meantime, on the 21st day of May, 2016, the applicant forwarded to the 1st, 3rd and 4th Respondents, an Affidavit detailing the complaint against the Interested Party and requested the constitution of a Committee of Three to hear and consider the complaint part of which related to the Interested Party's misconduct in taking instructions from **Mr. Nyagah** and the applicant in the conduct of H.C.C.C. No. 46 of 2015 on behalf of the Plaintiffs therein and later rejecting the brief, approaching the Defendants therein to act for them, compromise and terminating the suit. However, the complaint has not been responded to or acted upon by the 1st, 3rd and 4th Respondents or by the Interested Party.

22. The applicant disclosed that he was aware that the Chief Registrar of the Judiciary refused to comply with the DCI's request to release the Interested Party's Certificate of Completion of Pupillage for forensic examination as a result of which Misc Appln. No. 1082 of 2016 was

filed to ensure compliance. The Chief Registrar of the Judiciary in the meantime responded to the applicant's request on the 8th day of July, 2016 indicating that she could not release the Certificate of Completion of Pupillage for the Interested Party as the same was privileged and confidential.

23. The applicant lamented that the Interested Party had used his immense connections at the office of the Director of Public Prosecutions ("DPP") and in Court, to frustrate the progression of the said Misc Appln. No. 1082 of 2016, resisting an application for the applicant's joinder, all in a determined effort to suppress investigations against him on the forged Certificate of Completion of Pupillage.

24. It was in light of the foregoing depositions that the applicant believed that the 1st , 2nd and 4th Respondents' actions and the decision in respect to Disciplinary Tribunal Cause Number 95 of 2016:-

a. Are biased for the reason that the said Respondents have suppressed the earlier complaints of misconduct made against the Interested Party on 3rd May, 2012, 12th October, 2015 and 21st May, 2016, but chosen to act on the complaint against the applicant on the directions and control of the Interested Party;

b. Are taken with an ulterior motive or purpose calculated to prejudice the applicant's clients and his legal rights in the three cases for the reason that, the issue as to which Advocate is authorized to act for **Tatu City Limited** and **Kofinaf Company Limited** on the matters the subject of the complaints, is pending for determination in H.C.C.C. No. 46 of 2015, Civil Appln. No. 21 of 2016 and Civil Appeal No. 259 of 2015;

c. Are taken without due regard to relevant considerations, are irrational and not proportional as his responses to the complaints were not taken into consideration in establishing that a prima *facie case* had been made;

d. Are taken on the directions of the Interested Party who is not empowered to give such directions;

e. Violates the applicant's legitimate expectation that he shall perform his professional duties without intimidation, hindrance, harassment or improper interference, that he shall be adequately safeguarded by the 1st Respondent where is security and office is threatened as a result of discharging his duties and that he shall not be identified with his clients or his clients' causes as a result of discharging his functions; and,

f. Are made in bad faith, ulterior purpose and motive and in abuse of power as the said Respondents cannot undertake proceedings parallel to those in H.C.C.C. No. 46 of 2015, Civil Appln. No. 21 of 2016 and Civil Appeal No. 259 of 2015 pending before the superior Courts.

25. The applicant contended that his research indicated that the Interested Party has on several occasions habitually used individuals at the 1st, 2nd and 4th Respondent to compromise complaints against him and instead, set up complaints against those who make legitimate complaints against him. One such complaint against the Interested Party was made by **Leonard Kamweti** and was suppressed all through by the 1st, 2nd and 4th Respondents until such time as the Interested Party was made Senior Counsel and escaped disciplinary action by the 2nd Interested Party.

26. It was averred that the current holder of the office of the 4th Respondent was instrumental in the suppression of the complaint against the Interested Party by **Leonard Kamweti** and that the second similar complaint against the Interested Party was made by **Ochieng', Onyango, Kibet & Ohaga Advocates** and was again suppressed by the 1st, 2nd and 4th Respondents at the directions and control of the Interested Party. The third similar complaint against the Interested Party was made by **Rajesh Sahi** and the same was again, suppressed by the 1st, 2nd and 4th Respondents at the directions and control of the Interested Party.

27. The Applicant claimed that there was more evidence to suggest that the current holder of the office of the 4th Respondent was recruited in suspicious circumstances and has abused the office to fix several Advocates and suppress several complaints. The applicant added that the conduct of the current holder of the office of the 4th Respondent demonstrates lack of integrity in the decisions made by her on behalf of the 1st and 2nd Respondents and the applicant was reasonably apprehensive that she has been misused by the Interested Party to fix the applicant in Disciplinary Tribunal Cause Number 95 of 2016.

28. It was therefore the applicant's belief that the 1st, 3rd and 4th Respondents' actions and omissions in the suppression of complaints of misconduct made against the Interested Party as demonstrated hereinabove and in particular those made by him on 3rd May, 2012, 12th October, 2015 and 21st May, 2016:-

a. Amounts to abuse of discretion, unreasonable delay or failure to act in discharge of duty imposed under written law as provided by section 19 of the ***Advocates Act***, Cap. 16 of the Laws of Kenya;

b. Violates the legitimate expectation that all complaints against Advocates, including the Interested Party shall be fairly considered and determined; and,

c. Manifests abuse of power, favouritism and discrimination in the consideration of complaints against the Interested Party.

29. In view of the matters deposed to hereinabove, the applicant believe that he cannot get a fair hearing before the 1st, 2nd and 4th Respondents whose actions demonstrably manifest gross abuse of administrative power, requiring the intervention of the Court through its supervisory jurisdiction under Article 165 (6) & (7) of the Constitution and ***the Fair Administrative Action Act***, No. 4 of 2015, hence his

prayers for orders of *certiorari*, *prohibition* and *mandamus* to remedy by:-

a. Quashing the 1st and 2nd Respondents' decision made on the 27th day of September, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 95 of 2016 against him;

b. Prohibiting the commencement and hearing of Disciplinary Tribunal Cause Number 95 of 2016; and,

c. Compelling the 1st, 3rd and 4th Respondents to constitute a Committee of Three under section 19 of the ***Advocates Act***, Cap. 16 of the Laws of Kenya, to consider and determine all disciplinary complaints against the Interested Party, pending before the said 1st, 3rd and 4th Respondents in particular, the complaint dated the 21st day of May, 2016 by the applicant.

30. In support of his case the applicant also filed an affidavit sworn by **Nahashon Ngige Nyagah,** a director and the Chairman of the Board of Directors of **Tatu City Limited** ("Tatu") and **Kofinaf Company Limited** ("Kofinaf") who confirmed that the Applicant is the Advocate for **Tatu** and **Kofinaf** and has been retained as its Advocate since 2010. He however denied that **Tatu** did authorize the making of the complaints against the Applicant herein, the subject of these proceedings.

31. There was also an affidavit sworn by **Vimalkumar Bhimji Depar Shah,** another director and a shareholder of Tatu City Limited ("Tatu") and Kofinaf Company Limited ("Kofinaf") who confirmed the contents of the affidavit sworn by **Nahashon Ngige Nyagah**.

32. It was submitted on behalf of the Applicant that though the traditional common law position on judicial review has always been that judicial review is only concerned with the decision making process and does not look into the merits of a decision, the Court of Appeal held in **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others [2016] KLR** that in light of the Constitution of Kenya, 2010 and section 7 of the ***Fair Administrative Actions Act***, judicial review can be used to challenge the merits of a decision. The applicant also relied on the decision of **Mumbi Ngugi, J** in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR** and **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR.**

33. According to the Applicant, section 7(2) of the ***Fair Administrative Actions Act*** has also identified the grounds upon which an Applicant seeking Judicial Review orders can rely on when aggrieved by an administrative action or decision.

34. It was the Ex-parte Applicant's contention that the decision made by the 1st , 2nd and 4th Respondents on 27th October 2017 cannot stand because the decision is irrational and failed to take into account relevant matters, amounts to an abuse of power and was exercised in bad faith. Based on ***Peris Wambogo Nyaga (supra),*** it was submitted that where a tribunal acts without jurisdiction, *ultra vires*¸ or contrary to the provisions of the law, the tribunal's decision is null and void.

35. In this case it was submitted that on 30th August, the 1st Respondent wrote to the Ex-parte Applicant, transmitting the complaint dated 25th August 2016 and requiring that the Ex-parte Applicant submits his written comments on the complaint. This was, the 1st Respondent undertook, to enable the 1st Respondent to table the complaint and the Ex-parte Applicant's response before the 2nd Respondent. According to the applicant, in requiring the Applicant to submit his written comments before it and in purporting to have the power to transfer or "table" a complaint, already filed before the 2nd Respondent, the 1st Respondent acted without jurisdiction. This is so because the 1st Respondent does not have any jurisdiction over the disciplining of Advocates since that jurisdiction falls within the ambit of the 2nd Respondent and the Advocates Complaint Commission established under section 53 of the ***Advocates Act***.

36. It was submitted that while the 1st Respondent is governed by the ***Law Society of Kenya Act***, the 2nd Respondent is governed by the ***Advocates Act***. In support of its submissions the applicant relied on this Court's decision in **Wilberforce Nyaboga Mariaria vs. The Law Society of Kenya [2016] eKLR and Republic vs. Law Society of Kenya & Another [2015] eKLR** where it was held that the Law Society of Kenya, and the Disciplinary Committee/Tribunal are two distinct legal entities and one cannot be substituted one for the other.

37. In the applicant's view, the 1st Respondent does not have a power to refer a complaint to the 2nd Respondent as that power solely rests with the Advocates Complaints Commission and in this respect reference was made to **Republic vs. Law Society of Kenya disciplinary tribunal & Another Ex-Parte: Leonard Gethoi Kamweti [2015] eKLR,** where this the court held that:

> **"It is therefore clear that the power to refer a complaint to the Tribunal solely rests with the Complaints Commission and the Respondent Tribunal has no power to direct the Commission as it purported to have done in the instant case. By so doing it, with respect acted without or in excess of its jurisdiction."**

38. To the applicant, it therefore follows that in purporting to invite comments from the Ex-parte Applicant and in purporting to undertake to transfer or "table" the complaint and the Applicant's response before the 2nd Respondent, the 1st Respondent exercised a power which it does not have. In this respect the applicant relied on section 60(3) of the ***Advocates Act.***

39. Part X of the ***Advocates Act***, it was submitted, relates to the instance where the Advocates Complaints Commission refers a dispute to the tribunal while the subsection (1) being referred to is section 60(1) which states that a complaint founded on professional misconduct against an Advocate may be made to the tribunal by any person. Nowhere is the 1st Respondent granted the authority to transfer a complaint or even an Advocate's response to the 2nd Respondent.

40. However, section 60A (1) of the ***Advocates Act*** stipulates the situations in which the 1st Respondent can move proceedings before the 2nd Respondent. The section states that *"the powers conferred on the Committee by this section may be exercised on the hearing of…any application or complaint made to the Committee under this Act by or on behalf of the Council."* To the applicant, the section only allows the

Council of the 1st Respondent to lodge an application or complaint, on its own right, meaning, the council itself will be the complainant. The section does not grant any authority to the 1st Respondent to invite comments or responses from any Advocate or to purport to forward to the 2nd Respondent, a complaint, which, like in our present case, had already been filed before the 2nd Respondent. There was no complaint made by or on behalf of the 1st Respondent's Council hence the 1st Respondent had no jurisdiction to invite comments from the Applicant and to purport to transmit the same to the 2nd Respondent.

41. In this case it was submitted that the Affidavit of complaint dated 25th August 2016 was lodged, correctly so, with the 2nd Respondent, *The Advocates Disciplinary Tribunal* and not with the 1st Respondent, *the Law Society of Kenya*. The complaint was not even copied to the 1st Respondent and one would therefore wonder how the 1st Respondent became seized of the complaint as to invite written comments from the Applicant. While appreciating the provisions of section 58(3) of the ***Advocates Act*** that, *"the secretary of the Society shall be the secretary of the Tribunal and his remuneration, if any, shall be paid by the Society"*, the applicant submitted that in this instance, however, the letter dated 30th August 2016 was not signed by the Secretary in her capacity as the secretary of the Advocates Disciplinary Tribunal but in her capacity as the Chief Executive Officer of the Law Society of Kenya.

42. To buttress this point, the applicant submitted that there is a clear distinction, between the letter dated 30th August 2016 inviting comments from the Ex-parte Applicants and the letter dated 27th September 2016 fixing the matter for plea taking. The letter dated 27th September 2016 has specifically been captioned "disciplinary committee" and is signed by one **Florence Muturi**, a clear indication that the letter originates from a distinct entity, being the 2nd Respondent.

43. Notwithstanding the above, on 20th September 2016, the Ex-parte Applicant submitted his comments via a letter dated 19th September 2016 and lodged the same before the 1st Respondent, *Law Society of Kenya,* which had invited the comments. As it has been promised in the letter dated 30th August 2016, the Ex-parte Applicant submitted his responses based on the undertaking by the 1st Respondent that the same would be transmitted to the 2nd Respondent. It was submitted that if the letters originated from the 2nd Respondent herein, which is not the case, there would have been no need for the letter to intimate and promise that the complaint and the Ex-parte Applicant's response would be forwarded and table before the disciplinary committee/tribunal.

44. It was the applicant's case that the Ex-parte Applicant's responses were not taken into account because the 1st Respondent did not as promised in the letter dated 30th August 2016, transmit the Ex-parte Applicant's reply to the 2nd Respondent. In any event, the 1st Respondent did not intimate to the Ex-parte Applicant whether his replies had been forwarded to the 2nd Respondent before a decision as to whether a *prima facie* case was proved as to warrant plea taking was made.

45. The applicant therefore urged the Court to find an hold that in purporting to exercise a power that it does not have, of inviting comments in a disciplinary matter which the 2nd Respondent was seized and in purporting to have the powers to forward a complaint, already filed before the 2nd Respondent, the 1st Respondent acted without jurisdiction and its letter dated 30th August is *ultra vires,* null and void.

46. The applicant further averred that the conduct of the said Respondent amounted to abuse of power and bad faith. In this respect the applicant relied on **Sony Holdings vs. Registrar of Trade Marks & Another [2015]eKLR.**

47. The Applicant submitted that the decision take by the 1st, 2nd and 4th Respondents amounted to abuse of power and was made in bad faith on two main fronts. First, the decision made on *27th day of September, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 95 of 2016 against the Ex-parte Applicant* was reached at on the directions of the Interested Party herein who directed that the complaint be "fixed for plea taking as soon as possible". Secondly, the 1st, 2nd and 3rd Respondents have showed open bias and favouritism in favour of the Interested Party because complaints filed by the Ex-parte Applicant against the Interested Party on 3rd May 2012, 12th October 2015 and 21st May 2016 have not proceeded. Instead, the complaint filed by the Interested Party against the Ex-parte Applicant has been speedily fixed for plea taking.

48. While cognisant that under section 19 of the ***Advocates Act***, complaints against the Interested Party are to be heard by a Committee of three comprised of the Attorney-General or the Solicitor-General and two Senior Counsel, the applicant averred that the complaints are not always filed before the Chief Justice but before the 2nd Respondent and it is therefore the 2nd Respondent's mandate to intimate to the Chief Justice to form the committee. Having failed to do so consistently in light of all the complaints filed by the Ex-parte Applicant against the Interested Party, the 1st and 2nd Respondents have demonstrated open bias and favouritism in favour of the Interested Party.

49. It was the Ex-parte Applicant's prayer that this court finds and holds that in hurriedly fixing the complaint filed against the Ex-parte Applicant for plea and in the same token in exercising reticence in moving the Chief Justice to constitute a tribunal to prosecute the Interested Party on complaints filed against him, the 1st and 2nd Respondents abused their power and acted in bad faith.

50. According to the applicant, it is now settled law based on **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** that the failure by a tribunal to take into account relevant matters it ought to take into consideration, renders the tribunal's decision irrational.

51. It was submitted that in the Ex-parte Applicant's substantive response dated 19th September 2016, the Ex-parte Applicant adduced evidence to demonstrate that a *prima facie* case had not been made out by the complainant. The Ex-parte Applicant gave a detailed background facts which triggered the Interested Party herein to lodge the complaints. The Ex-parte Applicant demonstrated that what precipitated the filing of complaint dated 6th September 2016 by the Interested Party herein is a dispute as to legal representation between the Applicant and the Interested Party in **Tatu City Limited & 2 others -vs- Stephen Jennings & 6 others H.C.C.C No. 46 of 2017**.

52. In the response to the complaint, the Ex-parte Applicant also demonstrated by way of evidence, that the issue had been determined in a ruling delivered on 11th November 2016, in H.C.C No. 46 of 2015 in which **Justice Tuiyott** struck out the Notice of Appointment of Advocates which had been filed by the Interested Party herein. The Ex-parte Applicant demonstrated that in the ruling the judge was alive to the fact that the Interested Party herein has sought to represent the Plaintiffs in H.C.C.C No. 46 of 2015 with a view to torpedo/terminate the case. The Applicant demonstrated that notwithstanding the ruling delivered by the Court of Appeal on 11th December 2015, the Ex-parte Applicant herein still had instructions to represent the Plaintiffs in the Derivative Action filed in H.C.C.C No. 46 of 2015.

53. It was submitted that the Ex-parte Applicant having demonstrated that the court held that the Interested Party could not come on record for the Plaintiffs in H.C.C.C No. 46 of 2015 due to his intentions to terminate the case, the substratum of the complaint filed before the 2nd Respondent ceased to exist. The complaint was founded on a dispute as to legal representation of the Plaintiffs in H.C.C.C No. which dispute, the Applicant submits had been conclusively determined by **Justice Tuiyott** in the ruling delivered on 11th November 2016.

54. According to the applicant, the only issue left on this limb is on the capacity or locus of the Interested Party herein to file the complaint. It was submitted that in his response to the complaints, the Applicant demonstrated that **Christopher Barron**, who purported to swear the Affidavit of Tatu City Limited was not authorized to make the complaint. The Ex-parte Applicant adduced in evidence that at the time of lodging the complaint, **Christopher Barron** had no capacity to lodge the complaint. Likewise, as it has already been demonstrated, the Interested Party has no *locus* to lodge the complaint against the Ex-parte Applicant.

55. It was therefore submitted that had the Respondents taken into account all these relevant facts, it would have reached an irresistible conclusion that the complaint did not raise a *prima facie* case which was defined in **Mrao vs. First American Bank of Kenya Limited & 2 others [2003] KLR 125** as a case which is based on *the material presented to the court, a tribunal properly directing itself, will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."* Thus, the failure by the 2nd Respondent to take into account these relevant facts, which was placed before them by the Ex-parte Applicant in his response to the complaint filed on 25th August 2016, the decision to commence disciplinary proceedings was rendered irrational/unreasonable.

56. In the circumstances, the Ex-parte Applicant submitted and prayed that this Court finds and hold that the decision by the 2nd Respondent of commencing disciplinary proceedings against the Ex-parte Applicant without taking into account relevant facts and evidence placed before them by the Ex-parte Applicant, renders the decision irrational.

57. In support of the submissions the applicant relied on the Court of Appeal decision in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR.**

58. According to the applicant, it was left guessing as to what reasons the 1st and 2nd Respondent took into account in making a finding that a *prima facie* Case had been proved vide the complaint filed by the Interested Party herein and relied on section 6(4) of the ***Fair Administrative Actions Act.***

59. The Ex-parte Applicant also relies on the decision in **Republic vs. Commissioner for Income Tax & Another Exparte Stockman Rozen (K) Limited [2015]eKLR** where the court restated that that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

60. According to the applicant, the right to fair administrative action especially in the context of disciplinary proceedings is intricately connected to the right to a fair trial under Article 50(1) of the Constitution of Kenya, therefore the statutory duty to give reasons must prevail. It therefore follows that where a tribunal, like the 2nd Respondent herein, fails to gives reasons for its decision which affects a person's right to fair administrative action, such a decision cannot stand.

61. In the circumstances, it was the Ex-parte Applicant's prayer that this court finds and holds that in failing to give reasons as to why a prima facie case had been made out, the 1st and 2nd Respondent's impugned decision made on the 27th day of September, 2016 cannot stand in light of Article 47 of the Constitution of Kenya, 2010 and the ***Fair Administrative Actions Act***.

62. As regards breach of legitimate expectation, the applicant relied on **Republic vs. Kenya School of Law & 2 others Ex-parte Julient Wanjiru Njoroge & 5 Others [2014] eKLR** where the court adopted the holding in **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553**.

63. In that regard, the Ex-parte Applicant submitted that based on the practice/statutory procedure under section 57 of the ***Advocates Act***, the Ex-parte Applicant has a legitimate expectation that the 2nd Respondent would fairly consider and determine all complaints against Advocates. Thus, there is no justification whatsoever in the 2nd Respondent not moving the 4th Respondent to constitute a tribunal to try the complaints lodged against the Interested Party. The Ex-parte Applicant therefore submitted that by failing to follow its standard procedures under section 19 of the ***Advocates Act***, the 2nd Respondent and by extension, the 4th Respondent breached the Applicant's legitimate expectation that all complaints against advocates will be treated equally and prosecuted fairly.

64. Secondly, the Ex-parte Applicant enjoys a legitimate expectation that as a member of the 1st Respondent, he will be safeguarded by the 1st Respondent in the event that his duty as counsel is threatened and that he will not be identified with his clients and the clients' causes as a result of discharging his duties. This legitimate expectation arises because as a society, the 1st Respondents is bound to safeguard all Advocates against their practice being interfered with and against any prejudice to the legal rights of the Ex-parte Applicant and his clients. Thus, the failure by the 1st Respondent to safeguard the Ex-parte Applicant even where it is manifest that through the complaint filed by the

Interested Party, the Ex-parte Applicant is being identified with his clients' causes, breaches the Ex-parte Applicant's legitimate expectation to be safeguarded against such moves, by the 1st Respondent.

65. As regards the efficacy of the order of mandamus, it was submitted that the scope of an order of mandamus was considered in **Republic vs. Non-Governmental Organizations Co-ordination Board & Another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR** where the court restated that:

> **"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."**

66. It was therefore the applicant's case that where a public duty has been imposed on a party by statute, like the 3rd Respondent herein by section 19 0f the ***Advocates Act*** and the party fails to perform the statutory duty, an order of *mandamus* will issue to compel that performance. It therefore follows that this Honourable Court has the power to grant an order of *mandamus* to compel the 3rd Respondent to constitute a committee under section 19 of the ***Advocates Act*** to try the complaint lodged on 21st May 2016 against the Interested Party herein.

67. Based on the foregoing, the applicant urged the Court to grant the judicial review orders as sought in the Notice of Motion Application dated and filed on 21st October 2016.

1st, 2nd and 4th Respondents' Case

68. In opposition to the application the Interested Party filed a replying affidavit sworn by **Mercy K. Wambua** who deposed that by virtue of the provisions of the ***Advocates Act*** Cap 16 Laws of Kenya, she is the Secretary of the 1st and 2nd Respondents, and the 4th Respondent in these proceedings.

69. According to the 1st, 2nd and 4th Respondents (hereinafter referred to as "the Respondents") on 25th August, 2016 they received an Affidavit of complaint sworn by one **Christopher Barron**, the Chief Operations Manager of **Tatu City Limited**, against the *Ex parte* Applicant to the effect that the *Ex Parte* Applicant had presented himself as having been instructed to act for **Tatu City Limited** and on its behalf wrote a letter dated 16th March 2016 addressed to **Superior Homes (Kenya) Limited** informing it that the alleged Term Sheet and the incorporation of an entity for the purposes of operations of the joint venture being **Tatu JVI Limited** had not been approved by the Board of Directors of **Tatu City Limited**. Thus, so alleged the Affidavit of Complaint aforesaid, the *Ex Parte* Applicant had no instructions to act for the Complainant, **Tatu City Limited**.

70. It was averred that upon receipt of the said Affidavit of Complaint, the Respondents wrote a letter dated 30th August, 2016 addressed to the *Ex Parte* Applicant informing him of the complaint lodged against him and requiring him within fourteen (14) days to provide his written comments on the same for the purpose of forwarding the same to the 2nd Respondent for a decision on whether the complaint disclosed a *prima facie* case.

71. According to the Respondents, on 20th September,2016 they received the *Ex Parte* Applicant's written comments via his letter dated 19th September, 2016 and placed the affidavit of complaint and the *Ex Parte* Applicant's written comments before the 2nd Respondent. Upon perusal of the said documents the 2nd Respondent did find that there was a *prima facie* case and fixed the same for plea taking on 24th October 2016 as Disciplinary Tribunal Cause Number 95 of 2016 and a notice to that effect dated 27th September 2016 was issued to the *Ex Parte* Applicant.

72. However, subsequent to the issuance of the plea taking notice to the *Ex Parte* Applicant, the *Ex Parte* Applicant on 21st October 2016 served the Respondents with the Orders from this Honourable Court dated 18th October,2016 which Orders *inter alia* granted the *Ex Parte* Applicant leave to apply for an Order of Certiorari to remove into the High Court and quash the entire decision of the 1st and 2nd Respondents made on the 27th day of September, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 95 of 2016 against the Applicant. The said leave was to operate as stay of the commencement and continued hearing of Disciplinary Tribunal Cause Number 95 of 2016 against the Applicant until the Judicial Review filed was heard and determined. The Court also granted the *Ex Parte* Applicant leave to apply for an order of *mandamus* to compel the 1st, 3rd and 4th Respondents to constitute a committee of three under section 19 of the ***Advocates Act***, Cap.16 of the Laws of Kenya, to consider and determine all disciplinary complaints against the Interested Party, pending before the said 1st, 3rd and 4th Respondents and in particular, the complaint dated the 21st day of May, 2016 lodged by the Applicant.

73. According to the Respondents, the *Ex Parte* Applicant's complaint dated the 21st day of May, 2016 against the Interested Party is a matter which falls within the purview of sections 19 and 70 of the ***Advocates Act***, Cap. 16 of the Laws of Kenya and which requires the 3rd Respondent to constitute a tribunal consisting of the Attorney General as its Chairman and two other senior counsels which complaint was served upon the 3rd Respondent on 23rd May 2016.

74. The Respondents explained that the delay in taking action in relation to the *Ex Parte* Applicant's complaint dated the 21st day of May, 2016 against the Interested Party was due to the nature of the complaint and the person against whom the complaint is filed. A complaint against a Senior Counsel unlike the one that the *Ex Parte* Applicant is facing, is governed by the provisions of section 19 of the ***Advocates Act***, Cap.16 Laws of Kenya which section 19 specifically requires that the 3rd Respondent constitutes the relevant tribunal to handle and address the complaint. However, the office of the 3rd Respondent had been vacant since 16th June 2016 when the **Hon Mr. Justice Willy**

Mutunga retired until 19th October 2016 when the **Hon. Mr. Justice David Maraga** was sworn in as the Chief Justice. The action of constituting a committee of three can only be carried out by the Chief Justice and no one else hence any orders of *mandamus* as against the 1st, 2nd and 4th Respondent with regard to the constitution of the committee of three clearly contradict and offend the provisions of section 19 of the ***Advocates Act***.

75. It was the Respondents' positions that by virtue of section 60(1) of the ***Advocates Act*** Cap.16 Laws of Kenya, the 2nd Respondent is statutorily mandated to entertain from any person (whether an advocate or not) a complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate. The complaint made against the *Ex Parte* Applicant was deemed as such by the 2nd Respondent hence the setting down of the matter for plea taking on 24th October, 2016 which was to mark the commencement of the proceedings that would afford both the Complainant and the *Ex Parte* Applicant an opportunity to ventilate their respective cases. The 2nd Respondent would after impartially hearing both sides make a decision on whether the complaint against the *Ex Parte* Applicant had been proved or not proved.

76. It was their position that the process of establishing whether a complaint discloses a *prima facie* case and the subsequent plea taking before the 2nd Respondent is informed by the same rationale which informs the procedure of applying for Judicial Review Orders. The fact that leave has been granted to a party to apply for Judicial Review Orders does not necessarily mean that the matter has been disposed of in favour of the Applicant. At the point of granting leave, the court is of the view that the matter placed before it discloses a *prima facie* case that merits a response from the Respondent. Subsequent to the grant of leave the Applicant and the Respondent have to be given an opportunity to ventilate their respective cases after which the court decides on whether to grant the Judicial Review Orders or dismiss the application.

77. It was therefore contended that it was premature on the part of the *Ex Parte* Applicant to impute that the decision and actions of the Respondents are:

i. Biased.

ii. Taken with ulterior motive or purpose calculated to prejudice his legal rights.

iii. Taken without due regard to relevant considerations, are irrational and not proportional to his responses to the complaints.

iv. Taken on the directions of the Interested Party who is not empowered to give such directions.

v. Made in bad faith and in abuse of their power and

vi. Violate his legitimate expectation to perform his professional duties without intimidation, hindrance, harassment or improper interference.

78. It was averred that the 2nd Respondent consists of the *Ex Parte's* applicant's peers elected by the members of the 1st Respondent, including the *Ex Parte* Applicant and that the members of the 2nd Respondent have absolutely no reason whatsoever for treating the *Ex Parte* Applicant unfairly or breaching his rights. Like this Court, they have to deal and determine matters that are filed before them.

79. It was averred that another Order granted to the *Ex Parte* Applicant by this Honourable Court was leave to apply for an Order of Prohibition to prohibit the 1st, 2nd and 4th Respondents from entertaining any disciplinary complaint against the *Ex Parte* Applicant in respect of matters pending in Court, being **HCCC No. 46 of 2015, Tatu City Limited & 2 Others-vs-Stephen Jennings & 6 Others; Civil Application No. 21 of 2016, Tatu City Limited & 2 Others-vs-Stephen Jennings & 6 Others; and Civil Appeal No.259 of 2015, Tatu City Limited & 2 Others-vs-Stephen Jennings & 6 others.**

80. The Respondents averred that though the facts which form the subject matter of these cases also forms the subject matter of the complaint filed before the 2nd Respondent, the 2nd Respondent addresses itself only to the disciplinary issues arising from the said facts. The jurisdiction of the 2nd Respondent is solely on whether, on the material and evidence placed before it, professional misconduct on the part of the *Ex Parte* Applicant has been proved – and nothing else. It was therefore their case that if an Order of Prohibition is issued against the 1st, 2nd and 4th Respondents to prohibit them from entertaining any disciplinary complaint against the *Ex Parte* Applicant in respect of these cases that would interfere and prevent the 2nd Respondent from discharging the statutory mandate granted to it under section 60 of the ***Advocates Act*** Cap.16 Laws of Kenya.

81. Therefore the said Respondents objected to the aforesaid Applicant's Application for the Judicial Review Orders of *Certiorari*, *Prohibition* and *Mandamus* as the same has no merit and prayed that the same be dismissed with costs to the 1st, 2nd and 4th Respondents.

82. In their submissions, the Respondents reiterated the foregoing averments.

Interested Party's Case

83. On behalf of the Interested Party herein, **Ahmednasir Maalim Adbullahi**, it was contended that by a letter dated 23rd August 2016, **Tatu City Limited** lodged a complaint through its duly appointed advocates the firm of **Ahmednasir, Abdikadair & Company Advocates** filed on 25th August 2016 with the Advocates Disciplinary Tribunal against **Mr. Nelson Havi** the ex parte Applicant herein. The complaint was in respect to;

'The ex parte Applicant's unilateral and wrongful decision to act for Tatu City Limited (the client) when in actual fact he was never authorised by the client to do so when he published an impugned letter dated 16th March 2016 to Superior Homes (Kenya) Limited'

84. According to the interested party, the letter dated 23rd August 2016 was accompanied by Statutory Declaration sworn by **Christopher Barron** the Chief Operations Manager of Tatu City Limited (the complainant)**.** By a letter dated 30th August 2016 the 1st Respondent forwarded the complaint to the ex parte Applicant and requested him to respond within fourteen (14) days to enable them to table the response before the committee and by a letter dated 19th September 2016, the ex parte Applicant responded to the complaint of misconduct.

85. It was averred that by a letter dated 27th September 2016, the 1st Respondent's Deputy Secretary Compliance and Ethics informed the ex parte Applicant that the matter - Disciplinary Tribunal Cause Number 95 of 2016 had been fixed for plea before the Disciplinary Tribunal on 24th October 2016 which plea taking and hearing of the disciplinary was deferred by the disciplinary tribunal pending hearing and determination of this judicial review application.

86. The interested party reiterated that the complaint before the Advocates Disciplinary Tribunal, was lodged by **Tatu City Limited** who instructed the firm of Ahmednasir, Abdikadir and Company Advocates to file and prosecute a complaint against the ex-parte Applicant in respect of a unilateral, unethical and wrongful decision to purport to represent and write letters on behalf Tatu City Limited when in actual fact, the ex parte Applicant did not have authority to communicate with prospective purchasers and other third parties on behalf of Tatu City Limited.

87. It was disclosed that at one point during the very early stages of litigation in **HCCC No. 46 of 2015, *Tatu City Limited & 2 others vs. Stephen Jennings & Others*,** the ex parte Applicant and **Nahashon Nyagah** visited the chambers of Ahmednasir, Abdikadir and Company Advocates situated along Standard Street, CBA Building and requested to have a meeting with the Interested Party. The ex parte Applicant informed the Interested Party that HCCC NO. 46 of 2015 (supra) was allocated to **Justice Farah Amin**, who certified the matter as being urgent but refused to grant any interim orders. The ex parte Applicant then asked the Interested Party whether he could 'talk' to the Judge and 'persuade' her to grant temporary relief. The interested party however averred that he categorically informed the ex parte Applicant that he does not talk to judges nor see them with a view to influence their decision-making. The two then left the Interested Party's chambers in a huff and did not get back to him.

88. It was deposed that later, Tatu City Limited instructed the Interested Party to take over the conduct of the case and that the ex-parte Applicant out of malice wrote to **Mr. Muhoro**, the Director of Criminal Investigation and lodged a complaint against the Interested Party alleging that he had either forged the signature of his pupil master or that he didn't complete his pupillage.

89. According to the interested party, the issue of legal representation of Tatu City Limited and Kofinaf Company Limited was subject to a legal dispute in HCCC No 46 of 2015 (Supra). According to the interested party, in summary;

1. On 16th September 2015, the Boards of Directors of Tatu City Limited and Kofinaf Company resolved and determined that the law firm of Havi and Company Advocates had no authority whatsoever nor instructions to file **HCCC No 46 of 2015** or to deal in any matter relating to the company legal affairs.

2. On 16th September 2015, the Board also resolved and appointed the firm of Ahmednasir Abdullahi & Company Advocates with immediate effect to act on behalf of the companies in relation to the law suits that were pending before the court.

3. The Notice of Change of advocates was challenged by the ex-parte Applicant herein, which issue was subject to a hearing before **Honourable Justice Tuyoitt** and in his ruling of 11th November 2016, the Court held that since the suit was declared to be a derivative suit, both companies namely Tatu City Limited and Kofinaf Company Limited were not necessary parties and could not play any active role. The Court held that the companies should remain neutral, in that should the derivative action succeed, then it will benefit the company. In the premise the court was of the opinion that the companies need not be represented by any lawyers in the litigation as they are nominal defendants and that only shareholders of the companies are the true protagonists in the suit.

4. The Court further held that the critical issue before the court was not the efficacy of the resolution that was passed on 16th September 2015 but whether or not in the circumstances the firm of Ahmednasir Abdullahi & Company Advocates should be allowed to come on record for the companies being that this was a derivative action and in such suits, companies do not play an active role but they are merely passive in nature and that all times the Interested Party was acting on full instructions of his clients Tatu City Limited and Kofinaf Company Limited.

5. The ex parte Applicant herein allegedly acting on the instructions of Tatu City Limited notified Superior Homes (Kenya) Limited not to proceed with the purchase for the property belonging to Tatu City Limited as a result of orders made by the High Court in **HCCC No 46 of 2015** on **6th March 2015** by **Hon. Justice Ogola.**

6. It is worthy to note that the Ruling delivered by **Honourable Justice Ogola** on 6th March 2015, the court at paragraphs 54 and 55 categorically declined to grant orders to stop any dealings with the land owned by Tatu City Limited as it would bring to a halt the legitimate business of Tatu City Limited and that there could be ongoing transactions at various stages with other third parties such as Superior Homes (Kenya) Limited.

7. The Court therefore did not issue any orders restraining Tatu City Limited from entering into any transactions with third parties. That notwithstanding, the ex-parte applicant herein falsely and maliciously and without any iota of instructions from Tatu City Limited wrote to Superior Homes claiming that he was acting for Tatu City Limited informing them that the joint venture had not been approved by the company's board of directors. He further informed Superior Homes that if they failed to comply with the

demand, then the ex parte Applicant would take legal action for contempt of court and for allegedly interfering with proceedings pending before the High Court in **HCCC No 46 of 2015.**

90. It was the interested party's case that the actions on the part of the ex-parte applicant caused the complainant to suffer damages and losses to the tune of USD 24,000,000.00 as a result of the unlawful procurement of breach of contract. In light of the above, Tatu City Limited instructed the firm of Ahmednasir Abdullahi & Company Advocates to file a complaint before the Advocates Disciplinary Tribunal against the ex-parte Applicant for acting without instructions.

91. According to the interested party, on 22nd September 2017, the Court of Appeal in ***Tatu City Limited & Others vs. Stephen Jennings & Others*** Civil Appeal No. 259 of 2015 [unreported] held that the firm of Nelson Havi & Company Advocates did not have instruction to act on behalf of Tatu City Limited.

92. Regarding the complaint made by the ex parte Applicant dated 21st May 2016 against the Interested Party, and in particular the order seeking *mandamus* to compel the 1st, 3rd and 4th Respondents to constitute a committee of three under section 19 of the ***Advocates Act*** to consider and determine all the disciplinary complaints against the Interested party pending before the Respondents and in particular complaint dated 21st May 2016 lodged by the ex parte Applicant, it was averred that the 1st, 2nd and 4th Respondent have discretion to determine the bona fides of any complaint lodged and have the right to reject, dismiss and to disregard complaints that are not bona fide. It was further averred that the 1st, 2nd and 4th Respondents have no jurisdiction to constitute the committee contemplated under section 19 of the ***Advocates Act***.

93. It was the interested party's view that it had ddemonstrated in the replying affidavits that all issues incidental to the purported complaint dated 21st May 2016 made by the ex parte Applicant have been litigated on in various suits, being determined and concluded by the court.

94. In support of his submissions the interested party relied on section 7(1)(a) of the ***Law Society of Kenya Act*** which provides that the membership of the society shall include any person who has been admitted as an advocate to the roll of advocates. He also relied on section 4(c), (d) and (l) of the ***Law Society of Kenya Act*** provides for the following objects of the Law Society of Kenya:

> ***(c) ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;***
>
> ***(d) protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law;***
>
> ***(l) protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners;***

95. According to the interested party, it is the mandate and objective of the Law Society of Kenya to ensure that all advocates who practice law in Kenya meet the standards of professional competence and conduct for the legal services they provide. It is within the mandate of the Law Society to protect the interests of the members of the public and consumers of legal services by ensuring that any complaints made against legal practitioners are resolved in a fair, effective, efficient and transparent manner. The interested party also cited section 55 of the ***Advocates Act.***

96. It was submitted that the Advocates Disciplinary Tribunal is established under section 57 of the ***Advocates Act*** and section 58 (5) thereof provides as follows on the proceedings before the Tribunal:

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

97. The interested party also relied on section 60(1) of the ***Advocates Act*** which provides that a complaint against an Advocate on professional misconduct may be made to the Advocates Disciplinary Tribunal by any person. The term professional misconduct is defined in section 60(1) of the ***Advocates Act*** to include disgraceful or dishonourable conduct incompatible with the status of an advocate. Further, section 60(2) of the ***Advocates Act*** provides that the person making the complaint to the Advocates Disciplinary Tribunal shall lodge an affidavit setting out the allegations of professional misconduct.

98. It was submitted that the firm of Ahmednasir Abdikadir & Company Advocates was instructed by Tatu City Limited to lodge a complaint of professional misconduct against the ex parte Applicant with the Advocates Disciplinary Tribunal. The Interested Party lodged the complaint by a letter dated 23rd August 2016 accompanied by Statutory Declaration sworn by **Christopher Barron** the Chief Operations Manager of Tatu City Limited (the complainant)**.** In this respect the interested party cited section 60(3) of the ***Advocates Act.***

99. In this case it was averred that the 1st Respondent by a letter dated 30th August 2016 sent the complaint and statutory declaration to the ex parte Applicant and requested him to respond to the complaint of professional misconduct. The ex parte Applicant's response to the complaint was considered and the matter was referred to the Advocates Disciplinary Tribunal. By a letter dated 19th September 2016, the ex parte Applicant responded to the complaint of professional misconduct. The ex parte Applicant was notified by a letter dated 27th September 2016 that complaint under reference Disciplinary Tribunal Cause Number 95 of 2016 had been scheduled for plea taking before the Disciplinary Tribunal on 24th October 2016.

100. According to the interested party, section 60 (4) of the ***Advocates Act*** provides for the remedies available after the Advocates Disciplinary Tribunal has heard the complaint and considered the evidence adduced which *inter alia* include dismissal of the complaint or for the advocate to be admonished or suspended while section (7) and (8) of the ***Advocates Act*** provides that the determination of the Tribunal

shall be deemed to be a determination of the Court. Section 62 of the ***Advocates Act*** provides for an appeal to be lodged by any advocate who is aggrieved by the decision of the Tribunal.

101. It was submitted by the interested party that the Advocates Disciplinary Tribunal has the mandate to hear and determine Disciplinary Tribunal Case Number 95 of 2016 and the grounds upon which the instant judicial review proceedings are premised on are unmeritorious and unsubstantiated. As the complaint on the ex parte Applicant's professional misconduct was already referred to Advocates Disciplinary Tribunal, this court should allow the Tribunal to carry out its mandate and if the ex parte Applicant is aggrieved by the decision of the Tribunal he can exercise the remedy available by way of preferring an appeal as provided for in section 62 of the ***Advocates Act.*** In the interested party's view, this judicial review application seeks to frustrate a legitimate statutory process is speculative and premature. In support of his submissions the interested party relied on **Muwema and Mugerwa Advocates & Solicitors v Shell (U) Limited and Others [2013] 1 258** where it was held as follows of the Disciplinary Committee of the Law Council of Uganda:

> **'Section 74 lists the possible disciplinary offences by advocates. Apart from the offence of contempt of court 74 (k) which is the only offence the Judge could summarily deal with, the others including fraudulent professional misconduct are to be referred to the Disciplinary Committee of the Law Council with jurisdiction to try disciplinary offences, with an appeal to the High Court before a panel of three judges.'**

102. It was submitted that judicial review now has a constitutional underpinning vide Article 47 of the Constitution. With the enactment of the ***Fair Administrative Actions Act***, the scope of judicial review has been expanded to review of the merits of the decisions by public bodies as well as procedural improprieties. In this respect the interested party relied on **Republic vs. Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR** and submitted that in arriving at the decision to refer the complaint for determination by the Advocates Disciplinary Tribunal the 1st and 2nd Respondents considered the affidavit evidence dated 23rd August 2016 in support of the complaints and the response by the ex parte Applicant. The 1st Respondent was not bias, did not act in bad faith, illegally or irrationally.

103. In his view, the ex parte Applicant should as an advocate subject himself to the disciplinary jurisdiction of the Advocates Disciplinary Tribunal as provided for in section 55 of the ***Advocates Act*** hence this Honourable Court should dismiss these judicial review applications and allow the Advocates Disciplinary Tribunal to carry out its mandate.

104. In his view, a reading of the grounds in support of the judicial review proceedings shows that the ex parte Applicant has raised grounds in opposition to the complaint which he should raise as defences before the Advocates Disciplinary Tribunal. The grounds in support of the judicial review proceedings do not meet the threshold required for the grant of any remedy sought for. The ex parte Applicant has not proved that the decision by the 2nd Respondent to invite him to take the plea and commence the disciplinary proceedings against him was unfair, biased, irrational or illegal. Reliance was placed on **Republic vs. Director of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 others [2015] eKLR** in this regard.

105. It was further submitted that remedies in judicial review are discretionary and are not guaranteed and that the role of the court in judicial review proceedings is to determine whether an administrative body such as the 1st and 2nd Respondent has overstepped its mandate in carrying out its functions and if so, whether the appropriate orders should be issued.

106. As regards the order of certiorari, the interested party relied on ***Halsburys Laws of England***, Fourth Edition, Reissue volume 1(1) page 137 Para.128 and urged the Court not to issue the orders of certiorari as it will interfere with the mandate of the 2nd Respondent to hear complaints made against Advocates as provided for in the ***Advocates Act*** and the ***Law Society of Kenya Act*****.** According to him, the court ought to decline to exercise its discretion in favour of the ex parte Applicant to grant the relief of certiorari. It was his case that the ex parte Applicant has not urged any substantial grounds to challenge the jurisdiction of the 2nd Respondent and he relied on **Republic vs. Disciplinary Committee Ex-Parte Wambugu Kariuki [2015] eKLR.**

107. The interested party also relied on the case of **Republic vs. Disciplinary Committee & Another Ex-Parte Daniel Kamunda Njue [2016] eKLR** where the court relied on quoted with approval the case of **Republic vs Disciplinary Committee Ex Parte Kimaiyo Arap Sego, Misc. Appl. No. 1266 of 2007.**

108. In this case it was submitted that the 2nd Respondent has the mandate to pursue disciplinary proceedings against the ex parte in Disciplinary Cause No. 95 of 2016 and determine whether the ex parte Applicant's conduct as set out in the complaint and affidavit was unprofessional and dishonourable and if the ex parte Applicant is aggrieved by the decision of the 2nd Respondent, he can appeal against the decision as provided for in section 62 of the ***Advocates Act***. The court was referred to the decision in the ***Ex parte Wambugu Kariuki*** case (supra).

109. With respect to the order of prohibition, it was submitted based on ***Halsbury's Laws of England***, Fourth Edition, Reissue volume 1(1) the 1st and 2nd Respondent in determining to commence with the hearing and determination of the disciplinary matters against the ex parte Applicant acted within their jurisdiction, in accord with the provisions of the ***Advocates Act***, the ***Law Society of Kenya Act*** and adhered to the rules of natural justice. Therefore the Court ought not to prohibit a quasi-judicial body from carrying out its mandate provided in the ***Advocates Act*** and ***Law Society of Kenya Act*** in absence of any substantial grounds to warrant the order of prohibition that the public body acted unlawfully. The ex parte applicant should not pre-empt the decision of the 2nd Respondent and the grounds raised in the instant judicial review proceedings can be raised as defences during the disciplinary hearing.

110. The Court was therefore urged to exercise restraint in allowing judicial review remedies against decision to commence disciplinary proceedings by the 2nd Respondent.

111. Similarly as regards the order of mandamus, the interested party relied on ***Halsbury's Laws of England*** Fourth Edition, Reissue

Volume(1)(1) and submitted that all issues incidental to the purported complaint dated 21st May 2016 made by the ex parte Applicant have been litigated on in various suits, being determined and concluded by the courts. The instant application claiming bias on the part of the Law Society of Kenya is an abuse of the court process as the issue of the validity of the Interested Party's admission has already been determined by the High Court in a ruling delivered on 21st November 2014 by **Lady Justice Ougo** in **HCCC No. 310 of 2013 (O.S.)** ***Brian Yongo vs. the Hon. Chief Justice & 5 Others*** and affirmed by **Justice Sergon** in HCCC No. 238 of 2015, ***Hon. Evans Kidero vs. Hon. Dr. Bonny Khalwale*****, [2015] eKLR**.

112. It was submitted that the 1st, 2nd and 3rd Respondents have exercised their discretion and declined to act on the complaint lodged by the ex-parte Applicant. The attempts by the ex-parte Applicant to institute criminal proceedings were halted by the Chief Magistrates' Court in a ruling delivered on 21st November 2014. The Interested Party therefore submitted that the judicial review application herein lacks merit and should be dismissed with costs. According to him, the ex parte Applicant in a bid to prohibit the 2nd Respondent from commencing with the disciplinary hearing in the Disciplinary Cause number 96 and 118 of 2017, cannot seek to compel the 1st, 3rd and 4th Respondents to determine complaints against the Interested Party. The ex parte Applicant cannot seek to use his incessant witch hunt to obtain discretionary remedies from this Honourable Court.

113. The Court was therefore urged to dismiss Judicial Review application with costs.

Determinations

114. I have considered the positions adopted by the respective parties to this application.

115. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

116. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

117. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
>
> **56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no**

mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

118. The Court of Appeal was however clear in its mind that there is a clear distinction between the powers of an appellate tribunal and a judicial review court.

119. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the *Law Reform Act* and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution; and this we have discussed elsewhere in this judgement. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent Board given the statutory circumstances of this case.

120. I am therefore of the view that the decision in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**: is still relevant in so far as it held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

121. Similarly, in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

122. That is my understanding of the decision of **Mumbi Ngugi, J** in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR** where the Learned Judge stated that:

"It is, I believe, settled law that a court exercising judicial review jurisdiction is concerned with the procedural propriety of a decision, rather than with its merits. A court will consider the merits of a decision only in the circumstances set out in the case of *Associated Provincial Picture Houses Ltd –versus- Wednesbury Corporation* (supra), namely: where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it'."

123. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of

Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

124. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

125. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

126. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

127. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

128. I therefore adopt the findings in **Republic vs. Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited** where **Majanja J**. quoting with approval the decision of **Githua, J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** held as follows;

> **"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates**."

129. In this case, it is clear that what provoked these proceedings was the letter written by the interested party dated on the 23rd day of August, 2016 on the an affidavit of complaint sworn by one **Christopher Barron**, the Chief Operations Manager of **Tatu City Limited**, against the *Ex parte* Applicant to the effect that the *Ex Parte* Applicant had presented himself as having been instructed to act for **Tatu City Limited** and on its behalf wrote a letter dated 16th March 2016 addressed to **Superior Homes (Kenya) Limited** informing it that the alleged Term Sheet and the incorporation of an entity for the purposes of operations of the joint venture being **Tatu JVI Limited** had not been approved by the Board of Directors of **Tatu City Limited**. Thus, so alleged the Affidavit of Complaint aforesaid, the *Ex Parte* Applicant had no instructions to act for the Complainant, **Tatu City Limited**. According to the ex parte applicant, the said complaint, which gave rise to Disciplinary Tribunal Cause Number 95 of 2016, was addressed to the 2nd Respondent with directives that the same "be fixed for the taking of a plea as soon as possible."

130. It was therefore the Applicant's case that the 1st and 2nd Respondents were acting at the behest of the interested party as opposed to their own.

131. It is not in doubt that where an authority is endowed with the exercise of a power or discretion, it ought not to exercise the same at the directions of another person not authorised to do the same. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

132. In **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271,** the Court expressed itself as follows:

> **"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was**

to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."

133. In **Esther Kavuka Adagala vs. The Attorney General Nairobi HCCC No. 4086 of 1992** it was held that there needs to be a strict observance of the procedure in any disciplinary proceedings and that leads to consequential quashing of the disciplinary action on account of non-compliance with the laid down procedure. This position was emphasized in **Joseph Mulobi vs. Attorney General & Another Nairobi HCCC No. 742 of 1985.**

134. The applicant's conclusion that the interested party was the driving force behind the manner in which the 1st and 2nd Respondents were operating was, according to him, informed by the fact that the said Respondent failed to adhere to the laid down disciplinary procedures guiding the conduct of disciplinary process against advocates and were eager to fast-track the complaint against him while his complaint against the interested party was being deliberately slowed down.

135. The first issue that this Court must therefore deal with is the procedure for conducting disciplinary complaints against advocates. It is not in doubt that the applicant herein, being an advocate of the High Court is subject to the disciplinary jurisdiction of the Disciplinary Tribunal. That comes out clear from the provisions of section 55 of the Advocates Act which provides that:

Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Tribunal.

136. The procedure for lodging a complaint against an advocate is prescribed under section 60 of the said Act which provides as hereunder:

(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.

(2) Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Tribunal, accompanied by such fee as may be prescribed by rules made under section 58(6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.

(3) Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:

Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.

137. It is therefore clear that a complaint against an advocate of professional misconduct is to be made to the 2nd Respondent (hereinafter referred to as "the Tribunal") and not the 1st Respondent (hereinafter referred to as "the Society"). That the two are distinct legal entities was appreciated by this Court in **Wilberforce Nyaboga Mariaria vs. The Law Society of Kenya [2016] eKLR** and **Republic vs. Law Society of Kenya & Another [2015] eKLR.** It is however clear that the Secretary to the Society wears two hats. He/she is both the secretary to the Society and the Tribunal since section 58(3) of the Advocates Act provides that:

The secretary of the Society shall be the secretary of the Tribunal and his remuneration, if any, shall be paid by the Society:

Provided that the Tribunal may, in the case of absence or inability to act of the secretary, appoint any person entitled to act as an advocate to act as secretary to the Tribunal during the period of such absence or inability to act and in such case the remuneration, if any, of the person so appointed shall be paid by the Society.

138. The above provisions emphasises the fact that when undertaking his/her role as the secretary to the Tribunal, the said person is undertaking a role different from that of the secretary to the Society otherwise in his/her absence, it would have been stated that it is the Society to appoint a replacement rather than the Tribunal. Therefore the directions emanating from the Tribunal's secretary in that capacity must be express that they are being given on behalf of the Tribunal and not the Society. In this case it is not in doubt that the letter dated 30th August, 2016 addressed to the *Ex Parte* Applicant informing him of the complaint lodged against him and requiring him within fourteen (14) days to provide his written comments on the same for the purpose of forwarding the same to the 2nd Respondent for a decision on whether the complaint disclosed a *prima facie* case was written by the 4th Respondent as the Secretary of the 1st Respondent, the Society and not as the secretary of the Tribunal. As held in **Hardware & Ironmonery (K) Ltd vs. Attorney-General** (supra) what matters is the taking of the decision and not the signature. It therefore does not matter whether it is the same person that doubles as the secretary to the Tribunal that signed the letter but the capacity in which she did so.

139. The importance of strict compliance with the procedural law in disciplinary proceedings was emphasised in in **Republic vs. Institute of**

Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006, where the Court expressed itself as follows:

> **"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."**

140. It is therefore clear that the Respondents commenced the disciplinary proceedings against the ex parte applicant on the wrong footing.

141. As regards the finding of a *prima facie* case, it is clear that the finding of a *prima facie* case may be based purely on the complaint as lodged and before the advocate is heard on the matter. In those circumstances, it is in fact the finding of a *prima facie* case that informs the decision to require the advocate to whom the complaint relates to answer any allegations made against him. If no *prima facie* case is disclosed the complaint is thereby dismissed without hearing the complaint or further ado. To my mind this ought to be the correct procedure. It is unreasonable to subject an advocate to disciplinary proceedings unless the complaint discloses a prima facie of professional misconduct since disciplinary proceedings against advocates have serious ramifications in themselves even without a determination being made thereon one way or the other.

142. To my mind just like in criminal proceedings, prudence would require that an advocate ought not to be called to answer to the complaint before the Tribunal satisfies itself a *prima facie* of professional misconduct is made out by the Tribunal since the fact that an advocate is being called upon to respond to a complaint ought to presuppose that the complaint discloses a *prima facie* case. However the legal provision seems to suggest that a finding of absence or prima facie case can be made at any stage of the proceedings.

143. I therefore disagree with the ex parte applicant that the decision of the finding of a *prima facie* case ought necessarily to have been made and transmitted to him after he responded.

144. The ex parte applicant complained that the issues the subject of the complaint against him being the subject of ongoing litigation, ought not to have been the subject of the disciplinary proceedings. This Court dealt with the issue of the concurrency of proceedings before the Tribunal and in a Succession Cause in **R. vs. Disciplinary Tribunal of the Law Society of Kenya Ex Parte John Wacira Wambugu Nairobi High Court Miscellaneous Application No. 445 of 2013** and expressed itself as follows:

> **"In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent. Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."**

145. Section 60(1) of the ***Advocates Act*** (Cap.16 Laws of Kenya) provides that:

> ***A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.***

146. Under section 57 of the Act, the Disciplinary Tribunal is mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act. It is also true that under section 60 of the Act, the said Tribunal has the power to receive complaints of professional misconduct against an Advocate from any person. Since the Applicant herein is such an Advocate, the Tribunal has jurisdiction to entertain any complaints made against him in his professional capacity pursuant to section 55 of the Act. This power, as was appreciated by **Mumbi Ngugi, J** in **Ex Parte Kimaiyo Arap Sego, Misc. Appl. No. 1266 of 2007**:

> **"goes over and above dealing with complaints by individuals. The Committee has the mandate to ensure ethical and**

professional conduct by members of the Bar and section 60 of the Advocates Act empowers it to deal with complaints regarding professional misconduct, defined to include conduct incompatible with the status of an Advocate…I take the view that the Disciplinary Committee would have failed in its duty if it did not pursue the disciplinary proceedings against the applicant if the evidence before it showed that such conduct was unprofessional and dishonourable."

147. It is therefore my view that as long as there is no allegation that the Tribunal intends to usurp or has usurped the powers exclusively reserved for civil courts, there ought not to be any objection to the Tribunal exercising its disciplinary jurisdiction against advocates based on such other civil proceedings since the roles of the two Tribunals and distinct and separate. Since based on the material placed before me I am not satisfied that that is the case in the instant case, the issue of double jeopardy does not arise.

148. As regards the allegation that the Respondents have been lethargic in pursuing the complaint against the interested party while they are more than enthusiastic in pursuing the one against the ex parte applicant fronted through the interested party, the Respondents have given an explanation for the delay in addressing the complaint against the interested party being the absence of the Chief Justice who is legally mandated to put the process into motion. Section 19 of the ***Advocates Act*** provides that:

In the application of Part XI to Senior Counsel—

(a) all references therein to the Disciplinary Committee shall be construed as references to a Committee of three, to be appointed in each case by the Chief Justice, consisting of the Attorney-General or the Solicitor-General and two Senior Counsel and the Attorney-General or Solicitor-General shall be chairman of the Committee;

(b) the secretary to the Disciplinary Committee shall perform the duties of secretary to any such committee; and

(c) subsections (2) and (3) of section 57 shall not have effect.

149. It is therefore clear that the power to establish a Tribunal in matters in which the conduct of a Senior Counsel is being investigated eposes in the Chief Justice and not the Advocates Disciplinary Tribunal.

150. That brings me to the prayer for mandamus. The ex parte applicant seeks:

An Order of mandamus be and is hereby issued to compel the 1st, 3rd and 4th Respondents to constitute a Committee of Three under Section 19 of the Advocates Act, Cap. 16 of the Laws of Kenya, to consider and determine all disciplinary complaints against the Interested Party, pending before the said 1st, 3rd and 4th Respondents in particular, the complaint dated the 21st day of May, 2016 by the Ex-Parte Applicant.

151. Clearly that prayer cannot be issued against the 1st and 4th Respondents since they have no power to constitute the Tribunal to investigate the conduct of the interested party. In **PrabhulalGulabchand Shah vs. Attorney General & Erastus Gathoni Miano** Civil Appeal No.24 of 1985 the Court of Appeal held that:

"The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature."

152. It is therefore upon the applicant to satisfy the Court not only that there resides in him a legal right to performance of a legal duty but the obligation to perform that duty rests with the Respondent. Similarly, the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself *inter alia* as follows:

"..an order of mandamus compels 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."

153. 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. Therefore the order of mandamus cannot issue against the 1st and 4th Respondents.

154. As regards the 3rd Respondent, the applicant has to show that there is a duty imposed on the respondent to act and the respondent as failed to act in accordance with that duty. It has therefore been held that generally a demand for the actions to be taken is a prerequisite to the grant of an order of *mandamus* though there may be exceptions to this general rule. See **The District Commissioner Kiambu vs. R & Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**

155. In **S. I Syndicate vs. Union of India AIR 1975 SC 460**, the Supreme Court of India stated as follows:

"As a general rule the order would not be granted unless the party complained of has known what it was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that the demand was met with

refusal."

156. However in **REX v The Licensing Authority for Goods Vehicles for Metropolitan Traffic Area – Exparte B.E. Barret LD (1949) 2 KB 17 Lord Goddard C.J.** said at p. 22:

> **"For a certiorari, where jurisdiction is in question the court must be satisfied that there was either an absence of jurisdiction or an excess of jurisdiction, and to allow an order for mandamus to go there must be a refusal to exercise the jurisdiction. The line may be very fine one between a wrong decision and a declining to exercise jurisdiction"**

157. As **Birketh, J**. explained in the same decision at page 30, a refusal may be conveyed by an absolute refusal in terms or may be by conduct amounting to a refusal.

158. Similarly in **West Kenya Sugar Company Limited vs. Kenya Sugar Board & Another [2014] eKLR**, the Court of Appeal expressed itself as hereunder at paras 34 and 35:

> **"It is apparent that the application for order of mandamus was grounded on events which had not occurred. Where a statute imposes a duty on a statutory body but gives the statutory body discretion on how to execute its duty, the correct test before a mandamus can be applied for is whether the statutory body has determined the matter according to law and, if there is no determination, whether it has unreasonably refused to exercise its discretion. Demand and refusal are necessary prerequisites. It follows, and we hold that in this case the application for order of mandamus did not fall within judicial review jurisdiction. The complaint was not justiciable. It was incompetent and the High Court lacked jurisdiction… It has also been submitted that there was constructive refusal to grant a licence. Where the statute does not stipulate the time within which the action or the decision should be made, the statutory duty must be performed without unreasonable delay. (See S.58 of the Interpretation and General Provisions Act). Unreasonable delay is considered as an abuse of power.**
>
> **Refusal can be express or can be implied from the conduct (for direct refusal, see the King v London County Council. 'Exparte Corrie [1918] 1KB 68, Regina v Secretary of State for Home Department exparte Phanson P Ker (supra) and for refusal by conduct- see Regina v. Tower Hamlets London Borough Council – exparte Kyne Lavenson Exparte [1975] 1 QB 75). Delay which can be tantamount to refusal should be computed from the time demand was made. In this case, demand for a licence was made by an application dated 10th April 2010. As already stated the application for an order of mandamus was made four days later. It was factually wrong for the learned Judge to say that a search for a licence started in 2005 and to limit the time to one day when the application for licence should have been granted. After the certificate of registration was issued BSM had to construct the sugar mill which it says was completed in 2010 without indicating the specific time. KSB could not reasonably be blamed for inaction before the application for a licence was made and received… Even if there was delay or refusal to consider the application for a licence, the lawful relief was to order KSB to hear and determine the application according to the law."**

159. The applicant has however contended that whereas under section 19 of the ***Advocates Act***, complaints against the Interested Party are to be heard by a Committee of three comprised of the Attorney-General or the Solicitor-General and two Senior Counsel, the said complaints are not always filed before the Chief Justice but before the 2nd Respondent and it is therefore the 2nd Respondent's mandate to intimate to the Chief Justice to form the committee.

160. It is true that the same secretary of the Tribunal also doubles up as the secretary to a Tribunal appointed under section 19 of the Act. Whereas I disagree that the said position only comes into existence upon the constitution of the Tribunal, it is my view that a complaint against a Senior Counsel must similarly be addressed to the office of the secretary of the relevant Tribunal, in this case the Tribunal to investigate the conduct of a Senior Counsel who in this case is the Secretary to the Law Society of Kenya and the Secretary to the Advocates Disciplinary Tribunal. To demarcate their three roles however the complaint must be expressly addressed to the secretary in his/her capacity pursuant to section 19 of the ***Advocates Act***. I however find that the position is standing position and does not depend on the existence of a particular Tribunal.

161. In this case there is no evidence before me that there exists a competent complaint or demand in order to justify the orders of *mandamus*.

162. As regards the order of prohibition, this Court cannot lawfully prohibit the Respondents from undertaking their statutory duties. To do that would contravene section 55 of the ***Advocates Act***.

163. As regards the allegation that the Respondents were not acting on their motion but under directions of the interested party, while I find that the requirement by the interested party that the matter be "fixed for the taking of a plea as soon as possible" was clearly unnecessary and uncalled for, I am not satisfied based on the material before me that the Respondents were simply following the directives of the interested party.

164. Having considered the issues raised herein, it is my view and I find that the letter which initiated the disciplinary process, in so far as it was authored by the 4th Respondent in her capacity as the Secretary to the 1st Respondent and not the 2nd Respondent was clearly unprocedural. Therefore the whole disciplinary process was abortive and a non-starter.

Order

165. Having considered the issues raised before me in this application the order which commends itself to me and which I hereby issue is an Order of *certiorari* removing into this Court for the purposes of quashing and quashing the entire decision of the 1st and 2nd Respondents

made on the 27th day of September, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 95 of 2016 against the Ex-Parte Applicant.

166. As the merits of the complaint remains unresolved, each party will bear own costs of these proceedings.

167. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 18th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: