



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**IN THE JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION NO. 565 OF 2016**

**IN THE MATTER OF AN APPLICATION BY NELSON HAVI FOR AN ORDER OF  
CERTIORARI**

**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.....1<sup>ST</sup> RESPONDENT**

**ADVOCATES DISCIPLINARY TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**SECRETARY LAW SOCIETY OF KENYA, DISCIPLINARY  
TRIBUNAL & COMMITTEE OF THREE.....3<sup>RD</sup> RESPONDENT**

**AND**

**AHMEDNASIR MAALIM ADBULLAHI.....INTERESTED PARTY**

**EX PARTE- NELSON HAVI**

**JUDGMENT**

**Introduction**

1. By a Notice of Motion dated 17<sup>th</sup> November, 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents made on the 1<sup>st</sup> day of November, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 118 of 2016 against the Applicant.**

b) **The costs of this suit be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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, 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, 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 6<sup>th</sup> day of March, 2015, the 28<sup>th</sup> day of April, 2015 and the 12<sup>th</sup> day of June, 2015, directing that an in-depth forensic audit in respect to the loans of the 1<sup>st</sup> and 2<sup>nd</sup> 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 16<sup>th</sup> 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 16<sup>th</sup> day of March, 2016 was not responded to.

7. It was deposed that on the 16<sup>th</sup> 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 16<sup>th</sup> day of March, 2016. To this, the applicant responded on the 31<sup>st</sup> day of August, 2016.

8. The applicant averred that the Summons by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is premised on the complaint made on the 6<sup>th</sup> day of September, 2016, which is based upon and is a follow up to an earlier complaint made on the 23<sup>rd</sup> day of August, 2016 by the Interested Party falsely and maliciously alleging that the ex parte applicant was not authorized to act in the said pending suits and to write to Superior Homes (Kenya) Limited as he did.

9. Accordingly, on the 30<sup>th</sup> day of September, 2016, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent served the applicant with Summons to appear before the 2<sup>nd</sup> Respondent on the 24<sup>th</sup> day of October, 2006 to take a plea on the complaint made on the 25<sup>th</sup> day of August, 2016 by the Interested Party. It was the applicant's case that the complaints dated the 25<sup>th</sup> day of August, 2016 and the 6<sup>th</sup> day of September, 2016 were addressed to the 2<sup>nd</sup> Respondent with directives that the same "be fixed for the taking of a plea as soon as possible."

10. It was averred that the directions from the 1<sup>st</sup> and 3<sup>rd</sup> Respondents dated the 30<sup>th</sup> day of August, 2016 and the 7<sup>th</sup> 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.

11. The applicant however lamented that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' actions and decisions were taken notwithstanding his substantive responses to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents on the 19<sup>th</sup> day of September, 2016, detailing how the two complaints did not disclose a *prima facie* or any case for a disciplinary complaint against the applicant.

12. The applicant disclosed that during the pendency of JR Misc. Application No. 499 of 2016, the subject of the earlier complaint, the issue of the Interested Party's claimed representation for Tatu City Limited and Kofinaf Company Limited in the place of the applicant in H.C.C.C. No. 46 of 2015 which is the foundation of the complaints against the applicant, was determined in a Ruling delivered on the 11<sup>th</sup> day of November, 2016, striking out the Notice of Change of Advocates filed therein by the Interested Party, purportedly on behalf of Tatu City Limited and Kofinaf Company Limited.

13. Notwithstanding the above, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have acted on the instructions and directions of the Interested Party and without due regard to the law and the facts, concluded that there is a *prima facie* case against the applicant in respect to the complaint lodged on the 6<sup>th</sup> day of September, 2016 and summoned the applicant again to take plea on the 21<sup>st</sup> day of November, 2016 in respect to Disciplinary Tribunal Cause Number 118 of 2016.

14. According to the Applicant, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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 3<sup>rd</sup> May, 2012, 12<sup>th</sup> October, 2015 and 21<sup>st</sup> May, 2016 whose progression the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have actively hindered and suppressed. It was therefore contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision in respect to Disciplinary Tribunal Cause Number 118 of 2016 is biased, is taken with an ulterior motive or purpose calculated to prejudice my legal rights and those of my clients in the three cases, is taken without due regard to relevant considerations, is taken on the directions of the Interested Party who is not empowered to give such directions and the decision is made in bad faith and abuse of power.

15. It was however averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not indicate any reasons upon which the applicant was required to a plea on the 21<sup>st</sup> day of November, 2016 in respect to Disciplinary Tribunal Cause Number 118 of 2016.

16. The applicant disclosed that he had consulted several past and present members of the 1<sup>st</sup> 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.

17. It was therefore the applicant's case that from the 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents merely acted on the directions of the Interested Party and "fixed for the taking of a plea as soon as possible" as directed.

18. It was therefore the applicant's case that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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 the 21<sup>st</sup> day of November, 2016 in respect to Disciplinary Tribunal Cause Number 118 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 1<sup>st</sup>, 3<sup>rd</sup> and 3<sup>rd</sup> 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 3<sup>rd</sup> May, 2012, 12<sup>th</sup> October, 2015 and 21<sup>st</sup> May, 2016 whose progression the 1<sup>st</sup>, 3<sup>rd</sup> and 3<sup>rd</sup> Respondents have actively hindered and suppressed.

19. It was in light of the foregoing depositions that the applicant believed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' actions and the decision in respect to Disciplinary Tribunal Cause Number 118 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 3<sup>rd</sup> May, 2012, 12<sup>th</sup> October, 2015 and 21<sup>st</sup> 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 1<sup>st</sup> Respondent where his 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.

20. 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**.

21. 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.

22. It was the Ex-parte Applicant's contention that the decision made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 27<sup>th</sup> 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.

23. In this case it was submitted that on 30<sup>th</sup> August, the 1<sup>st</sup> Respondent wrote to the Ex-parte Applicant, transmitting the complaint dated 25<sup>th</sup> August 2016 and requiring that the Ex-parte Applicant submits his written comments on the complaint. This was, the 1<sup>st</sup> Respondent undertook, to enable the 1<sup>st</sup> Respondent to table the complaint and the Ex-parte Applicant's response before the 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent acted without jurisdiction. This is so because the 1<sup>st</sup> Respondent does not have any jurisdiction over the disciplining of Advocates since that jurisdiction falls within the ambit of the 2<sup>nd</sup> Respondent and the Advocates Complaint Commission established under section 53 of the **Advocates Act**.

24. It was submitted that while the 1<sup>st</sup> Respondent is governed by the **Law Society of Kenya Act**, the 2<sup>nd</sup> 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.

25. In the applicant's view, the 1<sup>st</sup> Respondent does not have a power to refer a complaint to the 2<sup>nd</sup> 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."**

26. 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 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent exercised a power which it does not have. In this respect the applicant relied on section 60(3) of the **Advocates Act**.

27. 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 1<sup>st</sup> Respondent granted the authority to transfer a complaint or even an Advocate's response to the 2<sup>nd</sup> Respondent.

28. However, section 60A (1) of the **Advocates Act** stipulates the situations in which the 1<sup>st</sup> Respondent can move proceedings before the 2<sup>nd</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent to invite comments or responses from any Advocate or to purport to forward to the 2<sup>nd</sup> Respondent, a complaint, which, like in our present case, had already been filed before the 2<sup>nd</sup> Respondent. There was no complaint made by or on behalf of the 1<sup>st</sup> Respondent's Council hence the 1<sup>st</sup> Respondent had no jurisdiction to invite comments from the Applicant and to purport to transmit the same to the 2<sup>nd</sup> Respondent.

29. In this case it was submitted that the Affidavit of complaint dated 25<sup>th</sup> August 2016 was lodged, correctly so, with the 2<sup>nd</sup> Respondent, *The Advocates Disciplinary Tribunal* and not with the 1<sup>st</sup> Respondent, *the Law Society of Kenya*. The complaint was not even copied to the 1<sup>st</sup> Respondent and one would therefore wonder how the 1<sup>st</sup> 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 30<sup>th</sup> 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.

30. In the applicant's view, it appears that the 1<sup>st</sup> Respondent does not clearly understand its role in the context of disciplinary processes of Advocates. In that regard, the Ex-parte Applicant submitted that this Honourable court ought to make clear the distinctions between the roles of the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent with regard to disciplinary proceedings under the *Advocates Act* and relied on the decision of **Mativo, J** in **Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] eKLR**, that:

**"decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal." Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers."**

31. The Court was therefore urged to find and hold that in purporting to exercise a power that it does not have, of inviting comments in a disciplinary matter which the 2<sup>nd</sup> Respondent was seized and in purporting to have the powers to transfer a complaint, already filed before the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent without jurisdiction and its letter dated 7<sup>th</sup> September 2016 is *ultra vires*, null and void.

32. According to the ex parte applicant, the Interested Party's complaint is that the Ex-parte Applicant allegedly published a defamatory letter to him. To the Ex-parte Applicant, the 2<sup>nd</sup> Respondent does not have jurisdiction to hear and determine a claim founded on Defamation. Therefore, in purporting to have jurisdiction over a complaint founded on defamation, the 2<sup>nd</sup> Respondent's actions and decisions are *ultra vires*, null and void.

33. 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.

34. 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 2<sup>nd</sup> 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 25<sup>th</sup> August 2016, the decision to commence disciplinary proceedings was rendered irrational/unreasonable.

35. In the circumstances, the Ex-parte Applicant submitted and prayed that this Court finds and hold that the decision by the 2<sup>nd</sup> 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.

36. 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.**

37. According to the applicant, it was left guessing as to what reasons the 1<sup>st</sup> and 2<sup>nd</sup> 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***.

38. 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.

39. 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 2<sup>nd</sup> Respondent herein, fails to give reasons for its decision which affects a person's right to fair administrative action, such a decision cannot stand.

40. 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 1<sup>st</sup> and 2<sup>nd</sup> Respondent's impugned decision made on the 27<sup>th</sup> day of September, 2016 cannot stand in light of Article 47 of the Constitution of Kenya, 2010 and the ***Fair Administrative Actions Act***.

41. 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.**

42. 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 2<sup>nd</sup> Respondent would fairly consider and determine all complaints against Advocates. Thus, there is no justification whatsoever in the 2<sup>nd</sup> Respondent not moving the 3<sup>rd</sup> 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 2<sup>nd</sup> Respondent and by extension, the 3<sup>rd</sup> Respondent breached the Applicant's legitimate expectation that all complaints against advocates will be treated equally and prosecuted fairly.

43. Secondly, the Ex-parte Applicant enjoys a legitimate expectation that as a member of the 1<sup>st</sup> Respondent, he will be safeguarded by the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent.

44. Based on the foregoing, the applicant urged the Court to grant the judicial review orders as sought in the Notice of Motion Application dated 17<sup>th</sup> November 2016.

### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case**

45. 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and the 3<sup>rd</sup> Respondent in these proceedings.

46. According to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (hereinafter referred to as “the Respondents”) the complaint against the *Ex parte* Applicant herein was instituted before the Respondents on 6<sup>th</sup> September, 2016 through an affidavit of complaint sworn by **Ahmednasir M. Abdullahi SC**, the interested party herein, the same day. The said Affidavit of Complaint was forwarded to the 1<sup>st</sup> Respondent by the firm of Issa & Co. Advocates vide its letter dated 6<sup>th</sup> September 2016.

47. It was averred that the complaint against the *Ex parte* Applicant in the said affidavit of complaint was one of professional misconduct by authoring an allegedly abusive letter in response to a letter from the Interested Party. Following the filing of the aforesaid complaint the Respondents did inform the *Ex parte* Applicant of the said complaint via a letter dated 7<sup>th</sup> September, 2016 and by which letter the *Ex parte* Applicant was requested to give his written comments regarding the said complaint within fourteen (14) days.

48. In response to the letter dated 7<sup>th</sup> September, 2016 the *Ex parte* Applicant did give his written comments via a letter dated 19<sup>th</sup> September, 2016 served on the Respondents on 20<sup>th</sup> September, 2016. Thereafter the Affidavit of Complaint together with the *Ex Parte* Applicant’s response were placed before the 2<sup>nd</sup> Respondent for its decision on whether the material placed before it disclosed a *prima facie* case. Following the placing of the Affidavit of Complaint and the *Ex Parte* Applicant’s response before the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent did find that there was a *prima facie* case on the face of the said documents and the matter was fixed for plea taking on 21<sup>st</sup> November, 2016 and a notice to that effect was issued and served upon the *Ex Parte* Applicant on 11<sup>th</sup> November 2016.

49. However, before the plea taking date, the *Ex parte* Applicant came before this Honourable Court under a certificate of urgency and obtained leave to apply for an Order of Certiorari to remove into this court and quash the entire decision of the 2<sup>nd</sup> Respondent made on 11<sup>th</sup> November, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 118 of 2016 against the *Ex parte* Applicant. The said leave was to operate as stay of the proceedings in Disciplinary Tribunal Cause Number 118 of 2016 pending the hearing and determination of the substantive motion or further orders of this Court.

50. According to the Respondents, by virtue of section 60(1) of the **Advocates Act** Cap.16 Laws of Kenya, the 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent hence the setting down of the matter for plea taking on 21<sup>st</sup> November, 2016. In their view, the plea taking scheduled for 21<sup>st</sup> November 2016 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 2<sup>nd</sup> 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.

51. In the Respondents’ view, the process of establishing whether a complaint discloses a *prima facie* case and the subsequent plea taking before the 2<sup>nd</sup> 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.

52. The Respondents asserted that the 2<sup>nd</sup> Respondent consists of the *Ex Parte*'s peers elected by the members of the 1<sup>st</sup> Respondent, including the *Ex Parte* Applicant and that the members of the 2<sup>nd</sup> 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.

53. The Respondents' position was that following from the aforesaid, it is 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. They violate his legitimate expectation to perform his professional duties without intimidation, hindrance, harassment or improper interference.

54. It was for the aforesaid reasons that the Respondents objected to the aforesaid Applicant's Application for the Judicial Review Orders of Certiorari and prayed that the same be dismissed with costs to the Respondents.

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

### **Interested Party's Case**

56. On behalf of the Interested Party herein, **Ahmednasir Maalim Adbullahi**, it was contended that the application as filed and framed and its content thereto is not only vexing, but is once again an abuse of the court process by none other than **Mr. Nelson Havi**, the applicant herein, who is going on a tangent of his own in an imaginary fight against the interested party hence there is no legal basis in this application that will warrant the court to grant any orders as sought. According to the interested party, for reasons unknown to him, the ex-parte Applicant is dangerously obsessed with him.

57. It was deposed that on 31<sup>st</sup> of August 2016, the interested party's law firm received a letter from the firm of the ex-parte Applicant, whose contents were as follows:

***'Thank you for your letter of 16<sup>th</sup> August, 2016.***

***As far as we are concerned, you are a fraudster, charlatan, quack and imposter. You are not an advocate competent to issue any demand to the writer.***

***We will not favour you with any substantive response on the issues raised in your letter for the reason that you will not comprehend them in the first place.'***

58. Upon receiving the Applicants letter and reading its contents which, regrettably was authored by an advocate and an officer of this Court, the interested party instructed his advocates on record to file and prosecute a complaint against the ex-parte Applicant in respect of the dishonourable and professional misconduct on the part of the ex-parte Applicant. Accordingly, the complaint before the Advocates Disciplinary Committee is based on the contents of the letter under reference and has nothing to do with any other pending proceedings.

59. The interested party therefore opined that as the Advocates Disciplinary Tribunal is seized of the complaint, this Honourable Court does not have jurisdiction to hear the Judicial Review application and the grant of leave and orders of stay granted on 16<sup>th</sup> November 2016 should be discharged forthwith.

60. It was averred that the 2<sup>nd</sup> Respondent only made a *prima facie* evaluation that the conduct of the Applicant merited a hearing before the Disciplinary Committee but has not determined the complaint. Consequently the application as framed is pre-mature, the ex-parte Applicant is seeking to quash a decision by the 2<sup>nd</sup> Respondent that is yet to be made and any issue of alleged bias should be raised before the Disciplinary Tribunal.

61. 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.

62. 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. Such acts on the part of the ex-parte were obviously tainted with malice.

63. According to the interested party, the ex-parte Applicant was never instructed by my clients Tatu City Limited nor Kofinaf Company Limited to institute the suit HCCC no 46 of 2015. He averred further that:

i) The ex-parte Applicant herein allegedly acting on the instructions of Tatu City Limited threatened Superior Homes (Kenya) Limited so as to dissuade it from completing a contract for the purchase of a property belonging to Tatu City Limited allegedly on the strength of orders made by the High Court in HCCC No 46 of 2015. The High Court in its Ruling delivered by Honourable **Justice Ogola** on 6<sup>th</sup> March 2015, specifically at paragraphs 54 and 55 categorically declined to grant orders to stop any dealings with lands owned by Tatu City Limited, reason being that if the order was granted it would bring to a halt the legitimate business of the company;

ii) Further it was noted that these companies deal with land, they sell and acquire properties and stopping them from doing their business would amount to serious interference with their business. The court was further cognizant that being that this is their business, there could be ongoing transactions at various stages with other third parties such as Superior Homes (Kenya) Limited;

iii) Therefore as it stands there are no orders restraining my client Tatu City Limited from entering into any transactions with third parties;

iv) Despite being aware of the court order, **Mr. Nelson Havi**, the ex-parte applicant herein falsely and maliciously and without any iota of instructions from my client Tatu City Limited wrote to Superior Homes claiming that he acts for Tatu City Limited informing them that the joint venture

had not been approved by the companies board of directors. He further proceeded to inform Superior Homes that if they failed to comply with the demand, then **Mr Nelson Havi Advocate** would take legal action for contempt of court and for alleging to interfere with proceedings currently pending before the High Court in HCCC No 46 of 2015.

v) This was done so despite the fact that the ex-parte applicant had not received any instructions from Tatu City Limited to write to Superior Homes Limited.

vi) That the actions on the part of the ex-parte Applicant caused the Complaint to suffer damages and losses to the tune of **US\$ 24,000,000.00** as a result of the unlawful procurement of breach of contract.

vii) It was on this premise that Tatu City Limited instructed my firm to file a complaint before the Advocates Disciplinary Tribunal against the ex-parte Applicant for acting without instructions.

viii) That vide a letter dated 23<sup>rd</sup> August 2016, we wrote a letter to the Advocates Disciplinary Tribunal, Law Society of Kenya filing a complaint against the ex-parte Applicant in respect of his unilateral and wrongful decision to act for our client when he did not have the authority to do so.

ix) That on 31<sup>st</sup> August 2016, the ex-parte Applicant then published the most defamatory reply to the interested party's advocate's demand letter of 16<sup>th</sup> August 2016 in which instead of addressing himself to Tatu City's most grave complaint of professional misconduct, he scurrilously attacked, abused and insulted the interested party.

64. The interested party further averred as follows:

i) The provisions of the **Advocates Act** are very clear as to the procedure to be followed when a complaint has been made against an advocate.

ii) This complaint was based on the letter dated 6<sup>th</sup> of September 2016 hence is a separate and distinct complaint filed by the interested party's advocates on record on his behalf in respect of the dishonourable and unprofessional conduct on the part of the ex-parte Applicant;

iii) Section 60 of the **Advocates Act** mandates the 2<sup>nd</sup> Respondent to receive a complaint against an Advocate for professional misconduct.

65. According to the interested party, the ex-parte Applicant is misleading this Honourable Court as to the Ruling delivered by **Honourable Justice Tuyoitt**. In his view:

i) 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.

ii) On 16<sup>th</sup> 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 the suit in HCCC No 46 of 2015 or to deal in any matter relating to the company legal affairs;)

iii) On the same day, the Boards resolved and appointed with immediate effect, the firm of Ahmednasir, Abdikadir & Company Advocates to act on behalf of the companies in relation to the law suits that were pending before the court;

iv) That upon filing of the Notice of Change of advocates, the same was obviously challenged by the ex-parte Applicant herein, which issue was subject to a hearing before **Honourable Justice Tuyoitt**.

v) The Court delivered its Ruling on 11<sup>th</sup> November 2016 and ruled that since the suit was a derivative suit, both companies namely Tatu City Limited and Kofinaf Company Limited were not necessary parties and should not play any active role. He ruled that the companies should remain neutral, in that should the derivative action succeed, then it will benefit the company;

vi) 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.

vii) The court further ruled that the only shareholders of the companies are the true protagonists of the suit;

viii) The Judge stated that to his estimation, the critical issue before the court was not the efficacy of the resolution that was passed on 16<sup>th</sup> September 2015 but whether or not in the circumstances the interested party's law firm 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;

ix) In a ruling delivered on 11<sup>th</sup> December 2015, the Court of Appeal upheld an objection the interested party had raised in **Mr. Nelson Havi** representing Tatu City Limited and Kofinaf Company Limited.

x) That at all times, the interested party was acting on full instructions of my clients Tatu City Limited and Kofinaf Company Limited and he still acts for the two companies.

66. It was therefore the interested party's case that this application is an abuse of the court process and is merely used by the ex-parte Applicant in an attempt to vex and pressure the interested party to stop representing his clients, Tatu City Limited and its associate companies.

67. The interested party disclosed that **Mr. Havi**, the ex-parte Applicant was his student at the Faculty of Law University of Nairobi and is very well known to him and that this is not the first complaint **Mr. Havi** has made against him with regard to his professional qualifications. The interested party averred that on three occasions **Mr. Havi** has approached him for favours and on each occasion when he declined, the applicant would start a vile personal campaign against him.

68. The interested party disclosed that in the first instance, on the instructions of a client, he lodged a complaint against a judge with a deep and historic relationship with **Mr. Havi** with the judges and Magistrates Vetting Board. However, **Mr. Havi** approached him and pleaded with him that he withdraws the complaint. When he informed him that the applicant that his client was adamant to proceed with his case before the Vetting Board, **Mr. Havi** immediately started a vile and false claim about the interested party not undergoing pupillage or forging a pupillage completion certificate.

69. According to the interested party, simultaneously and not surprisingly, a similar complaint was made by one **Bryan Yongo** in an affidavit sworn on 3<sup>rd</sup> May 2012 alleging that the interested party had never attended pupillage and that he had forged his pupillage completion certificate. **Mr. Bryan Yongo** however recanted the false depositions and withdrew the patently false and contrived complaint in an affidavit sworn on 21<sup>st</sup> May 2012 and forwarded to the Law Society of Kenya. By a letter dated 16<sup>th</sup> July 2012, the late **Mr. Peter Simani** wrote a letter to the Secretary, Law Society of Kenya confirming that the interested party attended pupillage at his firm. To the interested party, if the late **Mr. Peter Simani** did not have a practicing certificate at the time of the said pupillage, which is not true, then a complaint should have been made against him as the pupil master and not against the interested party twenty-five years later.

70. The interested party contended that if **Mr. Nelson Havi** had a legitimate complaint, he would have filed a complaint in 2012 against the late **Mr. Peter Simani** with the Police or the Law Society of Kenya and that the fact that no such complaint was ever made confirms that the latest instalment in the witch-

hunt that nowadays preoccupies the ex-parte Applicant was actuated by malice and was contrived to exert pressure on the interested party to withdraw the complaint.

71. It was averred that the Director of Criminal Investigations filed an application before the Chief Magistrate's court in Misc Application No 1082 of 2015 seeking an order to compel the Chief Registrar of the Judiciary to hand over the interested party's certificate of completion of pupillage to enable it to conduct a forensic investigation into the signature of his previous pupil master, the late **Mr. Simani**. The purported complainants were as has become the norm, the ex-parte applicant's proxies **Osundwa Sakwa** and his crony **Mr. Bryan Yongo**. The ex-parte applicant filed an application to be joined as an Interested Party, on the basis that he had an interest in the application for warrants to investigate which was simply an abuse of the criminal justice system and by extension an abuse of the court process. However, the Chief Magistrate's Court delivered its Ruling on 1<sup>st</sup> February 2017 and dismissed the substantive application stating that the complaint filed was based on extraneous factors, the same was an abuse of the criminal justice system and an abuse of the court process and the investigations into the complaint a waste of scarce public resources. Accordingly the purported criminal investigations were stopped in the said Ruling declaring the investigations were in bad faith and an abuse of the criminal justice process.

72. This Court was urged, in determining the present application for Judicial Review which seeks to prohibit the 2<sup>nd</sup> Respondent from discharging its statutory mandate to inquire into a complaint of misconduct should consider the following important facts and previous conduct on the part of the Ex parte Applicant;

- a) That **Mr. Havi** conspired with others, and changed shareholders and directors of a company called Purple Saturn Properties Limited, which owns a piece of land worth Kshs.5.4 billion. This company and the property belong beneficially to the interested party's clients who are the owners of Tatu City.
- b) In defrauding the true owners of the property **Mr. Nelson Havi** transferred majority shares to a company called Nara Limited.
- c) The Director of Criminal Investigations after an exhaustive investigation recommended that **Mr. Nelson Havi** be charged and prosecuted for the crime of conspiracy to defraud.
- d) The Ex-parte Applicant having realized that his prosecution was imminent and inevitable, filed a constitutional Petition and asked the court to grant him an injunction and the Court granted him a conservatory order of injunction.
- e) At the time when the criminal complaint on was lodged by the Companies, the interested party had not been appointed to represent the companies in the ongoing cases between Tatu City Limited and Mr. Nahashon Ngige Nyagah, and I played no role in the criminal complaint that was lodged against **Mr. Nelson Havi**.
- f) **Mr. Nelson Havi** thereafter even filed a fresh application in **HCCC No 355 of 2015, Nelson Havi & others versus Director of Public Prosecution and others**, where he sought information on what basis the Director of Public Prosecutions had recommended his prosecution. In the same case, he alleged that since the Judicial Service Commission recruited the **Honourable Justice Onguto** when the interested party was a member, consequently the Judge should recuse himself which application was dismissed.
- g) **Mr. Nelson Havi**, the ex-parte Applicant then filed Petition No. 167 of 2016 **Michael Osundwa Sakwa vs. the Chief Justice and President of the Supreme Court of Kenya & Others**, seeking to stop the transfer of judges of the High Court. One of the grounds in support of the Petition was that the transfers of the judges was informed by the motive to remove certain Judges who had made unfavourable orders in case the interested party had handled which petition this Honourable Court struck out as it was unmeritorious.

h) **Mr. Nelson Havi**, the ex-parte Applicant with his partner **Mr. Osundwa Sakwa** filed an application before the Supreme Court to be enjoined in the cases filed by **Honourable Justices Kalpana Rawal** and **Philip Tunoi**. The applications were allegedly on grounds of public interest, but the applications were only calculated to insult and vex the interested party in the proceedings before the Supreme Court. The frivolous applications were dismissed.

i) Further, the ex-parte Applicant also filed a petition before the Public Service Commission seeking the removal of the Director of Public Prosecution allegedly on behalf of the general public and made various allegations against the interested party in the said Petition but the Public Service Commission dismissed this Application.

j) It is clear that the application herein is a farce and a continuation of the gross abuse on the part of the ex-parte Applicant.

k) It is clear that the ex-parte Applicant has filed various suits and initiated a number of proceedings before different courts litigating over the same issue. As demonstrated above, the ex-parte Applicant has filed suits and applications before the following courts and or tribunals:

- i) Supreme Court of Kenya;
- ii) Court of Appeal;
- iii) High Court Judicial Review Division;
- iv) High Court Constitutional Division
- v) Chief Magistrate Courts;
- vi) Public Service Commission;
- vii) Law Society of Kenya Disciplinary Committee.

73. According to the interested party, the application herein 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 his admission has already been determined by the High Court in a Ruling delivered on 21<sup>st</sup> 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.***

74. It was further averred that **Mr. Nelson Havi**, the ex-parte Applicant has made a number of derogatory statements on his twitter page regarding the interested party in his personal capacity and in his capacity as an Advocate of the High Court of Kenya.

75. In the interested party's view, as no decision has been made by the 2<sup>nd</sup> Respondent except the preliminary determination on *prima facie* basis that the complaint against the Applicant is not frivolous, the application herein seeks to frustrate a legitimate statutory process. It was contended that judicial review orders being discretionary, the Applicant is most undeserving of the courts discretion and the application for Judicial Review herein should be dismissed with costs and that the ex-parte Applicant should be directed to appear before the Disciplinary Tribunal to be heard on the complaint on his unprofessional and dishonourable conduct as an advocate.

76. 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;***

77. 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***.

78. 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.***

79. 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.

80. 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 23<sup>rd</sup> 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***.

81. In this case it was averred that the 1<sup>st</sup> Respondent by a letter dated 30<sup>th</sup> 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 19<sup>th</sup> September 2016, the ex parte Applicant responded to the complaint of professional misconduct. The ex parte Applicant was notified by a letter dated 27<sup>th</sup> September 2016 that complaint under reference Disciplinary Tribunal Cause Number 95 of 2016 had been scheduled for plea taking before the Disciplinary Tribunal on 24<sup>th</sup> October 2016.

82. 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.

83. It was submitted by the interested party that the Advocates Disciplinary Tribunal has the mandate to hear and determine Disciplinary Tribunal Case Number 118 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.'**

84. 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents considered the affidavit evidence dated 23<sup>rd</sup> August 2016 in support of the complaints and the response by the ex parte Applicant. The 1<sup>st</sup> Respondent was not bias, did not act in bad faith, illegally or irrationally.

85. 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.

86. 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 2<sup>nd</sup> 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.

87. 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 1<sup>st</sup> and 2<sup>nd</sup> Respondent has overstepped its mandate in carrying out its functions and if so, whether the appropriate orders should be issued.

88. 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 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent and he relied on Republic vs. Disciplinary Committee Ex-Parte Wambugu Kariuki [2015] eKLR.

89. 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.**

90. In this case it was submitted that the 2<sup>nd</sup> 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 2<sup>nd</sup> 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).

91. With respect to the order of prohibition, it was submitted based on ***Halsbury's Laws of England***, Fourth Edition, Reissue volume 1(1) the 1<sup>st</sup> and 2<sup>nd</sup> 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 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 2<sup>nd</sup> Respondent and the grounds raised in the instant judicial review proceedings can be raised as defences during the disciplinary hearing.

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

93. It was submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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 21<sup>st</sup> 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 cannot seek to use his incessant witch hunt to obtain discretionary remedies from this Honourable Court.

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

### **Determinations**

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

96. 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.

97. 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.**

98. 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.

99. 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.

100. 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.

101. 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.”**

102. 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 4<sup>th</sup> Edition Vol (1)(1) Para 60*.

103. 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’.”**

104. 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.

105. 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.

106. 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) 1 WLR 1155.

107. 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.

108. 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***,

**“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.”**

109. 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.”**

110. In this case, it is clear that what provoked these proceedings was the complaint against the *Ex parte* Applicant herein instituted before the Respondents on 6<sup>th</sup> September, 2016 through an affidavit of complaint sworn by **Ahmednasir M. Abdullahi SC**, the interested party herein, the same day. The subject of the said complaint was a letter written by the ex parte applicant to the interested party in which the interested party contended that the ex parte applicant had misconducted himself by authoring an allegedly abusive letter in response to a letter from the Interested Party.

111. It was however the Applicant’s case that the manner in which the said complaint was handled was unprocedural in that instead of the same being handled by the 2<sup>nd</sup> Respondent, it was handled by the 1<sup>st</sup> Respondent.

112. 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.

113. 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."

114. 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.

115. This issue calls for a determination of 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.*

116. 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.*

117. It is therefore clear that a complaint against an advocate of professional misconduct is to be made to the 2<sup>nd</sup> Respondent (hereinafter referred to as "the Tribunal") and not the 1<sup>st</sup> 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.***

118. 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 7<sup>th</sup> September, 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 2<sup>nd</sup> Respondent for a decision on whether the complaint disclosed a *prima facie* case was written by the 3<sup>rd</sup> Respondent as the Secretary of the 1<sup>st</sup> Respondent, the Society and not as the secretary of the Tribunal. As held in **Hardware & Ironmongery (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.

119. 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.”**

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

121. 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.

122. 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.

123. 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.

124. 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 since they revolve around defamatory allegations. 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.”**

125. 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.***

126. 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.”**

127. Since the matter is still pending hearing and determination, I would refrain from expressing an opinion on whether the contents of the letter the subject of the proceedings before the 2<sup>nd</sup> Respondent disclose the existence of disgraceful or dishonourable conduct incompatible with the status of an advocate hence a professional misconduct. I am however satisfied that it is for the Tribunal to inquire into the matter and make a finding thereon and this Court ought not to usurp its powers to do so, of course subject to the appellate process. There is therefore nothing inherently wrong in the 2<sup>nd</sup> Respondent entering into such an inquiry.

128. 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 are 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.

129. 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 3<sup>rd</sup> Respondent in her capacity as the Secretary to the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent was clearly unprocedural. Therefore the whole disciplinary process was abortive and a non-starter.

### **Order**

130. 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents made on the 1<sup>st</sup> day of November, 2016 directing the commencement and hearing of Disciplinary Tribunal Cause Number 118 of 2016 against the Applicant.

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

132. It is so ordered.

**G V ODUNGA**

**JUDGE**

**Delivered at Nairobi this 18<sup>th</sup> day of April, 2018**

**P NYAMWEYA**

**JUDGE**

**In the presence of:**