**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO 390 of 2016**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND IN THE MATTER OF THE ADVOCATES ACT, CA 16 LAWS OF KENYA**

**AND IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT CAP 18 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DISCIPLINARY TRIBUNAL OF THE**

**LAW SOCIETY OF KENYA.....RESPONDENT**

**JAYSHINE AFRICA COMPANY LIMITED.....INTERESTED PARTY**

**EXPARTE**

**BERNARD MURIUKI KANYIRI**

**JUDGMENT**

1. The Exparte Applicant Bernard Muriuki is an Advocate of the High Court of Kenya. By his Notice of Motion dated 2nd September 2016 filed pursuant to leave of court, the Applicant seeks Judicial Review orders as against the Disciplinary Tribunal of the Law Society of Kenya challenging the decision/ judgment of the Tribunal dated 4th April, 2016.

2. The prayers sought are:

> ***i. Certiorari to issue to bring into this court quashing the decisions of the Respondent, the Disciplinary Tribunal of the Law Society of Kenya and expressed vide an unsigned Judgment in Disciplinary Cause No. 138 of 2011 dated 4th April 2016 requiring inter alia the Applicant to pay a sum of over Kshs 5,520,000;***
>
> ***ii. Prohibition to issue prohibiting and stopping the Respondent from further proceeding with the Disciplinary Cause No 138 of 2011;***
>
> ***iii. Stay of any consequential proceedings before the Respondent in respect of the said Disciplinary Cause;***
>
> ***iv. The court do grant such other further orders that are analogue and or necessary adjuncts to the reliefs being sought that may be deemed fair and just to grant in the circumstances;***
>
> ***v. Costs be in the cause.***

**BACKGROUND OF FACTS**

3. The facts of this case are that the Interested Party Jayshine Africa Company Limited through its Director saw an advertisement for sale of land measuring 65 acres in Nyari Estate Nairobi County to which she got interested in the same and contacted the agent with whom they agreed that the purchase price for the land subject matter herein to be Kshs. 11, 000,000/= per acre and it is the said agent that introduced her to the exparte Applicant herein.

4. It was alleged that when the time came for the interested party to sign the Sale Agreement, she was surprised to find that the directors of the vendor company were not present but that in their place on the Sale Agreement had already been signed in her absence and upon asking, the applicant convinced her that everything would be fine to which she believed knowing that the applicant was acting in her best interests.

5. In the agreement the purchaser was to pay a deposit Kshs. 20,000,000/= to the vendor while the balance would be paid by the purchaser's financiers to which the interested party gave the applicant a deposit of Kshs. 310,000/= as legal fees and a deposit of the consideration of Kshs. 6,000,000/=

6. It was alleged that the interested party was unfortunately not able to raise the balance of the deposit but in the course of time she became suspicious when she conducted another search only to realize that the persons who had purportedly executed the agreement for sale on behalf of the vendor were imposters and to make matters worse, the Applicant Advocate herein had purportedly already released the said Kshs. 6, 000, 000/= to the purported Directors of the vendor Company which then prompted the interested party to file a complaint at the Advocates Disciplinary Tribunal claiming she lost Kshs. 6,320,000/= to the Applicant through the Applicant's collusion with imposters.

7. The advocate was charged with the following acts of professional misconduct:

a. Withholding Kshs. 6, 320,000/= plus interest belonging to the complainant;

b. Disgraceful conduct incompatible with the status of the advocated by engaging in suspected fraudulent activities;

c. Failure to reply to the Commission's letters dated 15/3/2011 and 14/6/2011.

8. the Tribunal after reviewing the evidence placed before it came to a conclusion that the Applicant received Kshs. 6, 320,000/= from the interested party, Kshs. 6,000,000/= being deposit for the purchase price and Kshs. 320, 000/= being deposit for the legal fee. It was also found by the Tribunal that the Applicant did not render professional services commensurate with the legal fee paid to him and he did nothing to protect the interest of the Interested Party in the failed transaction and as such the tribunal came to the conclusion that the said money be refunded to the Interested Party herein by the Applicant.

9. The Tribunal also found that it was not beyond possibility that the Applicant herein was a complicit to the fraud visited upon the complainant and the Interested Party herein and further found that in the collapsed transaction, the Applicant conducted himself in a manner incompatible with the status of an Advocate hence guilty of professional misconduct and the Applicant was then directed to refund the client Kshs. 5, 200,000/= that was wrongly paid to the fraudsters and Kshs. 320,000/= paid as legal fees.

10. It is upon the foregoing that the Applicant herein being dissatisfied with the decision of the Advocates Complaints Tribunal that he lodged these Judicial Review proceedings seeking orders:

a. Certiorari for purposes of quashing the Respondent's decision;

b. an order of prohibition to stop the Respondent from further proceeding with the Disciplinary Cause Number 138 of 2011 stating that the Tribunal acted in excess of jurisdiction, that he the Applicant was charged without being given a fair hearing , that the judgment by the Respondent is unsigned, and that the law of Natural justice was ignored in the whole process.

11. The exparte applicant's case is that the Disciplinary Tribunal conducted proceedings against him in an unprocedural and in a rather unfair manner, contrary to the provisions of law and principles and further that the Respondent acted ultra vires.

12. He claims that due process was not adhered to at the time of hearing of his case and that its subsequent conclusion was conducted in a manner that contravenes the law to the detriment of the Applicant.

13. The grounds upon which the application is premised are that are firstly: his right to speedy trial was violated in that the case against him took a rather long time to be heard and concluded thereby placing the applicant in a precarious position which served to occasion injustice to him.

14. The Applicant further alleges that he was not notified of the ruling date contrary to Article 38(c) of the Constitution, and further that it was not a valid ruling for it was signed irregularly by one Tribunal member.

15. In addition, it was alleged that the date the ruling was delivered was beyond the expected time as the first time the matter was slated for judgment was on 6 May 2013.

16. It was the Applicant's case that the Respondent has failed to present to court a signed judgment by all members of the Tribunal hence the 3 member panel was not involved in the decision making process and that therefore the single signature is illegal and irregular and in contravention of Article 47 of the Constitution.

17. Further, the exparte applicant asserts that the Respondent did not restrict itself to the issues before it and that their decision was entirely

on different facts not before it, relied on irrelevant facts and that it did not take into consideration the facts as adduced by the Applicant.

18. Lastly the applicant claims that he was not given an opportunity to be heard on the various facts presented by the Interested Party claimant against him nor was he allowed to reply to those facts.

19. The exparte applicant averred that the Respondent acted unreasonably, irrationally, and irregularly in reaching its unreasonable decision and did not make a finding on the charges against the Applicant.

20. The Respondents opposed the application by the exparte applicant through an affidavit in reply sworn by the Secretary, Chief Executive Officer of the Law Society of Kenya Ms Mercy Wambua. In the said affidavit, it was contended that the application as drawn is bad in law and has no basis whatsoever.

21. The respondent's Secretary stated that due process was followed and further stated that the respondents did not act in excess of jurisdiction, in that section 60(9) of the Advocates act provides that they may order an Advocate to pay such sums as it finds to be due from the advocate and that the amount in question here included the principle amount withheld plus interest accrued on the same.

22. It was further contended that that by dint of section 60(1) of the Act, the Tribunal's jurisdiction is not limited by monetary value but by the subject matter amounting to professional misconduct. That monetary jurisdiction is determined by considering the principal amount involved not the interest, and that the principal amount having been Kshs. 3,437, 404/= had not exceeded the Kshs 5million ceiling.

23. In the replying affidavit sworn by Jane Wanja Wanjiru dated 15.11.2006 on behalf of the interested party it was deposed that the Applicant cannot substantiate his allegations that his Replying affidavit was not considered. The deponent denied all the allegations made by the Applicant.

24. It was further deposed that at paragraph 34 of his affidavit, the Applicant contradicted himself when he alleged that he was not aware of what was happening at the Tribunal yet he claims that in the course of the proceedings, he was busy gathering and analyzing the information.

25. In answer to the allegation that the proceedings before the Tribunal took too long, the respondent's deponent deposed that the applicant's case was not the only case that the Tribunal was dealing with and that the Tribunal's diary was subject to other cases too including that of the applicant.

26. Further, in answer to the allegation that there was no valid judgment on record, they annexed a signed judgment by the 3 member panel although the said Judgment is not dated. They urged the court to dismiss the application by the exparte applicant.

27. Parties advocates also filed written submissions and lists of authorities for consideration by the court. The said submissions echo the pleadings.

28. On the part of the exparte applicant advocate, he filed written submissions and supplementay submissions in response to the respondent's and the interested party's submissions and asserted that the matter was not heard speedily and he maintained that the Respondent breached his right to a speedy trial; that the inordinately long hiatus that occurred between the completion of the hearing and delivery of the ruling is also unfair and illegal and that the court should also note that the Applicant was not notified of the ruling which it is submitted in emphasis was signed irregularly by only one Tribunal Member. Reliance was placed on the case of **Erick OkongoOmogeni v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** where the court made it clear that while referring to the case of **Owuor Okungu vs. Lazaro Onyango Civil Appeal No. 43 of 1982** the Court of Appeal held that a party should have notification before an order can be made to the prejudice of his rights. He emphasized that the order that was made by the Committee prejudiced the exparte applicant's rights as enshrined in Article 38(c) of the Constitution which provides that Every adult citizen has the right, without unreasonable restrictions to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. It is trite law that Officials must comply with the rules of natural justice when exercise quasi-judicial functions and that each party must be given an opportunity to present their cases.

29. Further, that the case of **Central Organization of Trade Unions vs. Benjamin K Nzioka& Others Civil Appeal No. 166 of 1993** was also cited.

30. Further, it was submitted that there was an inordinate delay in delivery of the judgment as the first time the matter was slated for judgment as per the Respondent's Affidavit was 6th May, 2013 and that the Respondent has to date never presented to court a signed Judgment by all the members of the Respondent Tribunal adding that any signed Judgment presented at this stage is an afterthought and on this it was submitted that the judgment was illegal as the 3 member panel was not involved in the decision and that the actions of the Respondent were contrary to Article 47 of the Constitution.

31. On whether the Respondent acted illegally, it was submitted that the number of irregularities and illegalities that the Respondent engaged in, in arriving at its decision were numerous. Some of these irregularities as mentioned are: the Respondent did not make a finding on the charges against the Applicant; considered irrelevant matters that had not been presented in any of the affidavits before it and that the facts presented by the Interested Party did not support the charges and that the Respondent completely ignored the Applicant's responses especially on the issue; that the Respondent made an irrational finding that the Applicant failed to render any legal services and illegally ordered that he refunds legal fees yet the Interested Party actually confirmed receiving legal services.

32. It was submitted that the exparte applicant had met the criterion laid out in the case of **Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue [2016] eKLR** where the Court stated:

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

33. The Respondent in response to the Ex parte Applicant's submissions relied on the Replying Affidavit as sworn by Mercy Wambua, and the legal authorities as filed on record. The Respondent framed the following issues for determination:

**i. Did the Respondent have jurisdiction to entertain the complaint against the Ex parte Applicant and did its judgment exceed its jurisdiction as provided for under S. 60(4)(e) of the Advocates Act.**

**ii. Was the Ex parte Applicant given a reasonable opportunity to file his pleadings?**

**iii. Did the Respondent adhere to the principles of natural justice during the proceedings of complaint against the Ex parte Applicant as were before it?**

**iv. Was the delay in the delivery of judgment by the Respondent inordinate and unexplained?**

**v. Was the judgment delivered by the Respondent unsigned?**

34. On issue I, reliance was placed on the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil Kenya limited (1989) KLR** as cited in the case of **Antony Munene Maina v University of Nairobi & another [2015] eKLR where Nyarangi JA** stated ;

***"that Jurisdiction is everything….A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"***

35. It was submitted in contention that by virtue of section 60(1) of the Advocates Act the Respondent is empowered to entertain a complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate and which complaint may be made by any person. That in this case, the Ex parte Applicant was charged with withholding Kshs. 6,310,000/= plus interest, engaging in suspected fraudulent activities and failing to respond to correspondence and that such issues amount to professional misconduct and so fall squarely within the ambit of the jurisdiction of the Respondent.

36. It was contended that Section 60(4) of the Advocates Act provides that if after hearing the complaint and considering the evidence of parties, the Respondent is of the opinion that a case of professional misconduct on the part of the Advocate has been made out, the Respondent may order such an Advocate to be admonished, or suspended from the practice for a period not exceeding five (5) years or have the name of the Advocate struck off the Roll or pay such a fine not exceeding one million or such an advocate may be condemned to pay the aggrieved person compensation or reimbursement not exceeding five million or a combination of such orders as the Committee thinks fit.

37. That upon the Respondent entertaining the complaint against the Ex parte Applicant and taking into considering all the evidence before it, it found the Ex parte Applicant guilty or professional misconduct and went ahead to sentence him as follows:

i. He was admonished.

ii. He was fined Kshs. 50,000/= to be paid within 60 days from the date of the sentencing.

iii. He was to pay costs of Kshs. 10,000/= to the Law Society of Kenya and a similar amount to the Advocates Complaints Commission within 60 days from the date of the sentencing.

iv. He was given an extension of 60 days within which to pay Kshs. 5,520,000/= as ordered on 4th April, 2016.

38. That it is the latter aspect of the sentencing which required the Ex parte Applicant to refund Kshs. 5,520,000/= to the Interested party herein that made the Ex parte Applicant raise the issue that the Respondent had exceeded its jurisdiction in its judgment.

39. According to the respondent, the limitation of the amount that the Respondent can order an Advocate to pay to an aggrieved person as compensation or reimbursement not exceeding five million as provided under section 60(4) (e) of the Advocates Act is in relation to issues such as costs, losses and other expenses that an aggrieved person may be deemed to have incurred in pursuing the complaint before the Respondent, which the respondent believes is different from the amount involved in the subject matter of the complaint which could be any amount and which the Respondent also has inherent jurisdiction to order its restitution to the aggrieved person in order to do full justice noting that the same is only possible on condition that the aggrieved person has not filed a civil suit against the Advocate in respect of the sum in dispute and that the same is in the realm of section 60(9) of the Advocates Act which provides that:

> ***"In any case where the complainant has not filed a civil suit against the advocate in respect of the sum in dispute, the committee may order the advocate to pay to the complainant such sum as it finds to be due from the advocate."***

40. It was submitted that in this case, the Interested Party had not filed a civil suit against the Ex parte Applicant to claim the amount involved in the subject matter of the complaint and for this, the case of **Republic v Disciplinary Committee Law Society of Kenya & another Ex-parte Charles Lutta Kasamani[2015]eKLR** was relied on wherein, the Applicant claimed that the Respondent herein had exceeded its jurisdiction under Section 60(4)(e) in order him to pay an amount exceeding Kshs. 5 million but the Applicant had failed to prove or show that there was a civil suit pending in court between him and the complainant, the Respondent was allowed by law to handle the Interested Party's complaint.

41. On issue 2, it was submitted that the Ex parte Applicant specifically stated that the Respondent never served upon him the written submission as filed before it by the Interested Party. On this that it was submitted the Respondent's Replying Affidavit at paragraphs 16 and 17 states that on 4th February, 2013 when the matter came up for hearing the Ex parte Applicant and the Interested party did confirm that they had filed all their documents and they sought leave to proceed under Rule 18 of the Advocates Disciplinary Committee Rules which rule allowed the Respondent to proceed with the matter based on the evidence on record as given by the parties by way of affidavits and that the Respondent ordered the parties to file and exchange their submissions within 30 days and judgment was scheduled for delivery on 6th May, 2013.

42. That in compliance with the orders of the Respondent as issued on 4th February, 2013 the Interested Party filed its written submissions on 11th March, 2013, however, the Ex parte Applicant did not file his written submissions as ordered by the Respondent.

43. That despite the long delay in the delivery of judgment and several appearances before the Respondent after 4th February, 2013 the Ex parte Applicant did not bother to find out whether the Interested party had filed its submissions and pray that the Respondent directs the Interested party to serve them with the same and even seek leave of the Respondent to file his submissions in Response and as such, it is the Applicant who should be the explaining why he did not file his submissions as directed by the Respondent herein. Reliance was placed on the case of **Republic v Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** W. Korir J, G V Odunga and Gikonyo J at paragraph 134 the three judge bench stated:

> ***"....The work of the tribunal is to allow parties sufficient time to plead their cases, but of course, within the bounds of the applicable law on the matter."***

44. Further reliance was placed on **Union Insurance Co. of Kenya Ltd. Vs Razman Abdul Dhanji Civil Application No. Nai. 179 of 1998 where it was held:**

> ***"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point in which the party not utilizing the opportunity can be heard is why he did not utilize it."***

45. On issue c), reliance was placed on the case of **Republic v Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014**] eKLR W. Korir J, G V Odunga and Gikonyo J at paragraph 124 which established the ingredients of natural justice by stating that:

> ***"...It is paramount at this juncture that this court established the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individual and enhances public confident in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be a judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material..."***

46. Reiterating the two above cited cases on issue b above and also quoting **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** at pages 7 and 8 **where the Court of Appeal stated as follows: "....However, in our view, the fairness of a hearing is not determined solely by its oral literature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing".**

47. Other cases relied on this issue include: **LOCAL GOVERNMENT BOARD vs. ARLIDE [1915] A.C.120, 132-133, SELVARAJAN vs. RACE RELATIONS BOARD [1975] I WLR 1686, 1694, and in R vs. IMMIGRATION APPEAL TRIBUNAL ex-parte JONES [1988] I WLR 477, 481.**

48. It was submitted further in concluding the issue that the Respondent observed the rules of natural justice by complying with all its ingredients and that the Respondent's decision as enshrined in its judgment delivered on 4th April 2016 was based on the evidence on record as given by the parties via affidavits filed therein and which was in tandem with rule 18 of the Advocates (Disciplinary Committee) Rules, which rules provides that:

> ***"18. The Committee may, in its discretion either as to the whole case or as to any particular fact or facts, proceed and act upon evidence given by affidavit."***

49. On issue d), it was submitted that the delay in the delivery of the judgment is to be attributed to the changes in the constitution of the

membership of the Respondent following the elections and also that the nature of the complaint and the voluminous documents involved required more time to digest so as to take into account all the relevant matters as presented by the parties through their affidavits as filed in the matter hence explaining the reason for the delay.

50. On the issue of whether the judgment delivered by the Respondent was signed or not is one of fact and not law and reiterate that the judgment delivered by the Respondent which is annexed at paragraph 22 of the Respondent's Replying Affidavit is signed.

51. The Respondent concluded by saying that it adhered to all the relevant Advocates (Disciplinary Committee) Rules that govern the proceedings before it and having accorded the Ex parte Applicant a reasonable opportunity to be heard. It is not in breach of the principles of natural justice. Therefore, the Ex parte Applicant's case has no merit and should be dismissed with costs to the Respondent.

52. The interested party framed the issues for determination as follows;

> ***i. Did the disciplinary tribunal act beyond its jurisdiction.***
>
> ***ii. Was the applicant herein given an opportunity to be heard in line with the principles of Natural Justice?***
>
> ***iii. Was the judgment of the tribunal signed?***
>
> ***iv. On issue a) it is submitted that the question whether the Respondent exceeded its pecuniary jurisdiction in ordering the applicant to refund Kshs. 5, 200,000/= wrongfully paid to fraudsters and Kshs. 320,000/= paid as deposit for legal fees. It is submitted that the Respondent properly exercised its jurisdiction as the Respondent did not impose any fine upon the applicant nor did it order the Applicant to pay interest and all that was asked of the applicant was to refund the money paid out to fraudsters and that of legal f***ees.

53. It was submitted further that the cardinal objective of any institution in the administration of justice is to ensure that Justice done and that any institution having proper evidence into a matter will make a decision that will be seen to bring into reality the realization of justice and to this end submitted that if we were to limit the matter that can be brought to the respondent tribunal on basis of the amount involved then the cause of justice will have been lost and on this relied on the position articulated in the matter of **Mumbi Ngugi, J** in **Ex parte Kimaiyo Arap Sego, Misc. Appl. No. 1266 of 2007**where it was stated:

> ***"The power of the respondent goes over and above dealing with complaint by individuals. The committee has 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"***.

54. On issue 2, it was submitted that the Applicant was accorded adequate opportunity to be heard as he was indeed served with the pleadings. That the Applicant was served with Notice from the Counsel for the Disciplinary Tribunal dated 15/3/2015 where he was required to make a written reply to the allegations levelled against him and later the Applicant was also given 21 days' notice to take advantage of the in House Dispute Resolution session failure to which the matter would be referred to the Disciplinary Tribunal which the interested party submits that it is abundantly clear that the Applicant did not use the opportunity given.

55. Further it was submitted that the Interested Party herein was also served with Supplementary Affidavit sworn by her and it is clearly indicated that the same was served and received by the Applicant on 3/11/2011 to which the applicant filed a Replying Affidavit dated 6/6/2016 in reply to the application made by the Interested Party.

56. It was then submitted that **"equity does not aid the indolent but vigilant"** and as such it was upon the applicant by virtue of being an advocate acquiesce to the matter to be vigilant on the happenings and proceedings before the said Tribunal and as such it beats logic that the Applicant would fail to appear before the tribunal and then come and make a complaint of not being given an opportunity to be heard and it is thus submitted that as long as the Applicant herein was notified about the matter and the mere fact that the Applicant even filed a Replying Affidavit is a clear indication of him having been accorded opportunity to be heard.

57. On this front, it was argued that Judicial Review applications should be found on some clear defined grounds as was highlighted in the Ugandan case of **Pastoli vs. Kabale District Local Government Council and others (2008) EA 300** where the court cited with approval the case of **Council of Civil Unions vs Minister for the Civil Services [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478** at **479**where it was held:

> ***"in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety….illegality is when the decision making authority commits an error of law in the process of taking or making the act".***

58. It was therefore submitted that the court needs to ask itself three questions:

> i. Was the decision by the respondent tainted with illegality?
>
> ii. Was there irrationality in arriving at the decision subject matter herein?

iii. Was there procedural impropriety?

59. And that for all the three questions asked , the Interested Party answers in the negative stating that no illegality was committed by the Respondent in making the decision and as such the prayer to have it quashed is unfounded and unmerited and that there was no irrationality as the Tribunal properly addressed its mind to the fact that the transaction did not follow through and that no work was done by the Applicant thus the Applicant was not entitled to any legal fees and the direction for the Applicant to refund the legal fees cannot be in any way termed as unfair as the money was not spent for the purpose it was to.

60. On issue c), it was submitted that the Applicant stated that he got the Judgment from one of the staff members at the Law Society of Kenya and he found that it was not signed. Here it is submitted that, there is a manner in which a certified copy of the judgment and it is therefore unprocedural for the Applicant to get the copy of the said judgment through the back door and subjecting himself to the risk of getting a draft copy instead of a certified copy and that the Applicant has not produced any letter to the Executive Officer or the Registry of the Respondent requesting for a Certified Copy of the Judgment and the same denied to him as such the allegations that one of the members of the Respondent bench being biased is baseless .

61. In conclusion, it was submitted that the Application is unmeritorious, filed with sole intention to delay justice and to prolong the stay of the Applicant in safe haven as he enjoys the Interested Party's hard earned money and pray that the same be dismissed.

**Determination:**

62. From the foregoing I find the following main issues for determination:

***(1) Whether delay in delivery of the judgment vitiated the decision ;***

***(2) What is the effect of an undated and unsigned judgment or ruling by a tribunal/ court;***

***(3) Was the Respondent's order on the sum payable was ultra vires or made without jurisdiction?***

***(4) Whether the orders of Judicial Review sought are available to the exparte applicant;***

***(5) What orders should the court make?***

***(6) Who is to bear the costs of the application?***

63. On issue No 1, the ex parte applicant places his major reliance on the fact that the trial and subsequent conclusion if any was not speedy enough occasioning a miscarriage of justice, was in several instances not given opportunity to be heard and on the purportedly unsigned judgment to prevail upon this court to grant the orders sought. He also alleges that the Tribunal acted ultra vires by entertaining a claim that exceeded its pecuniary jurisdiction in that the amount plus interest due to the interested party was in excess of Kshs 5, 000,000. Thus on issue 1, The Applicant urged this Court to quash the decision of the tribunal on the basis that due process was not followed and on reliance on an unsigned judgment.

64. The Applicant alleges that the actions of the Defendant are in contravention of Article 47 of the Constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Article also provides for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal to promote efficient administration and that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. To this end the High Court has been granted the jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation, infringement of, or threat to a right or fundamental freedom in the Bill of rights at Article 25 of the Constitution.

65. The right to a fair trial, which encompasses the right to a speedy trial i.e. to have trial begin and conclude without unreasonable delay, to be informed and to put in a defense is seen in Kenyan law in terms of procedural fairness. It is a fundamental rule of law and has its tenets on natural justice thus a failure thereof tends to undermine human rights. However, there are many situations where expedition may not necessarily bring justice to the affected person

66. The question therefore is whether the manner in which the case was conducted against the Applicant was prejudicial to his rights? If yes then this is a matter that ought to be subjected to J. R to curb or curtail the excesses of the Tribunal from infringing on the fundamental rights of the applicant.

67. The right to fair trial is enshrined in the Constitution at Article 50 (2) and is one of the fundamental rights under the Bill of Rights that is non derogable by dint of Article 25 thus cannot be limited under any circumstance as such the law has come in to secure the rights of individuals and assert the obligation of courts to ensure both substantive and procedural fairness in the dispensation of justice. In the case **Coalition for Reform and Democracy & Another v Republic of Kenya & Another,** Judge Odunga while emphasizing on the importance attached on the right to fair trial under Article 50 of the Constitution, held that:

***"It must be remembered that Article 50 of the Constitution is one of the protected <u>Articles by Article 24</u> and hence cannot be limited".***

68. **Fair trial without unreasonable delay** under Article 50 and what factors are to be considered before it can be said that a trial has

delayed in a manner that is unreasonable has been subject of many decisions. In ***Republic v Attorney General & Another Ex Parte Ngeny (Ngeny Case)*** The High Court, while upholding the Petitioner's claim, ***held that it was important to determine the cause of delay and where no explanation is given, the delay will be deemed inordinate and an abuse of the constitutional rights of a Petitioner.***

69. ***In Republic V Pc. George Okelo & Another [2012]eKLR***, at paragraph 22 through to 30 the court held that the individual right of the accused must be balanced against society's interest and in ***John Njoroge Chege v Director of Public Prosecutions [2014] eKLR***, It was held that the delay in concluding the issue before the Magistrate's Court violated the petitioner's right to a fair and expeditious trial under Article 50 of the Constitution. Majanja J while dismissing this application held at paragraph 7 that:

> ***"for delay to constitute a violation of Article 50(2)(e)of the Constitution, the petitioner must demonstrate that the delay is "unreasonable"…….. the court stated that the standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable."***

70. As there is no formal definition of what amounts to unreasonable delay or constitutes reasonable time, the same will be determined on a case by case basis depending on the facts and circumstances of a particular case. Long delays which are beyond the prescribed statutory limits will normally be deemed to amount to unreasonable delay unless justifiable reasons for the delay are given. With factors to be considered in determining whether the right has been violated include the length of the delay, reasons for the delay, failure to assert the right, nature of the offence, the nature of the right, societal expectations and the prejudicial effect of a violation on a party and whether it rendered the entire trial unfair.

71. The right to fair trial or due process of law must be construed as providing careful thought for procedural protections. However, the Applicant must demonstrate how unreasonable or how prejudiced he was by the Tribunal's actions and the Respondent must have not advanced any plausible reasons for the delay.

72. In the instant case, the Tribunal gave reasons for the delay namely, due to the fact that the Tribunal had other matters before it to deal with and also at times the adjournments were at the instance of the Applicant to furnish further particulars.

73. Again, on the issue of the judgment taking too long to be delivered, at paragraph 19 of the Replying Affidavit dated 7th December, 2016 by the Secretary of the Respondent- Mercy Wambua- deposes that the delay in delivery of the judgement is attributed to the changes in the Constitution of the membership of the Respondent following elections and also the nature of the complaint and the voluminous documents involved which required more time to digest so as to take into account relevant matters presented by the parties in their affidavits. Further, that in fact it was the Applicant who failed to submit his submissions up until the date of delivery of judgment yet the respondent filed their submissions on 11th March, 2013.

74. On other procedural issues mentioned by the Applicant such as the right to be heard and not being given time to respond, the court's record has a number of pleadings and responses including submissions filed by the Applicant at different stages and also from the counter reply by the interested party's affidavit sworn by Jane Wanjiru, it is obvious that the Applicant was present during the sessions up and including the time when judgement was first to be delivered. Neither has the applicant adduced, explained or proved instances of irrelevant considerations in the Tribunal's decision making satisfactorily besides just mentioning the same.

75. This court is not persuaded that the Applicant has proved his allegations to the requisite threshold stated above.

76. However, on the issue of an unsigned judgment, I find and hold that an unsigned judgment is a procedural technicality which goes to the root of the matter and has been held time and time again that the absence of a signature or signatures as the case may be renders a judgment a nullity, as though, no case had not been heard nor judgment delivered. This position is supported by the decision in ***CIVIL APPEAL NO.560 OF 2016 –*** ZAKAYO SANG & 9 OTHERS V SOT TEA GROWERS RURAL COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED & 10 OTHERS [2018] eKLR where the court held at paragraph 4 thus: "**That the failure by all the members to sign the ruling, renders the whole decision a nullity".**

77. Further, in the case of ***Ferdinand Indangasi Musee & Another vs. Republic [2013]eKLR*** cited in ***Republic V National Environmental Tribunal & 4 Others Ex Parte China Road And Bridge Corporation*** **at page 13 paragraph 42**, where the **Court of Appeal held that a judgment which had not been duly signed by all the judges who prepared it was a nullity.**

78. While on this ground alone the decision of the tribunal would be amenable to be quashed by this court, the Applicant has not submitted his copy of the alleged unsigned judgment to the contrary or given any evidence that goes to question of the credibility of the signed judgment annexed by the Respondent to its replying affidavit sworn by Mercy Wambua and annexed as "MW15." Therefore, unless there is anything to controvert the signed Judgment which is also dated 4th April 2016 by E.N.K Wanjama, A.N Mwaure and G.O Ochich then the claim by the Applicant must fail.

79. In the same vein, if the judgment annexed by the Respondents was undated, it would also be vitiated and rendered null and void.In the case of **William Kinyanyi Onyango v Independent Electoral And Boundaries Commission & 2 others [2013] eKLR**, Kimondo J had this to say in the appeal where the appellant raised one of the grounds of appeal to be that the impugned judgment by the trial court was not dated, and I concur with the learned Judge:

> ***" 9. I will deal next with ground 7 of the appeal. All the parties conceded that the impugned ruling was delivered in open court at Nairobi on 31st May 2013. Did the learned Magistrate date his ruling" The record of appeal at pages 493 to 506 contains the certified true copy of the original ruling of the lower court. The ruling is signed but not dated. The respondents' counsel conceded that that is the version of ruling that was delivered in open court on 31st May 2013 and supplied to the parties. I have then looked at the original court record of the lower court. The original typed ruling is similar save that the learned magistrate***

***has added by hand the following text at the bottom and reverse of his ruling: "ruling delivered (sic) dated and signed on this 31/5/13 in the presence of all counsel for all (sic) parties". The appellant's case is that that handwritten text was added by the magistrate long after delivery of the ruling and after filing of this appeal. The respondents' counsel submitted that since the ruling was delivered in open court, and there is no doubt that it was on 31st May 2013, it does not really matter. It was further submitted that that was a technical slip incapable of impeaching the decision.***

***10. Dating a judgment or ruling is a requirement of law. It is a matter of substance and not a technicality. It engenders certainty of the decree or order. Order 21 rule 3 (1) of the Civil Procedure Rules 2010 for example provides that "a judgment pronounced by the judge who made it shall be dated and signed by him in open court at the time of pronouncing it". The language there is mandatory. The date of judgment impacts on the rights of parties: the time to lodge an appeal starts to run for example.***

***11. I disagree with the respondents' submissions that merely because the ruling was read in open court on a certain date, it matters little that it was not dated. I have said that all counsel in the appeal conceded freely that the ruling delivered was not dated on 31st May 2013. The typed ruling had no pre-printed date or provision for insertion of a date in court. That may explain the odd insertions by hand that spill over to the reverse of the ruling. The conduct by the learned Magistrate of adding a date later to the ruling and purporting it to have been done on the date of its pronouncement was highly irregular. It is not the kind of slip that is envisaged, for instance, by sections 99 or 100 of the Civil Procedure Act. I draw support here from Halsbury's Laws of England 4th edition paragraphs 545 and 546. It is stated at paragraph 546 as follows;***

> ***"The date of the judgment or order is important in that the judgment or order generally takes effect from that date. Interest on the judgment debt runs from the date of entry of the judgment, although interest on costs runs from the date of the taxing master's certificate.***
>
> ***Garnishee proceedings may be begun before judgment is actually entered; but, when it is necessary to enter judgment, execution may not issue until the entry, and the time for service of notice of appeal runs from the time the judgment or order is signed, entered or otherwise perfected. Again, an order generally takes effect from the day it was made (which is its date) without its being drawn up or served, unless it is otherwise expressed……"***
>
> ***See also Kola Chacha vs Kenya Commercial Bank and another Kisumu, Court of appeal, civil appeal 342 of 2001 [2006] eKLR. I have reached the conclusion that failure to date the impugned ruling vitiated it. The lapse was incurable by the purported conduct of dating it retroactively. Accordingly, ground 7 of the appeal has merit and succeeds.***

80. In the instant case, the applicant maintained that the judgment was not signed but the respondents produced a copy of judgment which was signed and dated. Therefore, as the burden of proof lies with he who alleges and as the applicant has failed to prove that the judgment of the Tribunal was unsigned, his claim on that ground must fail.

81. On issue of whether the Respondent made a decision ultra vires, or without jurisdiction, in that it ordered the applicant to refund to the interested party an amount in excess of 5 million which is the upper ceiling that the law permits the Tribunal to award, the case of **Owner of Motor Vessel "Lilian S" V Caltex Oil (K) Limited [1989]** leaves no doubt that where there is no jurisdiction then a court or tribunal or any organ with mandate to hear matters has not much to do and such tribunal cannot overstep or act beyond what is stipulated in law. In ***Republic V National Environmental Tribunal & 4 Others Ex Parte China Road And Bridge Corporation,*** Judge G.V. Odunga, referred to the Supreme Court case of ***Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011*** at page 29 paragraph 123 which dealt with a similar issue, it was observed that:

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings…Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation".***

82. However, in the case of ***Republic Vs Disciplinary Tribunal of the Law Society of Kenya & another Ex parte Charles Lutta Kasamani*** included in the Respondent's authorities dealing with a similar issue to the one in this case, the learned judge addressed the issue and while holding that the Respondent was allowed to handle the Interested Party's complaint there being no civil suit pending in court between the Applicant and the complainant he stated that:

> ***"section 60(4)(e) [of the Advocates Act] must be interpreted along with Section 60(4) (a), (b), (c) and (d) which is about punishment for the advocates' unlawful conduct and compensation. My understanding is that Section 60(9) is a clarification provision. It expresses Parliament's intention to curtail the powers of the Respondent to matters where the complainant has not instituted a civil suit. That is why the Respondent can only act where a complainant has not filed a civil suit for recovery of any money from the advocate. If a civil suit has been filed, the Respondent ceases to have jurisdiction in so far as compensation is concerned. The jurisdiction under Section 60 (9) should however be read together with Section 60(4) (e) which caps the Respondent's jurisdiction in civil matters at Kshs. 5million. If Parliament had intended to give the Respondent unlimited jurisdiction in civil matters it would have opened Section 60 (9) with words like: Notwithstanding the provisions of Section 60(4) the Committee shall..."***

83. The court in the above case also referred to the case of ***Bushenyi-Ishaka Town Council V Mafred Muhumuza & 2 Others, Civil Appeal No. 68 of 2011*** where the Ugandan High Court stated:

***"…..it was held that interest awarded by the court on decretal amount is not to be taken into account while valuing the subject matter for the purposes of pecuniary jurisdiction of a court. However, where interest is claimed in its own right, it contributes to the subject matter while beckoning the pecuniary jurisdiction of the court".***

84. Section 60 of the Advocates Act is on **Complaints against advocates and stipulates:**

***"(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.***

***(4) After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—***

***(a) that such advocate be admonished; or***

***(b) that such advocate be suspended from practice for a specified period not exceeding five years; or***

***(c) that the name of such advocate be struck off the Roll; or***

***(d) that such advocate do pay a fine not exceeding one million shillings; or***

***(e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.***

85.. In my view, the law must be read purposively. And in this regard, section 60(4)(e) of the Act must be read together with section 60(9) of the Act which stipulates:

***".“In any case where the complainant has not filed a civil suit against the advocate in respect of the sum in dispute, the committee may order the advocate to pay to the complainant such sum as it finds to be due from the advocate."***

86. The Tribunal has disciplinary powers and once it finds the advocate culpable, for misconduct it should conclude the matter and not give orders for compensation of part only of the amount due and send the aggrieved party to the civil courts to recover the balance. The Tribunal being a subordinate court established under section 169 of the Constitution in my humble viewhas jurisdiction to make such orders for reimbursement of the amount the advocate has withheld from his client where the advocate s found culpable especially where there is no suit pending in court for recovery of the same. It is for that reason that I wholly agree with the decision in the **Charles Lutta Kasamani case** (supra) on the jurisdiction of the Tribunal where the amount being claimed from an advocate exceeds 5 million the Tribunal has the power to order for refund of the same to the complainant aggrieved client.

87. As such the Respondent did not make an order in excess of its pecuniary jurisdiction.

88. On whether the exparte applicant is entitled to the judicial review order sought and if so what orders, I find that the applicant has not demonstrated that he is entitled to any of the orders sought in his notice of motion I decline to prohibit the respondents from taking other decision or steps that are legal to achieve the ends of justice for the aggrieved complainant.

89. As the court has not dealt with the merit review of the complaint before the Tribunal, I order that each party shall bear their own costs of these judicial review proceedings.

**Dated, signed and Delivered at Nairobi this 27th Day of September, 2018.**

**R.E. ABURILI**

**JUDGE**