



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 8 OF 2018**

**IN THE MATTER OF: THE LAW REFORM ACT (CHAPTER 20) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION BY: JOSEPH K. KANYI, FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF: THE ADVOCATES ACT (CAP 16) LAWS OF KENYA**

**BETWEEN**

**JOSEPH KARANJA KANYI.....EX PARTE APPLICANT**

**AND**

**THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT**

**AND**

**KENYA TOURISM DEVELOPMENT CORPORATION....INTERESTED PARTY**

**RULING**

**The Application**

1. Vide Amended Notice of Motion filed herein on 15<sup>th</sup> March, 2018 the Ex parte Applicant prays for the following orders.

(a) That this Honourable Court be pleased to issue a writ of certiorari to bring to this court for the purposes of being quashed, the decision of the Respondent made on 8<sup>th</sup> December, 2017 compelling the Ex parte Applicant to appear before it and take plea in Disciplinary Cause Number 177 of 2018 on 19<sup>th</sup> February, 2018.

(b) That this Honourable court be pleased to issue a writ of certiorari to bring to this court for the purposes of being quashed, the decision of the Respondent made on 8<sup>th</sup> December, 2017 commencing disciplinary proceedings against the Ex parte Applicant in Disciplinary Cause Number 177 of 2018.

(c) That the cost of this application be in the cause.

2. The application is premised on the grounds that the Ex parte Applicant acted for the vendor in a conveyancing transaction in November, 2011 while the Interested Party was represented by Ms. Miller & Company Advocates; that on 2<sup>nd</sup> February, 2018; the Court granted leave to commence these proceedings; that parties never executed any formal agreement as there was a disagreement on the purchaser's insistence and demand for a Presidential Consent although some Kshs. 3 million deposit had been paid to the Ex parte Applicant; that the ex parte Applicant did not give any personal or professional undertaking to either the Interested Party or its advocates to hold the deposit as stakeholders and to refund the same in the event of a breach; that the Respondent lacks the pertinent jurisdiction to entertain the dispute wherein there was no professional undertaking; that the Respondent's decisions under challenge therefore amounts to an abuse and/or excess

of power and it has been made mala fide with a view to oppress, vex, embarrass and harass the Ex parte Applicant; that although the Ex parte Applicant had agreed to refund the balance of purchase price (if paid) if registration was denied for want of Presidential Consent, Ms. Miller & Company Advocates did not accept the offer and in any event, the balance of purchase price was never paid; that the Ex parte Applicant will suffer harm and loss at the instance of the Respondent and the Interested Party; that the Respondent's decision was demonstrably unreasonable as to constitute irrationality and that the Respondent's decision under challenge amounts to an abuse and/or excess of power and has been made mala fide with a view to oppress, vex, embarrass and harass the Ex parte Applicant.

3. The application is further supported by Amended Statement and Supporting Affidavit of Joseph Karanja Kanyi filed herein on 15<sup>th</sup> March, 2018.

4. The Ex parte Applicant's case is that in November, 2011, he was instructed by his client, Francis Waiganjo Kimanga, to act for him in a transaction of sale of some parcels of land in Kwale to the interested party hereof. Price was agreed at Kenya Shillings Thirty Five Million (KShs.35,000,000/=) only with a down payment of 10% i.e. Kenya Shillings Three Million Five Hundred Thousand (KShs.3,500,000/=) and a completion period of Thirty (30) days. (A draft agreement was annexed marked as 'JKK-3') Ms. Miller & Company Advocates for the Buyer responded with some proposed amendments one of which was with regard to Presidential Consent being included as a Completion document. However, the Ex parte Applicant vide his letter dated February, 2012 informed Ms. Miller & Company Advocates that Presidential Consent was not a legal requirement and should not be included in the Agreement. The Ex parte Applicant in fact undertook to refund the deposit if the completion documents were rejected by the Registrar all because of the Consent. In subsequent correspondences the Ex parte applicant informed M/S Miller & Company Advocates that both parties had discussed the matter directly and agreed that Presidential Consent should not be made a condition and if it was going to be necessary, the purchaser was going to arrange for it. That notwithstanding, and contrary to parties express agreement, M/S Miller & Company Advocates in their letter dated 17<sup>th</sup> February, 2012 continued to insist on the Consent. In view of M/S Miller & Company Advocates penultimate demand the Ex parte Applicant states that his client had no choice other than to seek the same at a very considerable expense and eventually obtained it on 15<sup>th</sup> May 2012. The Ex-Parte Applicant states that M/S. Miller & Company Advocates then kept quiet about the matter for the following four (4) years until August 2016 when they requested for an update. The position on the Presidential Consent was subsequently clarified and confirmed by the High Court vide **Constitutional Petition number 41 of 2011, Mombasa, and a Court of Appeal Mombasa Number 191 of 2012**. The Ex-Parte Applicant states that they have never given any personal or professional undertaking in respect to the said conveyancing transaction to the interested party pursuant to Rule 46 of the Law Society of Kenya Digest of Professional Conduct and Etiquette, which would invoke the jurisdiction of the Respondent. The Ex-Parte Applicant's case is that in total disregard of their lack of jurisdiction, based on want of any personal or professional undertaking, the respondents, in their decision made on 5<sup>th</sup> December 2017 to prefer charges for professional misconduct and have scheduled the same for plea taking on 19<sup>th</sup> February 2018, have acted in excess of jurisdiction and this court has the jurisdiction to quash the proceedings in the Tribunal Disciplinary case, hence this application.

### **The Response**

5. The Respondent oppose the application vide a Replying Affidavit sworn by Mercy Wambua on 16<sup>th</sup> May, 2018. The deponent described herself as the Secretary and Chief Executive Officer of the Law Society of Kenya and has the authority to depone to the said affidavit.

6. The Respondent's case is that the Interested Party made a complaint to the Respondent that the Ex parte Applicant had refused to refund KShs. 3,500,000/= on account of a sale transaction which did not go through. The Respondent took steps by virtue of Section 60 of the Advocates Act, leading to the filing of a formal complaint against the Ex parte Applicant under Section 60 of the said Act.

7. The Respondent's case is that its jurisdiction or mandate is not limited to matters where there have been issuance of professional undertaking, but in all complaints against advocates. The Respondent's case is that the proceedings in the Disciplinary Tribunal Cause No. 177 of 2018 are within the mandate of the Respondent and should be allowed to continue unhindered.

### **The Interested Party**

8. The Interested Party also oppose the application. The Interested Party's case is that in line with their desire to acquire certain mentioned properties herein, the Corporation instructed its Advocates, Messrs. Miller & company Advocates vide a Letter dated 24<sup>th</sup> of November 2011 to carry out thorough and comprehensive investigation including but not limited to official searches of titles and of the properties with a view to establishing the authenticity, ownership and status of the titles. The Vendor Mr. Francis Waiganjo Kimanga appointed the firm of the ex-parte Applicant to act for him in the sale transaction. The ex-parte applicant's firm thus prepared and forwarded a draft Agreement for sale via an email dated 17<sup>th</sup> of January 2012 to M/S Miller & Company Advocates for their perusal and comments. Upon receipt of the draft agreement for sale from the ex-parte Applicant's firm, the Corporation's advocates reviewed the same and proposed a raft of changes to the draft, one of them being the inclusion of a Presidential Consent to transfer as one of the completion documents to be procured and supplied by the vendor, to enable successful registration of the aforementioned properties in favour of the Corporation as the said properties lay within the first and second row of the beach line.

9. As discussions on the need for a presidential Consent to transfer the properties continued between the parties the Corporation made a decision to pay the ten-percent (10%) deposit of the agreed purchase price being Kshs.3,500,000/= prior to executing the agreement for sale. This amount was credited into the ex-parte applicant's account and he duly acknowledged receipt thereof vide his Letter dated 09/02/2012 and issued an official receipt of number 2051 to that effect. The Interested Party's case is that there being no formal or written agreement for sale executed between the purchaser and the vendor that spelt out conditions and obligations to be adhered to by the parties, it was implied that the ex-parte applicant would hold the said deposit on a stakeholder basis pending the execution of the agreement for sale and subsequent successful registration of the transfer in favour of the Corporation. About three months after acknowledging receipt of the deposit paid by the Corporation, the ex-parte applicant wrote a letter dated 17<sup>th</sup> May 2012 to M/A Miller & advocates forwarding a duly signed amended agreement for sale together with a presidential consent to transfer as one of the completion documents to be procured by the vendor for the successful registration of the transfer in favour of the Corporation. However, due to unforeseeable challenges and circumstances, the agreement for sale could not be executed by the Corporation because the corporation lacked a functional board of directors to execute the agreement at the time as the newly appointed board of directors had been barred from assuming office by court orders and this stalemate was

conveyed to M/S Miller & Co advocates. Once the stalemate ceased, the Corporation made a decision not to see through the sale transaction and advised its advocates to call for a refund of the deposit of Kshs.3,500,000/= that had been paid to the ex-parte applicant and which was being held by him on a stakeholder basis. A Letter dated 26/01/2017 was addressed to the ex-parte applicant by M/S Miller & Co advocates (asking for the refund of the said deposit). However, the Ex-Parte applicant refused or declined to respond to the said demand. This forced the Interested Party to file a complaint with the said Tribunal. The Interested Party states that they followed legal procedure to lodge the said complaint as outlined under Section 60 of the Advocates Act, Cap 16 of the Laws of Kenya. The Interested Party believes the decision made by the Respondent on the 8<sup>th</sup> of December 2017 compelling the ex-parte applicant to appear before it and to take a plea in disciplinary cause number 177 of 2018 was a decision made within the mandate and purview of the jurisdiction of the Respondent as outlined in Section 60 of the said Advocates Act., arguing that among the powers that the Respondent has by dint of Section 60(4) (e) of the Advocates Act, is to, , order that an advocate reimburses or compensates a complainant for the loss suffered should be found culpable. The Interested Party's case is that the judicial review proceedings filed herein are a desperate attempt by the ex-parte applicant to avoid appearing before the Respondent and to take a plea in Disciplinary Cause Number 177 of 2018 and expound on what basis within the law he can continue withholding the deposit paid to him when no written agreement was executed by both parties that would entitle the vendor to withhold the deposit in case of breach.

### **Submissions**

10. Parties filed submissions which I have considered. The issue for determination by the court is whether or not the Respondent acted *ultra vires* in commencing the Tribunal Disciplinary Cause No. 177 of 2018.

11. I will not repeat the facts of this application. It is not disputed that the Ex parte Applicant received Kshs. 3,500,000/= being deposit towards a sale transaction which did not take off. There was no agreement as to how the said deposit would be treated in the event of failure of the transaction. There was also no agreement whether it would be returned and it so how much of the same would be returned to the depositor. What is clear, however, is that there was advocate client relationship, both between the Ex parte Applicant and the vendor and between the firm of Miller & Company Advocate and the purchaser. Within these secure arrangement the said deposit was released. Upon the failure of the said transaction the would be purchaser demanded for its money, but the Ex parte Applicant refutes the demand.

12. The Ex parte Applicant does not state the reasons why he has declined to return the money. He does not say whether it is his fees, or whether he has earned it as a result of breach of some kind. He does not even make a claim to part thereof. He remains with all of it. When required to appear in the Disciplinary Tribunal No. 177 of 2018 the Ex parte Applicant has come to this court to stop the said disciplinary proceedings, arguing that the said proceedings have no basis since he had never given any undertaking to either the Interested Party or to its advocates, and that the disciplinary proceedings are being used as a tool to collect debt by the Interested Party.

13. The jurisdiction of this court at this stage is not to attempt to find any fault. The jurisdiction hereof is limited to establishing whether or not the said disciplinary proceedings against the Ex parte Applicant are procedural and legally anchored.

14. In doing that I have to resort to the controlling legal regime. Section 60 (1) of the Advocates Act provides that:

**“any person may make a complaint to the Tribunal against an advocate for professional misconduct, which expression includes disgraceful or dishonourable conduct not compatible with the status of an Advocate.”**

15. From above section of the law, it is clear that what constitutes professional misconduct is broad. The Interested party herein has accused the Ex parte Applicant of disgraceful and dishonourable conduct of refusing to refund Kshs. 3,500,000/= given to him with no agreement to keep it. Like I have said earlier herein, the Ex parte Applicant has admitted the receipt of the said sum of money, but he has not said why he lays claim to it. Whether the Ex parte Applicant's conduct is questionable under Section 60(1) of the Advocates Act is not an issue to be determined by this court at this stage. In **Republic vs. Advocates Disciplinary Committee Interested Party Daniel Mutisya Ngala Ex parte Danstan Omari Mogaka [2015] eKLR, Korir J said as follows:**

**“The onus of determining whether an act amounts to professional misconduct belongs to the Disciplinary Tribunal. It would amount to usurpation of that mandate were the court to decide what amounts to professional misconduct.”**

16. Indeed, the Tribunal must be allowed to pronounce itself on that issue because it is a specialized tribunal with jurisdiction and competence to make that decision. It is that decision which may later on be questioned, if need be, by this court. If this court were to interfere at this stage that would amount to divesting the said Tribunal of the specialized jurisdiction it has in handling complaints against advocates.

17. The other issue is to establish whether before requiring the Ex parte Applicant to appear before the said Tribunal, the procedures under the said Act have been complied with.

18. Section 60(2) guides on how a complaint is to be made to the Tribunal, which is by way of an affidavit, setting out the allegations of the professional misconduct which appear to arise on the complaint. Section 60(2) of the Act, then directs the Tribunal on what steps they should take on receipt of complaint, that is:-

- (a) The Tribunal is obligated to give the Advocate against whom a complaint is made, an opportunity to appear before it;
- (b) The Tribunal shall furnish him with a copy of the complaint and any evidence in support thereof;
- (c) The Tribunal shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing.

19. Further, if 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 to any allegations made against him and without hearing the complainant. The Respondent received complainants' Affidavit dated 19<sup>th</sup> September, 2017 pursuant to Section 60 of the Advocates Act. The Respondent in compliance with Section 60(3) of the Act, upon receipt of the complaint, wrote a letter to the Applicant dated 19<sup>th</sup> October, 2017 forwarding a copy of the affidavit of complainant, informed the Applicant of the complaint and requested him for a response. The information was placed before the Tribunal for determination of a prima facie case and upon such determination the Ex parte Applicant was informed of the result and given an opportunity to attend the Tribunal for plea. All this is in compliance with Section 60(3) of the Advocates Act. The Ex parte Applicant did not, or chose not to appear, and the Respondent gave him and or afforded him another opportunity to appear before it and be heard. Once again he ignored. He subsequently filed this application to stop the said disciplinary proceedings.

20. From the foregoing, it is clear that the Respondent followed proper procedure in summoning the Ex-Parte Applicant to appear before it. By virtue of section 60(1) of the Advocates Act and by virtue of section 57 thereof the Respondent has jurisdiction to entertain complaints made against Advocates and it is mandated to receive complaints from any person of professional misconduct against an Advocate. In **Republic vs. Disciplinary Committee & another Ex parte Daniel Kamunda Njue [2016] eKLR** the learned Judge at paragraph 29 of the Judgment held:

**“That the Respondent has jurisdiction to entertain the complaint against Advocates cannot be doubted. Under Section 57 of the Advocates Act, the Disciplinary Committee (now the Disciplinary Tribunal) (hereinafter referred to as the Committee) 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 committee has the power to receive complaints of professional misconduct against an Advocate from any person. I agree that since the Applicant herein is such an Advocate, the Committee has jurisdiction to entertain any complaints made against him in his professional capacity pursuant to Section 55 of the Act.”**

21. It is the finding of this court that if the Respondent failed to consider the complaint it would have failed in its mandate. To try to stop the Disciplinary committee from carrying out its legal mandate under the law would be illegal. In **Republic vs. Disciplinary committee Ex parte Wambugu [2008] and T. O. Kopero vs. The Disciplinary Committee of the Law Society of Kenya & Another HCCCA No. 461 of 2011** the court held that:

**“No one, not even the Applicant, in my view has a right to anticipate what the sentence of the Disciplinary Committee will be, until it's legally pronounced. Indeed to try to stop the Disciplinary Committee from completing carrying out its legal mandate under the relevant law appears to me to be an illegal exercise which this court in its unfettered discretion, will not be willing to assist the Applicant to achieve. The stay sought if granted, will without doubt assist the Applicant in preventing a lawfully constituted Tribunal from carrying out its legal mandate.”**

### **Conclusion**

22. From the foregoing paragraphs of this Ruling this court finds that the Amended Notice of Motion filed herein on 15<sup>th</sup> March, 2018 lacks merit and is dismissed with costs to the Respondent and to the Interested Party. Accordingly, the existing stay orders are lifted.

**Dated, Signed and Delivered at Mombasa this 20<sup>th</sup> day of December, 2018**

**E. K. OGOLA**

### **JUDGE**

In the presence of:

Mr. Maundu for Ex-Parte Applicant

M/S Kaguri holding brief Bulama for Interested Party

Court Assistant Kaunda