



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JR MISC. APPLICATION NO. 22 OF 2016

IN THE MATTER OF: AN APPLICATION BY MARTIN TINDI ADVOCATE FOR JUDICIAL REVIEW APPLICATION FOR ORDER OF PROHIBITION AND CERTIORRI

AND

IN THE MATTER OF: THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF: THE ADVOCATES (DISCIPLINARY COMMITTEE) RULES, CAP 16 (SUB-LEG) OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE LAW SOCIETY OF KENYA DISCIPLINARY COMMITTEE CAUSE NO. 155 OF 2015 DECISIONS MADE ON 2ND MARCH, 2016 AND 24TH MARCH, 2016

BETWEEN

MARTIN TINDI KHAEMBA.....APPLICANT

AND

1. THE LAW SOCIETY OF KENYA

2. THE DISCIPLINARY COMMITTEE.....RESPONDENTS

SALIM MWAROPHA MANENO.....INTERESTED PARTY

RULING

The Application

1. The Notice of Motion application before the court is dated 26th April, 2016 and is filed under Section 8(2) of The Law Reform Act and Order 53 rule 1 and 2 of the Civil Procedure Rules. The Applicant prays for the following orders:

- (a) That an order of certiorari be issued to remove into the High Court and quash the proceedings

of the Respondent in the Disciplinary cause known as Disciplinary Committee Cause No.155 of 2015 against the ex parte Applicant.

(b) That an order of prohibition be issued prohibiting the Respondents, Interested Parties or any person acting on their behalf from continuing with the Disciplinary Cause Number 155 of 2015 against the ex parte Applicant.

(c) That costs of the application be awarded to the ex parte Applicant.

2. The application is premised on the grounds that the ex parte Applicant has demonstrated that in the face of the High Court order made by the Lady Justice Kasango in lieu of his legal fees in **Miscellaneous Application NO. 27 of 2013 between Martin Tindi Khaemba And Iddi Ibrahim & Yusuf Nevi**, it would be unfair, unjust and a breach of his right to a fair hearing by the tribunal to entertain the said complaint and to proceed to trial and determination thereof and it would be an illegality by the Tribunal committing an “*error of Law*” due to lack of Jurisdiction to set aside the High Court Order.

3. The other ground is that the orders within the Certificate of Taxation by the Deputy Registrar Kimanga made on the 8th September, 2014, and eventually the order made before the Honourable Lady Justice Mary Kasango on the 1st December, 2014 remain unchallenged to date after the ex parte Applicant followed the due process of recovery of his legal fees. The ex parte Applicant was entitled and as an Advocate, he had the right to apply to the Court for a charging order on property recovered as presented through his instrumentality in a matter as provided for within Section 52 of the Advocates Act and the Lady Justice Mary Kasango recognized and protected his interest being legal fees and costs in the matter by charging the amount within the Judgment emanating from the Certificate of Taxation issued by the Honourable Deputy Registrar Kimanga on the 8th September, 2014.

4. The Tribunal by proceeding with the trial shows gross unreasonableness and in light of the said court order the tribunal would be sitting as an Appellant Court against the decision of Lady Justice Mary Kasango which decision still stands unchallenged.

5. The application is supported by affidavit of the ex parte Applicant sworn on 26th April, 2016 and a further affidavit sworn on 15th August, 2016.

The Applicant’s Case

6. The Applicant’s case is that a complaint against him under Section 60 of the Advocate Act has been made by Salim Mwaropha Maneno in Disciplinary Tribunal Cause No. 155 of 2015 and the main gist of the complaint is that the Applicant.

“Acted unprofessionally by apportioning yourself three (3) acres from the Plot No. 288/V/MN being plot no. 2625 without the consent and knowledge of his clients”.

7. The Applicant’s case in that the leave to apply for orders of prohibition and certiorari to stop and quash the proceedings in Disciplinary Committee Cause No. 155 OF 2015 was granted on the basis that:

“prima facie it is apparent that the complaint is based on facts that were all in issue before the high Court in miscellaneous Application No 27 of 2013 and may turn out to be Res Judicata”

8. The Applicant’s case is that it is unfair, unjust and a breach of his right to a fair hearing by the Tribunal to entertain the said complaint and to proceed to the trial and determination thereof when the High Court awarded the Applicant a portion of “3 Acres” through the order made by the Lady Justice Mary Kasango in lieu of the Applicant’s legal fees in **MISC CIVIL APPLICATION NO. 27 OF 2013 BETWEEN MYSELF AND IDDI IBRAHIM AND YUSUF NEVI**, in which case, after Judgment was delivered in the adverse possession claim, the 127 members began squabbles amongst themselves on the sharing of

the parcel of the land and ignored to settle the legal fees and this led to Applicant taxing Bill of Costs and thereafter applied to the High Court to charge the parcel of the suit land that led to the making of an Order By Lady Justice Mary Kasango.

9. The Applicant's case is that he is an Advocate, and had the right to apply to the Court for a charging order on property recovered through his instrumentality in a matter as provided for within Section 52 Of The Advocate Act Cap 16 and the Judge recognized and protected his interest being the legal fees and cost in the matter by charging the amount within the Judgment emanating from the *Certificate of Taxation* issued by the Deputy Registrar since the authorized leaders of Mabirikani Village Land Committee were in the process of selling and transferring the said parcel of land to 3rd parties and refusing to settle the legal fees of the property originally known as Plot No. MN/V/288 and MN/VI/855.

10. The Applicant's case is that the remedy left to the Interested Party was to challenge the Order made by the Lady Justice Mary Kasango charging three (3) acres in lieu of his legal fees and the complaint presented to the Tribunal on the same subject matter is *res judicata* and the Tribunal therefore has no Jurisdiction to deal with it.

11. The Applicant's case is that the complaint of the *Interested Party* that he apportioned himself three (3) acres from PLOT NO.288/V/MN being Plot No. 2625 does not amount to professional misconduct by virtue of Section 60 (1) of the Advocates Act (Cap 16 Laws of Kenya) in the face of the order made by Justice Mary Kasango aforesaid.

12. Further, the Applicant states that within the Affidavit of Complaint filed, Salim Mwaropha Maneno is deponing to be the Chairman of The Mabirikani Village Land Committee but indeed the Judgment in HCCC NO. 328 OF 2010 was made in favour of Iddi Ibrahim & Yusuf Nevi on behalf of 127 members of the Mabirikani Village Land Committee and hence the affidavit as presented is by an individual purporting to be the chairman whilst the Judgment in issue shows someone else. Hence it is clear that Salim Mwaropha Maneno is the complainant within the Disciplinary Cause No.155 of 2015 but not the chairman within HCCC. No. 328 of 2010 and hence the complaint lodged at the Disciplinary is not valid notwithstanding the lack of Jurisdiction.

13. The Applicant's case is that proceeding with the Tribunal hearing is tainted with illegality since the Tribunal is acting without Jurisdiction or "*ultra vires*" in the face of two (2) Court orders on the same subject matter which have remained unchallenged by the interested parties who have the options to challenge the same.

14. The Applicant's case is that the issues raised against himself are misleading because the same Interested Parties have gone ahead and filed a claim against the Judgment decree holder in **MALINDI HCCC CIVIL CASE NO. 30 OF 2016- SALIM MWAROPHA MANENO & 3 OTHERS VS. IDD IBRAHIM & 3 OTHERS**, which is pending for hearing and determination and these indeed are the individuals to complain against and not the Applicant.

15. The Applicant states that on the 31st August 2015, the 1st Respondent notified him of a complaint filed on 19th August 2015 at the Disciplinary Tribunal and they required a written comment within 14 days. The Applicant states that he was indeed surprised that the 1st Respondent had proceeded to file their complaint at the Disciplinary Tribunal before the Applicant could respond to the 1st Respondent's inquiry. This alleged procedural irregularity could only mean that the 1st and 2nd Respondents moved to the next stage before the time given to the Applicant to respond had lapsed and it defies logic and amounts to gross failure to act fairly as it is an indication that the 1st and 2nd Respondents had already made a decision before all materials relevant had been placed before it. Nevertheless, on 9th September, 2015, the Applicant responded to the letter as directed knowing very well that an administrative decision had already been taken against him. Since the 1st Respondent had already decided to file a complaint on 19th August, 2015, the Applicant was served with the official registered complaint through a letter dated 2nd November, 2015 summoning him to take plea before the Disciplinary Tribunal on the 23rd November,

2015. The Interested Party's complaint to the 1st and 2nd Respondents emanated from dissatisfaction with the High Court's decision awarding 3 acres of land to the Applicant in satisfaction of the Applicant's legal fees following his instrumentality in recovering 152 acres (plot no. 885/VI/MN) and 134 acres (plot no. 288/V/MN) of land for the Plaintiffs in **HCC. NO. 328 OF 2010 (O.S) IDD IBRAHIM & YUSUF NEVI (Suing on behalf of 127 members of Mabirikani Village Land Committee) vs. AINSLEY LEVERATT & ANOTHER**. The Applicant's case is that the issue is *res judicata* and hence the orders sought herein for certiorari and prohibition.

The Response

16. The 1st and 2nd Respondents oppose the application vide Grounds of Opposition filed herein on 1st July, 2006. The Respondents' case is that the application is premature, totally incompetent bad in law and grossly misconceived and an abuse of the due process of this Courts' process as the proceedings being sought to be quashed have not yet commenced and there is no decision from the Committee capable of being quashed. The Respondents state that they are properly clothed to hear complaints against an Advocate on any professional misconduct as provided under Sections 46, 56, 57, 58 and 60 of the Advocates Act CAP 16 of the Laws of Kenya. The Respondents state that the ex parte Applicant has failed to demonstrate any illegality, irrationality and/or procedural impropriety on the part of the 1st and 2nd Respondents herein. The Respondents state that the ex parte Applicant has been granted and continues to be granted audience by the 2nd Applicant thus any claim of breach of rules of National Justice is misplaced and without any basis. The Respondents state that the Judicial Review is concerned with the decision making process and not with the merits of the decision itself and as it is the process is justified and fair and in accordance with the provisions of the law. The Respondents state that the ex parte Applicant has a chance and every right to ventilate his defence before the 2nd Respondent. The ex parte Applicant's application to try and stop the 1st and 2nd Respondents from completing carrying out its legal mandate under the relevant law is an illegal exercise which the Court in its unfettered discretion should not assist the Ex-parte Applicant to achieve. The Respondents urged the court to dismiss the application.

Issues for Determination

17. Parties and this court identified the following as the issues for determination:

- (i) Whether the motion is premature.
- (ii) Whether the disciplinary action by the Advocates Disciplinary Tribunal is *res judicata*.

Submissions

18. Parties filed submission which I have carefully considered. The ex parte Applicant, Mr. Tindi's submissions concerned with the merits and alleged impropriety of the 1st Respondent in trying to proceed with disciplinary proceedings. Counsel submitted that the Advocates Disciplinary Tribunal had no jurisdiction because it cannot purport to set aside the orders of the High Court that dealt with the issue of advocates legal fees on taxation and a "*charging lien*" on the property. Mr. Tindi submitted that all the issues to be dealt with by the Tribunal had been canvassed in the High Court, and are now *res judicata* since the Interested Party never appealed against those decisions. Mr. Tindi submitted that the issue of costs was concluded and a certificate of taxation issued, and that the Tribunal cannot purport to open up the matter which is now *res judicata*.

19. On their part, M/s Wangare for the Respondents submitted that the authority of the Disciplinary Tribunal cannot be limited, and that if Mr. Tindi had any issues including allegations of *res judicata*, those issues are to be submitted to the Tribunal for their consideration. M/s Wangare submitted that this application is premature and that the said Tribunal is yet to start the proceedings and render a decision which can then be the subject of these proceedings.

Background

20. The brief background of this matter is that the 1st Respondent received a complaint against the ex parte Applicant herein on the 19th August, 2015, and upon receipt of the said complaint the 1st Respondent invited the ex parte Applicant herein vide a letter dated 31st August, 2015 to respond to the allegation within 14 days which letter has been annexed as "MTK-8" In the Ex-parte Applicant's Further Affidavit filed on the 16th August, 2016. The ex parte Applicant duly responded vide a letter dated 9th September, 2015 annexed as "MTK-10" in the above mentioned Affidavit, and offered a well detailed explanation disputing the Complaint. Upon receipt and thorough consideration of the explanation offered by the Ex-parte Applicant herein, the matter was set down for Plea taking on Monday 23rd November, 2015, as evidenced by the letter dated 2nd November, 2011, annexed as "MTK-9" in the above mentioned Affidavit. However before the matter could commence before the Disciplinary Tribunal the Ex-parte Applicant herein rushed to court and filed the Chamber Summons application on the 12th April, 2016 seeking leave to commence Judicial Review proceedings for Orders of Certiorari to remove into the High Court and quash the proceedings of the Respondents in Disciplinary Committee Cause No. 155 of 2015 and for Orders of Prohibition prohibiting the Respondents, Interested Parties or any person acting on their behalf from continuing with the Disciplinary Committee Cause No. 155 of 2015. Lastly the ex parte Applicant sought that the leave granted do operate as stay of the proceedings in the Disciplinary Committee Cause No. 155 of 2015. Leave was successfully granted on the 12th April, 2016 and the substantive Notice of Motion was thereafter filed on the 26th April, 2016.

Determination

21. I have carefully considered the application and submissions. Judicial Review proceedings and remedies are concerned with the process leading to decision and if the court finds that a process was faulty then a decision pursuant to that process would be quashed under an order of certiorari. Now, it is clear that Mr. Tindi's argument is vindicated by the court processes, which have upheld his conduct and even allowed him 3 acres in lieu of cash and a Taxation Certificate duly issued. It is clear that Mr. Tindi has acted above board if the Rulings before the court are anything to go by. It is also clear that in due cause the Disciplinary Tribunal may be satisfied by the vindication the High Court has given Mr. Tindi, and which have not been appealed. However, in all these Mr. Tindi has forgotten that Judicial Review proceedings are concerned with procedure leading to a decision. Further, Mr. Tindi has also forgotten that the Advocates Disciplinary Tribunal also has mandate which is not limited by whatever may be taking place elsewhere, unless of course there is an order of stay. In this regard it is important to look at the mandate of the Tribunal.

Whether or not the Disciplinary Committee and /or Tribunal lacked the requisite jurisdiction to hear the complaint lodged by the Interested Party herein?

22. The Advocates Act has provided for various ways of dealing with disciplinary issues involving Advocates and in so doing has provided for a Complaints commission established under Section 53 of the Advocates Act Cap 16 of the Laws of Kenya as hereunder. Section 53(1) of the Advocates Act, Cap 16 of the Laws of Kenya provides that:

"There is hereby established a Complaints Commission (in this Part referred to as "the Commission") which shall consist of such commissioner or commissioners as shall be appointed by the President for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof..."

23. The Advocates Act has further given the scope and the locus of persons who can file the complaint with the Commission, under the Section below;

Section 53(4)

"It shall be the duty of the Commission to receive and consider a complaint made by any

person, regarding the conduct of any Advocate, Firm of Advocates, or any member or employee thereof..."

24. Further, the Advocates Act has established the Disciplinary Tribunal under Section 55 of the Advocates Act, and Section 60(3) of the Act provides for the Locus of persons who can file a complaint against the Advocate. The said Section 60(3) reads as follows -

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

25. By virtue of Section 60 (4) of the Advocates Act the ex-Parte Applicant herein is brought under the jurisdiction of the above two bodies and cannot in any way run away from that jurisdiction.

Section 55 provides as follows:

"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."

26. From the Law as outlined above it is clear that the following two elements must be present for purposes of lodging a complaint;

- a. That the complaint must be against an Advocate or his or her employees
- b. That the complaint may be made by any person.

27. In the instant case the complaint that was lodged by the complainant in Disciplinary Cause Number 155 of 2015 was by all means rightfully lodged in the Tribunal and as such the Tribunal had all the requisite jurisdiction to handle the complaint raised against the Ex-parte Applicant herein. By virtue of Section 60(1) of the Advocates Act (Cap.16 Laws of Kenya), the Tribunal is legally mandated to handle all issues of professional misconduct relating to advocates and the ex parte Applicant herein being an advocate and the subject matter concerning him being one of professional misconduct, the issue rightfully falls within the realms of the jurisdiction of the Tribunal. So, it is the finding of the court that the Tribunal cannot be prevented from executing its statutory mandate through the issue of an Order of prohibition as sought by the *ex parte* Applicant. Justice G V. Odunga in the case of **Republic vs. Advocates Disciplinary Tribunal & 2 others ex parte Mpuko Nahason Mwiti [2015]** rightfully held that:

"Under section 57 of the Act, the Disciplinary Committee [now 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"

28. The ex parte Applicant has submitted that by virtue of the Tribunal hearing the complaint against him, the Tribunal will be sitting on an appeal in respect of a Ruling by the High Court in taxation proceedings and that more so bearing in mind that no Appeal has been filed to challenge the said Ruling. The opinion of the court is that the Respondents herein have a statutory obligation to hear the complaint brought before it whether or not the matter has been concluded in the Court. It is the duty of the ex parte Applicant to submit himself to the jurisdiction of the Disciplinary Tribunal, and explain to the Tribunal what transpired in the court.

Whether Or Not The Orders Sought Can Issue?

29. In **Reid vs. Secretary of State for Scotland [1999] ALL ER 481** Lord Clyde observed that:

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something, which it had no lawful authority to do (ultra-vires). It may have abused or misused the authority, which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed."

30. Further in **Republic vs. Judicial Service Commission** the Court outlined the purpose of Judicial Review as follows -

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect 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 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 the individual judge for that of the authority constituted by law to decide the matter in question."

31. From the foregoing it is clear that before Judicial Review proceedings can commence there must be a decision that the Applicant seeks to challenge.

32. In the instant case the Respondents have not heard the parties to the Disciplinary Cause and hence there is no decision that can be challenged. In this regard it is the finding of this court that the application by the ex parte Applicant is pre-mature. He must appear before the Tribunal and state his case. If, after that appearance the Tribunal reaches a decision unsatisfactory to the ex parte Applicant, then the ex parte Applicant will have every right to institute afresh these proceedings.

33. What remains now is for the court to observe that upon the enactment of the Fair Administrative Actions Act, all applications for Judicial Review that arose after the enactment of the Constitution of Kenya, 2010 are required to be anchored under the provisions of the Fair Administrative Action Act, and the courts must equally derive its powers from the said Act. The ex parte Applicant has filed the Judicial Review pursuant to the provisions of Sections 8 and 9 of the Law Reform Act. The said statute was by the operation of the Fair Administrative Action Act affected. The transition provision under Section 14 of the said Act provides as follows:

"14. (1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done."

34. The ex parte Applicant filed the Judicial Review application while the Fair Administrative Action Act was in force and as such was bound to approach the Court pursuant to the provisions of the Fair Administrative Action Act and not otherwise. This implies that the Judicial Review application is defective to that extent. It is a well-known principle of the law that an aggrieved party has to approach the court under the right law that qualifies the Judge to issue orders that are properly anchored under the law. At the substantive stage of Judicial Review the Republic ought at all times be the Applicant. While this may be a matter of form and not substance, it must be emphasized that law is made to be observed accordingly. From the pleadings that have been filed herein it is without any doubt that the application is defective for the sole reason that there does not exist an Applicant before court. What exists is an Application brought by an ex parte Applicant. This means that we don't have a party suing or an Applicant seeking for the orders contained in the Notice of Motion. The court has to be approached by an Applicant and the orders issued ought to be for the Applicant, the ex-parte Applicant cannot move court for Orders whereas the Applicant is not named.

35. From the foregoing, it is clear that the application by Mr. Tindi is premature. It is also clear that the Disciplinary Tribunal has the jurisdiction to entertain the complaint. It is upon Mr. Tindi to appear before

the Tribunal and to tell his side of the story. Once his side of the story is told the tribunal will make a decision which if unsatisfactory to him can be challenged through these proceedings. It is easy to understand the grievances caused to Mr. Tindi by the complainant. But even then Mr. Tindi must remain cool and exercise proper counsel.

36. The order of the court is that the application is dismissed with no orders on costs.

Dated, Signed and Delivered in Mombasa this 31st day of May, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

M/s Chweya holding brief Mr. Nyongesa for 1st and 2nd Respondents

Mr. Gikandi holding brief Mr. Tindi for ex parte Applicant

Mr. Kaunda Court Assistant