



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTION AND JUDICIAL REVIEW DIVISION**

**MISC.CIVIL APPLICATION NO. 81 OF 2016 (JR)**

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

**AND**

**IN THE MATTER OF: AN APPLICATION BY CHARLES OPULU ADVOCATE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: THE DISCIPLINARY COMMITTEE CAUSE NO. 97 OF 2013**

**AND**

**IN THE MATTER OF: THE ESTATES OF ELIZABETH JOHNSON MKALA AND PETER JOHNSON MWERO AND FREDRICK MWACHITI JOHNSON (All Deceased)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA.....RESPONDENT**

**2. THE LAW SOCIETY OF KENYA.....RESPONDENT**

**EXPARTE: CHARLES ADAMSON OPULU**

**RULING OF THE COURT**

**Application**

1. This application is brought by way of a Notice of Motion dated 16<sup>th</sup> November 2016 under Order 53 Rules 2, 3, 4, 5, 6, 7 of the Civil Procedure Act, Section 1A, 1B, 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and Article 165 (6, 7) Of the Constitution of Kenya (2010) and the Law Reform Act Cap 26 of the Laws of Kenya and in pursuance to leave granted by the Court on 14<sup>th</sup> November 2016 by the applicant who seeks the following orders:

i. **An Order of Certiorari do issue** to remove into the High Court Proceedings before the Disciplinary Tribunal of the Law Society of Kenya being **Disciplinary Tribunal Cause No. 97 of 2013 [Sheila Chizi Mwero Versus Opolu & Co. Advocates]** for the said proceedings to be quashed.

ii. **An Order of Prohibition do issue** to prohibit the Respondents i.e the Law Society of Kenya Disciplinary Committee and or the Complaints Commission or the Disciplinary Tribunal or any other organ, authority or person whomsoever and whatsoever acting as a Disciplinary Tribunal or in whichever form from proceedings with the said **Disciplinary Tribunal Cause No. 97 of 2013 and further from making any Decisions, Directions or Rulings or Orders or Judgments** in any manner whatsoever or howsoever.

iii. All the necessary and consequential Orders and Directions be given.

iv. Costs be provided for.

The application was supported by the statutory statement dated 14<sup>th</sup> November 2016 and the verifying affidavit sworn on 14<sup>th</sup> November 2016 by **CHARLES ADAMSON OPULU**.

2. The Applicant alleges that there is a **Disciplinary Committee Cause No. 97 of 2013** (private prosecution) which is ongoing initiated by one **SHEILA CHIZI MWERO** as a complainant against the firm of **OPULU & CO. ADVOACTES** in which the complainant alleges that she was not given an account of Kshs 12,000,000/= received by the Applicant. The Applicant alleges that the subject matter of the proceedings before the Respondent remains in complete as the Applicant had given a professional undertaking to the Purchaser which remains undischarged and the Applicant has also supplied all information and accounts, and it is only the issue of taxation of the Bill of Costs that is pending.

3. The Applicant claims that on 24<sup>th</sup> August, 2015, the Respondent issued an order against the Applicant and never served the same until March 2016 when they were seeking to punish the Applicant for non-compliance. Further, the Applicant alleges that there is an application by the Applicant dated 18<sup>th</sup> May 2016 which the Respondent has refused to hear and render a decision on.

4. The applicant further alleges that he was to be served with a notice of Judgment for 21<sup>st</sup> November 2016 and that the matter was never heard on merits and the Tribunal refused to hear an application to join the Interested Parties in the matter.

5. The Applicant claims that the Respondent issued drastic orders without a hearing or a notice in order to punish the Applicant for its mistakes.

### **Response**

6. The Respondent did not respond to the application but instead wrote a letter to the Applicant dated 16<sup>th</sup> January, 2017 indicating that the proceedings in **Disciplinary Tribunal Cause No. 97 of 2013** had been stayed by orders issued in this matter on 14<sup>th</sup> November 2016.

### **Hearing**

7. When the application came up for hearing on 17<sup>th</sup> May 2017, the Applicant was present in person while there was no appearance for the Respondent. The Applicant submitted that there was no opposition to the application as the Respondents had not filed any documents opposing the application nor were they present in court to defend the application. The Respondent also submitted that proper service was done to the Respondents and urged this court to grant the orders sought.

### **Determination**

8. Having carefully analysed this application, I find that the issue for determination is whether the Applicant should be granted the orders sought.

Order 52 Rule 14 of the Civil Procedure Rules 2010 provides:

**“(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents:**

**(a) a notice preliminary objection; and/or;**

**(b) replying affidavit; and/or**

**(c) a statement of grounds of opposition.**

**(2) The said documents in sub rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing....**

**(4) If a respondent fails to comply with sub rule (1) and (2) the application may be heard ex parte.”**

9. The Respondent in this application has not filed any of the documents indicated under Order 52 Rule 14 (1) above in response to the application. Instead the Respondent opted to write a letter dated 16<sup>th</sup> January 2017 to the Applicant in which the Respondent does not in any way oppose the application.

10. When the application came up for hearing on 17<sup>th</sup> May 2017 there was no appearance for the Respondents and there was again no opposition to the application. Order 12 Rule 2 of the Civil Procedure Rules 2010 provides:

**“2(2) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied-**

**(a) That notice of hearing was duly served, it may proceed ex parte.”**

11. A perusal of the affidavit of Service sworn by one **JOHN KILONZO** indicates that on 10<sup>th</sup> April 2017 the Respondents herein were served with a hearing notice for this application indicating that the application was coming up for hearing on 17<sup>th</sup> May 2017, which they proceeded to accept and acknowledge by rubber stamping on the fore side of the hearing notice. I am therefore inclined to believe that there was proper service of the hearing notice upon the Respondents. The Respondents did not send any Advocate to hold brief for them and hence they can be said to have disregarded or ignored attending court for the hearing of the application.

12. The Respondents herein have thus been given ample time to respond to this application but have failed to do so, therefore, the application can be said to be undefended or unopposed. The Applicant, on the other hand, has dutifully prosecuted this matter from the beginning and should not therefore be delayed justice due to the Respondents inactions.

13. For the foregoing the application is allowed as prayed with costs to the Applicant.

**Dated, Signed and Delivered in Mombasa this 21<sup>st</sup> day of June, 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the Presence of:

Mr. Opolu (in person) the Applicant

Mr. Kaunda Court Assistant