REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 429 OF 2015

IN THE MATTER OF AN APPLICATION BY PETER MAINA MUKOMA, ADVOCATE FOR JUDICIAL REVIEW AND FOR THE ORDERS OF PROHIBITION AND CERTIORARI

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

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

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

IN THE MATTER OF THE LAW SOCIETY OF KENYA DISCIPLINARY COMMITTEE CAUSE NO. 89 OF 2012 AND THE DECISIONS MADE ON THE 13TH JULY 2015, AND 5TH OCTOBER 2015 IN THE PROCEEDINGS OF THE SAID CAUSE.

IN THE MATTER OF PETER

MAINA MUKOMA, ADVOCATE….....APPLICANT

AND

THE DISCIPLINARY TRIBUNAL OF

THE LAW SOCIETY OF KENYA….....RESPONDENT

AND

JOHN PETER KAMAU RUHANGI.....1ST INTERESTED PARTY

COSMAS NJORORO MURITHI T/A

UMBRELLA PROPERTIES…….....2ND INTERESTED PARTY

THE ADVOCATES COMPLAINTS

COMMISSION.....3RD INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th December, 2015, the *ex parte* applicant herein, **Peter Maina Mukoma,** seeks the following orders:

1) An order of certiorari to call up into the High Court and to quash:

a) The proceedings and decision therein made on the 13th July, 2015 in the Disciplinary Tribunal in Cause No. 89 of 2012 communicated by the Deputy Secretary of Compliance and Ethics Program of the Law Society of Kenya under letter dated 4th November, 2015.

b) The proceedings and decision therein made on the 5th of October, 2015 in the Disciplinary Tribunal in Cause No. 89 of 2012 communicated by the Deputy Secretary of Compliance and Ethics Program of the Law Society of Kenya under letter dated 4th November, 2015.

2) An order of prohibition do issue to prevent the Disciplinary Tribunal of the Law Society of Kenya, either by themselves or through the Compliance and Ethics Program Disciplinary Committee or their agents, officers and or any person from taking out any disciplinary proceedings against or concerning the applicant whether the same or arising out of the same facts, as those involved in the Disciplinary Tribunal Cause No. 89 of 2012 and or continuing with the proceedings in Disciplinary Committee Cause No. 89 of 2012.

3) An order to prohibit the Respondent from conducting any further proceedings or sittings of the Tribunal whether the same arising from the same facts in the disciplinary Tribunal Cause No. 89 of 2012 and or continuing with the proceedings in the disciplinary Tribunal Cause No. 89 of 2012.

4) That the Court be at liberty to make such further orders or direction as it may deem proper in the circumstances and expedite hearing and determination of this matter.

5) That the cost be provided for.

Ex Parte Applicants' Case

2. Acording to the applicant, he has practiced law for the last 23 years without any disciplinary issues raised against him by any person during that period.

3. It was averred by the applicant that his client, **Cosmas Njororo Murithii** T/A Umbrella properties (hereinafter referred to as "the Client"), the 2nd Interested Party herein approached and requested him to represent him in selling a property to the 1st interested party herein, **Mr. John Peter Kamau Ruhangi** (hereinafter referred to as "the Complainant"), and the applicant agreed to do so. The said sale agreement, it was agreed would be executed through their respective advocates and it was a term of the sale agreement that the sale deposit in the sum of Kshs. 900,000/- was to be sent to the Client directly by the complainant. According to the applicant, by a letter dated 27th February 2012, he was notified by the Respondent of a complaint that had been filed by a firm of advocates, **Kingori Kariuki & Co. Advocates** raising two grounds: failure to honour professional undertaking and failure to respond to correspondence.

4. It was averred that by letter dated 19th March 2012, the applicant's Advocates on record **Okweh Achiando & Co. Advocates** (herein after referred to as Advocates on record) responded to the allegations raised against the applicant to the secretary of the Respondent and by a letter dated 29th May

2012 the Respondent forwarded another letter of complaint written by the Complainant on similar grounds to those alleged by Kingori Kariuki to which the said Advocates on record responded to by a letter dated 18th June 2012 and raised objections on procedural grounds.

5. It was averred that during the 1st hearing of the complaint the applicant's Advocates on record rejected the admission of the complaint by the Complainant but the Respondent overruled him in spite of the procedural flaw inherent in the complaint as his said Advocates submitted that the applicant could not be subjected to two complaints by the same party on the same grounds.

6. According to the applicant, in his replying Affidavit dated 13th August 2013, he enclosed the Affidavit of the Client dated 13th August 2013 who admitted having received the money and purchased alternative plots with the money that was paid to him by the Complainant through the Applicant's office. To the applicant, in the written submissions by the parties the issues raised and articulated therein are incompatible with the issues that the Respondent based its decisions upon.

7. It was disclosed that though after the submissions by the parties the Respondent directed that it would deliver its judgment on 7th October, 2013, the Respondent failed to do so until 13th July 2015. However, the purported notices of the delivery of the judgment, sentencing and mitigation dated 13th July 2015 and 5th October 2015 respectively issued by the Respondent were never received by the applicant or his Advocates on record. Accordingly, on 13th July 2015 the Respondent delivered its judgment ex parte in the absence of the applicant or his Advocate.

8. The applicant faulted the judgment, sentencing and mitigation aforesaid on the following basis;

(i)The Respondent stated that the complainant duly paid and deposited Kshs. 900,000/- but does not state to whom whereas the pleadings are clear that this was paid to the complainant. The omission to state to whom the money was paid is outrageous, casts aspersions on the integrity of the tribunal in the sense that it leaves room for speculation that the money was paid to the applicant.

(ii)The above further lends credence to the fact that the alleged payment of the deposit was paid to the applicant which is incorrect as this amount was paid directly to the vendor by the purchaser.

(iii) The judgment recognizes that the complainant was not the applicant's direct client but proceeds and makes a finding that "it is clear that this was an act of fraud that led to the loss Kshs. 9,000,000/- without taking into consideration the Kshs. 900,000/- that was sent to the vendor directly by the complainant.

(iv) It orders that the refund of the entire purchase price of Kshs. 9,000,000/- with interest at 14% per annum from July 2011 until full refund.

(v) The judgment fails to state the particulars of fraud.

(vi) It totally ignores the Affidavits of Cosmas in its entirety and interrogation of evidence thereof.

(vii) That in its finding in mitigation and sentence the Respondent states that the money the subject matter of the complaint herein is a loan. This is arbitrary and unreasonable as there was no evidence placed before the Respondent that the money was a loan and also fails to state the particulars of that loan hence was a strange finding.

9. According to the applicant, the further analysis of the said judgment and order reveal the following flaws:

i. The Committee acted beyond its jurisdiction or *ultra vires* by ordering the Applicant to pay the complainant Kshs. 9 Million contrary to section 60(4)(e) of the ***Advocates Act*** Cap. 16, that provides that "*that such advocate pays to the aggrieved person compensation or reimbursement not*

exceeding Kshs. 5 Million".

ii. The Committee completely failed and ignored to take into account that the Complainant had already been compensated by the 2nd Interested Party when he received and accepted 20 acres of land in an alternative parcel of land. The Order as it stands awards the Complainant twice as he will now receive the money and he is also in possession of the alternative 20 acres of land for which he has been pushing the 2nd Interested Party to hasten their registration.

iii. The Complainant has not refuted or challenged that he received the 20 acres of land from the 2nd Interested Party as compensation or as an alternative to the land he initially purchased.

iv. The Tribunal failed to take into account that the deposit for the purchase price in the sum of Kshs. 900,000/= was paid directly by the Complainant to the 2nd interested party and not to the Applicant herein. The Applicant had only received Kshs. 8.1 Million from the Complainant's Advocates and therefore the order for the Applicant to pay the complainant Kshs. 9 Million is illegal and irrational.

v. The complaint against the Applicant was for failure to honour a professional undertaking and failure to respond to correspondence. The Judgment seems to have dealt with other matters which the Applicant herein had neither been charged with nor given a chance to defend himself.

10. It was contended that the aforementioned Judgment and order of the Tribunal is not properly analysed, ignores crucial unchallenged or impeachable evidence by the 2nd Interested Party, is casual and reckless, in defiance of logic and acceptable moral standards in light of the affidavit evidence presented to the Tribunal by the Complainant, the Applicant and the 2nd Interested Party for the following reasons:.

1. It completely ignores the fact that the Applicant was duty bound as provided by the agreement for sale to release the money to the 2nd Interested Party and that upon receiving the said money, the said 2nd Interested Party was to procure the documents for completion and hand them over to his Advocates, which he failed to do and has never been sued for specific performance of the sale;

2. It completely ignores to address itself as to why the Complainant's Advocates, **Kingori Kariuki** did not obtain a professional undertaking before releasing the balance of the purchase price to the Applicant and whether such Advocate by such failure was guilty of professional misconduct and therefore entitled to pay all dues in terms of the judgment due to his negligence in failing to protect the Complainant in negotiating the terms of the release of the said monies;

3. It completely ignores the fact that it was at the request of the Complainant that the said monies were not returned to the Applicant as both the 1st Interested party and the Complainant had agreed without reverting to their respective Advocates that the said money be utilised for the purchase of alternative land;

4. It failed to take into account that the Complainant was in possession of the parcels of land that he had received as compensation awaiting issuance of Titles and as exhibited by J. M. Njengo & Company Advocates letter dated 4th September 2012, the Complainant had in fact stated looking for potential buyers for these parcels of land;

5. It failed to question or ask the 3rd Respondent to show how he paid for the said parcels of land which he clearly received from the 2nd Interested Party other than the monies that he paid for the purchase of initial land;

6. It failed to take into account that the Complainant had not disputed by supplementary or replying affidavit all these facts with regard to requesting and accepting from the 2nd Interested Party alternative parcels of land in lieu of refund of the Kshs. 9 million; and it failed to give any reason

why the said crucial evidence by the 2nd Interested Party that he had already compensated the Complainant was ignored or irrelevant to the matter before it and yet, if true, which is the case herein, it would not have led to an order for the reimbursement by the Applicant herein of the said monies.

11. According to the applicant, these proceedings have been necessitated as a result of the decision made by the Respondent which reveals a trend of illegal, arbitrary and/or statutory and constitutionally impermissible process that has infringed on his rights. In his view, for this Court to appreciate the underlying issues raised in this application, it is important to understand the ***Advocates Act*** (herein referred to as the Act) as an Act that governs and regulates the professional conduct of Advocates which Act establishes the Disciplinary tribunal in terms of section 57 of the Act and provides in terms of section 58(5) thereof that "All proceedings before the Tribunal shall be deemed for the purposes of Chapter XI of the ***Penal Code*** (Cap. 63) to be judicial proceedings" and for the purposes of the ***Evidence Act*** (Cap. 80) to be legal proceedings.

12.The applicant contended that as a Tribunal the Respondent, is a body or authority vested by law with the power to determine questions and disputes affecting the rights of citizens and as such must be under a duty to act judicially.

13.The applicant therefore averred that as gleaned from section 60(4)(e) of the Act which provides that "that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings", the Tribunal acted in excess of its jurisdiction under the Act creating and rendering its decision to be *ultra vires* to those provided under the Act thus a nullity and void. Further, excess of jurisdiction means that the Tribunal has power to enter upon the question but because of the abuse of discretion, such as exercise of the power for an improper purpose or in bad faith or irrelevant grounds, the exercise of the power is *ultra vires* and therefore in excess of jurisdiction.

14.The applicant contended that he was never given an opportunity to rebut the grounds that formed the basis of the judgment and the sentence thus the tribunal violated the principle of *audi alteram partem* (hear the other side). In addition whereas he was entitled to reasoned decisions the Tribunal failed to furnish him with the same.

15. It was the applicant's case that the Tribunal which exercises judicial or quasi judicial powers such as the Complainant ought to have indicated as to why it acts in a particular way and when is rights which are equally important and have far reaching consequences to him are adjudicated upon in a summary fashion without giving him a hearing on those grounds of the decision so that he could have examined them.

2nd Interested Party's Case.

16.The application was supported by the 2nd interested party herein and urged the Court to grant the orders requested by the applicant who at all material times acted as his advocate in the sale of land which is the subject matter of the Complainant's complaint in Cause Number 89 of 2012.

17. In his view, the Respondent despite taking so long to write its judgment made very serious mistakes and completely ignored his affidavit that he filed in cause number 89 of 2012 in particular the fact that he compensated the 1st Interested party and therefore he has suffered no loss at all. The Respondent, according to him ignored his confirmation that only Kshs 8,100,000/= was paid through the applicant and furthermore it was agreed by him and the Complainant in the agreement that this money was to be released to him by the applicant. He therefore asserted that the Respondent falsely condemned his advocate, the applicant, to refund to the Complainant monies that he himself received as per the sale agreement and which he had already utilised with the consent and behest of the Complainant to purchase for him other alternative properties measuring about 20 acres which he today is enjoying. By ignoring this fact, the 2nd interested party averred that the Respondent has unjustly enriched the Complainant to whom he have already given possession of the alternative land and which he has been trying to sell.

18.It was the 2nd interested party's case that there was no fraud or crime or unbecoming conduct committed against the Complainant as he has received land from the 2nd interested party. Further the applicant was never charged with fraud by the Respondent but with failure to keep his professional undertaking, which he never gave at all and also for failing to reply to letters hence it is unfair to judge him for what he was not charged for. The 2nd interested party asserted that the applicant was not guilty of any offence and he was ready and willing to refund to the Complainant the said monies but on condition he returns the 20 acres of land the 2nd interested party gave him as an alternative.

19.It was therefore contended that if this application is disallowed the applicant will be unfairly condemned to pay what he did not receive in the first place.

1st Interested Party's Case

20. In opposition to the application, the respondent averred that the entire Judicial Review Proceedings as filed are misconceived and devoid of merit.

21.According to him, contrary to the allegations made by the *ex parte* Applicant, the Disciplinary proceedings in D.C No. 89 of 2012 are lawful and the decisions arising there from are legally sound and the decision complained of was reached at after due and fair administration of the law, and is not biased as the Applicant fully participated in the proceedings as conceded in his application and there were no procedural flaws whatsoever. Further the Disciplinary Tribunal considered all matters of evidence and the law before reaching its decision.

22. Based on legal advice the said interested party maintained that the High Court under its judicial review Jurisdiction is unconcerned with the merit or otherwise of the impugned decision.

23. He disclosed that D.C No. 89 of 2012 was initiated through a complaint filed by himself by way of an affidavit sworn on 28th May 2012 which complaint was further supported the supplementary affidavit of one Kingori Kariuki, his advocate in the sale transaction, sworn on 16/1/2012. On the other hand the *exparte* Applicant herein having entered a plea of not guilty in the disciplinary case was granted an opportunity to file his Replying Affidavit which affidavit was sworn on 16/11/2012 by Peter Maina Mukoma and was duly filed.

24. According to the interested party, the disciplinary matter was canvassed by way of written submissions filed by the advocates representing the respective parties. To him, the Law Society of Kenya at all times served requisite Notices to attend court whether for Mention, Hearing, Judgement, Mitigation/Sentence as the case may be which said Notices were addressed to the *ex parte* Applicant herein. It was therefore his case that it is highly improbable that the ex parte Applicant received all the Notices from the LSK but failed to receive the judgment Notice moreso when it is apparent that a uniform mode of service was applied by the LSK on all occasions.

25. Based on the foregoing and his advocate's advice, 1st the interested party believed that the ex parte applicant was afforded an opportunity to be heard on the disciplinary case before judgement was pronounced and there was no procedural flaw and that there are no errors in the proceedings and judgement and an error occurring during sentencing cannot render the entire proceedings and judgement lawfully held a nullity.

Determinations

26. I have considered the application, the evidence adduced in the form of affidavits, the grounds and the submissions filed on behalf of the parties herein some of which like those of the applicant were unnecessarily lengthy. It is simply incredible to file submissions spanning 40 pages of font 11 in a matter such as this. I have considered the said submissions, and it is my view that a good deal of the material comprised in the said submissions were with due respect clearly superfluous.

27. I have considered most of the grounds relied upon by the applicant in this application and in my view it is important to understand this Court's jurisdiction in judicial review application as opposed to the exercise of this Court's appellate jurisdiction.

28. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

29. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of 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. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

30. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

31.The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

32. To do that would amount to this Court sitting on appeal on the decision made by the Respondent. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision… It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."**

33. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals**

Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR, that:

> "**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

34. Similarly, in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

35. It must be reiterated that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

36. This Court adopts the findings in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J**. quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows;

> **"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates**."

37. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** that:

> "**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision…I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

38. In this case the applicant complains that the merits of his case was not sufficiently evaluated by the Respondent in arriving at its decision. In my view that would amount to an error on the merits which does not justify this Court's interference with the decision.

39. What has caused me concern is the contention that the material placed before the Respondent with respect to the fact that the Complainant entered into an arrangement with the 2nd interested party was never considered. In his affidavit, the Complainant has not denied the existence of the said arrangement. In my view that arrangement was clearly material to the matter before the Respondent. Though it would not necessarily have materially affected the decision whether the applicant was culpable of professional misconduct or not, it definitely had a bearing on the sentence to be meted.

40. In **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55** it was held that:

> **"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute"**

41.In **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 others[2013] eKLR** this Court held that:

> **"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."**

42. The holding in the *locus classicus* of **Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223** best summarizes the situation that has prompted the *Ex Parte* Applicant to seek the court's intervention and protection in these proceedings, particularly in the

words of **Lord Greene** MR at pages 681-682 thus*:*

> **"If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters...Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration...For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"...Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority..."**

43. In my view the Respondent ought to have taken into account the averments made by the 2nd interested party. Its failure to do so warrants this Court in interfering with its decision.

44. Section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

> ***(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;***
>
> ***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***
>
> ***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***
>
> ***(d) prohibiting the administrator from acting in a particular manner;***
>
> ***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***
>
> ***(g) prohibiting the administrator from acting in a particular manner;***
>
> ***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(i) granting a temporary interdict or other temporary relief; or***
>
> ***(j) for the award of costs or other pecuniary compensation in appropriate cases.***

45. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision.

Orders

46. Having considered the issues raised before me it is my view that the order that commends itself to me and which I hereby grant is that the judgement of the Respondent herein be and is hereby set aside, the

matter is remitted to the Respondent for reconsideration taking into account the material placed before it by the 2nd interested party.

47. In the circumstances of this case each party will bear own costs of these proceedings.

48. It is so ordered.

Dated at Nairobi this 21st day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wara for the applicant

NA for the Respondent

CA Ooko