



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION NO.4 OF 2015

REPUBLIC APPLICANT

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE CHAIRMAN, THE ADVOCATES

COMPLAINTS COMMISSION 2ND RESPONDENT

EX PARTE DEREK GYIDEI MANGO

RULING

This is a Notice of Motion dated 4th February 2015 brought under *Order 53 rule (3)(1)* of the Civil Procedure Rules, *sections 8 and 9* of The Law Reform Act, Cap 26 Laws of Kenya, and all enabling provisions of the law, seeking the following reliefs:-

1. An order of CERTIORARI to remove into the high Court for the purposes of its being quashed the decision of the DISCIPLINARY COMMITTEE whereby it was ordered on the 17th of November, 2014 that:
 - a) DEREK GYIDEI MANGO be suspended from practising law for a period of one year from the date of the order.
 - b) He complies with an (undisclosed) order issued on the 25th of August, 2014.
2. An order of Mandamus directed to the DISCIPLINARY COMMITTEE requiring it to accord the said DEREK GYIDEI MANGO a hearing in respect of the cause the subject matter of this proceedings.
3. An injunction restraining the 2nd respondent and the DISCIPLINARY COMMITTEE whether by themselves or agents from publishing the order complained of and to further require them to reinstate his practise status as being "ACTIVE" in all its publications.
4. An order for costs.
5. Such further relief as the court may deem fit.

This application was made pursuant to leave of the court given to the applicant on 23rd January, 2015.

Upon being served, the 2nd respondent. The Chairman, Advocates Complaints Commission, took out a Notice of preliminary objection dated 21st May, 2015, and filed in court on 16th June, 2015, objecting to the motion by the *Ex-parte* applicant listing the following as points of objection, namely:-

- “1.) THAT the said application is irregularly and improperly filed.
- 2.) THAT the said application is a non-starter, defective in both form and/or substance and improperly presented.
- 3.) THAT the said application is bad in law for non-joinder of the body in respect of which its decision is sought to be challenged.
- 4.) THAT the said application is utterly defective for being superfluous.

When this matter came up for hearing of the Preliminary Objection on 25th, January, 2016, Mr Shifwoka appeared for the 2nd respondent and Mr Wekesa for the *ex-parte* applicant. Mr Shifwoka learned counsel for 2nd respondent, addressed the court on the preliminary objection saying that neither the Disciplinary Committee nor the Disciplinary Tribunal was enjoined in these proceedings hence that is a serious omission and the court cannot properly pronounce itself on the matter. If the court were to hear the matter and make a determination on it, the court will have made a decision without hearing the party that ought to have been joined in the proceedings. Counsel referred to Robert Muli Matolo vs Director of Land Adjudication & 2 others [2014] eKLR saying that the error of omitting a crucial party is so fundamental that it cannot be cured under Article 159 of the Constitution. He also referred to Patrick O. Misiko vs The Town Clerk Kakamega Municipal Council, Misc Application No.114 of 2002, for the proposition that once you omit the maker of the decision in the proceedings, it is not a mere irregularity but a fundamental error; Henry Amwayi Ndeti vs Chairman Land Disputes Tribunal & Another, Bungoma Misc. Appl. No.79 of 2002 for the proposition that once there is existence of wrong parties, it cannot be allowed and Fatuma Adan K [2013] eKLR vs Independent Electoral and Boundaries Commission & Another for the proposition that non-joinder of the person whose decision is sought to be challenged is fatal. Learned counsel further submitted that the Notice of motion was irregular arguing that leave was sought and granted for taking out *mandamus* proceedings while the motion seeks *mandamus* and *certiorari*. He argued that *certiorari* cannot be urged because leave was not granted for it and further that *mandamus* cannot be granted in the manner the *ex-parte* applicant has moved the court given that the Tribunal has already made its decision, where the *ex-parte* applicant is presumed to have been heard. Counsel urged the court to sustain the objection and dismiss the Notice of Motion.

Mr Wekesa, learned counsel for the *ex-parte* applicant on his part opposed the preliminary objection and submitted that the second respondent is the organ that institutes disciplinary proceedings against members. He submitted that the applicant is a member of the Law Society of Kenya and the 2nd respondent is an organ of the Law Society of Kenya and any action against the *ex-parte* applicant has to be instituted through the 2nd respondent as the Advocates Complaints Commission, arguing that according to him, the right party has been sued.

On non-joinder, counsel submitted that it is not a fatal omission and cannot invalidate a suit, but an amendment could cure it. He distinguished the decisions relied on by the 2nd respondent saying that the positions they were addressing was different from the present matter. Counsel further argued that a preliminary objection does not require facts but must be based on a pure point of law. According to counsel, an amendment could cure the Notice of motion and also held the position that the Chairman of the Complaints Commission having been sued, that suffices. He prayed that the preliminary objection be dismissed.

I have considered the preliminary objection and rival submissions both in support and opposition thereto. A preliminary objection is meant to dispose of a matter without necessarily going into a full trial. It is supposed to address points of law which when taken at that early stage, will save both Judicial time and resources that the court is able to direct its energy and resource to some other deserving cases. The law as

stated in the case of *Mukisa Bisquits Manufacturing Co. Ltd vs West End Distributors* [1969] EA 696 is that a preliminary objection should consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection will dispose of the suit. Further it was held in the case of *Oraro vs Mbaya* [2005] KLR 141 that a preliminary objection is a point of law which must not be blurred by factual details liable to be contested and in any event to be proved through the process of evidence.

The 2nd respondent has opposed the hearing of the Notice of Motion dated 4th February, 2015, saying that it won't see the light of day and should not therefore be allowed to proceed to hearing. The first point of objection is that the Notice of Motion is irregularly and improperly filed and that the motion is defective in both form and substance. The point here is that the maker of the decision has not been enjoined in these proceedings and counsel has cited a number of decisions to support his arguments. The ex-parte applicant has in his motion named the following parties as respondents, that is The Attorney General and the Chairman of the Advocates Complaints Commission as the 1st and 2nd respondents respectively. The second respondent, it has been argued, did not make any decision and therefore none of its decisions is being challenged in these proceedings.

When the *ex-parte* applicant sought leave to commence Judicial Review proceedings, he said he was to challenge “*the verdict emanating in Disciplinary Committee Cause No.215 of 2013*” and attached an unmarked annexure, a letter from the Law Society of Kenya dated 21st November, 2014 referenced *DISCIPLINARY COMMITTEE CAUSE NUMBER 215 of 2013*. In the said letter, paragraph (1) thereof refers to orders made on 17th November, 2014 by the “*Tribunal*” meaning the Advocates Disciplinary Tribunal. From the reading of that letter, the decisions that were made by the Tribunal are the once that the *ex-parte* Applicant's Notice of Motion is directed at.

The Complaints Commission (The 2nd Respondent herein) is established under *section 53* of the Advocates Act (Cap 16) Laws of Kenya and *sub-section (4)* thereof provides as follows:-

“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; and –

- a) if it appears to the Commission that there is no substance in the complaint it shall reject the same forthwith; or*
- b) If it appears to the Commission whether before or after investigations that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence, it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under part XI; or*
- c) If it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence. It shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification. “ (emphasis”*

The Complaints Commission (The 2nd respondent herein) is mandated to investigate and to deal with complaints that do not constitute disciplinary offences – those that disclose disciplinary offences are referred to the Disciplinary Committee (now Disciplinary Tribunal) for hearing and determination. From the reading of *section 53* of the Act, the 2nd respondent herein only processes complaints and either deals with those under its mandate or forwards the more serious once to the relevant organ. The decision communicated to the *ex-parte* applicant was by the Disciplinary Tribunal, established under *section 57* and which conducts its proceedings under *section 58* and not the Complaints Commission. It is therefore true that the decision, the subject of the Notice of Motion before court was made by an organ that is not party to these proceedings.

In the case of *Mahaja vs Khutwato* [1983] KLR 553, *Hancox JA*, said at page 565 said:-

“It is in my view essential that the tribunal or person whose decision is impugned, whether or not that tribunal or person constitutes a court should, if not named in the title of the proceedings at least be served and have an opportunity to being heard.”

And in the case of Sammy Wycliffe Malesi vs Repub lic & 2 others Misc Civil Application No.55 of 2007. Koome (J) (as she then was) held among others as follows:-

“In this case, the application seeks to quash the decision of the Chief Magistrate and the outcome would be an order directed to quash the decision of that court which is not a party. I am afraid this is fatal mistake that goes to the core of the application and the order sought cannot issue. For that fundamental mistake and with a lot of sympathy to the ex-parte applicant, find the application is fatally defective and it is hereby struck out with costs to the interested party.”

Normally Judicial review proceedings are directed to the person or persons who are to comply with any orders that the court may make. And the rational for making the decision maker a party to the proceedings is that whatever decision the court may make, has to be acted upon by that decision-maker. In a case like the one before me, the decision was made by the Disciplinary Tribunal and not the Complainant’s Commission and were the court to make a decision pursuant to the motion, it would be directed at the Disciplinary Tribunal which is not a party herein. It is obvious that the decision maker whose decision is the subject of this motion was not made a party in these proceedings and therefore its decision cannot be challenged without it (the Disciplinary Tribunal) being heard. I agree with Koome (J) (as she then was) that failure to enjoin the decision maker is fatal.

The second limb of the objection is on the fact that leave to commence proceedings was sought for *mandamus*, but the motion seeks orders of *certiorari*, *mandamus* and injunction. I have perused the chamber summons dated 22nd January 2015 through which the *Ex-parte* applicant sought leave to apply for prerogative orders. The chamber summons sought leave to commence Judicial Review proceedings of *mandamus*. It did not seek leave of court to apply for orders of *certiorari*. The *ex-parte* applicant cannot commence proceedings for *certiorari* without obtaining leave of court to apply. *Order 53 rule 1* of the Civil Procedure Rules 2010, is clear and provides thus:-

“Rule 53.1(1) – No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.”

In the present motion, the *ex-parte* applicant did not seek leave to commence Judicial proceedings in the nature of *certiorari* and cannot so apply when he only obtained leave to commence proceedings for *mandamus*. Similarly, the *ex-parte* applicant has also sought an injunction through his notice of motion. *Order 40* of the Civil Procedure Rules has no application in prerogative orders, and proceedings commenced pursuant to *sections 8* and *9* of the Law Reform Act (Cap 26 Laws of Kenya) and *Order 53* of the Civil Procedure Rules, 2010. Judicial review proceedings are special proceedings and must be commenced in the manner allowed and cannot be taken as if they were same as ordinary suits where parties seek injunctions upon commencing those suits. Prerogative orders are governed by *sections 8* and *9* of the Law Reform Act and *Order 53* of the Civil Procedure Rules and parties in such proceedings should restrict themselves to those provisions of the law.

The *ex-parte* applicant could still proceed to urge the motion and pursue the prayer for *mandamus*. However looking at what is at stake, I do not think this would lead him anywhere. An order for *mandamus* is meant to compel the interested party to perform certain acts or functions which it is under legal obligation to perform or undertake. In the motion, the *ex-parte* applicant wants the Disciplinary Committee (Tribunal) which is not named, to accord the *ex-parte* applicant a hearing in respect of the cause the subject of these proceedings. I note from the decision attached to the application for leave that proceedings were concluded and a decision made. In my humble view, the matter before the Disciplinary Tribunal was concluded and cannot be re-opened before the decision is quashed. Perhaps that is why on realising this anormally, the *ex-parte* applicant, belatedly though, framed his motion in the manner he has, notwithstanding the danger that he had not sought and obtained leave to apply for *certiorari*.

I have perused the record including the chamber summons for leave to apply and noted that the application does not contain a statement of facts. The chamber summons contains a verifying affidavit and some annexures, there is no statement of facts relied on and which the affidavit verifies. *Order 53 rule 1(2)* provides as follows:-

“Rule 3.1(2) An application for such leave as aforesaid shall be made ex-parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verify the facts relied on.” (emphasis)

That was not the case in this matter. The ex-parte applicant is also required to serve the statement of facts on the respondent and interested parties. *Order 53 rule 4(1)* provides:-

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as herein after in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.” (emphasis)

The *ex-parte* applicant did not comply with the requirements of *Order 53(3)(2)*. The statement is supposed to state among other things the reliefs sought and grounds for such reliefs, and the motion should not be based on any other grounds save those in the statement of facts, neither should the *ex-parte* applicant seek any other relief except those set out in the statement. Although the chamber summons for leave refers to a statement, I have not seen one record and the only conclusion I can come to is that there was none. Furthermore, the *ex-parte* applicant has sought more reliefs in his motion that were in the application for leave which is a violation of clear provisions of the law.

Counsel for the *Ex-parte* applicant argued that an amendment can cure the Notice of motion. I doubt whether this would be the case. Leave to apply for an Order of *certiorari* was not sought. *Order 53 rule 4* is also clear that only reliefs contained in the statement would be canvassed during the hearing of the motion. The *ex-parte* applicant has gone ahead and added more reliefs that were not in his application seeking leave to apply.

I am aware of *section 1A* and *1B* of the Civil Procedure Act on the Overriding Objective which requires the court to facilitate the just, expeditious proportionate, and affordable resolution of disputes and that courts, while interpreting the Act and rules, should give effect to the Overriding Objectives. I am also aware of *Article 159(2)(d)* of the Constitution which requires courts to administer justice without undue regard to procedural technicalities. However, the view I take is that a litigant should not ignore clear provisions of the law and procedure and rush to cite *sections 1A* and *1B* of the Civil Procedure Act and *Article 159(2)(d)* in defence of his shortcomings. The overriding Objective should not be used to relieve parties of their obligation under clear rules of procedure and parties should not flout such rules simply because they would benefit from *sections 1A* and *1B* of the Civil Procedure Act or even *Article 159(2)(d)* of the Constitution.

As stated by the Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd vs Richard Akwesera Onditi* [2010] eKLR:-

“In applying the principle and concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with settled procedures and when asked why, to simply wave before the court provisions of sections 3A and 3B of the Appellate Jurisdiction Act” (similar to sections 1A and 1B of the Civil Procedure Act)

In my view, *Article 159(2)(d)* or the Overriding Objective is not an answer to the *ex-parte* applicant's problems or shortcomings in this application. An amendment will not also do.

There is one more issue that I should comment on, although it has no bearing on the outcome of this matter. It relates to extraction of court orders. An order is the formal expression of a decision of a court other than a decree, and once made, it should be extracted in the format that will clearly and

unequivocally express what the court said or the order the court granted. It is not supposed to leave anyone or even the party it is directed to guessing what the court must have said. It must be self-explanatory. Looking at the extract of the order for leave made on 23rd January 2015, on record, one cannot help but wonder what order the court granted on that day.

After reproducing the heading of the case, the extracted order flows as follows:-

ORDER

THIS MATTER coming up for ex-parte hearing of the application dated 22nd date of January 2015 before me.

IT IS HEREBY ORDERED THAT:-

- 1. The application be allowed in terms as prayer number 1.*
- 2. The applicant to file the substantial application within 21 DAYS from the date hereof.*
- 3. Costs herein be in the cause.*

Dated at Kakamega this 23rd day of January 2015.

DEPUTY REGISTRAR

KAKAMEGA HIGH COURT

GIVEN UNDER MY HAND AND THE SEAL OF THIS HONOURABLE COURT THIS 26th DAY OF January 2015.

DEPUTY REGISTRAR

KAKAMEGA HIGH COURT

This cannot be said to be a formal expression of the court's decision. A person who has not seen the application that was before that court for consideration, would not know what order was made, and by reading the order, one would not even know what prayer (1) was all about. It is a flawed way of extracting court orders, and in the event of disobedience, I do not know how the court would deal with the issue were contempt proceedings to be initiated. It is a challenge to practicing Advocates and the Deputy Registrar, otherwise this leaves a lot to be desired.

For guidance, I wish to draw parties, attention to the mode and format of extracting Orders suggested under *Order 21 rule 8(6)* of the Civil Procedure Rules, 2010, 8which provides as follows:-

0.21 rule 8(6) "Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree." (emphasis)

Order 21 rule 7(1) in relation to decrees provides;

"The decree shall agree with the Judgement; it shall contain the number of the suit, the names and description of parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit." (emphasis)

From the reading of *Order 21 rule 8(6)*, an order should be drawn in the same manner as a decree, which means when one draws an order, he is required to follow the provisions of *Order 21 rule 7(1)*. That is to say, an order should contain the number of the suit, names and description of parties, and particulars of

the claim, and above all, should specify clearly the relief granted or other determination of the suit. That is not how the order granting leave herein was extracted. The extract of the order, as far as the relief is concerned, is wanting. Even though one may argue that the extracted order has been approved and signed by the Deputy Registrar, it is clear that it is not in compliance with *Order 21 rule 7(1)*. I hope this will be helpful.

Having given a deep consideration of this matter, I have come to the conclusion that the ex-parte applicant's Notice of motion is defective both in form and substance to the extent that an amendment would certainly not cure it. I find that the Preliminary Objection is well founded and is sustained.

Consequently the Notice of motion dated 4th February, 2015 is hereby struck out with costs.

Dated and delivered at Kakamega this 16th day of February, 2016.

E.C. MWITA

JUDGE