REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 6 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI BY PETER KINYANJUI

AND

IN THE MATTER OR DISCIPLINARY COMMITTEE AND IN THE MATTER OF DISCIPLINARY CAUSE NO. 104 OF 2014

PETER KINYANJUI……..….APPLICANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL……..1ST REPONDENT

ANNE WAMBUI NGUGI……...2ND RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 27th January, 2016, the applicant herein, **Peter Kinyanjui,** seeks the an order for certiorari bringing into this Court for purposes of quashing and to quash the decision, orders and the judgment of disciplinary tribunal and law society made on 7th December, 2015 in cause No. 104 of 2014. He also sought an order for provision as to costs.

Applicant's Case

2. From what I can make of the application, which however does not come out clearly, it would seem that on the 9th November 1992 the applicant entered into an agreement for sale with a third party which was witnessed by the 2nd respondent advocate herein for which both parties paid the said advocate legal fees. By that fact the applicant therefore contended that he was the 2nd Respondent's client paid by both parties for custodial of land documents According to the applicant, he was the 2nd respondent's client having engaged her to draw for him an agreement dated 9th November, 1992 in which the 2nd respondent (hereinafter referred to as "the advocate") was to take custody of title documents that were a guarantee for a loan. According to the applicant, the advocate witnessed the agreement for each party and therefore acted for both parties. The advocate, it was averred, took custody of the documents and thereafter paid the applicant Kshs 20, 000 towards settlement of the loan.

3. It was the applicant's contention that by virtue of the fact that the advocate agreed to take custody of

the title documents and received payment from him for drawing the agreement the applicant consequently became her client.

4. It was however contended by the applicant that the advocate's conduct in the transaction amounted to a conflict of interest as a result of which she failed to comply with the applicant's instruction and was not only uncivil by her conduct but also failed to renderer professional services despite having been paid for her legal fees.

5. It would seem that aggrieved by the advocate's alleged conduct, the applicant lodged a complaint being case No. 104/2014 with the 1st respondent as regulatory professional body. He however contended that the advocate did not enter a plea to the complaint and the applicant proceeded with the hearing on 2nd March, 2015 after which the matter was fixed for judgement on 8th June, 2015.

6. The applicant averred that on the said date of judgement, when he appeared before the 2nd respondent tribunal in chambers for delivery of the said judgment he was informed that it was ready for delivery and that he should wait for the file to be called. While he was waiting the advocate appeared and was allowed to put in a replying affidavit after which they were given another date for judgment was among the files whose judgment were ready. Though the matter was listed for delivery of judgement, the applicant averred that the 1st Respondent allowed the advocate to put in a replying affidavit clearly against the set out procedure of the 1st Respondent. In the applicant's view, the manner in which the 1st respondent conducted its proceedings was unprocedural hence the outcome thereof was similarly flawed. It was the applicant's case that the tribunal was openly prejudiced against him and that they were out of defend their colleague.

7. To the applicant, the advocate used the information she received in the course of the said transaction against the applicant.

8. The applicant averred that the advocate was now boasting that her friends in judiciary will interfere and ensure this suit will be dismissed with costs to the respondents. It was further contended that the advocate claimed that she has access to the chambers of magistrates and advocates hence she cannot change her conducts.

Respondent's Case

9. In response to the application, the Respondent averred that on the 14th July 2014, the Disciplinary Committee of the Law Society of Kenya received a complaint by the Ex parte Applicant herein, presented vide an affidavit he swore on the 14thJuly 2014 which complaint was generally on the conduct of an advocate and therefore a copy of the Affidavit was sent to the Advocate with a requirement that she responds to the allegations therein.

10. The Respondent averred that although the matter had proceeded in the absence of the Advocate, she appeared on the 8th June 2015 and sought leave to file her Reply, which leave was granted on the same date and on the 22nd June 2015, the advocate filed her Replying Affidavit sworn on the 11thMarch 2015. The Respondent disclosed that *o*n the 14th of June 2015 the *Ex Parte* Applicant also filed a Further Affidavit sworn by himself on the 18th June 2015 and the matter proceeded to full hearing. Thereafter judgment was delivered on the 7thDecember 2015 whereby the advocate was acquitted.

11. According to the Respondent, the Disciplinary Tribunal at all time during proceedings in Disciplinary Tribunal Cause No 104 of 2014 followed the laid down procedure in discharging its mandate hence the Application herein does not disclose any cause of action.

12. It was further contended that the Application should be dismissed for want of form and that as the applicant had failed to establish any case for this honourable court to grant the Judicial Review orders sought, this Application is frivolous, vexatious and an abuse of the court process and ought to be

dismissed it with costs.

The Advocate's Case

13. According to the advocate, contrary to the e applicant's allegations, she did file her replying affidavit to the complaint and it was on that basis that the Tribunal made and delivered its judgment on 7th December, 2014.

14. The advocate admitted that on 9th November, 1992 she drew an agreement between the applicant and one **Virginia Waithira Mwangi** which agreement has been a subject matter in several suits brought by the applicant against the said **Virginia Waithira Mwangi** and the advocate. In the advocate's view, the terms of the said agreement were clear and the issue of confidentiality does not exist. To her clause (d) 0f the said agreement stated very clearly that the aggrieved party was to pursue their claim through the institution of legal proceedings and the applicant being aggrieved did exactly that and filed Thika Civil Suit No. 68 of 1993 against the said **Virginia Waithira Mwangi** which case was dealt with and exhaustively in the said court. Being dissatisfied with the judgment in the Lower Court the applicant filed Nairobi Civil Appeal No. 10 of 1994 and on 27th May, 1996 judgment was delivered by **Lady Justice Owour** and a retrial ordered which retrial was heard by **Honourable B.A. Owino RM** and a judgment delivered on 26th January, 2009. Once again being aggrieved by the said decision the applicant filed Nairobi Civil Appeal No. 50 of 2009 and judgment in respect of the said appeal was delivered on 17th February, 2011.

15. According to the advocate she could not have influenced the outcome of any of the judgment as she had no interest in the matter and the judgments were given after the hearing of all the parties involved. The advocate however took issue with the language used by the Applicant and especially in paragraph 13 of the supporting affidavit sworn on 16th January, 2016 and averred that the documents referred to all along were title documents in respect of one **Virginia Waithira Mwangi's** plot and which documents the applicant was to give to the advocate upon receipt of the Kshs 20,000/= receipt of which he acknowledge.

16. To the advocate, the applicant's allegation in respect of Tribunal Case No. 105 of 2014 are unfounded and baseless as he is not a party to the said case but for clarity purposes the said Kshs 10,000/- paid to the tribunal was adjournment fees/costs.

17. It was therefore the advocate's case that the Applicant's application is unmeritorious and an abuse of the court's process and should be dismissed and the applicant declared a vexatious litigant.

Determinations

18. I have considered the positions adopted by the respective parties to this application.

19. In my view this is a classic case in which the scope of judicial review proceedings ought to be restated. Generally, judicial review proceedings do not deal with the merits of the decision but by the decision making process. It was in this respect that in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

> **"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."**

20. 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.***

21. It must be remembered 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.

22. 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.

23. In this case the applicant contends that the manner in which the 1st respondent conducted its proceedings was unprocedural. This contention was based on the fact that the 1st respondent granted leave to the advocate to file her replying affidavit on the day when the matter was fixed for judgement. The applicant has however not contended that the 1st respondent had no jurisdiction to grant such orders. Whereas the grant of the same may, to an appellate Court be found to have been a wrong exercise of discretion, this Court not being an appellate tribunal over the decision of the 1st respondent cannot inquire into the, merits of its decision. Such a decision can only be challenged by way of an appeal to the High Court and such option is available in respect of decisions of the 1st Respondent.

24. In my view the route that the applicant has taken in challenging the decision of the 1st respondent cannot lead him to the destination he intended to arrive at. If he felt that the decision of the 1st Respondent was incorrect he ought to have filed an appeal against the 1st respondent's decision. In other words even if I was to be of the view that the 1st respondent in exercising its undoubted discretion, did so wrongly, I am not entitled to substitute my discretion for that of the 1st respondent in proceedings of this nature.

25. With respect to the allegation that the advocate has been boasting about the Court not being capable of making adverse orders against her, I wish to refer to the decision in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No. Nai. 195 of 1997** where it was held that:

> **"A judge is not concerned with what litigants may brag or boast as he is only concerned with dispensing justice according to law, and any boasts made by litigants ought not to perturb or even bother a Judge."**

26. I have also considered the language employed by the applicant in his affidavit and I must say that the applicant's language has no place in affidavit which ought to be factual. When a party resorts to referring to other parties in the proceedings as thieves, such language can only be termed as reckless. A party ought not to use legal proceedings as a platform of idiosyncrasy to unleash vituperative remarks.

27. Having said that it is my view and I find that there is no merit in these proceedings which I hereby dismiss with costs to the Respondents.

Dated at Nairobi this 29th day of June, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui the applicant in person

Miss Njagi for Mr Muleky for the Respondent

Cc Muruiki