



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 31 OF 2016

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW

ORDERS OF PROHIBITION AND CERTIORARI

AND

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

AND

**IN THE MATTER OF THE ADVOCATES DISCIPLINARY TRIBUNAL, UNDER THE
ADVOCATES ACT, 1989**

AND

IN THE MATTER OF AN APPLICATION BY ASIGE JAPHETH SAVWA, ADVOCATE

IN THE MATTER OF THE DISCIPLINARY TRIBUNAL CAUSE NO. 129 OF 2014

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

EX PARTE APPLICANT: ASIGE JAPHETH SAVWA

JUDGEMENT

Introduction

1. Before this Court is a Notice of Motion dated 3rd February, 2016, in which the *ex parte* applicant herein, **Asige Japheth Savwa**, seeks the following orders:

a) That an order of prohibition do issue to prohibit the Advocates Disciplinary Tribunal from proceeding further with its proceedings in the Advocates Disciplinary Tribunal Cause No. 129 of 2014 including mitigation and sentence.

b) That an order of certiorari to remove into the high court and quash the decision and judgment and orders of the Advocates Disciplinary Tribunal given on 9th November 2015 in the Advocates Tribunal Cause No. 129 of 2014 in which it was decided that the *ex parte* applicant has been guilty of dishonourable conduct and withholding client's documents.

c) That other consequential directions be given as may be deemed necessary.

d) That the costs of these proceedings be provided for.

Ex Parte Applicant's Case

2. According to the Applicant, an advocate of this Court, on 14th March, 2013, his client, one **David Needham**, filed a complaint against him with the Law Society of Kenya in which he raised a complaint of overcharging him in connection with Mombasa High Court Civil Case ELC 24 of 2012, the complaint being that the Applicant should have charged him Kshs 30,000/= instead of Kshs 50,000/=. By a letter dated 21st March, 2013 from the Law Society of Kenya, the complaint was forwarded to the Applicant to which the Applicant responded denying the said allegations.

3. However not being satisfied with the explanation, the complainant decided to file his complaint with the Advocates Disciplinary Tribunal on 28th August, 2014 which complaint was forward to the Applicant who was required to respond thereto by affidavit. Accordingly, by an affidavit sworn on 19th September, 2014, and filed at the tribunal on 1st October, 2014, the Applicant denied the complainants levelled against him. The matter then came up at the tribunal for plea at which the Applicant instructed **Mr. S.M. Keyonzo Advocates** to attend the tribunal and ask the tribunal to enter a plea of "Not guilty" on his behalf which was done and the matter set for hearing on 9th March, 2015.

4. However, before the matter could be heard the Applicant averred that he received yet another notice from the Law Society of Kenya dated 5th May, 2015 in which a new and fresh charge of "dishonourable conduct" was levelled against him. In the said notice he was informed that a plea of not guilty and been entered for him and the case was set for hearing on 9th March, 2015 though he was not asked to plead to this new charge. On the said 9th March, 2015, the Applicant averred that his advocate on record **S.M. Keyonzo Advocates** attended the tribunal for the hearing of the matter and according to information obtained from the said advocate, the complainant did not attend the Court as a result of which the matter was adjourned to 8th June, 2015 for hearing by affidavit evidence. At the request of his said advocate, the Applicant was permitted to file a further affidavit which request was granted. However his said advocate informed him that on 8th June, 2015, the said advocate was unable to attend the tribunal as he had a matter at the Machakos Law Courts to attend to but his clerk **Enock Mulindi** attended the tribunal to ask counsel to hold brief. However, the Applicant came to learn that on that day, the complainant did not again attend court and the matter was stood over generally. However from the judgement, the Applicant discovered that the matter came up again before the tribunal on 20th July, 2015, a day when the complainant seemed to have to have been aware of the date as he attended the tribunal though neither the Applicant nor his advocate, **Mr. Keyonzo** was aware of the date as they had not been notified. From the said judgement, the Applicant learnt that on 20th July, 2015, the complainant was allowed to file and serve yet another further affidavit within 10 days. Again from the judgment the Applicant learnt that he was allowed to file a response thereto (which he was not aware of) within 10 days.

5. The Applicant disclosed that he came to know that the complainant filed a further affidavit on 28th July, 2015 and was supposed to serve him with the further affidavit within ten days, which he posted by courier service to the Applicant's office in Mombasa from Nairobi on 28th July, 2015 (the day he filed the affidavit with the tribunal) which affidavit the Applicant became aware of much later after the filing. To the Applicant, it would also appear on the same day (i.e. 28/7/2015), the matter came up at the tribunal for hearing with neither the Applicant nor his advocate being notified of the date.

6. It was averred by the Applicant that in the further supplementary affidavit filed on 28th Jul, 2015, the complainant raised yet another fresh charge against him which the tribunal termed "professional negligence" and he was never given an opportunity to plead to this new charge and respond to it. Nevertheless, the tribunal went ahead to pronounce judgment, notwithstanding that the Applicant was not aware of these new charges and had not in fact been called upon to respond thereto.

7. The Applicant contended that in the new charge relating to professional negligence, he was condemned for having not advised the complainant of a right to appeal against a "judgment" which he had lost. This finding, the Applicant contended was as amazing as the "Ruling" of **Justice S.N. Mukunya** attached to the complainant's supplementary affidavit dated 23rd July, 2015 clearly showed it was a "ruling" and not a "judgment" and the complainant did not 'lose' a case but on the contrary the other side was allowed to file a defence to the complainant's claim with the complainant being awarded the costs of that application and the case was to proceed to full trial.

8. The Applicant disclosed that the complainant had for a third time appointed and changed advocates from **Marende Birir & Company Advocates** to **J.S. Khakula & Company Advocates**.

9. It was averred by the Applicant that the tribunal also found him guilty of withholding client's documents yet in the documents filed with the tribunal, he had agreed to release the file to the complainant's new advocates, **Marende Birir & Company Advocates** upon the said advocates giving a professional undertaking as to payment of the balance of his fees, an undertaking the said advocates never gave. According to the Applicant, though there was a charge of "professional misconduct" no particulars of such conduct were furnished to him yet the tribunal proceeded to find him guilty of "dishonourable conduct" without hearing him and furnishing me with details of the "dishonourable conduct".

10. It was averred that though the tribunal acquitted him of the original charge of overcharging the complainant because of the conviction meted to him by the tribunal, in the disciplinary cause, the Law Society refused to accept his money for the 2016 practicing certificate and process the same, on the ground that he had a pending conviction of a charge of dishonourable conduct.

11. It was the Applicant's case that the refusal by the Law Society of Kenya to process his practicing certificate application for the year 2016 was *ultra vires* the advocates act and would paralyze and irremediably and adversely affect his legal practice of 40 years.

Respondents' Case

12. In response to the Application, the Respondents averred that Disciplinary Tribunal (herein after 'the tribunal) is a creature of section 57 of the **Advocates Act** Chapter 16 Laws of Kenya and all advocates are subject to its' the jurisdiction.

13. According to the Respondent, on 29th August, 2014, the disciplinary committee of the Law Society of Kenya received a complainant by one **David Needham** vide an affidavit sworn on 13th August, 2014, a copy of which was sent to the accused advocate (the ex parte applicant herein) with a requirement that he responds to the allegations on the affidavit. On 1st October, 2014, the Applicant filed his replying affidavit sworn on the 29th September, 2014.

14. It was averred that on 27th October, 2014, the Applicant was represented at the tribunal by an advocate called **Karanja** who was holding brief for **Keyonzo**, who appeared pursuant to a notice sent to

him. On the 20th July, 2015, the tribunal having satisfied itself that the Applicant was duly served proceeded to direct that the complainant files and serves a supplementary affidavit and the Applicant was also granted leave to respond within 10 days after service and the matter was fixed for a mention of the 24th August, 2015. However despite being notified of the mention for the said date, the Applicant failed to appear on the scheduled date for mention at which point the Tribunal proceeded to give a judgment date which was scheduled for the 9th November, 2015 and a notice to this effect sent to the Applicant.

15. It was deposed that on the judgement date, the Applicant failed to attend and judgment was entered in his absence whereby he was found guilty of dishonourable conduct and convicted. Accordingly, the matter was set for mitigation and sentencing on the 8th February, 2016 and a notice was again sent to the Applicant informing him of the scheduled mitigation and sentence. However on the said date of mitigation and sentencing, the Applicant was represented before the tribunal, only that this time they served the Tribunal with the order issued in these proceedings stopping any further proceedings thereat.

16. It was therefore the Respondent's case that at all material times the matter was coming up for either a mention or a hearing, the applicant was properly notified as the tribunal had to satisfy itself that service had been effected before proceeding with the business of the day and this could only be ascertained from the filed affidavits of service for the diverse dates. Consequently, it was asserted that the Disciplinary Tribunal at all time during proceedings in disciplinary tribunal Cause No. 129 of 2014 followed the laid down procedure in discharging its mandate hence failed to establish any case for this Court to grant the judicial review orders sought which renders the application frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.

Applicant's Rejoinder

17. The averments of the Respondent was controverted by the Applicant vide a further affidavit in which he pointed out the deficiencies and inconsistencies in the Respondent's replying affidavit.

Determinations

18. I have considered the application, the evidence adduced in the form of affidavits and the submissions filed on behalf of the parties herein.

19. In my view the determination of this matter revolves around the issue whether or not the Applicant was served with the hearing notices for 28th July, 2015 when the matter was heard. According to the applicant prior to that date on 8th June, 2015 the matter was adjourned sine die as the parties were absent. The next proceedings then took place on 20th July, 2015 without the Applicant being notified of the same. Accordingly, the Applicant's case was that he was not notified of the proceedings subsequent to 8th June, 2015.

20. The Respondent on the other hand contended that on the 20th July, 2015, the tribunal having satisfied itself that the Applicant was duly served proceeded to direct that the complainant files and serves a supplementary affidavit and the Applicant was also granted leave to respond within 10 days after service and the matter was fixed for a mention of the 24th August, 2015. However despite being notified of the mention for the said date, the Applicant failed to appear on the scheduled date for mention at which point the Tribunal proceeded to give a judgment date which was scheduled for the 9th November, 2015 and a notice to this effect sent to the Applicant.

21. From the proceedings, it is clear that on 8th June, 2015, the matter was stood over generally. There are no minutes on the record showing how the matter was fixed for 20th July, 2015. There is however an affidavit of service to which a letter dated 20th June, 2015 is attached notifying the Applicant of the hearing date for 20th July, 2015. The exhibited document however only indicates a dispatch by post to the Complainant. There is no indication that the said letter was ever dispatched to the Applicant. In the premises there is no material upon which this Court can find that the Applicant was notified of the

proceedings for 20th July, 2015 when the complainant briefly addressed the Tribunal orally. Thereafter the Tribunal granted the parties leave to file further documents and adjourned the same for mention on 24th August, 2015 for compliance and for judgement date. In my view where a matter is adjourned after part hearing and parties granted leave to file further documents, there ought to be an opportunity for the parties to address the further documents where the Tribunal has shown an intention to hear the parties as seems to have been the case in this matter.

22. Even assuming that the Applicant was served with mention notice for 24th August, 2015, the first question would whether on a mention for compliance the Tribunal could proceed to fix a date for judgement in a part heard matter. It is trite and rudimentary that substantive or prejudicial orders ought not to be made on a mention date unless the same are by consent. See **South Nyanza Sugar Co. Ltd. vs. Andrew Ogola Maganda Civil Application No. Nai. 8 of 2003; Re: Timothy Riziki Hopkins Civil Application No. Nai. 194 of 2008; Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332**

23. Since the parties had agreed that the matter would be heard by way of affidavits, some form of a hearing was contemplated. However, according to the Respondent when the matter came for mention on 24th August, 2015 the Respondent Tribunal proceeded to give a judgement date. Although from the proceedings of 20th July, 2015, the mention for 24th August, 2015 was to confirm compliance with the direction for filing of further documents and for a judgement date, the proceedings of 24th August, 2015 do not show that the Tribunal was satisfied that its previous orders with respect to the service on the Applicant with the supplementary affidavit was complied with. The Tribunal therefore ought to have been satisfied that the complainant did serve the Applicant with the supplementary affidavit before proceedings to fix the matter for judgement. By not doing so the Tribunal relied on the averments made by the complainant without affording the Applicant an opportunity to respond to the same.

24. In my view even where the hearing is supposed to be by way of affidavit evidence unless the parties indicate that they do not intend to address the Tribunal, the Tribunal ought to hear them either orally or by way of written submissions.

25. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456**, it was held:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree

indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

26. Article 47(1) and (2) of the Constitution provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

27. In my view fair administrative action imports the rules of natural justice. To fail to adhere to the rules of natural justice may render an administrative action procedurally improper and procedural impropriety is no doubt one of the grounds for grant of judicial review remedies. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

28. As was held in Jafferson M S Nyagesoa vs. The Chairman of the Disciplinary Committee and Another Kisii HCMA No. 189 of 2004:

"The committee is a public body established under the Advocates Act. It has a duty to observe rules of natural justice. Indeed rule 17 of the *Advocates (Disciplinary Committee) Rules* empowers the committee to proceed ex parte if a party fails to appear but this is only when such a party has been given Notice of the hearing date. Otherwise if a party is not served he cannot be accused of failing to appear for he cannot appear unless he is aware of the hearing. There is no evidence that the ex parte applicant was served and as such by proceeding in his absence the respondent denied him his right to be heard. The sentence passed on 10th September, 2004 cannot stand."

29. In Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moiwo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004, the Court expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting

individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence...Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a canon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated..."

30. It follows that this Court has the powers to interfere with the decision of the Respondent arrived at in the exercise of its statutory mandate where the Respondent's powers are not validly exercised. To make a decision adversely affecting the applicant without affording the applicant an opportunity of being heard is in my view such invalid exercise of power warranting this Court to interfere.

31. In my view the respondent broke all the procedural rules relating to fairness in its proceedings. It issued prejudicial orders on a mention date; it did not bother to confirm whether its directions were complied with in order to ensure the fairness of the process; and it did not confirm whether the Applicant was duly notified at every stage of the proceedings. Accordingly, its decision cannot be allowed to stand.

32. In the premises I find merit in the Motion dated 3rd February, 2016.

Order

33. According the orders which commend themselves to me and which I hereby grant are as follows:

1. An order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the decision and judgment and orders of the Advocates Disciplinary Tribunal given on 9th November 2015 in the Advocates Tribunal Cause No. 129 of 2014 in which it was decided that the ex parte applicant was guilty of dishonourable conduct and withholding

client's documents which decision, judgment and orders are hereby quashed.

2. An order of prohibition is hereby issued against the Advocates Disciplinary Tribunal prohibiting it from proceeding further with its proceedings in the Advocates Disciplinary Tribunal Cause No. 129 of 2014 including mitigation and sentence.

3. The costs of this application are awarded to the applicant to be borne by the Respondent.

Dated at Nairobi this 20th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamunya for Mr Keyonzo for the Applicant

Miss Mwinzi for the Respondent

Cc Mwangi