



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 13 OF 2014**

**(CONSOLIDATED WITH NO. 36 OF 2014)**

**IN THE MATTER OF: A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO ARTICLES 22, 23, 165 (3) (B) 7 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE SUPREMACY OF THE CONSTITUTION AS PER ARTICLE 2 (1 AND 4) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE FUNDAMENTAL RIGHT AND FREEDOMS UNDER ARTICLE 25 (C) AND 50 OF HE CONSTITUTION REGARDING THE RIGHT TO A FAIR TRIAL AND HEARING**

**AND**

**IN THE MATTER OF: THE UNCONSTITUTIONALITY OF THE COMPOSITION OF THE DISCIPLINARY TRIBUNAL CREATED UNDER SECTION 57 OF THE ADVOCATES ACT (CAP 16) OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: DISCIPLINARY TRIBUNAL CAUSE NO. 33 OF 2014**

**SHADRACK KAMBI & OTHERS VS. ROBINSON MALOMBO**

**AND**

**IN THE MATTER OF: UNDERMINING THE PRINCIPLE OF FAIR AND NATURAL JUSTICE**

**BETWEEN**

**ROBINSON O. MALOMBO T/A O.M. ROBINSON &**

**COMPANY ADVOCATES.....PETITIONER**

**VERSUS**

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

**2. THE ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**SHADRACK KAMBI & 34 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

1. This Judgment relates to Petitions Number 13 of 2014, and Number 36 of 2014 which because they are brought by the same Petitioner and raise substantially the same issues, were consolidated by orders made on 20<sup>th</sup> February, 2015 and be heard together.

2. Petition No. 13 of 2014 sought the following orders –

(a) a conservatory order directed at the Disciplinary Committee of the Law Society of Kenya, the First Respondent from proceeding with the hearing of DCC No. 33 of 2014; Petitioner Shadrack Kambi & 34 others vs. Robinson Malombo;

(b) a declaration that any proceedings heard and/or determined by the First Respondent in DCC No. 33 of 2014 between Shadrack Kambi & 34 others vs. Robinson Malombo are in breach of the Petitioner's fundamental rights and freedoms as enshrined in Article 25(2) and 50(1) of the Constitution and should be declared null and void **ab initio**;

(c) a declaration that the First Respondent as constituted under the provisions of Section 57(1) of the Advocates Act, (Cap 16, Laws of Kenya) is unconstitutional and in breach of the Petitioner's fundamental rights and freedoms as enshrined on Article 25(c) and 50(1) of the Constitution;

(d) a declaration be issued that Section 57(1) of the Advocates Act is unconstitutional in so far as constituting a Tribunal that is in conflict with the provisions of Articles 25(c) and 50(1) of the Constitution;

(e) that costs in favour of the Applicant be afforded.

3. Likewise in Petition Number 36 of 2014, the Petitioner sought a similar conservatory order, and a similar declaratory order that any further proceedings heard and determined by the first Respondent in DCC No. 181 of 2013 between **Robert Mutuku Mutiso vs. Robinson Malombo** are in breach of the Petitioner's fundamental rights and freedoms as enshrined in Article 25(c) and 50(1) of the Constitution and should be declared null and void **ab initio**.

4. In the event conservatory orders were issued on 14<sup>th</sup> November, 2014 staying proceedings, pursuant to the Petitioner's Notices of Motion dated 25<sup>th</sup> March, 2014, in Petition No. 13 of 2014 and dated 12<sup>th</sup> June, 2014 in Petition No. 36 of 2014.

5. The facts are not in dispute. The Petitioner is an Advocate of the High Court of Kenya. He acted as Advocate for Robert Mutuku Mutiso, the Interested Party in Petition Number 36 of 2014. He had recovered a sum of Kshs. 332,500/= in Kilifi Senior Resident Magistrate Court Civil Case Number 177 of 2007. The said sum was by consent reduced to Kshs. 320,000/=. This is per the Replying Affidavit of Mercy K. Wambaa, the Secretary of the Law Society, sworn on 30<sup>th</sup> May, 2016, and filed on 31<sup>st</sup> May, 2016.

6. There is also no dispute that the Petitioner failed to pay the said sum. The Interested Party made a

complaint to the Law Society of Kenya, and the complaint was, in the absence of settlement by the Petitioner, referred to the Disciplinary Tribunal of the Law Society in terms of Section 53(4)(b) of the Advocates Act. The Society constituted Disciplinary Case Cause No. 181 of 2013, **Robert Mutuku Mutiso vs. Robinson Malombo**.

7. Though the Petitioner originally pleaded not guilty, he changed his plea to guilty, and was convicted accordingly and the Tribunal fixed the matter for mitigation. In mitigation the Petitioner informed the Tribunal that he had paid Kshs. 227,240/= and Kshs. 45,000/= by way of costs. The only issue outstanding was sentencing. The Tribunal could not mete out a sentence because the Petitioner came to this court claiming that his fundamental rights and freedoms had been violated by the Respondents. He obtained conservatory orders restraining the Tribunal from sentencing the Petitioner.

8. The Petitioner raises an ingenious argument. Through his counsel, Dr. Khaminwa, the Petitioner says that his fundamental rights and freedoms to fair hearing guaranteed under Articles 25(2) and 50(1) of the Constitution cannot be limited and that consequently his prosecution by the Disciplinary Tribunal of the Law Society of Kenya is null and void, **ab initio**.

9. The Disciplinary Tribunal of the Law Society and the Attorney-General (the Respondents) deny violation of any of the Petitioner's fundamental rights and freedoms as contended by the Petitioner.

10. The Respondents say that the Tribunal reserved the right to mete out a sentence and appropriate fine upon the Petitioner for breaching the Advocate's Code of Ethics and the Advocates Act, as well as misleading the Tribunal.

11. The Respondents also say that the Petitioner was duly represented by an Advocate at all stages of the proceedings and was accorded the constitutional rights to fair administrative action and hearing before an impartial tribunal in accordance with Article 47(1) and 50(1) of the Constitution.

12. The Respondents say that the Petitioner is not sincere in filing these Petitions and that the Petitions are calculated to delay the proceedings of the Tribunal properly acting within its mandate. The Respondents deny any bad faith or conflict of interest in the proceedings at the Tribunal which are being conducted pursuant to a statutory mandate under the Advocates Act for a complaint duly referred to it by a member of the public.

13. The Respondents say that no prejudice will be suffered by the Petitioner in the event of due procedure being followed by the Tribunal or the Petitioner being sentenced for his errant actions while being a member of the Law Society.

14. The Respondents contend that in the event of being sentenced by the Tribunal, the Petitioner has a right of appeal to the High Court against any eventual orders made by the Tribunal under Section 62(1) of the Advocates Act if he were dissatisfied with the Judgment. The Respondents therefore urged the court to dismiss the Petition with costs.

### **The Petitioner's Case**

15. The Petitioner's case is ingenious, as I said in the opening paragraphs of this Judgment. The Petitioner says that the composition of the Tribunal which is making an inquiry into his breach of the Advocates' Code of Ethics, is comprised of members of the Executive Branch of Government namely the Attorney-General and the Solicitor-General, while the six members of the Tribunal are like himself, Advocates. The Petitioner therefore contends that his right to fair hearing which is guaranteed by Article 50(1) of the Constitution is being curtailed contrary to Article 25(1) which in turn categorically provides that a right to fair hearing cannot be limited.

### **Analysis and Determination**

16. Article 50(1) of the Constitution provides –

**“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

17. And Article 25 of the Constitution sets out the rights which cannot be limited, and says –

**“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

**(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**

**(b) freedom from slavery or servitude; (c) the right to a fair trial.”**

18. Before determining what constitutes “fair hearing”, I will attempt to determine what constitutes an “impartial tribunal” or “body”.

19. The nearest definition of a “tribunal” in the Constitution is the word **“person”**, which under Article 260 of the Constitution is defined as including, a **“company”**, **“an association”** or other body of persons whether incorporated or unincorporated. In the absence of a specific definition of the expression **“tribunal”** or “body” in the Constitution, we must go to secondary sources to find an appropriate definition of the expression **“tribunal”**.

20. According to Longman Dictionary of Law, 7<sup>th</sup> Edition defines **“Tribunal”** as –

**“bodies outside the hierarchy of the courts with administrative or judicial functions, exercising an independent jurisdiction” “Administrative” tribunals are established by the State, “domestic tribunals” are set up by professional bodies.....Their members include lawyers and laymen with specialized knowledge.”**

21. Whether judicial or administrative a tribunal is appointed to adjudicate or enquire into some disputed question. The Advocates Disciplinary Tribunal is established under Section 57 of the Advocates Act. That provision is anchored or underpinned by Article 50(1) of the Constitution. That provision provides for resolution of disputes in law, by either a court or an independent and impartial tribunal or body.

22. Impartial and independent means even-handed not subject to the control of the appointer. The Petitioner contends that the membership of the Advocates Disciplinary Tribunal comprises of persons who hold offices to which the Petitioner aspires to, namely, Office of the Attorney-General and the Office of Director of Public Prosecutions. The Petitioner says, they are likely to be biased so as to ensure that he would not ascend to those offices.

23. **“Bias”** or **“impartiality”** means lack of even-handedness. Its implied requirement of natural justice, is that no man shall be a Judge in his own cause. Article 50(2) sets out at length the attributes of fair hearing, and in particular the presumption of innocence until the contrary is proved (Article 50(2)(a), to be informed of the charge, with sufficient detail to answer it (Article 50(2)(b)) to have adequate time and facilities to prepare a defence (Article 50(2) (c).

24. In summary, at any hearing the tribunal is bound to follow a procedure which is fair to both sides (the Petitioner and the Interested Party – the complainant), while remaining responsible for the fair conduct of the proceedings, that procedural fairness is applied to the conduct of all involved in the proceedings.

25. The offices of both the Attorney-General and the Director of Public Prosecutions are independent offices, and they are performing their duties while being members of the Advocates Disciplinary Tribunal. As members of the Tribunal, they are a body of persons charged with quasi judicial function to enquire into the conduct of the Petitioner. They are not concerned with the Petitioner’s qualifications or otherwise to hold public office or in particular the offices of the Attorney-General or Director of Public Prosecutions.

26. I believe there are many Advocates who aspire to ascend to the office of “Judge”. To say that Judges would be biased against an Advocate because he aspires to be a Judge, is stretching the doctrine of bias to absurdity. Likewise to say that the Attorney-General or the Director of Public Prosecutions would be biased because they hold office in the Executive Branch of Government, without more would be equally absurd.

27. The right to fair hearing guaranteed under Article 50(2) of the Constitution, would be challenged if the Tribunal failed to observe or adhere to the provisions of Article 50(2) aforesaid. Without such material, the Petitioner cannot claim a limitation to the right to fair hearing as provided in Article 25(c).

### **Determination**

28. In the circumstances, this is one of those Petitions which the Indian Supreme Court Judges described as “**publicity interest litigation**” or “**politics interest litigation**” in the case of **Dr. B. Singh vs. Union of India & Others** [Petition No. 122 of 2004] -

**“...Public Interest Litigation which has now come to occupy an important field in the administration of law should not be “publicity interest litigation” or “private interest litigation” or “politics interest litigation” or the latest trend “paise income litigation”. If not properly and strictly regulated at least in certain vital areas or spheres and abuse averted it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well to malign not only an incumbent to be in office but demoralise and deter reasonable or sensible and prudent people even agreeing to accept highly sensitive and responsible offices for fear of being brought into disrepute with baseless allegations. There must be real and genuine public interest involved in the litigation and concrete or credible basis for maintaining a cause before court and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction.”**

29. I find no merit in either Petition and the same are hereby dismissed with costs to the Respondents.

**Dated, Signed and Delivered at Mombasa this 29<sup>th</sup> day of November, 2016.**

**M. J. ANYARA EMUKULE, MBS**

### **JUDGE**

In the presence of:

No Appearance for Petitioner

Mr. Ngari for 1<sup>st</sup> Respondent

Mr. Sitonik for 2<sup>nd</sup> Petitioner

No Appearance for Interested Parties

Mr. Kaunda Court Assistant