



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 445 OF 2013**

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

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

**IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA.**

**IN THE MATTER OF AN APPLICATION BY THE APPLICANT, JOHN WACIRA WAMBUGU, FOR LEAVE**

**TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION DIRECTED TO THE DISCIPLINARY TRIBUNAL**

**OF THE LAW SOCIETY OF KENYA (L.S.K) .**

**REPUBLIC .....APPLICANT**

**VERSUS**

**DISCIPLINARY TRIBUNAL OF THE**

**LAW SOCIETY OF KENYA.....RESPONDENT**

**EXPARTE: JOHN WACIRA WAMBUGU**

**MONICA WANJIKO NGUGI**

**& VICTORIA JOHN NGUGI.....INTERESTED PARTIES**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 19<sup>th</sup> December, 2013, the ex parte applicant herein, **John Wacira Wambugu**, seeks the following orders:

- (a) **THAT** an order of certiorari do issue to quash to the High Court the proceedings of the Law Society of Kenya Disciplinary Tribunal in Cause No. 79 of 2013 involving the applicant, John Wacira Wambugu, the order issued therein on 4<sup>th</sup> November, 2013 requiring the applicant to deposit a sum of Kshs 23, 984,708/= with the Law Society of Kenya and all other subsequent orders.

(b) **THAT an order of prohibition do issue to prohibit the Law Society of Kenya Disciplinary Tribunal from proceeding further with the disciplinary cause No. 79 of 2013 involving John Wacira Wambugu pending the final determination of the Mombasa High Court Succession Cause No. 416 of 2006 estate of Grace Wanjiku Ngugi (deceased) and Nairobi High Court Succession Cause No.1481 of 2011 estate of John Mbugua Ngugi (deceased).**

(c) **THAT costs of this application be met by the Respondents.**

### **Applicant's Case**

2. The application was supported by an affidavit sworn by the applicant on 19<sup>th</sup> December, 2013.

3. According to the applicant, his firm of advocates formerly **Wambugu, Motende & Co Advocates** was instructed by **John Mbugua Ngugi** (hereinafter referred to as the deceased) to apply for grant of the letters of administration and carry out the distribution of the estate of **Grace Wanjiku Ngugi** (deceased) on his behalf and on behalf of the estate of **Grace Wanjiku Ngugi** (deceased) in Mombasa High Court Succession Cause Number 416 of 2006 - Estate of **Grace Wanjiku Ngugi** (deceased).

4. According to the applicant, letters of administration of the estate on behalf of the estate of the said **Grace Wanjiku Ngugi** were issued to the deceased on 7<sup>th</sup> April, 2010 and thereafter were confirmed and the mode of distribution was agreed to by the parties. Pursuant to the said mode of distribution, the properties of the said estate were to be sold and the proceeds shared as per the certificate of confirmation of grant. However issues/dispute arose between the administrator of the estate, the deceased and the beneficiaries of the estate as he was accused of not having administered the estate properly leading to several applications being filed and heard before the Honourable Court in Mombasa High Court Succession Cause Number 416 of 2006.

5. As a result the court made an order on 26<sup>th</sup> November, 2010 directing that the parcels of land L.R Number 209/8/16 I.R No. 51787 located at parklands herein Nairobi be sold to **Jalaram Pride Apartments Limited** for Kshs 69,500,000 and the parcel of land L.R No. 209/4194/04 I.R No. 10228 located at Juja Road herein Nairobi be sold to **M. Dalmar Trading Company Limited**. Further, the court ordered the applicant's firm of advocates together with the firm of **Mereka & Co Advocates** to hold the proceeds of the sale jointly on behalf of the estate.

6. However, the administrator of the estate failed to complete the sale and another application was filed before the honourable court consequent upon which the Court on 11<sup>th</sup> March, 2011 confirmed the sale of two parcels of land and ordered the applicant's firm of advocates not to release the money held by it on behalf of the estate pending further orders of the court.

7. According to the applicant, L.R NO. 209 /4194/14 I.R NO. 10228 Juja Road Nairobi, was sold to **M. Dalmar Trading Company Limited** at the agreed purchase price of Kshs 22,000,000 which sum was deposited in joint account with the firm of **M/S Mereka & Co Advocates**. After taking account the firm of **Mereka & Co Advocates** released a sum of Kshs 7,349,732 being a share of the estate the deceased to the applicant's firm upon a professional undertaking issued by the later.

8. With regard to the sale and purchase of the parcel of land L.R Number 209/8/16 I.R No.51787 located at parklands Nairobi, the applicant deposed that it was sold to **Jalaram Pride Apartments Limited** at the agreed purchase price of Kshs 69,500,000 and out of the said purchase price an amount of Kshs 950,000 was paid by the purchasers directly to the deceased who was the administrator of the estate; an amount of Kshs 400,000 was paid by the purchasers directly to **Victoria John Ngugi**; an amount of Kshs 1,500,000 was paid out to the firm of **Justus Munyithya & Co Advocates** who were acting on behalf of the estate prior to our appointment; and that a total sum of Kshs 8,493,789/= was paid out as transaction costs for agency fees, land rates and rent clearance certificates, change of user, extension of lease of the property and stamp duty. It was further deposed that the balance of the purchase price of Kshs 58,156,211 which was being financed by M/S Development Bank of Kenya Limited was paid out as follows: Kshs 49,921,580/= to **M/S Mereka & Co Advocates** who were acting on behalf of the other beneficiaries of

the estate in line with the mode of distribution as per the certificate of confirmation of grant while Kshs 8,234,631/= was paid to the applicant's firm on behalf of the estate of the deceased, **John Mbugua Ngugi**.

9. It was therefore contended that in the circumstances, the total amount received by the applicant's firm of advocates of behalf of the estate of **John Mbugua Ngugi** with regard to the sale of the two properties was Kshs 15,584,363/= and not Kshs 27,484,708 as alleged by the administrators of the estate in the Law Society of Kenya Disciplinary Cause No. 79 of 2013 out of which an amount of Kshs 2,987,615 had already been paid to the administrators (beneficiaries) of the estate of **John Mbugua Ngugi** (Deceased) as they were in dire need of school fees and other expenses. However, the applicant's firm was unable to release the full amount to the administrators of the said estate as his family set up is polygamous in nature and the administrators failed to apply for confirmation of grant in Nairobi High Court Succession Cause No. 1481 of 2011 so as to enable the firm release the money to the rightful beneficiaries.

10. It was deposed further that all the issues as to the administration and distribution of the estate of **Grace Wanjiku Ngugi** are not yet settled and the High court in Mombasa is fully seized of the matter. In addition, the administrators of the estate failed to agree with the firm on the amount of legal fees payable for the huge and tedious work done prompting the firm to file its bill of costs for taxation before the High Court in Mombasa and in Nairobi. The applicant's position was however that instead of pursuing the release of funds through the rightful procedure as provided for in the law of succession so as not to infringe on the rights of the other beneficiaries of the estate, the administrators of the estate of **John Mbugua Ngugi** sought to privately institute disciplinary proceedings against the applicant alleging gross professional misconduct instead of going through the Advocates Complaints Commission if there was any professional misconduct on the applicant's part. Despite raising a preliminary objection and writing to the respondent disciplinary tribunal alleging abuse of process as the matter was *sub-judice*, and in addition, swearing an affidavit which was filed with the Law Society of Kenya Disciplinary tribunal on 24<sup>th</sup> September, 2013 disputing the claim, the respondent's disciplinary tribunal chaired by **Hon. Ezekiel Wanjama** sitting on 16<sup>th</sup> September, 2013 directed the complainants who are the administrators of the estate to pursue the High Court Succession Cause in Mombasa before proceeding further with the disciplinary proceedings and further ordered that the matter be mentioned on 7<sup>th</sup> October, 2013 and on 4<sup>th</sup> November, 2013 to confirm progress with regard to the succession cause. In line with the said orders the concerned parties appeared before **Hon. Lady Justice Maureen Odero** on 16<sup>th</sup> October, 2013 with regard to Mombasa High Court Succession Cause No. 416 of 2006 Estate of **Grace Wanjiku Ngugi** who reserved her directions to 8<sup>th</sup> November, 2013.

11. However when the parties appeared for mention before the disciplinary tribunal on 4<sup>th</sup> November, 2013 to confirm progress with regard to Mombasa High Court Succession Cause No. 416 of 2006 Estate of **Grace Wanjiku Ngugi**, the respondent's disciplinary tribunal chaired by **Hon. Ambrose Weda** unprocedurally reversed the orders issued on 16<sup>th</sup> September, 2013 and ordered the applicant to deposit a sum of Kshs 23,984,708/= with the law society of Kenya without hearing the matter on *merit*.

12. In the applicant's view, the respondent's disciplinary tribunal sitting on 4<sup>th</sup> November, 2013 acted *Ultra Vires* by issuing an order directing the applicant to deposit a sum of Kshs 23,984,708 despite the fact that the matter is substantially and directly in issue in Mombasa High Court Succession Cause No. 416 of 2006 estate of **Grace Wanjiku Ngugi** and was pending directions on 8<sup>th</sup> November, 2013 before **Hon. Lady Justice Maureen Odero**. On 7<sup>th</sup> November, 2013 **Hon. Lady Justice Maureen Odero** issued an order directing that parties do take accounts and issues of the distribution of the estate of **Grace Wanjiku Ngugi** (deceased) be settled before any of the funds are released to the rightful beneficiaries. It was therefore contended that the respondent's Disciplinary tribunal acted *ultra vires* on 4<sup>th</sup> November, 2013 and usurped the role of the High Court with regard to distribution of the estates of **Grace Wanjiku Ngugi** and **John Mbugua Ngugi**. The respondent's Disciplinary tribunal was further accused of failing to take into account the fact that the money held by the applicant is with regard to the estate of **John Mbugua Ngugi** being his rightful portion of the estate of **Grace Wanjiku Ngugi** of which no confirmation of grant in respect to his estate has ever been done to enable the applicant release the money

to the rightful beneficiaries.

13. The applicant contended that the amount of Kshs 23,934,708 was arrived at by the respondent's disciplinary tribunal sitting on 4<sup>th</sup> November, 2013 due to an error of fact and without due regard to a statement of account and that the applicant was not accorded a fair hearing before the disciplinary tribunal as he was not present in person due to the fact that the matter was slated for mention to confirm progress with regard to the succession cause in Mombasa High Court. To the applicant, it is not a professional misconduct when an advocate complies with the order of the court as is the case herein and rules of procedure as provided for in the law of succession.

14. It was submitted on behalf of the applicant that the Respondent only has powers to deal with matters of professional misconduct of an advocate but not powers to interfere with the administration of the estate of a deceased which powers are vested in the High Court under the **Law of Succession Act** hence the Respondent acted in excess of its power in dealing with a matter which was the subject of a High Court Cause. It was further contended that as the matter was pending before the High Court the Respondent had no power to entertain the same and give the orders it gave. According to the applicant it was incomprehensible how the applicant could be accused of retaining money which as yet did not belong to the interested parties.

15. It was contended that the decision of the applicant amounted to both errors of law and fact and was in breach of the requirement for fair hearing since the applicant was never accorded a fair hearing as there was a breach of the rules of natural justice.

#### **Interested Parties' Case**

16. In opposition to the application the interested parties filed a replying affidavit sworn by **Monica Wanjiko Ngugi** who together with one **Victoria Ngugi**, her mother (hereinafter referred to as the interested parties) were the co-administrators of the estate of **John Mbugua Ngugi**, the deceased.

17. According to the deponent, at the time of his death, the deceased had engaged the Applicant from the firm of **Wambugu & Motende Advocates** in the conveyance of two properties being L.R. No. 209/8/16 (original Number 209/8/7/2) and L.R. No. 209/4194/04 in which he was the vendor. After the deceased's death, the interested parties instructed the Respondent who undertook to procure the letters of administration on their behalf and the grant of the said letters was obtained.

18. According to the deponent, the said properties were sold for the sum of Kshs 69,500,000/- for L.R. No. 209/8/16 (original Number 209/8/7/2) and Kshs 20,000,000/- for L.R. No. 209/4194/04 and the proceeds therefrom were to be divided equally among the estate's beneficiaries (net of any attendant costs). It was further deposed that due to pressing financial needs, the deponent's mother over time managed to obtain an aggregate sum of Kshs 2,545,000/- from the Applicant. However, sometime late 2013, the Applicant stopped taking their calls, became elusive and would persistently fail, refuse and/or neglect to attend and show up for meetings that had been scheduled with him. Apart from that their requests to be furnished with full particulars of the conveyance and also a comprehensive account of the application of the balance of the proceeds, from the sale of the properties, due to her late father's estate were often ignored thereby prompting them to inform the Applicant that we were withdrawing our instructions. Subsequently they engaged other advocates in attempt to have the balance of the proceeds of the sale delivered to her late father's estate, even filing a complaint against the Applicant before the Advocates' Disciplinary Committee being **MISC. CAUSE NO. DCC 79 OF 2013**, but all their efforts did not bear any fruit.

19. It was averred that upon receiving and perusing the complaint the Respondent was satisfied there was a *prima facie case* which had been established and that the matter should be placed for plea and the Applicant was notified accordingly. He was given an opportunity to respond to the allegations before the matter was fixed for plea taking, which he did and clearly articulated his defence both in the correspondence with LSK and in the Notice of Preliminary Objection and Replying Affidavit. He further he chose to be represented by Counsel and they were given an opportunity to be heard each time the

matter came up. It was contended that the Respondent did not act *ultra vires* as it is mandated to receive, hear and determine complaints against advocates such as the Applicant herein. Since in Kenya advocates are bound to be members of the Law Society of Kenya on admission, it is the Law Society that supervises their conduct with power to have proper control of the Advocates and that is why it has a disciplinary committee.

20. It was the deponent's position that on the face of it, the Applicant holds money which belongs to the Estate of the deceased, and he does not deny so, yet he has no colour of right to hold the same, as that money does not belong to him, as payment has been demanded by the client. It was asserted that Client money is defined under the **Advocates (Accounts) Rules** as money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate an agent, bailee, trustee, stakeholder or in any other capacity.

21. According to the deponent, the Respondent's order on 16<sup>th</sup> September 2013 did not stay the disciplinary proceedings as suggested by the Applicant. In any case it is trite law that civil and criminal proceedings against the same Respondent can proceed concurrently. To her the proceedings before the Respondent are punitive in nature whereas the proceedings before **Lady Justice Odera** are Civil in nature and although the issues overlap, the provisions of *sub judice* cannot be invoked. It was the deponent's view that the Advocates Disciplinary Committee has jurisdiction to take punitive disciplinary actions against its members and in so doing, uphold the integrity of the legal profession. Since the applicant was illegally withholding funds belonging to the interested parties, the Respondent ordered that the sums be deposited with it as a neutral body and this did not violate the terms of the orders of **Lady Justice Odera**.

22. It was further deposed that whereas the Applicant is pleading that this court allows him a chance to prove that he had paid part of the Kshs 23,984,708/-, this court is not concerned with the merits of the case before the Disciplinary Committee since Judicial Review is concerned with the fairness of the process at the Disciplinary Committee. Whether or not the money was paid however will be a matter for the Disciplinary Committee. Moreover, the Disciplinary Committee has not ordered the release of the funds to the complainants but has ordered that the funds held by the Advocate be deposited with the Society to hold in trust for the benefit of all persons who shall be entitled to the funds. It was the deponent's position that by the fact that they have filed the case before the disciplinary committee, is a clear indication that they have lost all faith and trust in the Advocate hence their prayer that the funds be held by an independent third party.

23. The interested parties' case was that no evidence was rendered before this Honourable Court or the tribunal to prove the payment of the various amounts allegedly paid out to various beneficiaries and set out in paragraph 10(c) to 10(f) and in the absence of such evidence, the Advocates assertions are baseless and unfounded; that the Advocate did not state who paid out these funds and where the Advocate claims to have only received the sum of Kshs 15,584,363/=, it is not explained where the extra funds to pay out the sums alluded to in the affidavit came from; that furthermore, the allegation that counsel only received Kshs 8,234,631 from the proceeds of the sale of L.R. No. 209/8/16, I.R. No. 51787 which was sold at Kshs 69,500,000/= is to say the least preposterous for the fact that the applicant admits that the estate of **John Ngugi** was entitled to 34% of the proceeds and from the total of Kshs 58,156,211/= which was the alleged net amount paid to the two Advocates, the family of **John Mbugua Ngugi** was entitled to 34% of this which is the sum of Kshs 19,773,111.7 of this amount; and that it was imperative that the firm of **Mereka & Co Advocates** being a party to these matters be enjoined to this proceedings to explain the disbursement of funds.

24. The position of the interested parties was that the Ngugi family has never been embroiled in dispute and there has never been infighting hence it was strange that the same Advocate who was involved in the application for the administration of the estate failed to complete the administration and is now claiming that he was impeded in doing so. To the contrary as is evidenced in the bundle of documents annexed the other families have since been paid their respective percentages of the estate and are not claiming anything from the estate of **John Mbugua**.

25. It was averred that under S 60(7) of the *Advocates Act*, the Respondent is empowered to assess the costs due to an Advocate if a bill of costs has not been taxed. Further to the above the Respondent has the jurisdiction to determine the costs due to an advocate under S 60 A (2) of the *Advocates Act*. Furthermore, of the bills that have been filed, one has already been taxed while the other two are pending finalization.

26. According to the deponent, in light of the Respondent's withholding of the funds due to the deceased's estate, the beneficiaries face and continue to suffer great inconvenience otherwise in their day-to-day lives for want of finances since the estate is unable to sustain the demands of school fees and meet costs of other necessities for these beneficiaries for much longer.

### **Determinations**

27. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

**“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.”**

28. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **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** and 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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.”**

29. 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 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

30. 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.

31. In this application, it is contended that the Respondent had no jurisdiction to deal with a matter arising from succession issues. The Applicant contends that since the succession cause was pending before the High Court the Respondent had no jurisdiction to entertain any dispute arising therefrom. In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent. Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain.

32. It is further contended that the Respondent ought not to have made the impugned orders since the complainants before it had not yet become entitled to the proceeds of the sale. Whereas that may well be correct, the issue in my view falls within the realms of the merits of the Respondent's decision rather than the process. If the Applicant was aggrieved by the Respondent's decision on that score, it ought to have invoked the appellate process rather than challenge such a decision by way of judicial review. As was held in Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155:

**“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.”**

33. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the Boundary Commission [1983] 2 WLR 458, 475:

**“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”**

34. It was further contended that the orders made by the Respondent were made when the matter was coming up for a mention and without affording the applicant a hearing. The law with respect to that issue was succinctly laid in Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 where it was held that when a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. Therefore the law is not that the Court or any other Tribunal is precluded from making any order on a mention date but what the Court is not permitted to do is to make substantive orders on a mention date. A substantive order, as opposed to a merely procedural order is an order which goes to the root of the issues before the Court or the Tribunal. An order which is simply meant to preserve the subject matter of the dispute in my view cannot be termed a substantive order since

the Respondent was properly entitled to preserve what was before it so that its proceedings are not rendered superfluous. By directing that the sum in dispute be deposited it is my view that the Respondent was not determining the complaint before it but was simply preserving the subject matter of the dispute. I therefore do not agree with the applicant that such an order was without or in excess of the Respondent's jurisdiction.

35. Apart from that it is stated in *Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270*:

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”**

36. In this case even if I were to find that the Respondent's action called for the grant of judicial review, taking into account the need to preserve the subject matter of the dispute I would have been very reluctant to grant orders whose effect may well lead to unjust consequences to the persons who are entitled to the proceeds of the sale of the subject properties.

37. Having considered the application herein it is my view that the Notice of Motion dated 19<sup>th</sup> December, 2013 has no merit and the same is dismissed with costs.

38. The sum of money deposited herein shall be released to the Law Society of Kenya for safe custody pending distribution of the estate or further orders of the Court.

**Dated at Nairobi this 21<sup>st</sup> Day of January 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence:**

**Mr Ngige for the Applicant**

**Cc Patricia**