REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

J. R MISCELLANEOUS CIVIL APPLICATION NO. 498 OF 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY WAMBUGU KARIUKI ADVOCATE FOR AN ORDER OF PROHIBITION AGAINST THE DISCIPLINARY COMMITTEE

AND

IN THE MATTER OF DISCIPLINARY COMMITTEE CAUSE NUMBER 103 OF 2008

AND

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16, LAWS OF KENYA

AND

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

BETWEEN

REPUBLIC …...APPLICANT

AND

THE DISCIPLINARY COMMITTEE ....RESPONDENT

EX-PARTE.............................WAMBUGU KARIUKI - ADVOCATE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th August, 2008, the *ex parte* applicant herein, **Wambugu Kariuki,** seeks the following orders:

a. **THAT AN ORDER OF PROHIBITION do issue prohibiting the respondent or its authorized agents from commencing/continuing with the proceedings in Disciplinary Cause No.103 of 2008 or any variation thereof or any complaint akin to the same before the respondent namely the Disciplinary Committee.**

b. **<u>THAT</u> costs of and incidental to this suit.**

<u>Ex Parte Applicant's Case</u>

2. The application supported by two sworn by the Applicant on 29th August, 2008 and 27th May, 2013.
3. According to the Applicant, he received a letter dated 25th July 2008 requiring his attendance thereat on the 11th September 2008 for the taking of plea in Disciplinary Committee Cause No.103 of 2008 (hereinafter referred to as "the said cause"), which according to him is founded on the complaint by **Joyce Wamutira Nyamu** (hereinafter referred to as "the complainant") and contained in the affidavit of Commissioner **Joseph Kingarui** in respect of damages recovered from Milimani Chief Magistrate Civil Case No. 634 of 2007 (hereinafter referred to as "the said suit") for and on behalf of Joyce the complainant.
4. He deposed that in the complaint, he was charged with failing to account to the complainant for the sum of **Kshs.2,146,932/=** withholding the same, and failing to keep the complainant informed of the correct payment, which amount was together with other moneys paid for other claims because what was payable as ordered by Court in respect of the said suit is Kshs 1,876,785/=.
5. It was averred that the said complaint is not only a sham, and based on material non-disclosure on the complainant's part, but is also in conflict with the ***sub judice*** rule, as there are four (4) Advocate –Client bills of costs pending for hearing and taxation before this Court, and whose outcome would most definitely affect the foundation of the respondents cause in Disciplinary Committee Cause No. 103 of 2008.
6. He explained that through an instruction form duly executed by the complainant, his firm of advocates took over the conduct of the said suit on behalf of the complainant and filed a petition in the High Court for Letters of Administration *Ad Litem* upon procurement of which he filed Civil Suit No.4253 of 2003 at the Mombasa Chief Magistrate's Courts. Vide his letter dated 15th October 2003 he informed the complainant of the filing of the suit aforementioned and duly informed the complainant of the hearing dates to her cause in 4253 of 2003 through a letter dated 19th February 2004. On the 23rd February 2004, the complainant was further informed of the progress therein by informing the complainant of payments made to an eye witness in the said suit. Subsequently on the 30th June 2004 judgement was entered therein and the complainant was duly informed of the same vide his letter dated 5th July 2004 and on the 8th July 2004, wrote to the complainant requiring her attendance at his chambers for further instructions.
7. It was however deposed that on the 26th July 2004 an appeal was filed against the complainant's judgement and the Complainant was informed of this development vide a letter of 3rd August 2004, the complainant was informed of the appeal. On the 4th August 2004, the applicant filed a cross – appeal on behalf of the complainant and informed the complainant of the hearing of an application in the appeal and requested for funding on the 1st September 2004. Further, on the 17th October 2004 the complaint was informed of the progress therein and the financial strain experienced by the firm in funding her cause.
8. It was deposed that on the 30th September 2006 the firm procured the decree in CMCC 4253 of 2003 and informed the complainant vide a letter of same day. On the 20th January 2007, the applicant wrote to the complainant informing her of the need to file a declaratory suit which he did file on 2nd February, 2007 and on the 15th March 2007 and 28th May 2007 the complainant was further informed of the progress on an application to strike out the defence. Upon obtaining the decree in the declaratory suit viz 634 of 2007, he proceeded to inform the complainant vide a letter of 9th August 2007 and actually paid her **Kshs.143,000/=.** On the 1st October 2007, the complainant was informed of the defendant's bouncing cheques and paid a further **Kshs.60,000/=.** On the 6th November 2007, the complainant was informed of the need to join her as an interested party in High Court petition No.1178 of 2007, by the defendant in the Declaratory suit viz; Invesco Assurance Co. Ltd, because her case had also been listed as having been allegedly fake.
9. However a rift developed between the applicant and the complainant pursuant to which the applicant filed and served H.C Misc. Appl. No. 113 of 2008 and 114 of 2008 at Mombasa for the taxation of his costs in Mombasa C.M.C.C No. 4253 of 2003 and Mombasa H.C.C.A No. 83 of

2004, which bills are pending determination. Apart from that the applicant filed two other applications for taxation of advocate – client's bills of costs at the High Court at Nairobi in view of the declaratory suit aforementioned, and the petition by Invesco Assurance Company Limited which applications are similarly pending determinations.

10. According to the applicant, he did register his discontentment with the way the complaints commission was handling the complaint. In his view, there are four applications pending before this Honourable Court on the issue of costs two of which were filed and or commenced before the lodging of the complaint herein, which goes to clearly demonstrate good faith on the part of the applicant who has even paid Kshs.207,000/= to the applicant. According to him, the complainant was represented by his firm in H.C.S.C. No. 2412 of 2003 Nairobi, C.M.C.C No. 4253 of 2003 Mombasa, H.C.C.A. No. 83 of 2004 Mombasa, C.M.C.C. No. 634 of 2007 Milimani, H.C. Misc Appli No. 1178 of 2007 Nairobi towards which the complainant paid thing in terms of fees yet she has since received **Kshs.207,000/=** from the applicant's firm to just lessen her anxiety.
11. The Applicant contended that though the decree in issue is clearly for Khss.1,887,657/= the complaint states he was paid Kshs.2,353,932/= a discrepancy that goes to the root of this application because moneys paid in respect of other claims must have been maliciously included. The respondent, it was averred, has however expressly overruled the relevance of the matters pending before this court, an action which in the applicant's view goes against the very rule of **sub judice** and contempt of court.
12. The applicant contended that there were extraneous matters and or forces to have the said Disciplinary Cause No. 103 of 2008, maliciously prosecuted even when there was evidence that such process would only serve as an embarrassment and/or harassment against his legal practice and political aspiration for the Gichugu Constituency's parliamentary seat hence this Court ought to prohibit the prosecution by the respondent of Disciplinary Cause no. 103 of 2008 pending the determination of his application.

Respondents' Case

13. In response to the Application, the Respondents filed replying affidavit sworn by **Apollo Mboya**, the Respondent's Secretary on 4th November, 2011.
14. According to him, the provisions of section 58(3) of the ***Advocates Act*** (hereinafter referred to as the Act) are very clear in that the Secretary of the Law Society of Kenya shall be the Secretary of the Disciplinary Committee. Further to the above, the provision of Section 58 of the ***Advocates Act***, makes the Law Society of Kenya an integral part of the Disciplinary Committee and therefore the Ex-parte Applicant is misconceived to suggest that he had no role to play in this case.
15. It was deposed that whereas the role of the Judicial Review Court is to determine whether a body such as the Disciplinary Committee has overstepped its mandate in the carrying out of its mandate, and if so issue appropriate orders, the Order sought by the Ex-Parte Applicant is that of prohibition to prevent the Respondent from commencing or continuing with the proceedings in Disciplinary Cause Number 103 of 2008 and as it stands the case against the Ex-parte Applicant has not been concluded before the Respondent. Therefore the issue before the Judicial Review Court would be to determine whether the 2nd Respondent was carrying out its duties as would be expected and whether in doing so, it was conducting itself in a fair manner to all parties, NOT, to have the case canvassed before it and in the absence of the Complainant in the disciplinary Cause. Further to the above, it is not for the Ex-Parte Applicant to choose how best the 2nd Respondent should argue out its case.
16. In the deponent's view, there is a great misconception by the Ex-Parte Applicant that the letters referred to from the Disciplinary Committee were ignoring the orders issued by the Honourable Court, when the letters referred to were mentions which are commonly used by the 2nd Respondent to keep itself abreast of matters and keep itself in the know as to how the Judicial Review matter was proceeding and the progress made, it would only be natural and fair to invite all parties to the dispute to appear and state the position of the Judicial Review matter before the Disciplinary Committee.
17. According to him, the bills of costs alleged to be filed and pending in court are for several cases in Mombasa which are irrelevant to civil suit CMCC No.634 of 2007, filed at Milimani Law Courts. However, section 53 (6) of the Act, provides the Disciplinary Committee with the powers to tax a

Bill of Costs and where it is found that the same had been filed in court or was taking too long to be taxed, parties could agree to have the same taxed before the Disciplinary committee for expediency sake.

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. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision......Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

20. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was 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."

21. 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.***
22. 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.
23. The broad grounds upon which the Court grants judicial review remedies were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** in which the Court 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** the Court expressed itself as follows:

"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."

24. In my view the determination of this matter revolves around the issue whether or not the Respondent was within its lawful mandate to commence and proceed with the disciplinary proceedings before it while the Applicant's costs were pending taxation before the Court and secondly whether the said proceedings were informed by ulterior motives.
25. On the first issue it is true that under section 57 of the Act, the Disciplinary Committee [now the Disciplinary Tribunal] (hereinafter referred to as the Committee) is mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act. It is also true that under section 60 of the Act, the said Committee has the power to receive complaints of professional misconduct against an Advocate from any person. I agree that since the Applicant herein is such an Advocate, the Committee has jurisdiction to entertain any complaints made against him in his professional capacity pursuant to section 55 of the Act. This power, as was appreciated by **Mumbi Ngugi, J** in **Ex Parte Kimaiyo Arap Sego, Misc. Appl. No. 1266 of**

<u>2007</u>:

"goes over and above dealing with complaints by individuals. The Committee has the mandate to ensure ethical and professional conduct by members of the Bar and section 60 of the Advocates Act empowers it to deal with complaints regarding professional misconduct, defined to include conduct incompatible with the status of an Advocate…I take the view that the Disciplinary Committee would have failed in its duty if it did not pursue the disciplinary proceedings against the applicant if the evidence before it showed that such conduct was unprofessional and dishonourable."

26. Section 67(7) and (8) of the Act provides:

(7) If a bill of costs has been filed in Court by the advocate against whom a complaint is being heard but has not been taxed, the Committee may adjourn the complaint for such period as it considers reasonable to allow such taxation:

Provided that if at the expiry of such adjournment, the bill is still not taxed, the Committee may make its own estimate of the costs due to the advocate and make orders accordingly.

(8) A determination of the Committee under subsections (7) and (8) shall be deemed, for all purposes, to be a determination of the Court.

27. The matters mentioned by the Applicant seems to have been before the Courts since 2008, six years ago and without any end in sight. As was held in **<u>Ex Parte Kimaiyo Arap Sego</u>** (supra):

"The second argument raised by the applicant is that there was a Bill of Costs pending, the taxation of which may well result in an amount over and above what the complainants owed. The complaint against the applicant relates to a 1997 matter, and the initial complaint was failure to render professional services. Had the applicant indeed had a pending Bill of Costs, it is difficult to understand why such a Bill was still pending some ten years after the instructions were given, and some seven years after the complaint against him was lodged with the 1st respondent. He alleges that the 1st respondent had taken five years to deal with his complaint – again more than adequate time for him to deal with the Bill of Costs. It is noteworthy, however, that he was entitled, under the Disciplinary Committee Rules to bring up the matter of his Bill of Costs before the 2nd respondent, but he did not."

28. In this case, the applicant contends that the Respondent ought not to have entertained the Complainant's complaint in light of the pendency of the taxation proceedings pending before the Court. Whereas it may have been prudent for the Respondent to await the outcome of the said taxation proceedings, where such proceedings have been instituted with a view to scuttling any disciplinary proceedings which may be brought against the Advocate, the Court may well not be amenable to the favourable exercise of its discretionary jurisdiction in favour of the advocate.

29. In my view, the Applicant ought not to be allowed to rely on legal proceedings instituted by himself and which he does not show any urgency in prosecuting to stall the complaint made against him and thus bar the Respondent from carrying out its statutory mandate. In any case no one can tell with certainty what the outcome of the complaint will. There is nothing to bar the Applicant from raising the issues he has raised herein in the said Disciplinary Proceedings for consideration by the Committee. As was correctly appreciated by **Onyancha, J** in **<u>T O Kopere vs. The Disciplinary Committee Law Society of Kenya & Anor. HCCA No. 461 of 2011</u>**:

"No one, not even the applicant, in my view, has a right to anticipate what the sentence of the Disciplinary Committee, will be, until it is legally pronounced. Indeed to try to stop the Disciplinary Committee from completing carrying out its legal mandate under the relevant law, appears to me to be an illegal exercise which this court in its unfettered discretion, will not be willing to assist the applicant achieve. The stay sought if granted, will without doubt assist the applicant in preventing a lawfully constituted tribunal from carrying out its lawful

mandate."

30. If and when the Committee makes its decision and the Applicant is aggrieved thereby, it will be entitled to invoke the appellate jurisdiction of this Court pursuant to section 62 of the Act. As it was held in **Republic vs. National Environment Management Authority [2011] eKLR**, where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.
31. That view was shared by this Court in **Republic vs. Ministry of Interior and Coordination of** National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013 where it was held:

    "…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

32. Consequently, the first ground for seeking judicial review remedies is unmerited.
33. The second ground for seeking the said remedies was that the said proceedings were instituted with a view to locking the Applicant from pursuing his political ambitions taking into account that the then Minister for Justice and Constitutional Affairs, **Hon. Martha Karua** was the MP for Gichugu Constituency where the applicant wanted to vie. No allegations however were made to the effect that the complaint was instituted by the said minister. Similarly she was not made a party to these proceedings. Accordingly to make any adverse comments and findings against her would amount to a breach of the rules of natural justice.
34. Apart from the foregoing the complainant was for some reasons unknown to this Court not made a party to these proceedings. To grant the orders sought by the applicant herein without affording the complainant an opportunity of being heard would be in breach of the applicant's right to a hearing. As was appreciated in **In the Matter Nyamodi Ochieng Nyamogo & Another Nairobi High Court Misc. Appl. No. 122 of 2007**:

    "The Interested Party's complaint can only be heard, investigated or inquired into by the Disciplinary Committee. This Court has no capacity to do so. If this court were to quash Disciplinary Committee 38/06, it would be locking out the Interested Party from having is complaint considered on merit."

35. In this case I am not satisfied that the Committee has exceeded its jurisdiction and there is no evidence that it has exceeded its powers. The hearing is yet to take place hence it was premature for the Applicant to bring this challenge.

Order

36. In the result I find no merit in the Notice of Motion dated 29th August, 2008 which I hereby dismiss with costs.

Dated at Nairobi this 24th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwangi for Mr Njugi for the Applicant

Ms Betty Rashid for Mr Olembo for the Respondent

Cc Patricia