



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 49 OF 2014 (JR)**

**REPUBLIC .....APPLICANT**

**VERSUS**

**ADVOCATES COMPLAINTS COMMISSION.....1ST RESPONDENT**

**DISCIPLINARY COMMITTEE.....2ND RESPONDENT**

**JOSEPH MURIITHI M'IMUNYA.....INTERESTED PARTY**

**MORRIS GICHURA NJAGE.....Ex Parte Applicant**

**J U D G M E N T**

This is Judicial Review proceedings through the application dated 4/4/2014 which were filed by the ex parte applicant seeking for orders of certiorari and prohibition under Order 53 Rule 1, 2, & 4 of the Civil Procedure Rules and under Part of the Law Reform Act, Cap 26 of the Laws of Kenya. The ex parte applicant was granted leave to institute these judicial review proceedings on the 17/3/2014. This application was filed on 4/4/2014 which period was within the 21 days granted by the court.

The application seeks for the following orders:-

- 1. That the ex parte applicant be granted an order of certiorari to remove to the High Court for the purpose of quashing the complaint dated 17t January, 2014 by the 1st respondent under Misc. Cause No. 21 of 2014.*
- 2. That the ex parte applicant be granted on order of prohibition to prohibit the 2nd respondent from commencing or conducting trial proceedings against the ex parte applicant under Disciplinary Committee Cause No. 21 of 2014.*
- 3. That the costs of the application for leave and stay shall abide the final determination of the notice of motion.*

The facts leading to these proceedings were briefly stated by the counsel for the ex parte applicant Mr Gachuba of Oyon, Opini & Gachuba Advocates. He told the court that the interested party was the client of the ex parte applicant in CMCC No. 66 of 2009. The case was against Equity Bank where judgment was entered in favor of the interested party on 22/10/2010 for a sum of KShs.130,660/=. The bank made the payment to the ex parte applicant who in turn paid KShs.72,202/= in full and final settlement of the claim. The interested party acknowledged receipt on 5/5/2012 and signed that he had no further claim.

On the 15/3/2013 the ex parte applicant was served with a notice of complaint by the 1st respondent. It was claimed by the 1st respondent that the amount recovered from the bank was KShs.232,856/= and that then interested party was claiming the entire amount. On 13/5/2013 the ex parte applicant served the 1st respondent with a request for a statement of account to which the 1st respondent did not respond. On 15/5/2013 the 1st respondent invited the ex parte applicant for an in-house settlement which the ex parte applicant unable to attend due to his tight schedule.

On 22/5/2013 the ex parte applicant requested the 1st respondent to furnish him with the complaint and all its details to enable him prepare his defence but got no response. On 16/8/2013 the 1st respondent directed the ex parte applicant to pay the interested party an additional sum of KShs.135,969/=. In a letter dated 29/8/2013 the ex parte protested and denied any indebtedness. He requested for the second time to be furnished with the evidence presented to the 1st respondent by the interested party. Once again, the ex parte applicant claims that he got no response.

The ex parte applicant claims that the amount that the 1st respondent directed him to pay of KShs.135,969/= included the auctioneer's fees which was not disputed.

The ex parte applicant relied on Article 165 of the Constitution, Sections 8 & 9 of the Law Reform Act which form the basis of these proceedings. He urges the court to find that the decision of the 1st respondent was an illegality, irrational and unprocedural and grant the orders sought.

The respondent's counsel Ms. Gathoga agreed with the facts given by the applicant's counsel Mr. Gachuba. However, the respondent opposes the application on grounds that the 1st respondent accorded the ex parte applicant a chance to be heard but he declined to utilize it. The complaint of the interested party was received on 25/7/2012 by the Advocates Complaints Commission. Investigations commenced whereas the ex parte applicant was informed of the complaint and requested to give his input. The 1st respondent wrote to the ex parte applicant on 13/5/2013 but there was no response. In the absence of any input from the ex parte applicant, the 1st respondent went ahead to investigate.

In the course of the investigations, Equity Bank confirmed that they paid the ex parte applicant KShs.282,856/= in satisfaction of the decree in CMCC No. 66 of 2009. The 1st respondent directed the ex parte applicant to pay the interested party the balance of KShs.130,660/= which was still owing. The ex parte applicant failed to pay the money and became unco-operative in that he failed to account to the 1st respondent for the money paid to him by the bank.

The 1st and the 2nd respondent did not act illegally, irrationally or un-procedurally as alleged. The act of the 1st respondent in receiving the complaint and dealing with it was within its mandate. The threshold for granting orders of certiorari and prohibition has not been met by the ex parte applicant. He duly notified of the complaint and given a chance to respond. The orders sought ought not to issue where the 1st respondent have acted within its mandate. The applicant is an attempt to cartel the statutory mandate of the 1st respondent which is well spelt out by the law.

The ex parte applicant should appear before the 2nd respondent where the interested party has legitimate expectations. The respondents urge the court not to grant the orders sought.

The ex parte applicant relied on the following authorities:-

1. **REPUBLIC VS BUSINESS PREMISES RENT TRIBUNAL & ANOTHER EXPARTE WESTLANDS SUNDRIES LIMITED & 2 OTHERS [2013] eKLR** where the court held that judicial review was based on articles 165(6) and 7 of the Constitution.
2. **REPUBLIC VS THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS EXPARTE AVANTE INTERNATIONAL TECHNOLOGY INC. JR. APPLICATION NUMBER 415 OF 2012** where the court held that in order to succeed in an application for judicial review the applicant must show that the decision complained of is tainted with illegality, irrationality and procedural impropriety.
3. **MECOL LTD VS ATTORNEY GENERAL & 7 OTHERS [2006] eKLR** where the court cited with approval the holding in the cases of **HC. MISC. CIVIL APPLICATION NO. 102 OF 2006 AND EX PARTE PRESTON [1985] AC 835** where the court held that the principle of fairness has an important place in the law of judicial review and that was an appropriate ground upon which the court can intervene to quash a decision made by a public officer or authority. Judicial review is a remedy applicable where a decision making authority exceeds its powers..... courts are a guardian of the constitution and the guardian of the rule of law.
4. **REPUBLIC VS THE MINISTER FOR LANDS & SETTLEMENT & 2 OTHERS [2007] eKLR** the court cited the case of **O'OREILLEY VS MACKMAN [1983] AKK ER 237** a decision of a person or body of persons may be quashed if there was an error in reaching it or failure to act fairly towards a person adversely affected by the decision.
5. **JUDICIAL REVIEW LAW PROCEDURE AND PRACTICE [2009] LAW AFRICA, NAIROBI Pg 93** stating that certiorari is designed to prevent abuse of the power. Its purpose is to ensure an individual is given fair treatment by the authority which he is subjected..... accordingly when issued with an order of certiorari is issued, it restores the situation that existed before the decision quashed was made.
6. **CAPRI HOLDINGS LTD, KAILIMU ENTERPRISES, MBALE FARMS, J. MUCANGI & A.K. MWANGI VS COMMISSIONER OF LANDS [2001] eKLR** where it was held that an order of prohibition is from the high court directed to an inferior tribunal or body which forbids it to continue proceedings therein in excess of its jurisdiction or in contravention of the laws.

The issues for determination are whether the decision of the 1st respondent was made without jurisdiction, in excess of jurisdiction or without observing the rules of natural justice and whether the orders of certiorari and prohibition should issue.

These proceedings are based on Article 165, Order 53 of the Civil Procedure Rules and Section 8 & 9 of the Law Reform Act which confers powers to this court to grant orders of certiorari and prohibition. The parameters of judicial review were set out by the court in the case of **REPUBLIC VS KENYA NATIONAL EXAMINATION COUNSEL EX PARTE GATHENJI & OTHERS CIVIL APPEAL NO. 266 OF 1996** where it was held:-

*“Prohibition looks to the future so that if 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 making of a contemplated decision.....”*

It is only an order of certiorari that can quash an order which has been made without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

In the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANCE LTD Civil Appeal No. 185 of 2001** it 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”.*

Section 53 of the Advocates Act confers on the 1st respondent powers to investigate complaints against the conduct of any advocate, firm of advocates or any employee thereof. The procedures of receiving and dealing with complaints is clearly spelt out in the provisions of this Section 53 and can be briefly stated. In regard to any complaint which has no substance, the commission is required to reject it forthwith. Any matter that constitutes a disciplinary matter will be referred to the Advocates Disciplinary Committee. The commission is required to deal with any other complaints which does not constitute a disciplinary offence. In such a case, it is required to call upon the person or the firm to answer to the complaints after being notified of the same.

In the event that the person or the firm fails to answer to the complaint, commission shall proceed to investigate the manner in accordance with the provisions of the law. In addition to the commission promoting reconciliation and encouraging amicable settlement between the parties, it may refer some of the complaints to the courts for the appropriate redress. Where the Commission considers that the complainant has suffered loss or damage it may award compensation or reimbursement.

The decisions of the Commission are appealable to the High Court and the determination of any such appeal shall be final. If a party chooses to seek a remedy in judicial review, the option is still available.

The Commission in this matter received the complaint and wrote the ex parte applicant on 15.3.2013 asking him to respond within 14 days and to give a statement of account. The ex parte applicant did not answer to the complaint but instead annexed a copy of the court decree and the fee note. The ex parte applicant did not disclose the amount realized after execution and that he had been paid interest on the decretal amount.

It was after the expiry of the 14 days granted to the ex parte applicant to respond that the Commission proceeded to investigate the matter whereas it was confirmed that the bank had settled the decree in full including interests and costs. It was within the mandate of the commission to direct the ex parte applicant to pay the interested party the amount which was still owing. However section 53 sub section 6 empowers the Commission to award compensation or reimbursement not exceeding Ksh. 100,000/=. By awarding reimbursement of Ksh. 135,696/=:, the Commission exceeded its mandate. The question is whether this anomaly entitles the ex parte applicant to orders of certiorari. It is my considered opinion that the decision for reimbursement was made within the jurisdiction of the Commission.

By a letter dated 13th of May 2013, the 1st respondent invited both the complainant and the ex parte applicant for a in-house dispute resolution to be held on 13th of June 2013. The ex parte applicant did not attend the meeting citing a prior engagement prior official engagements. It is noted that ex parte applicant did not suggest the date that were available to him to appear before the Commission.

After conducting the investigations into the complaint and taking into consideration the conduct of the ex parte applicant in failing to co-operate, the Commission referred the matter to the advocates Disciplinary Committee for appropriate action.

The ex parte applicant argues that he was not given a chance to be heard. He denies that he received the first respondent letter dated 13th of May, 2013 inviting him to answer to the complaint. There is evidence that he wrote to the 1st respondent and annexed the decree and the fee note thereby omitting to give specific answers to the issues raised in the complaint. He was required to give a statement of account in respect of the money paid to him by the bank and how it was disbursed.

It was argued by the ex parte applicant that the 1st respondent in his order to reimburse to the interested party KShs.135,696/=:, did not take into consideration the auctioneers fees. It is noted that the 1st respondent did not have any material in his possession to show the amount charged by the auctioneer. This material ought to have been availed to the 1st respondent by the ex parte applicant. The 1st respondent only reduced the amount owed to the interested party by KShs.74,958/=: which was Advocates fee as per the fee note forwarded by the ex parte applicant. This demonstrates that the 1st respondent would have taken into the account the auctioneers fees if the amount was communicated to him.

By failing to give a statement of account, the ex parte applicant lost his chance to be heard. It is not correct to say that he was denied an opportunity to be heard. The 1st respondent followed a due process in handling the complaint. When the ex parte applicant was invited for an in house settlement, he failed to attend and he did not give alternative dates when he would be available. By inviting the ex parte applicant for settlement of the dispute, the 1st respondent accorded ex parte applicant the chance to be heard. It cannot be said that the 1st respondent breached the rules of natural justice. The ex parte applicant has failed to convince this court that he was denied a chance to be heard.

The ex parte applicant stated that he has never denied that he received the amount allegedly received from the

bank. In paragraph 19 of his affidavit sworn on 12th of March, 2014 the ex parte applicant states that he requested to be furnished with evidence that the amount of KShs.282,856 was paid for and on account of the interested party or that the same was paid on account of the decree. This statement would rightly be construed be a denial.

The matter has now been referred to the Advocates Disciplinary Tribunal for determination in accordance with the law. Both the interested party and ex parte applicant will have their day before the tribunal which is expected to give them a fair hearing.

It was held in **High Court Misc. Civil Application No. 102 of 2006, REPUBLIC VS THE JUDICIAL COMMISSION OF INQUIRY INTO GOLDENBERG AFFAIR AND OTHERS:**

*“I must make it clear in my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of power conferred by law.*

*Judicial review is available where a decision making authority exceeds its powers commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers”.*

In one of the authorities cited by ex parte applicant **REPUBLIC VS THE MINISTER FOR LANDS & SETTLEMENT & 2 OTHERS [2007] EKL** the court cited the case of **O’OREILLEY V MACHMAN [1993] ALL ER 237** a decision of a person or body per persons may be quashed if there was an error in reaching it or failure to act fairly towards a person adversely affected by the decision.

Prohibition is an order by the High Court directed to an inferior tribunal or body forbidding it to continue with proceedings in excess of its jurisdiction or in contravention of the law. It does not lie to correct the course, practice or procedure of the inferior tribunal. Neither does it correct a long decision on the merit of the proceedings.

The 2nd respondent should not be stopped from exercising its legal mandate in the matter. It is not in the interest of justice for this court to issue orders of prohibition against the 2nd respondent.

Considering the facts in this case, including the facts that the ex parte applicant was not denied a chance to be heard, I find that this application has no merit and it is therefore dismissed with costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 17TH DAY OF JUNE, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**The Interested Party**