REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 8 OF 2015 (J.R)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY ORDERS OF PROHIBITION, CERTIORARI, AND MANDAMUS.

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA.

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010.

AND

IN THE MATTER OF: THE ADVOCATES ACT CHAPTER 16 THE LAWS OF KENYA.

AND

IN THE MATTER OF: ARTICLES 22, 27 (1), 47, 159 (2) AND 165 OF THE CONSTITUTION OF KENYA

REPUBLIC……...…..……APPLICANT

VERSUS

THE ADVOCATES DISCIPLINARY TRIBUNAL.....1ST RESPONDENT

LAW SOCIETY OF KENYA…….....…….…….2ND RESPONDENT

TELKOM KENYA LIMITED……..…..…….....…..INTERESTED PARTY

EXPARTE

THOMAS LETANGULE……..……..…….....……1ST APPLICANT

CHARLES KOECH…….……..…….....……2ND APPLICANT

HILLARY SIGEI…….…….……3RD APPLICANT

SONGOLE BRILLIAN…….....……..4TH APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion erroneously expressed to be dated 21st December, 2015, filed on 21st January, 2015, the *ex parte* applicants herein seek the following orders:

1. This Honorable Court be pleased to issue an order of prohibition;

i. **Directed to the to the Law Society of Kenya by itself or through the Compliance and Ethics Program Disciplinary Committee from taking out any disciplinary proceedings against or concerning the applicant whether the same or arising out of the same facts, as those involved in the Disciplinary Committee Cause No. 224 of 2013 or continuing with the proceedings in Disciplinary Committee Cause No. 224 of 2013.**
ii. **directed to the Respondents barring the Respondents, their servants and/or agents from in any manner howsoever proceedings with any disciplinary charges against the Applicants whatsoever in relation to the complaint by Telkom Kenya pending the decisions of the Taxing Master on various Bills of Costs filed by the Applicants as against the Interested Party.**

2. This Honorable Court be pleased to issue an order of certiorari directed at the Respondents to call up into the High Court and to quash the proceedings and decisions in DCC/224/2013 made on 8th October 2014 and 17th November 2014.

3. This Honourable Court be pleased to issue an order of mandamus directed to the Law Society of Kenya and the Disciplinary Committee to;

i. **Observe the law and particularly the rules of natural justice enshrined therein on the discipline of advocates and the applicants in particular, and**
ii. **Refer the matter between the interested party and the Applicants herein to mediation and/or arbitration.**

4. The Honourable Court be pleased to give further Orders and directions as it may deem fit and just to grant.

5. The cost of this application be provided for.

Ex Parte Applicants' Case

2. The grounds upon which the application was based were:

a. **THAT based on the background leading to DCC/224/2013 the complaint therein regards fees due to the applicants' firm and funds retained by the firm as lien and thus can be resolved by mediation.**
b. **THAT the 1st respondent failed to recognize the above position, yet this position was appreciated by the 2nd Respondent which made a decision on a number of occasions to refer the matter to mediation.**
c. **THAT from the way the proceedings were conducted, the 1st respondent, in reaching its decisions of 28th October 2013 made a determination before having the benefit of perusing the replying affidavit which was yet to be filed by the Applicants.**
d. **THAT from the way the proceedings were conducted, the Respondents, in reaching their**

decisions of 8th October 2014 and 17th October 2014 made a determination before having the benefit of perusing the response in form of replying affidavit which had now been filed by the Applicants and without taking into consideration the efforts made by the Applicants to amicably settle the matter, more especially the filing of Bill of Costs above.

e. **THAT the Applicants were not afforded an opportunity of being heard before the charges in DCC/224/2014 were preferred contrary to Articles 47 and 50 of the Constitution.**
f. **THAT as the matter touches on the legal practice of a lawyer the consequences of the preferred charges are far reaching and the applicants might not be able to get future work hence the stay ought to be granted in light of the failure to comply with the rules of natural justice.**
g. **THAT the 1st Respondent's decisions are unfair in that they go against the very spirit of reconciliation, arbitration and rehabilitation.**
h. **THAT the 1st Respondent's decisions as a whole have denied the Applicants the right to fair administrative action.**
i. **THAT it is unfair and amounts to double vexation for the proceedings in DCC/224/2013 to proceed concurrently with the taxation of our Bill of Costs, as the Bills touch on the substratum of the complaint by the interested party.**
j. **THAT it is against the principles of natural justice for the Applicants' herein to be subjected to three proceedings which effectively deal with the same issues; that is DCC/224/2013 herein; Taxation of Bill of Costs as between the Applicants and Interested party; while the same parties are still litigating and/or negotiating on how to settle Kshs. 1,416,136,676.00 for the claimants in Civil suit no. 216 of 2007 as consolidated with HCC no. 255 of 2007 & HCC no. 219 of 2007**
k. **THAT it is just and fair that orders prayed for herein be granted.**

3. According to the applicants, the Interested Party herein filed a complaint against the Applicants in October 2013. The applicants however explained that the status of the relationship between the Applicants and the Interested Party from the period of their representation of the interested party up to the time of the complaint was that the applicants' firm was placed in the panel of the Interested Party to represent it in various cases from 1995. The applicants did represent successfully the Interested Party and had had good professional working relationship. However, sometimes in 2007 or thereabouts, the Interested Party ceased giving the Applicants instructions in its matters and instructively the applicants were no longer in their panel for any fresh instructions. Consequently, the applicants after determining that there would be no associated prejudice, received instructions from among others over 700 employees and former employees of the Interested Party to institute and prosecute suits for recovery of, *inter alia*, their pension and severance pay upon termination of employment and retrenchment; securing of their tenancy status and enforcement of the option to purchase by virtue of their relationship with the Interested Party as former employees; Injunctions against the Interested Party's intended eviction from the house they occupied following their retrenchment and or termination. It was averred that at the time of receiving instructions, there were unconcluded cases that were being handled by the applicants for the Interested Party and in good faith, the applicants did retain, as is lawful, these files as lien for their legal fees which to date are unpaid.
4. It was the applicants' case that when the Interested Party sought to transfer the then pending files from the applicants' firm to the firm of **Kale Maina** and **Bundotich Advocates** the applicants expressly intimated their intention to retain the said files pending determination of their outstanding fees. However, the relationship between the Applicants and the Interested Party became acrimonious thereafter and this fact coupled with various court victories against the Interested Party is what ultimately led to the filing of DCC/ 224/ 2013.
5. Via letter dated 22nd October 2013, the second respondent wrote to, forwarding the Complaint, and requiring the applicants to file their written response regarding the complaint within 7 days of the letter to enable the second respondent table the complaint and the applicants' response before the 1st Respondent. The said letter was sent to the applicants by post reaching them on 31st October, 2013. To the applicants, the 7 days issued therewith was insufficient in the circumstances as the committee normally issued a 21 days notice.

6. Nevertheless, on the 28th day of October, even before the expiry of the 7 days notice issued by 2nd respondents to respond to the complaint, and without considering any of the applicants' comments in relation to the complaint, the 1st Respondent hurriedly issued an order marking the complaint *prima facie* and indicating that the matter be placed for plea. The applicants protested this move on the ground of irrationality and impropriety of the decision and requested that the orders issued on 28th October, 2013 be reviewed and set aside and that the Committee seeks a response from the complainant on issues raised by the applicants before it deliberates on the matter *prima facie*.
7. It was averred that the Applicants filed their Defence in the form of a Replying affidavit dated 20th November 2013 and filed with the 2nd respondent on 21st November 2013. In a letter dated 8th January, 2014 the CEO / Secretary of the Law society of Kenya **Mr. Apollo Mboya** wrote to all parties, acknowledging receipt of the said letter dated 26th November 2013 and recognizing the contents thereto. The letter forwarded the applicants' response to the committee and the Interested Party and invited the Interested Party to respond to the applicants' defence and stayed the matter laying a platform for Alternative Dispute Resolution Mechanism between the Applicants and the Interested Party, as mandated by the law.
8. It was averred that on the 16th January, 2014 the Applicants initiated the mediation process by writing to the Interested Party seeking audience and asking for a meeting to sort out the issues raised in the complaint since the Complaint by the Interested Party arose out of and is based on Advocate/Client relationship wherein the Interested party's main prayer is that the Applicants be directed to pay them approximately Kshs.4 000 000.00 plus any fees charged by the applicants upon the Interested Party in excess be recovered and that any monies held by the Applicants be given to the Interested Party. This was despite the fact that the Interested Party is yet to settle the applicant's fees amounting to approximately Kshs. 4,194,119. 00, forcing the applicants' firm to lawfully retain Kshs. 3 000 000.00 as lien for unpaid fees.
9. In a further attempt to amicably settle the matters forming the crux of the complaint, the Applicants filed its bill of costs, drawn to scale and informed the 2nd respondent and the Interested Party of this. It was disclosed that the Bills of Costs filed and which are awaiting the decision of the taxing master are listed as;-

i. **Nairobi High Court Misc. Application No. 186 of 2014,**
ii. **Nakuru High Court Misc Application No. 43 of 2014,**
iii. **Nairobi High Court Misc. Application No. 187 of 2014,**
iv. **Nairobi High Court Misc Application No. 193 of 2014,**
v. **Nairobi High Court Misc Application No. 185 of 2014,**
vi. **Nairobi High Court Misc Application No. 24 of 2014,**
vii. **Nairobi High Court Misc Application No. 205 of 2014,**
viii. **Nairobi High Court Misc Application No. 192 of 2014,**
ix. **Nairobi High Court Misc Application No. 191 of 2014, and**
x. **Nairobi High Court Misc Application No. 188 of 2014.**

10. To the applicants, the taxing master's ruling on the bill of costs above, have the potential of settling, substantially a huge part of the Interested Party's complaint, since the complaint is based on advocate/client relationship and basically advocates fees.
11. In the meantime, the applicants' clients, former employees of the Interested Party, obtained various judgments in the High Court against Telkom for a total sum of approximately 3 billion. An appeal was preferred but it was dismissed by the Court of Appeal. In actual fact, it was after various court victories against the Interested Party that it then filed the complaint against the applicants. It was disclosed that in fact the Applicants and the Interested Party are holding a joint account in which the interested party deposited a sum of **Kshs. 250 000 000** as ordered by the Court of Appeal in the case mentioned above.
12. To the applicants, the timing of the complaint is suspect and reasons for filing the claim are ill intended and malicious, considering the timing, as most of the matters date back to 2007 and 2008 and it is very suspect that it is only after the very recent judgment against the Interested party and the failure of their purported appeal that they filed the complaint.
13. The applicants added that in the intervening period, between the time the Interested Party filed the

complaint in DCC/224/2013 and now, the Applicants on behalf of Telkom's former clients and the Interested Party, have engaged in prolonged out of Court negotiations in which they mutually agreed for a compromise, for the full and final settlement of the following Court Proceedings and all claims related thereto which are:-

a. **High Court Civil Cases Number 216, 219, 255 of 2007**
b. **High Court Commercial Division Case Number 545 of 2011**
c. **Court of Appeal Civil Appl No. 237 of 2011 (UR 151 / 2011)**
d. **Court of Appeal at Nairobi Civil Appeal Number 2007 of 2012.**
e. **Court of Appeal Civil Application Number Sup. 24 of 2013**
f. **Court of Appeal Civil Application No. 112 of 2012 (UR 87 / 2012)**
g. **Court of Appeal at Nairobi Civil Appeal Number 60 of 2013**
h. **Supreme Court of Kenya Motion Number 17 of 2014**
i. **Supreme Court of Kenya Motion Number 24 of 2014**
j. **Industrial Court at Nairobi Cause Number 654 of 2014**

14. The applicants added that the terms of the aforesaid settlement were recorded in a **'**Deed of Settlement**'** dated 8th August 2014 in which the total Settlement sum inclusive of relevant taxes amounts to **Kshs.1,416,136,676.00**, while the applicable costs amounts to another **KShs.30,000,000**. However, the Interested Party has refused to honor its promise under the said settlement deed, in an attempt to further frustrate the Applicants herein and/or their clients hence the negotiations between the Applicants and the Interested Party has been therefore been prolonged and twofold, as they negotiated the settlement of dues owed to the applicants' clients as well as how to amicably settle the subject matter of the Complaint in DCC/224/2013.
15. It was averred that no fresh order was issued by the 1st respondent either varying or setting aside their earlier decision of 28th November 2013, which had been made irregularly, as the 1st respondent had made the said order without perusing the applicants' response or affording them sufficient time to file our response as required by law.
16. The applicants averred that with the above in mind, they were shocked to receive a letter, sent by post, dated 8th October 2014, from the 2nd Respondent, indicating that the matter had yet again been set down for plea to be taken on 17th November 2013 and on 30th October 2014 they again wrote to CEO/secretary of the Law Society asking that the 2nd respondent intervenes as they had filed their Bill of costs and that the parties herein had even been talking with a view to settle the matter. Via a letter dated 11th November, 2014, the 2nd respondent referred the matter to mediation and on 17th November 2013 counsel for the Applicants requested the tribunal to adjourn the matter as all the four applicants were not present on the understanding that the matter had been referred to mediation. However, the 1st respondent declined to adjourn the matter as had been requested by the Applicants' counsel and proceeded to record a Plea of not guilty for all the four accused persons and set the matter for hearing on 19th January 2015.
17. The applicants' case was that the decision by the respondents to set down the matter for plea and hearing is high-handed, irrational, rash and unconstitutional and goes against the principles of natural justice and that it is necessary that complaints against advocates are taken seriously and ought not to be based on flimsy grounds. To the applicants, the aforesaid complaint is just but a means of pushing them to relent on justice and is a deliberate effort to revenge for the victory of the firm over various matters involving the claimant and is only meant at intimidating them to drop the quest for justice for their clients especially in view of the recent Court of Appeal judgments against the Interested Party; pushing them to relent on their quest to have their fees paid; and tarnishing the name of the firm in a bid to get back at the firm for successfully suing against them.

Respondents' Case

18. On behalf of the 2nd Respondent it was contended vide a replying affidavit sworn by **Apollo Mboya**, its secretary that the Disciplinary Tribunal is a creature of the ***Advocates Act*** and all

advocates are to be subject to its' the jurisdiction.

19. It was averred that the Law Society, acting as a secretariat for the Advocates Disciplinary Tribunal, received a complaint by the Interested Party vide an affidavit by one **Bonnie Okumu** on 11th October, 2013 which affidavit was effectively served to the Applicants by way of a letter dated 22nd October, 2013 forwarding a copy of the said complaint to the Applicants herein. The letter required the Applicants to within 7 days from the date of the letter to file a reply to the complaints. The Complaint was placed before the Disciplinary Committee to determine whether there was a *prima facie* case which determination was communicated to the Applicants vide a letter dated 15th November, 2013 attaching a copy of the order by the Disciplinary Committee. According to him, by time the Applicants had not yet filed any document or even acknowledged receipt of complaint.
20. He deposed that only the letter dated 15th November, 2013 elicited a reaction from the Applicants herein and to that letter, the Applicants wrote a letter dated 21st November 2013 in which they indicated that they had received the complaint on 31st October, 2013. However, the Applicants ignored and/or failed to file an immediate response or even acknowledge receipt and request for an extension of time. According to him, the Law Society in response to the letter dated 26th November, 2013 wrote back to the Applicants and indicated that the file would once again be placed before the Disciplinary Committee and encouraged parties to explore the option of settling the dispute through mediation and offered to facilitate the same if parties were amenable to the idea. Vide a letter dated 16th January, 2014, the Applicants indicated that they were getting in touch with the complainant to try and solve the matter amicably. They subsequently wrote to the Law Society of Kenya indicating that they had filed their bills of costs for taxation without any mention of amicable settlement of the complaint before the tribunal. The Law Society also received a letter dated 14th February, 2014 copied to it by the Applicants
21. In an attempt to have the matter before the Disciplinary Tribunal amicably settled by the Applicants and the Complainant, the Law Society of Kenya appointed a mediator for the parties. However, no amicable settlement was reported to the 1st and 2nd Respondent despite giving the parties to time to engage each other and the Interested Party/Complainant became agitated and started pushing for his complaint to be addressed. In October, 2014 a notice for parties to appear and take plea was effectively served on the parties for them and on the 17th November, 2014, when the parties were scheduled to take plea, the Applicants represented by a **Miss Nduta**, sought an adjournment on grounds that the matter had been referred for mediation. The complainant through its advocate **Mrs. Mbaabu** vehemently opposed the objection on grounds that the referral of the matter for arbitration was done arbitrarily and without reference it. As such, the tribunal directed the Applicants to take pleas where after a plea of not guilty was entered for the Applicants and the matter fixed for hearing on the 19th January, 2015, giving the parties thereto sufficient time to prepare for the hearing.
22. It was disclosed that the Interested Party, through their advocate on record **P.K. Mbaabu & Company** advocates wrote to the appointed mediator and copied the same letter to the Respondents indicating that they did not have instructions to participate in the mediation requested by the Applicants herein.
23. It was therefore contended that the Applicants have had knowledge of the existence of this matter since October 2013 which is more than a year and so they cannot be seen to claim that the 1st Respondent is conducting the Disciplinary Cause in a rush, unfairly and maliciously when they have had more than a year to try and settle the matter amicably with the complainant. To the deponent, it is not the Law Society of Kenya prosecuting complaint as the complaint is a private complaint instituted by the Interested Party against the Applicants. It was the Respondents' case that it is against the rules of natural justice for the Law Society of Kenya to subject parties to the disciplinary proceedings into mediation when the complainant has indicated that it is not willing to engage in the proposed mediation. Further, the existence of a bill of cost filed for purposes of taxation does not bar the 1st Respondent from going on with any disciplinary action initiated by a party for determination before the tribunal.
24. To the deponent, this application is therefore an abuse of the court process and the Disciplinary Tribunal should be allowed to determine the complaint as the Applicants here have failed to

establish any case for this Court to grant the Judicial Review orders sought. As a result, it was averred that the application is vexatious and an abuse of the court process and as such the court was urged to dismiss it with costs.

Interested Party's Case

25. In response to the Application, the the Interested Party filed a replying affidavit sworn by **Caroline Ndindi**, the the Interested Party's Legal Manager on 20th February, 2015.
26. According to her, the order of prohibition sought is overtaken by events as the ex parte Applicants submitted to the Jurisdiction of the Disciplinary Committee in D.C. No. 224 of 2013 and pleaded not guilty to the charges on 17th November, 2014. Before then the Applicants filed the Replying Affidavit.
27. It was deposed that the complaint was filed on 11th October, 2013, the Law Society served the complaint and sought the ex parte Applicants' comments within 7 days to enable it able to complaint and response before the committee. They responded via the replying affidavit of **Charles Koech** and vide a letter dated 15th November, 2013 the Law Society of Kenya communicated the decision and order of the Disciplinary Committee on 28th October, 2013 to the effect that the complaint established a prima facie case and that it should be placed for plea.
28. In her view, the proceedings were not done in a haste as evident from the documents attached to the Ex parte Applicants' verifying affidavit hence the Interested Party's complaint is clear and properly before the Disciplinary Committee and this court should not interfere with the Committee's mandate to hear and determine complaints on the conduct of the advocates and discipline them.
29. In her view, the complaint is not about fees but unprofessional, unethical conduct, and malpractice of the ex parte Applicants as Advocates for the Interested Party which complaint is self-explanatory and clear.
30. According to her, the Interested Party has never conceded to mediate or arbitration and cannot be compelled by the court to engage in either in the absence of an agreement. To her, the ex parte Applicants' firm filed bills of costs after the complaint had been filed and served hence their filing is not a bar to the Disciplinary Committee hearing the complaint.
31. Contrary to the position taken by the applicant, it was the deponent's view that the Interested Party's complaint arises from its relationship with the ex parte Applicants' firm as its advocates hence is totally separate and distinct from the proceedings referred to at group (e) of the Notice of Motion. In Civil Appeal No. 60 of 2013, and HCCC No. 216 of 2007, the ex parte Applicants' firm represents John O Ochanda & Others against the Interested Party and no advocate client relationship existed. The deed of settlement made on 8th August, 2014 is about the matters listed at paragraph B(a-j) of the deed of settlement.
32. It was disclosed that before the Interested Party lodged the complaint it wrote a demand to the Applicants dated 13th February, 2012 to which the Applicants responded on 8th April, 2013 which response the Interested Party did not find satisfactory and vide a letter dated 5th November, 2013 and telephone conversations, the Applicants requested a meeting and the Interested Party's Advocates on record wrote to them on 12th November, 2013 calling for written proposals that would form the basis of discussions but no response was forthcoming. The Applicants' letter to the Law Society of Kenya dated 26th November, 2013 was however not copied to the Interested Party's Advocates. When the Interested Party's advocates were served with the letter and replying affidavit, they with the Interested Party's instructions wrote a letter dated 12th February, 2014 protesting the conduct of the Law Society and the Applicants and did not concede to the request.
33. Subsequently, the Applicants were summoned for plea on 17th November, 2014 vide a letter dated 8th October, 2014 at which they were represented by an advocate who entered a plea of not guilty and the matter fixed for hearing on 19th January, 2015 following the decision by the 1st Respondent to decline to grant the application for adjournment of plea to refer the matter to mediation.
34. It was contended that the Applicants are not truthful and lack clean hands. They wrote to the Law Society of Kenya a letter dated 30th October, 2014 intimating that they negotiated settlement of all

cases between their firm and the Interested Party and executed a deed of settlement dated 8th August, 2014. The letter sought intervention of the chair to suspend Disciplinary Committee No. 224 of 2013 as a compromise had been reached. However, the above was absolute misrepresentation of facts as the only dispute between the Interested Party and Applicants is Disciplinary Committee No. 224 of 2013 that has not been settled. To the deponent this was a deliberate attempt to circumvent the complaint as the Applicants knew the allegations were false.

35. It was contended that the Law Society of Kenya without the Interested Party's consent appointed **Mr. John Ohaga Advocate** to mediate in a letter dated 11th November, 2014 and in a letter dated 1st December, 2014 the Interested Party's advocates wrote to **Mr. Ohaga** with a copy to the Law Society of Kenya clearly stating its position. To the deponent, the Interested Party has no malice against the Applicants and this Court should not be blind to the Applicants bid to cloud and mix matters between them and their clients and D.C. No. 224 of 2013 and was of the view that the appropriate forum for the Applicants to object is before the Disciplinary Committee and not this court. To her, the Interested Party's complaint is not flimsy but raises matters of professional misconduct and this Court would do injustice to stop prosecution of the complaint for determination on merit.

36. To the Interested Party it has nothing to revenge against the Applicants as they are not parties to the Court of Appeal judgment's alluded to in the statement. However, taxation of fees is not a defence to the misconduct complained of but a means to certify rightful fees the Applicants are entitled to though the Applicants' firm has never sued the Interested Party and it is not aware of any other suit between it and them.

Determinations

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

38. From the record, it is clear that the letter inviting the applicants to comment on the complaint raised against them was dated 22nd October, 2013. The said letter required the applicants to respond thereto within 7 days to enable the 1st Respondent table the complaint. However vide a letter dated 15th November, 2013, the 1st Respondent informed the applicants that the complaint was placed before the Disciplinary Committee for prima facie on the 28th October, 2013 and a decision made thereon. The applicants contend that it was not until the 31st October, 2013 that the letter of 22nd October, 2013 was received by them.

39. Whereas this Court cannot in these proceedings reconcile the factual averments in the absence of concurrence thereon by the parties, what is clear however is that the complaint was tabled for prima facie before the period given to the applicants to respond thereto lapsed. It may be argued that at that stage the 1st Respondent was not under an obligation to hear the applicants on the complaint since it was just making inquiries into the complaint. However in **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not

lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

40. In my view for one to say that a prima facie case has been made out, it is only fair that the person against whom adverse allegations are made be given an opportunity to respond thereto. This is exactly what the 1st respondent set out to do. However before the lapse of the period given to the applicants, the 1st respondent decided to table the matter thus denying the applicants the opportunity to respond to the allegations made against them.
41. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** where the Court expressed itself as follows:

"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

42. 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."

43. In my view, to give a party to a disciplinary proceedings an opportunity to respond to allegations made against him while at the same time proceeding to the next stage before the time given to the party to respond has lapsed defies logic and amounts to gross unreasonableness. Such gross unreasonableness, it is my view, amount to irrationality in terms of the Wednesbury principles.To do so also amounts to failure to act fairly as it is an indication that the authority concerned has made a decision for it does not make sense to move to the next stage of the proceedings before all the material the authority considers relevant has been placed before it purely as a result of the failure by the authority to adhere to its own directions.
44. The applicants also complained that the dispute ought to have been referred to mediation. Whereas that maybe a prudent way of solving disputes unless that mechanism is mandatory, the respondents cannot be faulted for not resorting to the same. Where the decision to refer the matter to mediation or any other alternative dispute resolution mechanism is purely discretionary, judicial review jurisdiction cannot be invoked with a view to compelling the authority concerned to opt for such alternative.
45. The parameters of judicial review orders of *mandamus* 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:

"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..."

46. I am equally not convinced that the mere fact that a party has filed his bill of costs for taxation deprives the respondent from jurisdiction to entertain a complaint. Whereas that is a matter which the Respondent may in its discretion take into account, that cannot be the sole basis upon which this Court would prohibit the Respondent from enquiring into a complaint made before it. The 1st respondent 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 ***Advocates Act*** ("the Act"), the said Committee has the power to receive complaints of professional misconduct against an Advocate from any person. Since the Applicants herein are Advocates, the 1st respondent has jurisdiction to entertain any complaints made against them in their 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 2007**:

"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."

47. 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.

48. In this respect it was held in **Ex Parte Kimaiyo Arap Sego** (supra) that:

"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."

49. In this case, the applicants contend that the Respondents ought not to have entertained the Complainant's complaint in light of the pendency of the taxation proceedings. Whereas it may have been prudent for the Respondents to await the outcome of the said taxation proceedings,

there is nothing to bar the Applicants from raising the issues they have raised herein in the said Disciplinary Proceedings for consideration by the Committee. As was correctly appreciated by **Onyancha, J** in **T O Kopere vs. The Disciplinary Committee Law Society of Kenya & Anor. HCCA No. 461 of 2011**:

"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."

50. If and when the Committee makes its decision and the Applicants are aggrieved thereby, they 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.
51. However in light of my finding that the respondents took a short-cut in the disciplinary proceedings in question, it is my view and I so hold that the impugned proceedings were tainted with procedural irregularities.
52. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. Similarly, in **Macharia vs. Wanyoike [1981] KLR 45,** the Court was of the view that, that a pleading by way of the proposed short-cut method may or may not be an out of place is perhaps a worthwhile proposition for the rules making body on grounds of expedience or as a time-saving device; but experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end and that it may be specifically argued that in relation to the precaution against delay, a short-cut may be accepted or applied to expedite but not to delay; but a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Lastly, on this point it was held in **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** that:

"The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."

53. In this case, the issue is not whether or not the applicants have a good defence to the complaint lodged against them. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456,** it was held:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in

substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

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

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

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

55. In my view fair administrative action imports the rules of natural justice. To fail to adhere to the rules of natural justice may render an administrative action procedurally improper and procedural impropriety is no doubt one of the grounds for grant of judicial review remedies.
56. As was held in **Jafferson M S Nyagesoa vs. The Chairman of the Disciplinary Committee and Another Kisii HCMA No. 189 of 2004**:

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

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

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates

all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated because there is no particular safeguards provided under section 62 that deals with the removal of a Judge in instances where there is a complaint against him."

58. It follows that this Court has the powers to interfere with the decision of the Respondents arrived at in the exercise of its statutory mandate where the Respondents' powers are not validly and fairly exercised. To make a decision adversely affecting the applicant in an unfair manner is in my view such invalid exercise of power warranting this Court to interfere.
59. In the premises I find merit in the Notice of Motion filed on 21st January, 2015.

Order

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

1. **An order of certiorari an order of certiorari directed at the Respondents removing into this Court to quash the proceedings consequent upon the decision made on 28th October, 2013 in DCC/224/2013 which proceedings and decision is hereby quashed.**
2. **As the substance of the complaint remains undetermined there will be no order as to costs.**

Dated at Nairobi this 28th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mulomi for Mr Nasir and Miss Muigai for the Applicants

Mr Ogoti for Miss Mbaabu for the Interested Party

Miss Mwinzi for the Respondent

Cc Patricia