REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW NO.25 OF 2014

IN THE MATTER OF AN APPLICATION BY: ROBERT OUMA NJOGA-APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL.....1ST RESPONDENT

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

HON. ATTORNEY-GENERAL.....3RD RESPONDENT

PAMELA AKINYI AUKA.....INTERESTED PARTY

J U D G M E N T

1. By a notice of motion dated the 12.2.14 the applicant prays for the following order:

1. **An order of certiorari directed at the 1st respondent removing to this court its decision made on 24.3.14 in Disciplinary Cause No.187/11 for purposes of having it quashed.**

2. **An order of prohibition prohibiting the 1st Respondent from proceeding further with hearing, mitigation and sentencing in Disciplinary Case No.187/11**

2. The facts concerning the parties herein are clear and straight forward. The applicant (a counsel) was acting on behalf of the Interested Party herein in respect to suit number Kisumu CMCC No.735/04 for recovery of general and special damages pursuant to a fatal road traffic accident. An award of Kshs.1,348,600 inter-alia was granted in favour of the clients. The client apparently did not get the award fully from the advocate upon being paid by the insurance M/S UAP Insurance Company. This then prompted her to lodge a complain with the 1st and 2nd Respondents.

3. After hearing the parties the 1st respondent rendered the following verdict, namely that the applicant had been found to have committed professional misconduct in the nature of:

a. **Fraudulent Accounting.**

b. **Non-disclosure of material facts to the client.**

c. **Lack of candidness and**

d. **probity with clients**

4. The said tribunal went further to state as follows after convicting the applicant"

> **"Due to difficulties posed to this tribunal by non-disclosure of crucial documents, presenting questionable documentation, the following issues should be clarified first -**
>
> 1. **The original judgment issued in Kisumu CMCC 735/04 be availed to the tribunal.**
>
> 2. **The authenticity of the letter dated 15.11.11 from UAP Provincial Insurance Limited be ascertained.**
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> 3. **The origin and correctness of the decree dated 23.10.07 be ascertained.**
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> 4. **The pleadings in the two cases be availed.**
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> 5. **Details of RTGS in respect of the payment of Kshs.2,020,730/= be availed.**
>
> 6. **The assistance of the DPP be sought in this matter.**
>
> 7. **The actual amount due to the complaint together with occrued interest be ascertained upon these clarifications prior to mitigation and sentence.**

5. It is this decision that prompted the applicant to file this application. According to the applicant there is no sufficient reasons, why the 1st respondent issued a conviction then proceeded to ask for additional evidence. He states further that the decision is based on conclusive findings and goes against the rules of evidence by shifting the burden to the applicant.

6. On its part the 1st and 2nd respondents have filed grounds of opposition arguing that the application is unmeritorious and ought to be dismissed That the applicant has withheld vital information to the 1st respondent but instead choose to come to court and further that if the application is granted it will cripple the duties of the 1st respondent which is mandated in here to do.

7. The court has carefully perused the application together with its annexures as well as the written submissions of the parties herein. Apparently the 3rd respondent and the interested party did not file any response.

The issues to be decided are clearly discerned from the facts herein namely:

1. **Whether the application portrays grounds for judicial review orders.**

2. **Whether the application dated 16.12.14 is properly before court.**

8. The grounds for granting the orders of judicial review were well captured in the Uganda's case of **PASTOLI VRS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] 2 E.A. 300.** It was held while citing **COUNCIL OF CIVIL UNION VRS MINISTER OF THE CIVIL SERVICE [1985] AC 2** and an application by **BUKOBA GYMKHANA CLUB [1963] E.A. 478** at **479** that:

> **"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 prevalent propriety.. illegality is when the decision making authority commits on 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 law or its principles and instances of illegality. It is, for example 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 in 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 absence 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 instruments by which such authority exercise jurisdiction to make decision."

9. As is the rule, judicial review is merely concerned with the decision making process not necessarily the merits of the decision. In this matter it is not disputed that the 1st respondent had jurisdiction to entertain the complaint. The argument however is whether the decision arrived at breached the cardinal rules of natural justice. In other words did the tribunal grant a fair hearing to the applicant? Was there any hint of biasness?

10. Having perused the proceedings, I am satisfied that the applicant was represented by counsel all through including the dates of the delivery of the judgment. The judgment however was not conclusive as sentencing was yet to be meted against the applicant. Before then the 1st respondent asked for better particulars or further evidence in respect to the issues at hand. The applicant has argued that it was not clear who was to provide this extra details. Was it him, interested party or the DPP?

11, I find the above requirements not to have breached the rules of natural justice. Whether it was the applicant or other 3rd parties to supply or the interested party for that matter, does not necessitate this court to interfere with the tribunal's process in arriving at a judgment. If this court was to prohibit the tribunal from its work, it means that the matter would not be concluded.

12 In other words I do not find the request by the tribunal as illegal, bias, irrational or there was any procedural impropriety. If for example the applicant was unable to provide, them, I do no see any reason why he should not face the tribunal and explain so. Again the court is not called to decide on the evidence produced but on procedural requirements by the tribunal. I do not therefore find that there was any breach of procedure by the tribunal. Respectfully therefore the proper recourse for the applicant was to comply with the order requiring further details, which in my opinion has not been demonstrated to be onerous.

13 The other issue to determine is the validity of the entire application. From the record, leave was granted to the applicant on 6.10.14 and my brother Judge Odunga transferred the matter to Kisumu High Court and granted the applicant 14 days to file the substantive application. The applicant failed to do so and on 14.1.14 sought an extension of time to file the same substantive application. That application was granted unopposed. The whole issue has been reignited by the respondent herein. According to the respondent Order 53(3) of the Civil Procedure Rules clearly stipulates that the substantive application after leave is granted ought to be filed within 21 days. The application herein was filed way after expiry of the 14 days granted by Judge Odunga and more so after 21 days per the Rules.

14. A closer reading of Order 53(3) states that the notice of motion shall be filed within 21 days. The same is mandatory and nowhere does it state that one ought to seek an extension. The rules governing Judicial Review are *suigeneris* and are complete on there on. No other part of the Civil Procedure applies.

15. Consequently I find that having failed to meet the 14 days deadline as ordered by Judge Odunga, the applicant ought to have sought another 7 days extension so as to make an aggregate of 21 days as clearly stipulated by the rules. The 7 days extension should have of course been done within the 21 days window provided.

16. The upshot of my finding are that the applicant jumped the gun. He ought to have complied with the tribunal's requirement then thereafter if not satisfied pursue the next cause of action. There is no sufficient evidence to suggest that the tribunal's decision should be quashed neither prohibited. The appellant as well as the interested party had sufficient time to explain themselves at the tribunal and

whether the finding was wrong or right, is not for the court to decide., In any event the notice of motion as stated above I find is totally unmeritorious having been filed outside the stipulated time. The same is disallowed with costs to the 1st and 2nd respondents.

Dated, signed and delivered this 29th day of October 2015.

H. K. CHEMITEI

J U D G E