



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 70 OF 2012

REPUBLICAPPLICANT

VERSUS

LAW SOCIETY OF KENYA'S

DISCIPLINARY COMMITTEE.....RESPONDENT

EX-PARTE

ROBERT KENNETH MACHARIA &

GERALD NDUNGU GAKARIA

T/A MACHARIA GAKARIA & ASSOCIATES

JUDGEMENT

By way of an notice of motion application dated 16th March, 2012 Robert Kenneth Macharia (the 1st Applicant) and Gerald Ndungu Macharia (the 2nd Applicant) seek an order of certiorari to remove into this Court and quash the judgment of the Disciplinary Committee of the Law Society of Kenya dated 6th February, 2012 in **Miscellaneous Cause No. 58 of 2011**. The Respondent is the Disciplinary Committee of the Law Society of Kenya.

I have looked at the chamber summons application for leave, the verifying affidavit of Robert Kenneth W. Macharia, the statutory statement plus the annexures all dated 5th March, 2012 and the case that emerges is that one Harrison Njoroge Igiria swore on undated affidavit accusing Robert Kenneth Macharia and Gerald Ndungu Gakaria trading as Macharia Gakaria & Associates for failing to account for Kshs.1.7 million being the balance of the purchase price in respect of L. R. No. Dagoretti/Riruta 4084 and L. R. No Dagoretti/Riruta/4085. The said law firm was acting for the said Harrison Njoroge Igiria who was the vendor in the transaction.

Through a notice dated 20th April, 2011 Gerald Ndungu Gakaria (the 2nd Applicant) was notified that a complaint which had been registered as **Disciplinary Committee Cause No. 58 of 2011** was coming up

for plea on 23rd May, 2011. Thereafter the matter proceeded to hearing and on 6th February, 2012 the Respondent found the applicants guilty of professional misconduct for withholding a client's funds and not accounting for the same. The applicants herein were then directed to deposit with the Law Society of Kenya secretariat the sum of Kshs. 500,000/= within 30 days from the date of decision.

The applicants have now moved to this Court by way of these judicial review proceedings and challenged the decision of the Respondent on the ground that the same was arrived at in defiance of the rules of natural justice.

The applicants' first complaint is that the 1st Applicant was convicted without being charged as the letter notifying the taking of plea was only addressed to the 2nd Applicant.

Secondly, the applicants contend that the decision by the Respondent to proceed by way of affidavit evidence breached their right to a fair trial under **Article 50 of the Constitution** in that they were denied the right to challenge the evidence of the complainant through cross-examination.

Thirdly, the applicants submit that they were convicted in respect of an offence for which they had not been charged. It is their case that although the complaint to the Disciplinary Committee was in respect of L.R. No. Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085, the Respondent had gone ahead and convicted them in respect of a complaint relating to L.R. Dagoretti/Riruta/4080.

The applicants therefore urge this Court to quash the decision of the Respondent.

The Respondent opposed the application through a replying affidavit sworn on 29th June, 2012 by Mr. Apollo Mboya, the Secretary of the Law Society of Kenya. It is the Respondent's case that on 13th April, 2011 a complaint was received from one Harrison Njoroge Igeria against the professional conduct of Robert Kenneth Macharia and Gerald Ndungu Gakaria trading as Macharia Gakaria Associates. The allegation was that the applicants had failed to account for a sum of Kshs.1,700,000/= being money received in connection with the sale of Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085 to Wells Publishing Limited wherein the said firm of advocates was acting as advocates for the said complainant who was the vendor in the transaction.

Subsequently the Respondent perused the complaint and on 1st April, 2011 established that the complaint revealed a *prima facie* case and ordered that the matter be fixed for plea taking. As a result, **Disciplinary Cause No. 58 of 2011** was preferred against the applicants. The matter was scheduled for plea taking on 23rd May, 2011 when the 2nd Applicant entered a plea of not guilty. The applicants were directed to file a replying affidavit within 21 days and the matter was fixed for hearing on 8th August, 2011.

The Respondent states that the 2nd Applicant is the only one who filed a replying affidavit and in the replying affidavit he averred that the subject matter of the complaint was handled by the 1st Applicant.

When the matter came up for hearing on 8th August, 2011 the applicants were represented by an advocate called Alex Karanja and the complainant was represented by Mr. Ojiambo. Counsel for the complainant applied to cease acting for the complainant and the Respondent directed service of a notice of withdrawal upon the complainant. The matter was then adjourned to 7th November, 2011.

On 7th November, 2011 the applicants were represented by the same advocate. The Respondent decided to proceed by way of affidavit evidence under **Rule 18 of the Advocates (Disciplinary Committee) Rules**. The Respondent then adjourned the matter to 6th February, 2012 for judgment, mitigation and sentencing. It is the Respondent's case that on 7th November, 2011 the advocate for the applicants did not make any application to cross-examine the complainant.

Further, that on 6th February, 2012 the judgment was delivered in the presence of the advocate for the

applicants. The matter was then adjourned to 16th April, 2012 for mitigation and sentencing.

The Respondent's case is that the 1st Applicant was all along aware of the proceedings and his claim that he was not afforded a chance to be heard holds no water.

It is the Respondent's submission that the applicants ought to have appealed as provided by **Section 62 of the Advocates Act** instead of filing these judicial review proceedings. The Respondent urged the Court to dismiss this application so that it can proceed with mitigation and sentencing in **Disciplinary Cause No. 58 of 2011**.

The applicants filed another undated affidavit on 22nd November, 2012. The affidavit which was sworn by the 1st Applicant reiterates the contents of the application and points out the errors in the Respondent's judgment. The applicants argue that the decision to proceed by way of affidavit evidence was taken by the Respondent without involving their advocate.

Mr. Apollo Mboya swore a further affidavit on 21st May, 2013 in which he averred that there was another complaint lodged against the applicants by Harrison Njoroge Igeria in respect of a sum of Kshs.500,000/= being money received on his behalf in a sale transaction involving L.R. No. Dagroretti/Riruta/4080. Mr. Mboya averred that the applicants replied to the complaint through a replying affidavit sworn on 4th July, 2011 and which affidavit was annexed as exhibit "AM-7" to his replying affidavit dated 29th June, 2012 in these proceedings. Mr. Apollo Mboya submitted that the judgment in respect to the complaint arising from the transaction involving L.R. No. Dagoretti/Riruta 4080 was delivered on 6th February, 2012.

The 1st Applicant swore a further affidavit on 22nd August, 2013 averring that no complaint had been made to the Respondent in regard to L.R. No. Dagoretti/Riuta/4080.

The question for the determination of the Court is whether the applicants were given a fair hearing by the Respondent.

It is now well settled that judicial review will come to the aid of an applicant where the applicant has been subjected to an illegal and unreasonable process by a public authority. Judicial review orders will also issue where an applicant establishes that the rules of natural justice were not complied with.

The circumstances under which orders of judicial review can issue were elaborated by Justice Kasule in Ugandan case of **PASTOLI v KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] 2 EA 300** at pages 303 to 304 thus:

"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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision 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.....

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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

The 1st Applicant contends that he was convicted without a hearing since he was not served with the allegations against him.

The complaint that was made to the Respondent by Harrison Njoroge Igiria states in paragraph 1:

“I make a complaint, on the grounds set out below, against the conduct of Robert Kenneth Macharia and Gerald Ndungu Gakeria trading as MACHARIA GAKARIA & ASSOCIATES of P. O. Box 70662-00400 Nairobi Advocates of the High Court of Kenya.”

Notice of the complaint was served on the 2nd Applicant. He was asked to appear for plea on 23rd May, 2011. The 1st Applicant claims he was not served with notice to take plea.

The 2nd Applicant filed a replying affidavit before the Respondent in which he stated that he never personally handled the conveyance and that the conveyance in question was handled by his partner the 1st Applicant. He then proceeded to aver that he had consulted the 1st Applicant who had given him information about the transition.

The Respondent exhibited the notice to take plea dated 20th April, 2011 which was only served upon the 2nd Applicant. Even the affidavit of service sworn on 3rd May, 2011 by John Ombwonya Kisia shows that it was the 2nd Applicant alone who was served with a document for plea on 21st April, 2011. Only after the plea had been taken do we see the 1st Applicant being served with documents relating to the matter.

All the documents I have referred to are in relation to an undated complaint filed with the Respondent by Harrison Njoroge Igiria on 13th April, 2011. According to the title of the complaint the same arose from failure to account and remit proceeds from the sale of L.R. No. Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085. This is also clearly brought out in paragraph 2 of the complaint which states:

“The said firm of Advocates acted for me as vendor in the sale of L.R. No. Dagoretti/Riruta/4084 & 4085 to Wells Publishing Limited for the sum of 4,500,000/= each, copies of the sale agreements are annexed and marked HN1-1.”

In paragraph 5 the complainant avers:

“That the said MACHARIA GAKARIA & ASSOCIATES have since either refused or neglected to pay to me part of the purchase price in the amount of Kshs.1,700,000/= still in their possession.”

Through the affidavit of Apollo Mboya sworn on 21st May, 2013 it emerges that there was yet another complaint in respect of transactions involving LR. No. Dagoretti/Riruta/4080. This particular cause was lodged through an affidavit sworn on 5th April, 2011 by Harrison Njoroge Igaria. It was filed with the Respondent on 6th April, 2011.

No documentary evidence was exhibited by the Respondent to show that this particular complaint was served on the applicants. It is said that the judgment the applicants seeks to quash related to this complaint but no judgement has been exhibited in respect to complaint arising from the sale of Dagoretti/Riruta/4084 and 4085.

In fact the replying affidavit of the 2nd Applicant exhibited by the applicants and the Respondent is clearly in response to the complaint arising from the sale of L.R. No. Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085. The judgment exhibited refers to the replying affidavit and the Respondent

wonders why the applicants were talking about L.R. No Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085.

The proceedings before the Respondent leave unfilled gaps. Were the two complaints consolidated? Where is the judgment concerning the complaint for the sale of L.R. No. Dagoretti/Riruta/4084 and Dogoretti/Riruta/4085? Where are the proceedings for the complaint? Why didn't the Respondent produce the proceedings? Why didn't the Respondent adduce evidence in regard to the complaint touching on Dagoretti/Riruta/4080? Why was one file, to wit, **Disciplinary Cause No. 58 of 2011** opened for the two complaints which were filed on different dates?

Looking at the unanswered questions, the impression one gets is that the applicants were never informed of the charge in respect to the sale of L.R. No. Dagoretti/Riruta/4080. They were therefore convicted for an offence with which they were not charged. The right to a hearing, which is the cornerstone of the rules of natural justice, was breached.

As regard the charge in respect to the sale of L.R. No. Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085 I agree with the Respondent that the partnership was the accused and the 1st Applicant cannot pretend to be separate from the 2nd Applicant. In fact the complaint was very clear. No judgement for this complaint has been exhibited. Looking at the decision of the Respondent, it is possible that the complaint arising from the sale of L.R. No Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085 was not pursued.

The judgment dated 6th February, 2012 clearly shows that it relates to a complaint arising from the sale of L.R. No. Dagoretti/Riruta/4080. In its findings the Respondent stated:

“We find that the respondents acted for the complainant in the sale of L.R. No. Dagoretti/Riruta 4080 the subject matter of the complaint the affidavit of the complaint. The affidavit of complaint and all the supporting documents produced by the complainant refer to L. R. No. Dagoretti/Riruta/4080.

The Respondents for reasons best known to themselves in their affidavit of response and in their supporting documents choose to refer to transactions which were not the subject matter of the complaints-Dagoretti/Riruta 4084 and 4085. Hence the copies of discharges that the respondent tabled before us refer to Dagoretti/Riruta 4085 and Dagoretti/Riruta/4084.

The copy of the Transfer the respondents have annexed to their affidavit also relate to Dagoretti/Riruta/4085”.

If there was no complaint arising from the sale of Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085 as alleged in the judgment then why did Mr Apollo Mboya in his replying affidavit of 29th June, 2012 refer at length to a complaint arising out of the sale of L.R No. Dagoretti/Riruta/4084 and Dagoretti/Riruta/4085? Why did he exhibit documents relating to that particular complaint? I think the Respondent got mixed up and ended doing injustice to the applicants. The decision of the Respondent cannot be allowed to stand. In short, the application succeeds and an order of certiorari shall issue accordingly. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 25th day of September , 2014

W. KORIR,

JUDGE OF THE HIGH COURT