REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL APP. NO. 346 OF 2013

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAW REFORM ACT & THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF AN APPLICATION BY SALOME NYAMBURA NYAGAH FOR LEAVE TO APPLY FOR CERTIORARI & PROHIBITORY ORDERS

AND

AND IN THE MATTER OF THE ADVOCATES ACT (CAP. 16) AND ADVOCATES (COMPLAINTS COMMISSION) RULES

REPUBLIC ..... APPLICANT

VERSUS

ATTORNEY GENERAL ..... 1ST RESPONDENT

DEPARTMENT OF ADVOCATES COMPLAINTS COMMISSION…….2ND RESPONDENT

***EXPARTE*: SALOME NYAMBURA NYAGAH**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th November, November, 2013, the exparte applicant herein, **Salome Nyambura Nyagah**, seeks the following orders:

1. **THAT an order of prohibition do issue to prohibit the Respondents, their servants and/or agents from instituting, commencing, filing or in any manner howsoever proceeding with any disciplinary charges against the Applicant whatsoever in relation to the complaint by one Mary Nyakeru Walker as threatened vide the 2nd Respondent's dated 28th August 2013.**
2. **THAT an order of certiorari do issue to bring to this Honourable Court and quash the decision by the 2nd Respondent contained in the letter dated 28th August 2013, to prefer charges against the Applicant allegedly for acting and charging fees without instructions**

and/or charging the Applicant whatsoever in relation to the complaint by one Mary Nyakeru Walker.

3. **THAT costs of this application be borne by the Respondents.**

2. The application is supported by an affidavit sworn by the applicant herein on 1st October 2013.

3. According to the applicant, an advocate practising in the name and style of **Njoroge Nyagah & Co. Advocates**, the said firm was instructed by **Gatagama Housing Estate (1981) Limited**, land buying company to assist them in obtaining the requisite approvals and consents for subdivision, processing deed plans and thereafter processing and issuance of the title deeds for members in respect of LR No. 12933 and LR No. 13537/111. Pursuant to the foregoing it was agreed by the members of the company, of which the complaint herein **Mary Nyekeru Walker** was one, that payment for legal fees would be made directly to the firm's offices in Nairobi. Thereafter, the firm proceeded as instructed and in respect of the complainant she made initial payment of Kshs 6,050/= to the company and an additional payment of Kshs 22,400/- being disbursement and deposit of the firm's fees directly to the firm.

4. It was contended that by making the said payment the complainant acknowledged the firm as acting on her behalf in the matter and on 23rd August 2010 when the titles were ready the complainant was informed to collect the same on settlement of the balance of the firm's fees and other disbursements amounting to Kshs 51,204/=. However no response was received and until 25th January 2012 when a letter dated the same day was received from the Law Society of Kenya indicating that a complaint had been made against the applicant as contained in a letter dated 24th January 2012 in which it was alleged that the fees of Kshs 51,204/= was not justified which letter the applicant responded to. According to the applicant there was no allegation that instructions were not given.

5. The complainant was thereafter advised to inform the applicant if she was not satisfied with the charges to enable the firm file a bill of costs for taxation. Instead the firm received a letter on 22nd April 2013 dated 13th April 2013 from the Advocates Complaints Commission referring to a complaint lodged by her alleging that the firm had withheld her title documents and asking whether the applicant had filed the bill of costs. After an exchange of correspondences it was agreed that the applicant files the bill of costs as previously advised by the Law Society of Kenya and pursuant thereto the applicant filed a bill of costs on 9th July 2013.

6. However by a letter dated 28th August 2013 the Commission purported to make a completely new, biased, inconsistent and unfounded allegations that the complainant had not instructed the applicant to act for her and that the Commission was proceeding to file charges against the applicant for acting and charging fees without instructions. Despite refuting the same, he Commission has not responded and the applicant is apprehensive that the Commission will proceed to prefer the said charges a fact which was confirmed by telephone conversation.

Respondent's Case

7. In response to the application, the Respondent filed a replying affidavit sworn by **Grace Thuku**, a Deputy Chief State Counsel in the Office of the Attorney General in the Department of Advocates' Complaints Commission on 14th November, 2013.

8. According to her the Judicial Review proceedings herein are premature and an abuse of the court processes as they had not yet charged the Applicant herein since they were still investigating on the matter. In her view, the application does not disclose any issue triable in Judicial review and that it is pegged mainly on issues of merit.

9. She deposed that they wrote to the Applicant herein on the 10th April 2013 informing her of the complaint filed against her and inviting her to attend their offices for the purposes of pursuing an alternative dispute resolution on the complaint. It was her position that the commission is mandated by the ***Advocates Act*** to deal with complaints filed against advocates and that summoning the Applicant was

rightfully within their mandate.

10. While asserting that they had not charged the applicant, the deponent, averred that they were in the process of pursuing a settlement failure of which they intended charge the Applicant as communicated in the letter dated 28th August 2013. In her opinion, the said letter is not a decision to charge the Applicant but a mere communication that the Applicant shall be charged and hence it is not capable of being quashed. She further contended that the issues that were canvassed before the Law Society of Kenya disciplinary committee was on fees and not the same issues that the complainant is raising before the Advocates Complaints Commission.

11. The deponent reiterated that this application is premature as it is pegged on anticipation of a charge by the Applicant and the Applicant still has other remedies available to her and should have sought Judicial Review only as a last resort and that should the commission decide to charge the Applicant she shall be afforded a fair hearing.

12. It was however the Respondent's case that the commission which is subject to the supervisory jurisdiction of this honourable court is acting within its mandate and following due process of the law.

Applicant's Submissions

13. On behalf of the applicant it was submitted that by intimating that they were proceeding to file charges for acting and charging fees without instructions, the 2nd Respondent had already made a decision to refer charges against the Applicant hence it was dishonest to contend that a decision had not been made to charge her.

14. It was submitted that before the said decision was made the applicant was not afforded a hearing or given reasons for the contemplated action as required under Article 47 of the Constitution. It was further contended that the provisions of section 53(4)(c) & (d) of the ***Advocates Act*** with respect to notification of the complaint and an opportunity to respond thereto was not complied with hence the decision was tainted with irregularity, illegality and is ultra vires.

15. The said decision was further contended to be in breach of Article 50(1) of the Constitution which requires fairness and reliance was placed on **Shyanguya vs. Public Service Commission & Others [1976-1985] EA 556**.

16. It Was submitted that the 2nd Respondent's decision was procedurally unfair and tainted with malice as the 2nd Respondent deliberately decided to prefer other charges against the Applicant knowing very well that the Applicant had not been given an opportunity to be heard and to defend herself.

17. It was submitted that contrary to the provisions of section 53(4)(c) and (d) of the Advocates Act that requires the 2nd Respondent to "notify the person or firm against whom the complaint has been made of the particular complaint and call upon such person or firm to answer the complaint within such reasonable period."

18. The Court was therefore urged to grant the application.

Respondent's Submissions

19. On behalf of the Respondents it was submitted that the affidavit in support of the application herein reveal that the issue is that of merits yet based on **Seventh Day Adventist Church East Africa vs. Permanent Secretary Ministry of Nairobi Metropolitan Development & Another [2014] KLR,** the Court in judicial review application.

20. It was further submitted that the respondent is sufficiently mandated to deal with the issues raised herein under section 53 of the Advocates Act. Based on **West Kenya Sugar Co. Ltd vs. Kenya Sugar**

Board [2014] eKLR and **Republic vs. Chairman Business Premises Rent Control Tribunal & Another ex parte Hekima College [2014] KLR**, it was submitted that judicial review being a remedy of last resort, as there are other available remedies, they ought to be resorted to.

21. With respect to the remedy of certiorari, it was submitted that the same cannot issue since this is not a decision to charge the applicant but a communication informing her of the intention.

Determination

22. I have considered the issues raised herein.

23. In this case the applicant contends that the Respondent intends to charge the applicant without getting the applicant's side of the story in breach of the rules of natural justice and Articles 47 and 50 of the Constitution were cited. The powers of the Advocates Complaints Commission are specified in section 53(4) of the ***Advocates Act*** as the power to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof. Where after considering such a complaint the Commission finds that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XII. If on the other hand it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification and it is only upon expiry of the said period that the Commission is empowered to proceed to investigate the matter for which purpose it has the power to summon witnesses, to require the production of documents.

24. It is contended by the applicant that the complaint laid before the Law Society is not the one which is being relied upon by the respondent. In its letter dated 28th August 2013, the Commission intimated that it was proceeding to file charges against the applicant for acting and charging fees without instructions. However in the letter dated 21st June 2013, the Commission itself expressly indicated that the complaint was one of withholding the complainant's title documents and overcharging on fees. If the applicant was only to respond to the issue of overcharging and withholding title documents and was not and has never been requested and given opportunity to respond to the issue of acting for the complainant without instructions, then the decision by the Respondent to prefer charges against the applicant as intimated in the letter dated 28th August 2013 was in breach of the rules of natural justice and the procedure provided under section 53(4) of the ***Advocates Act***. Procedural impropriety is recognised as a ground for judicial review as well as breach of natural justice. As provided in Article 47 of the Constitution which provides:

(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.

25. 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. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** 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.....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."

26. Under section 53(4) of the ***Advocates Act***, the Commission is under an obligation to consider a complaint made before it. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

"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."

27. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** that where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

28. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

"The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution "in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property…….The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…….. The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts…… The provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void……. The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…….. An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law… It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit. From it the minister was concerned with development and referred to his national concern relating to sugar production. In his order for sale he said that the owners were not able to develop the farm. The true test is whether the farm should be leased or sold to save it from deteriorating; the purpose of showing the cause is to allow the Minister to decide whether, in view of the deterioration, the farm had better be leased or sold. In either case, the owners are not going to be considered able to develop the farm or to continue as they have been. They are indeed, nolonger in occupation. It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

29. 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,** the Court held:

"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."

30. In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case cannot be said to have been considered when the person against whom the complaint is preferred has not been called upon to give his or her version of the issues in question.

31. In its letter dated 28th August 2013, the 2nd Respondent clearly stated that it was proceeding to file charges for acting and charging fees without instructions. One does not need to hold a doctorate in linguistics to understand that an action was being commenced against the applicant. To interpret the said letter to mean that investigations were still being conducted in my view is an aberration of English language. There is no evidence that the applicant was asked to give her version with respect to the charge with which the 2nd Respondent was "proceeding to file charges" for.

32. I therefore have no hesitation in finding that the 2nd Respondent's action was tainted with procedural impropriety. The applicant seeks both an order of prohibition and certiorari. In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** the Court of Appeal expressed itself as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, *where a decision has been made*, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. *Prohibition cannot quash a decision which has already been made*; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which *forbids that tribunal or body to continue proceedings* therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings……Only an order of *certiorari* can quash a *decision already made* and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter." [Emphasis mine].

33. Whereas an order of certiorari cannot issue in the circumstances of this case as there is no clear evidence that any decision was made by the 2nd Respondent, clearly the 2nd Respondent had announced in advance that it intended to proceed in breach of the rules of natural justice and this Court is obliged to prohibit it from acting in such manner.

Order

34. In the result the order which commends itself to me and which I hereby grant is an order of prohibition prohibiting the Respondents, their servants and/or agents from instituting, commencing, filing or in any manner howsoever proceeding with any disciplinary charges against the Applicant whatsoever in relation to the complaint by one **Mary Nyakeru Walker** as threatened vide the 2nd Respondent's letter dated 28th August 2013 without strictly complying with the provisions of section 53(4) of the ***Advocates Act***. As the subject matter of the complaint is yet to be determined on merits, there will be no order as to costs.

Dated at Nairobi this day 18th day of September, 2014

G V ODUNGA

JUDGE

<u>Delivered in the presence of:</u>

Miss Cheruiyot for the Respondents

Cc Patricia