REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 86 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

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

AND

IN THE MATTER OF LAW SOCIETY OF KENYA DISCIPLINARY TRIBUNAL CAUSE NO. 85 OF 2011 AND 8 OF 2014

REPUBLIC ……..…….....APPLICANT

VERSUS

THE LAW SOCIETY OF KENYA DISCIPLINARY TRIBUNAL...RESPONDENT

***EX-PARTE:* MICHAEL KIMANI HORERIA**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 12th March, 2014, the exparte applicant herein, **Michael Kimani Horeria**, seeks the following orders:

1. **An order of Certiorari do issue to bring to into this for purposes of being quashed the proceedings, decisions, *ex-parte* judgment and all consequential *ex parte* orders made herein by the Respondent in its Disciplinary Cause No. 85 of 2011 and more particularly the proceedings, decisions, directives and/or orders of 2nd September 2013 by which it purportedly ordered the suspension from practice of the Applicant herein for one year thus breaching the rules of natural justice and the Constitutional rights of the Applicant to receive fair administrative action.**
2. **An order of Prohibition directed to the Respondent barring the Respondent, or its servants and/or agents from instituting, commencing, filing or in any manner howsoever conducting proceedings in its cause number 8 of 2014 or any other disciplinary charges against the *Ex parte* Applicant whatsoever in relation to the complaint by one BERNARD OTUNDO SHIKWE as threatened vide the Respondent's letter dated the 12th November 2013 and 12th February 2014.**
3. **An order of Certiorari to remove to this honourable court and quash the decisions made by the Respondent contained in the letters dated the 12th November 2013 and 12th February**

2014 to prefer charges against the Applicant allegedly for non-remittance of monies due under a professional undertaking to another advocate under a delayed transaction and/or charging the Applicant whatsoever in relation to the complaint by one BERNARD OTUNDO SHIKWE relating to the subject matter in Disciplinary Cause No. 85 of 2011.

2. The application was supported by an affidavit sworn by the applicant herein on 1st October 2013.
3. According to the applicant, he was acting for a Purchaser of a house in Nairobi which transaction is incomplete as part of the funds of the purchase price have not been redeemed from the purchaser and hence he was not able to perform his undertaking to the Vendors Chargee's Advocates, the subject matter of the Disciplinary Cause No. 85 of 2011.
4. He contended that he was unlawfully suspended from the Roll of Advocates for one year and in addition a fine of Kshs. 30,000 was imposed by an order of the Disciplinary Committee on 2nd September 2013 for professional misconduct in not honouring a professional undertaking specifically given to the firm of **Wamaitha Kange'the & Company Advocates** and yet there was no undertaking to the complainant herein.
5. The applicant further deposed that due to the undue pressure and his reputation put to question, this matter has caused him great anxiety attacks and pressure as the complainant in Disciplinary Cause No. 85 of 2011 stated that he had not made any offer to settle the claim yet they are not interested in settlement as they have since March 2011 sought a unilateral reversal of the transaction instead of pursuing specific performance which they were entitled to since they were the cause of the delays in the completion of the transaction. According to him, this matter was heard and determined in his absence without affording him a chance to state his position and demystify all the wild allegations made by the complainant advocate as the Disciplinary Committee did not consider his affidavit as filed or at all. Although he had been given the 2nd September 2013 to clear his name and explain the delay in executing his professional undertaking to **Wamaitha Kangethe & Co. Advocates**, he was unfortunately caught ill on the Sunday of 1st September 2013 and was bedridden all day having caught a stomach bug which condition worsened and on the 4th September 2013, he was taken to Nairobi hospital and treated accordingly.
6. Thereafter, he attempted to get clarification from the Law Society on the occurrence of the 2nd September 2013 so as to put in an application to get a further early date to be heard but that was not accorded to him judiciously and he has had had to suffer since filing his application dated the 10th October 2013. He was only accorded a date of review on the 20th January 2014 thereby unlawfully forcing him to undergo an illegal sentence. He deposed that when he was accorded a delayed hearing of his application for review of the ex parte mitigation and sentence together with the setting aside of the conviction on the fundamental basis that the Disciplinary Committee had neglected, ignored and/or not in the first instance considered his replying affidavit filed with the Disciplinary Committee on the 4th July 2012 as was ordered by the Disciplinary Committee to be so filed (sic).
7. It was averred that the Originating Summons filed by the Bank's Advocates seeking the court to order performance of the undertaking by himself and adjudge whether interest accrues was still pending and negotiations waiving of the interest amount were ongoing since the Bank was the one solely able to decide what charges and levies will be imposed and or waived in the case of a settlement leaving costs as the only contentious issue.
8. However on the 21st November 2013 he received a letter from the Law Society of Kenya in regard to a further complaint regarding the same subject matter of the Cause No. 85 of 2011 to which they acted further and intend to charge him on the 10th March 2014 under cause No. 8 of 2014 vide a letter dated the 12th February 2014 which action is capricious and meant to subject him to double jeopardy as he did make a substantive reply and also it is the law that the Respondent has no jurisdiction to entertain matters which are pending before a High Court.
9. It was the applicant's position the surrounding circumstances conduct of the entire proceedings is selective and the sentence as meted is very severe and extremely punitive which is evidence of partiality by the Disciplinary Committee. According to him, though the Disciplinary Committee purported to grant him a reasonable opportunity to be heard, on the various dates, they did not consider nor attempt to look at his filed application which contained the entire evidence he was

relying on in his defence which was to be heard on merit in the interest so justice to all which is evidence that they had a preconceived position against his innocence and defence filed well in advance of the main hearing date for the record. In his view, this is the worst case of bias and this court should exercise its supervisory powers and consider that the Respondents are not being fair to him and that his Constitutional rights have been infringed as he is entitled to fair administrative action as is guaranteed under Article 47 of the constitution.

Respondent's Case

10. In response to the application, the Respondent filed a replying affidavit sworn by **Apollo Mboya**, the Secretary of the Respondent on 22nd May, 2014.
11. According to him, a complaint was received by the Law Society of Kenya vide an affidavit of complaint against the Applicant from one **Patrick Mbugua** on 20th June 2011 alleging that the applicant had failed to honour a professional undertaking given to the firm of **Namachanja & Co. Advocates**. Subsequently, the Law Society of Kenya Disciplinary Tribunal perused the complaint and saw that a prima facie case had been made against the Applicant and therefore fixed the matter for plea taking on 18th July 2011 on which day the *Ex parte* Applicant appeared in person and entered a plea of not guilty and was granted 21 days within which to put in his reply and the matter was then fixed to be heard on 12th September 2011.
12. A hearing notice was served for 12th September 2011 and though the *Ex parte* Applicant was present, the matter could not proceed as the complainant sought an adjournment and further the *Ex parte* Applicant intimated that they were trying to settle the matter and therefore the matter was then adjourned for to 5th December 2011. Though the date was taken in court (sic) in the presence of the *Ex parte* Applicant and a hearing notice served upon him, he did not appear before the Tribunal on 5th December 2011 and consequently the matter was adjourned to 5th March 2012 and a hearing notice ordered to be served upon the Applicant. On the said day, the *Ex parte* Applicant appeared in person and sought 45 days to put in his replying affidavit and the matter was then fixed for hearing on 14th May 2012 on which date the *Ex parte* Applicant appeared and claimed that they were settling the matter and therefore a further date was taken for hearing to enable settlement. Come the 14th of May 2012, despite the date having been taken in court and having been being served with a hearing notice, the *Ex parte* Applicant did not appear nor did he instruct anyone to hold his brief and neither had he complied with the Tribunal's order to file Replying Affidavit within 45 day from 5th March 2012. In the circumstances the Complainant's Advocate sought leave to proceed under Rule 18 of the Advocate (Disciplinary Tribunal) Rules and the said leave was granted and fixed or 12th November 2012 and a judgment notice served upon the *Ex parte* Applicant who did not appear thus causing the Tribunal to invoke its powers under Rule 17 of the Advocates (Disciplinary Tribunal) Rules and read the judgment notwithstanding the *Ex parte* Applicant absence. The matter as then fixed for mitigation and sentence on 18th March 2013, and the *Ex parte* Applicant was served with the notice for mitigation and sentence and despite the notification the Advocate did not appear. Considering the gravity of the matter, the Respondent postponed the said mitigation and sentence and ordered that the *Ex parte* Applicant be served afresh and therefore fixed the matter for mitigation and sentence on 10th June 2013 and once again the advocate was served. On 10th June 2013 the *Ex parte* Applicant appeared in person and sought more time to sort out the matter and the Tribunal gave him time and adjourned the Mitigation and sentencing again for 22nd July 2013. On the said date, the applicant once again sought further time to settle the matter and the matter was therefore adjourned in his presence and the date for mitigation and sentence was fixed for 2nd September 2013.Though served with the notice and despite his presence when the matter was fixed for sentencing, the *Ex parte* Applicant neither appeared nor asked anyone to hold his brief and the Respondent, taking into consideration all the opportunities accorded to the Applicant to be heard, invoked the powers donated under Rule 17 of the ***Advocates (Disciplinary Tribunal) Rules*** to determine the complaint before it and gave the orders which the *Ex parte* Applicant wish to quash herein.
13. It was deposed that it is only after learning that adverse orders had been made against him that the *Ex parte* Applicant wrote to the Tribunal informing them of his indisposition and presented his

medical report before the Tribunal dated 9th October 2013 in its application for review which clearly states that the advocate was seen by the hospital on 4th September 2012 contrary to the averments in the motion. It was therefore contended that in view of the foregoing, it is clear that the *Ex parte* Applicant has always been granted the opportunity to be heard, he was given ample time to put in his replying affidavit which he did not do, he was well aware of the date for mitigation and sentence, and opted to ignore the notice despite having been served with the same. He was further aware he was already convicted yet he kept on evading the mitigation and sentence. Further and in addition to the above the *Ex parte* Applicant applied for review on 10th October 2013 one year after the judgment which application was heard and determined by the Tribunal on 17th February 2014.

14. In the Respondent's view, in regard to Disciplinary Cause Number 8 of 2014 the Complaint therein was independent from Disciplinary Cause Number 85 of 2011 and though the same emanated from the same subject matter the complainant is different to wit that the complainant is the actual purchaser and his complaint relate to the fact that the Applicant herein failed to remit the purchase price to the vendor yet the purchaser had deposited Kenya Shillings Five Million (Kshs. 5,000,000) with the *Ex parte* Applicant. As a result of the Advocates Conduct in the said transaction the complainant in Disciplinary Cause Number 8 of 2014 has been subjected to unnecessary litigation in ELC 106 of 2012 against the Purchaser and further risks the cancellation of the title on account of fraud perpetuated by the Applicant herein. It was asserted that one of the main purpose of the Respondent is to protect members of the public by checking the conduct of the members of its profession and thus the proceedings before the Respondent in Disciplinary Cause number 8 of 2014 does not amount to illegal trial as alleged by the Applicant. In addition to the above the 1st Respondent has the power, by dint of Section 60 (4) (b) of the ***Advocates Act*** Cap. 16, to order that any advocate found guilty of professional misconduct be suspended from the practice of law for a specified period not exceeding 5 years. The Applicant herein was found guilty of a professional misconduct in Disciplinary Cause No.85 of 2011 referred and subsequently the order was meted against him.

15. The Respondent therefore contended denied the Applicant's averment that it did not act severely or unreasonably and instead contended that the Respondent acted proportionally and within its mandate and that failing to attend to the Respondent proceedings despite service was not only contemptuous to the Tribunal but also an impediment to expeditious justice contrary to Article 159(2) (b) of the Constitution of Kenya which demands that justice shall not be delayed.

Interested Party's Case

16. The interested party herein, **Maybin Holdings Limited**, filed a replying affidavit sworn by **Arthur Amukitoye**, its Director on 23rd May, 2014.

17. According to the deponent, the Company retained the professional services of the Applicant sometime in the month of July 2010, for the purchase of land known as Nairobi/Block 93/282 and the improvements thereon and paid a deposit of Kshs. 1,000,000/= upon executing the Sale Agreement, for which the total consideration was Kshs 10,000,000/=. On 20th August, 2010, the Applicant wrote to the Company requesting to be placed in funds of Kshs 9,000,000/= to enable him issue an undertaking to the Vendors' Advocates **M/s Namachanja & Mbugua Advocates** and on 1st September, 2010, wrote a further letter to the Company confirming receipt of Kshs 5,000,000/= at his firm's bank account on 1st September 2010. However, the Applicant to honour his professional undertaking to the Vendor's Advocates and in the meantime went ahead and effected transfer of title in favour of the Company but failed to remit to the Vendor's Advocates the monies he had received as stakeholder in consideration of the purchaser price.

18. Thereafter the Vendor's Advocates commenced disciplinary proceedings against the Applicant in Disciplinary Cause No. 85 of 2011.Alongside the Disciplinary proceedings the Vendors also filed suit in the High Court being **ELC Suit No. 106 of 2012** against the interested party herein seeking *inter-alia.*

    (a) Vacant possession

(b) An order directing that the registration of the transfer effected on 24th December 2010 be vacated

(c) An order that the proprietorship section of the register of the property of title No**. Nairobi/Block 93/282** be rectified by reinstatement of the Plaintiff's as the proprietors of the said property in place of the Defendant.

19. The Disciplinary Tribunal concluded its proceedings on 2nd September 2013 where upon the Applicant was found guilty of failing to honour his professional undertaking and sentenced to a 12 month suspension from practicing. However, the Company in anticipation of an adverse finding against it in **ELC Suit No. 106 of 2012** filed a formal complaint with the Law Society of Kenya over the conduct of the Applicant in not only exposing it to such liability but also for conduct incompatible with the status of an advocate in diverting Kshs 5,000,000/= received by him as stakeholder being Disciplinary Cause No. 8 of 2014. In the meantime, **ELC Suit No. 106 of 2012** was heard and concluded before **Justice Pauline Nyamweya** and judgment delivered on 5th May 2014 in which judgement the Judge found the Company to be liable for the acts of default or negligence on the part of the Applicant who was acting as its agent.
20. It was therefore the interested party's case that the Company has suffered a loss of bargain, loss of money and embarrassment through no action of its own but rather of the Applicant hence its complaint is serious, warranted and justified in light of all the developments and this court should allow the relevant tribunal to proceed to hear the Complaint and adjudicate on it since the Applicant has on his part already participated in the proceedings in Disciplinary Cause No. 8 of 2014 filing a response to the Complaint and cannot now be heard to seek prohibitive orders. To the deponent, the orders obtained on 28th February 2014 were on the strength of misrepresentations and material non-disclosure of relevant facts and ought to be vacated forthwith.

Applicant's rejoinder

21. In his further affidavit sworn on 13th June 2014, the ex parte applicant contended that **t**he issue of failure to honour professional undertaking was dealt with in Disciplinary cause No. 85 of 2011 and cannot be subject to proceedings in disciplinary cause No. 8 of 2014 hence issues raised by the interested party are the same as those dealt with in disciplinary cause number 85 of 2011 and involved the same transaction and sequence of events.

Determination

22. I have considered the application, the affidavits both in support of and in opposition to the application.
23. The ex parte applicant herein contends that he was never afforded an opportunity of being heard because on the day of the hearing he was unwell. It is further contended that the Respondent in its decision did not consider the ex parte applicant's replying affidavit.
24. As indicated at the beginning of this Judgement what the ex parte applicant seeks to quash are ex parte orders made by the Respondent particularly the order of 2nd September, 2013 by which the Respondent suspended the applicant for one year. That decision however, was the subject of the ex parte applicant's application for review which was heard on merits and dismissed on 17th February, 2014. To attempt to quash the said decision in these proceedings in my view amounts to a second bite at the cherry. In other words the ex parte applicant is seeking through these proceedings to obtain what he failed to secure by the application for review. That in my view amounts to an abuse of the process of the Court. If the ex parte applicant was aggrieved by the decision by the Respondent declining to allow its application for review he could only challenge the order arising from the review and not go back and challenge the decision which he had sought to set aside by review.
25. The applicant's case is not that he was never afforded an opportunity of being heard but rather that he was unwell. However, on the day of the hearing there was no application for adjournment made before the Respondent hence there was no basis upon which the Respondent could be expected to

exercise its discretion and adjourn the hearing. In the circumstances it is unfair for the ex parte applicant to accuse the Respondent of failing to afford him a hearing when he was never represented thereat though he was aware of the said proceedings. As was held by the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

26. Therefore the only issue in which the applicant could be properly heard was why he did not appear at the hearing. That issue was the subject of the application for review which was heard and determined by the Respondent on merits and if the ex parte applicant was dissatisfied therewith he ought to have exercised his appellate option under section 53 of the ***Advocates Act***, Cap 16 Laws of Kenya.
27. It must always be remembered that the decision whether or not to grant an adjournment is an exercise of discretion based on the material before the Court. Where there is absolutely no material placed before the Court due to the absence of a party, it cannot be said that the discretion was improperly exercised. The principles guiding the grant of adjournment were stated in **Famous Cycle Agencies Ltd & 4 Others vs. Masukhalal Ramji Karia SCCA No. 16 OF 1994** in which the Supreme Court of Uganda held as follows:

"…the granting of an adjournment to the party to a suit is thus left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner, and upon proper material. It should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth, and sufficiency of the reason alleged by him for not being ready. But the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause refers to the acts or omissions of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case and generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part an adjournment would not normally be refused. But where the party has been wanting in due diligence or is guilty of negligence an adjournment may be refused."

28. In this case the applicant contends that the Respondent failed to consider his replying affidavit. However, without the decision made by the Respondent dated 2nd September, 2013, this Court cannot be expected to find that the applicant's contention is correct. In any case the failure to consider material on record goes to the merits of the case and ought to be challenged by way of an appeal since the 1st appellate Court would be entitled to reappraise the material on record and arrive at its own decision. That however is not the role of the judicial review court.
29. Having considered the grounds upon which the instant application was brought, I find no merit in the Notice of Motion dated 12th March, 2014 which I hereby dismiss with costs.

Dated at Nairobi this day 27th day of October, 2014

G V ODUNGA

JUDGE

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

Mr Otundo for the interested party

Cc Florence