REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC APPLICATION NO. 328 OF 2011 (JR)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DISCIPLINARY COMMITTEE OF THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

BETWEEN

REPUBLIC…………………...…………………………………..…..APPLICANT

AND

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA......................................RSPONDENT

JULIUS NGUMBAU MWENGEI T/A MWENGEI & ASSOCIATES...............................EX PARTE APPLICANT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 15th March 2012, the *ex parte* applicant herein, **Julius Ngumbau Mwengei T/A Mwengei & Associates**, seeks the following orders:

1. **The decision made by the Institute of Certified Public Accountants of Kenya (ICPAK) as contained in the letter dated 25th October, 2011 suspending the Ex parte Applicant's practising certificate be called into this court and be quashed and/or set aside.**

2. **Costs of this application be borne by the Respondent**

***EX PARTE* APPLICANT'S CASE**

2. The application is based on the Statutory Statement filed on 16th December 2012 and the verifying affidavit sworn by the *ex parte* applicant on the same day.
3. The verifying affidavit of the ex applicant contains 6 paragraphs which state as follows:

1. **That I am applicant herein and therefore a competent to swear this affidavit.**

2. **That I have read and understood the statement accompanying the application herein.**
3. **That I verify that the contents of the said statement are true and correct.**
4. **That I have also read and understood the supporting affidavit and the annextures thereto and have duly executed the said affidavit.**
5. **That I verify that the contents of the said affidavit are true and correct.**
6. **That what is deponed herein is true and within my knowledge and belief.**

4. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal citing ***Supreme Court Practice 1976 Vol. 1 at Para. 53/1/7*** **&** **R. vs. Wandsworth JJ. ex Parte Read [1942] 1 KB 281** held that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the facts ought to have been contained in the verifying affidavit to which exhibits also ought to have been annexed other than in the statement.
5. The ex parte applicant, however, filed an affidavit together with his application seeking leave. That affidavit, in my considered view, was unnecessary as the facts deposed therein ought to have been deposed to in the verifying affidavit. However, that error, in my view was not fatal to the applicant's case and nothing turns upon it in light of the provisions of Article 159(2)(d) of the Constitution under which the Court is enjoined, in exercising judicial authority, to be guided by the following principle, inter alia, that justice shall be administered without undue regard to procedural technicalities.
6. The *ex parte* applicant's case is that on 3rd March 2010 he, in his capacity as a certified public accountant, participated in elections for the appointment of an external auditor for the audit of the books of accounts for **Kyanzavi Farmers Company Limited** (hereinafter referred to as the Company) in which he emerged 2nd after **M/s D M K Muathe and Assocaites**. He was however, on 8th March 2010 invited for interview by the Chairman of the Board of Governors of the Company on the basis that **D M K Muathe and Associates** had declined to take the said position. Following the said interview he was duly appointed the Company's auditor and commenced the said duties. On 25th January 2011 he was served with pleadings in Machakos HCCC No. 249 of 2010 – **Mwei Kithinji & Another vs. Kyanzavi Farmers Co. Ltd & Ngumbau Mwengei T/A Mwengei and Associates** following which he stopped further audit duties for the Company. On16th May, 2011, he however received a letter dated 4th May 2011 from the respondent referring to a complaint made against him in respect of the same audit work in which reference was made to previous correspondence between the applicant and the respondent and in which allegations of obtaining professional business by means not open to an accountant and issuing misleading financial statements knowing the same to be false were made against him to which he appropriately respondent. He subsequently appeared before the disciplinary committee of the respondent on 9th June 2011 and explained the issues relating to the audit inquiry although he was not made aware of his accusers. On 18th October 2011 he received a letter dated 16th September, 2011 from the respondent seeking his explanation on the issues raised in a letter dated 1st September from the Kenya Revenue Authority to which he responded vide his letter dated 18th October 2011 seeking for more time to respond. He in due course responded thereto vide his advocate's letter dated 25th October 2011 pointing out the impropriety of proceeding with the inquiry in view of the pending High Court case. Despite that on 1st November 2011, he received a letter dated 25th October 2011 communication the respondent's disciplinary committee's decision suspending his practising certificate for two (2) years with costs and fines totalling Kshs 62,000.00 and directing him to undergo training under the supervision of an approved practising member of the respondent for six (6) months. On receipt of the minutes he discovered that the same were signed on 6th December 2011 despite the decision having been communicated to him vide a letter dated 25th October 2011. According to him, the decision was made before the minutes of the Committee and the complainant **M/s D M K Muathe** appeared before the Committee on 6th July 2011 after his appearance on 9th June 2011 and hence he was not afforded an opportunity of cross-examining his accuser. According to him, the allegations made against him were not supported by any evidence. Hence the respondent's decision was not well founded and clearly irregular. Further

the respondent's decision was bias and pre-meditated as the respondent acted as the complainant, prosecutor and judge and that the punishment meted against him was extremely harsh in the circumstances.

RESPONDENTS' CASE

7. In opposition to the application the respondent on 5th April 2012 filed a replying affidavit sworn by **John K. Wambugu**, its Legal Manager, Discipline and Regulations on 4th April 2012. According to him, the respondent is a statutory body whose mandate is the promotion of standards of professional competence and practice among its members and in executing the said mandate is charged with the responsibility of taking disciplinary actions against its members of which the applicant is one by inquiring into complaints raised by various stake holders and its members. On receipt of a complaint from its member **D M K Muathe of Muathe & Associates** against the applicant and the Company to reject **Muathe's** election as the Company's auditor it embarked on investigations of the said complaint. In the course of the said investigations the respondents learnt that members of the Company moved to Court challenging the applicant's appointment as the Company's auditor and secured an order restraining the applicant from carrying himself out as the Company's auditor although the respondent's investigations were separate and independent from the said court proceedings. The applicant was duly notified of the complaints against him and in due course made a representation on the allegations against him and appeared before the respondent's disciplinary committee at which he put up a spirited defence on 9th June 2011. Likewise the complainant was also summoned on 6th July 2011 and gave his version of the events. After the hearing the said disciplinary committee gave its verdict on 25th October 2011 which was communicated to the applicant. According to the deponent, it is therefore dishonest on the part of the applicant to allege that he was not given an opportunity of being heard. The procedure for undertaking the investigations of the nature undertaken, it is deposed, is inquisitorial and not adversarial and was conducted diligently and since the applicant was given a fair hearing and treatment, there was no breach of the rules of natural justice. In his opinion the *sub judice* rule does not apply to the subject proceedings in which the inquiry was being conducted for the purposes of an internal in-house private investigation. In his view, the matter of discipline and breaking of the law cannot be suspended until finalisation of the civil case. On the issue of retrospective suspension, it is deposed that the Disciplinary meeting was held on 25th October 2011 and that the date of 6th December 2011 was the date on which the minutes of the said meeting were confirmed. Judicial review process, according to him, is not concerned with the merit or demerits of the case but only with the decision-making process hence the Motion ought to be dismissed with costs.
8. There was a further affidavit sworn by the applicant on 19th April2012 in which he disputed the version presented by the respondent.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANT'S APPLICATION

9. While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that the respondent made its mind before the applicant was notified of the charges and that the disciplinary proceedings were conducted in contravention of the *sub judice* rule hence were not only illegal, unlawful but also improper and irregular. It is further submitted that the applicant was not given a chance not only to know his accuser but also an opportunity to face him or examine him and further the suspension of his licence and imposition of other sanctions took effect prior to the ratification and/or confirmation by the Respondent's Disciplinary Committee. It is further submitted that there was no evidence in support of the allegations levelled against. It is further submitted that the findings and recommendations that the applicant had filed tax returns in disobedience of the Court order were not supported by evidence and did not form part of the charges against him hence the respondent had no mandate to adjudicate on the said issues. It is further submitted that the sentence meted against the applicant was the maximum allowed without him being afforded an opportunity to mitigate the same. In support of his submissions the applicant relied on **Prime Salt Works Ltd vs. Kenya Industrial Plastics Ltd**

[2012] 2 EA 528 for the proposition that no man shall be a judge in his own case and that no man shall be condemned un-heard. Citing **Muntu & Others vs. Kyambogo University [2008] 1 EA 236**, it is submitted that the decision herein is in all fours with the said decision hence the decision made by the respondent was tainted with procedural impropriety, was illegal and irregular and was against the tenets of natural justice hence the application ought to be allowed.

RESPONDENT'S SUBMISSIONS

10. On the part of the respondent, it is submitted that based on the material before the Disciplinary Committee there were proper grounds for suspension for suspension of the applicant's Practising Certificate. It also submitted on the authority of **David Njoroge Kimani vs. Teachers Service Commission Nairobi High Court Misc. Civil Appli. No. 171 of 2006** that the applicant was given an opportunity to be heard both by written submission and through Disciplinary Committee hearing. Since the matter which the respondent was dealing with was a disciplinary matter, it is submitted that the *sub judice* rule was inapplicable and reliance is placed on **Republic vs. University of Nairobi ex parte Irungu Kangata, David Ole Sankok, George Omondi Tambo Misc. Civil Case No. 40 of 2001** to the effect that matters of discipline cannot be suspended until the hearing and determination of the matters in Court. According to the respondent, judicial review is not concerned with private rights or its merit of the case but on whether the decision making process was proper, that the individual was given a fair treatment by the subject authority and that in this case the applicant was given a fair hearing and the right legal procedures were followed. The issues of lack of [proper grounds, the harsh punishment and that the decision was baseless, it is submitted, are matters which touch on the merits and hence judicial review ought not to be entertained. Thee matters, it is contended, ought to have been the subject of an appeal under section 33(3), (4), (5) and (6) of the Accountants Act No. 15 of 2008. As authority for this submission, the respondent relies on **R vs. Judicial Service Commission ex parte Pareno Misc. Application No. 1025 of 2003** and **Pwani University College ex parte Maina Mbugua James and Others Malindi High Court Misc. Appli. No. 28 of 2009**. On the authority of **Aquarius Limited & Others vs. Chief Magistrate Court, Nairobi Misc. Appli. No. 191 of 2006** and **Republic vs. The Commissioner for Co-operatives Development & Kariobangi Housing and Settlement Co-operative Society Limited ex parte David Mwangi & 13 Others** it is submitted that certiorari is a discretionary remedy which a Court may refuse to grant even when the requisite grounds for grant exist since the Court has to weight one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining since the discretion of the court must be exercised on the basis of evidence and legal principles. In the respondent's view certiorari is not the most efficacious remedy in the circumstances of this case.
11. It is further submitted that the failure by the applicant to cite section 8 and 9 of the Law Reform Act which is the substantive enabling provision renders the application fatally defective in light of the decision in **Eunice Wanjiru Muchiri vs. County Council of Kirinyaga Misc. Civil Application No. 14 of 2008**. With respect to the further affidavit, it is submitted that the omission to exhibit documents referred to therein renders the same inadmissible and hence liable to be struck out. In conclusion, it is submitted that the general rule is that domestic tribunals are not to be interfered with by the Courts ands such institutions are best left to administer their affairs without interference of the procedures of the Court.

DETERMINATIONS

12. I have considered the foregoing. Since the issue of the competency of the application has been raised by the respondent, it is prudent to first deal with the issue since in the event that the same is upheld, it would be unnecessary to go to the merits of the application as the application would thereby be struck out. The respondent's submission is that the failure to cite sections 8 and 9 of the Law Reform Act, which are the substantive provisions, render the application fatally defective and deprives the Court of the jurisdiction to entertain the application. I have perused the decision in **Eunice Wanjiru Muchiri vs. County Council of Kirinyaga** (supra). That decision was delivered on 6th December 2010 after the present Constitution was promulgated on 27th August 2010. The learned Judge's attention was however not drawn to the provisions of Article 159(2)(d)

hereinabove cited. However, it is noteworthy that despite the learned Judge's comments that the application was fatally defective, she proceeded to decide the matter on the merits a clear indication that the learned Judge was alive to the need to determine disputes on merits rather than on the procedural inadequacies. Accordingly, I decline to hold that the present application is fatally defective for failure to cite section 8 and 9 of the Law Reform Act.

13. What is the scope of judicial review? Like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

14. However, the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** held that judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court 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. 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."

15. That the applicant was afforded an opportunity of presenting his version of the events in respect of the complaint is not disputed. It is, however, the form of that opportunity that is disputed. The applicant contends that he was notified by way of telephone call and that the previous correspondences referred to were non-existent. However, it is not disputed that allegations were placed before the applicant and that he did respond to the same both formally and orally at the hearing. He however, contends that there was no opportunity afforded to him to cross-examine his accuser. In **Dalip Singh Karam vs. Anderji Odhavji Nathwani [1949] LRK 49** it was held that whereas every judicial or quasi- judicial tribunal must apply the fundamental principles of natural justice and natural justice will not allow a person to be jeopardised in his person or pocket without giving him an opportunity of appearing and putting forward his case, tribunals should not be

unduly fettered in the manner and method by which they give considerations to the problems brought before them. It has been held that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. See **Russell vs. Nolfolk [1949] 1 All ER 109.**

16. Therefore the mere fact that the quasi-judicial body did not strictly comply with the formal requirements for hearing of a dispute before it as expected of a Court of law would not necessarily deprive its decision of legal validity where the basic rules of natural justice are complied with. It is therefore not unheard of for such bodies to base their decision purely on written statements of parties. It is not every case in which an examination in chief followed by cross-examination and re-examination of parties is expected to be undertaken by such bodies. Accordingly, I am not satisfied that the mere fact that the applicant did not cross-examine the complainant in the circumstances of this case merits the grant of the judicial review orders sought.
17. It is however true that for a tribunal to base its decision on extraneous matters which were not properly before it and which the applicant was never afforded an opportunity to respond to would constitute irrationality and amount to unreasonableness within the ***Wednesbury's Principles***. In the present case, it is contended that the respondent arrived at the decision that the applicant had filed tax returns and disobeyed the court orders when the same were not the subject of the charges that were levelled against the applicant. From the contents of the letter dated 25th October 2011 written by the respondent to the applicant it is clear that the charges which were levelled against the applicant were that he had obtained professional business by means not open to an accountant in accepting an appointment by the mismanagement of the company despite having lost the election by members contrary to section 30(1)(b) of the Accountants Act and that he was collaborating with the management of the company to issue misleading financial statements knowing the same to be false contrary to section 30(1)(m) of the same Act. However, in its findings the Disciplinary Committee noted that the applicant had completed the job contrary to the applicant's assertions before the Committee that he did not have working papers as he did not complete the job and even submitted a court order stopping him from doing so. The Committee's further finding was that it had obtained audited financial statements made to support tax returns filed by the Company from Kenya Revenue Office in Machakos that were signed by the applicant and a confirmation to that effect by the said Authority. It also found that the applicant did work contrary to court orders stopping him from doing so. These seem to have been the findings that led to the resolution to suspend the applicant's membership certificate for the said period of 2 years and the imposition of penalties aforesaid. It is clear that there were no express findings with respect to the charges that were mentioned in the said letter. I have perused a copy of the letter dated 16th September 2011 from the respondent to the applicant as well as the one dated 1st September 2011 from the Kenya Revenue Authority and I cannot help but agree with the applicant's advocate's view expressed in the letter dated 23rd October 2011 to the respondent that the allegations contained therein were difficult to understand.
18. Where a Tribunal intends to conduct an inquiry in respect of a complaint made against a person by way of writing without resorting to the necessity for oral hearing coupled with cross-examination, the failure to disclose the full particulars of the charges that the applicant is to face amounts to a breach of his right to a fair hearing. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. An administrative action cannot be said to be procedurally fair where a decision is arrived at based on other issues which were not the subject of investigation by the Tribunal unless the charges are amended and a proper opportunity given to the party charged to respond thereto. See **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007**.
19. Whereas I agree with the respondent that the mere fact that there are civil proceedings does not bar a body charged with investigating professional misconduct of its members from undertaking investigations with respect of the alleged professional misconduct with a view to enforcing discipline, where the intended disciplinary proceedings may potentially have the effect of prejudicing the pending civil proceedings, the Tribunal may well be advised to hold its horses. In the present case the respondent made a finding that the applicant did not in actual fact comply with the Court order in force, an issue which was squarely within the jurisdiction of the Court and which was neither the subject of its investigations nor within its mandate to determine.

Accordingly, I find that the respondent's action was tainted with illegality and procedural impropriety.

ORDER

20. In the result I find merit in the Notice of Motion dated 15th March, 2012 which I hereby allow and I direct that the decision made by the Institute of Certified Public Accountants of Kenya (ICPAK) as contained in the letter dated 25th October 2011 suspending the ex parte applicant's practicing certificate be called into this court and is hereby quashed. The applicant will also have the costs of the Motion.

Dated at Nairobi this day 25th of February 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kihara for Mr Njue for the Respondent and Mr Wainaina for the applicant.