



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. CIVIL APPL. NO 1266 OF 2007**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**ADVOCATES COMPLAINTS COMMISSION .....1<sup>ST</sup> RESPONDENT**

**THE ADVOCATES DISCIPLINARY COMMITTEE .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The ex parte applicant, an Advocate of the High Court of Kenya (hereafter referred to as the applicant), seeks orders to quash decisions made by the 1<sup>st</sup> and 2<sup>nd</sup> respondent arising from complaints made against him by his clients. In the application filed in court on 3<sup>rd</sup> December, 2007 pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules, the applicant sought leave, which was duly granted, to file an application for Judicial Review against the respondents.

2. By a Notice of Motion dated 14<sup>th</sup> December 2007, the applicant sought the following orders:

a) **THAT** an order of certiorari do issue to quash the decision made by the complaints commission, the Honourable Mr. Joseph Nguthia Kingarui to lodge a complaint to the Disciplinary Committee without first notifying the applicant and/or attempting to resolve the complaint as per the provisions of Section 53 of the Advocates Act.

b) **THAT** an order of certiorari do issue to quash the decision by the Disciplinary Committee of the Law Society of Kenya to proceed ex-parte with the Disciplinary Cause No. 123 of 2007 thus breaching the rules of natural justice and the constitutional rights of the applicant.

c) **THAT** the costs be provided for.

3. The grounds on which the application was based as set out in the application were that:

a) The 1<sup>st</sup> respondent's decision was unfair arbitrary capricious and an overt abuse of its authority/duty to discharge its responsibilities fairly and reasonably.

b) The applicant was never given a chance to be heard because no notification of the hearing was served upon him thus violating the rules of natural justice.

c) That applicant was attending a continuing legal education seminar in Nakuru on the purported hearing date and would have attended the same had he been informed about it

d) *The respondent's acts and decisions were made in bad faith thus violating the applicant's rights as an advocate.*

4. Pursuant to the application, interim orders were issued by the Honourable Court, which orders the applicant was directed to serve upon the respondents within two days and for the application to be heard *inter partes* on 5<sup>th</sup> March, 2008.

5. The respondents oppose the application. The 1<sup>st</sup> respondent filed an affidavit in opposition sworn on 26<sup>th</sup> May, 2008 by Joseph Nguthiru Kingarui, its Chairman. The 2<sup>nd</sup> respondent filed an affidavit in reply sworn by Apollo Mboya, the Secretary of the Law Society and of the 2<sup>nd</sup> respondent by virtue of his position as secretary, on 27<sup>th</sup> May, 2008.

6. By his application by way of Notice of Motion dated 5<sup>th</sup> July, 2011, the applicant sought orders to amend the statement of facts in his application of 14<sup>th</sup> December 2008 and to quash judgment entered against him on 18<sup>th</sup> February 2008 which was scheduled to come up for mitigation and sentence on 18<sup>th</sup> July 2011. When the matter came up before the court on 12<sup>th</sup> July 2011, the applicant sought leave to amend the application so that the leave would operate as a stay of the judgment of the 2<sup>nd</sup> respondent. The applicant was directed to file a formal application seeking such leave, and when the matter came up before the court on the 15<sup>th</sup> of July 2011, the court directed that the judgment of the 2<sup>nd</sup> respondent be stayed pending the hearing and determination of the application dated 14<sup>th</sup> December 2008. This application was canvassed before me on 28<sup>th</sup> November 2012.

### **The Applicant's Case**

7. The applicant's case was presented by Ms. Mithamo who relied on the applicant's application, affidavits in support and the written submissions dated 15<sup>th</sup> October 2012. According to the applicant, he was, on or about the year 1997, instructed to act for Kibirgen Miyo, Elias Busienei, John Kipsigit, Kipkoech Kerich (since deceased) Kipsang Masai and Abdi Sitienei to file suit on their behalf and that he filed Eldoret High Court Civil Case Number 427 of 1997. However, there were disagreements between him and his clients, and he alleges that he subsequently noted from the court's Daily Cause List that his clients had instructed another law firm to take over the conduct of the case.

8. The said clients then proceeded to file a complaint with the 1<sup>st</sup> respondent alleging failure by the applicant to render the requisite professional services, a complaint that the applicant alleges is at best false, malicious and/or unfounded. He states that he responded to the complaint and has been waiting to be informed of the 1<sup>st</sup> respondent's decision. He further alleges that he has not received any correspondence from the 1<sup>st</sup> respondent in five years.

9. Instead, according to the applicant, the 1<sup>st</sup> respondent proceeded to forward the complaint to the 2<sup>nd</sup> respondent; that the 2<sup>nd</sup> respondent heard the complaint in Disciplinary Committee Cause Number 123 of 2007 *ex parte* and did not accord the applicant a hearing; that he did not receive any notification on the said hearing from the 2<sup>nd</sup> respondent, and the 2<sup>nd</sup> respondent had no authority to enter an *ex-parte* judgment against him.

10. The applicant contends further that the 2<sup>nd</sup> respondent acted *ultra vires* when it entered judgment against him as there were interim orders barring it from proceeding with the hearing of the complaint against him and passing judgment. He also alleges that he was not accorded an opportunity to be heard by either the 1<sup>st</sup> or 2<sup>nd</sup> respondent and that he was therefore condemned unheard. The applicant alleges a violation of Article 50 of the Constitution of Kenya which guarantees to everyone the right to a fair hearing before a court or independent body or tribunal and relies on the decision of the court in **R vs. The Chairman Advocates Disciplinary Committee & The Secretary LSK. Ex-Parte Jafferson M.S. Nyagesa Misc Application No. 189 of 2004 at Kisii, Oloo vs. Kenya Post & Telecommunications Corporation (1985) KLR 829** and **Nyongesa & 4 Others vs. Egerton University College (1990) KLR**

**092**for the proposition that every man must be afforded an opportunity to be heard and public bodies established under statute have a duty to observe rules of natural justice.

11. With regard to the 1<sup>st</sup> respondent specifically, the applicant contends that it did not follow the proper procedure in dealing with the matter when it was first brought before it. He contends that the provisions of Sections 53 (4) (5) (6) and (71) of the Advocates Act require that the Advocates Complaints Commission adheres to the preliminary procedures provided for by Section 53(4) (d) and Sections 53 (5) of the Advocates Act; that the Commission should have conducted investigations, summon witnesses and conduct a hearing; that the complaint before the 1<sup>st</sup> respondent did not constitute a disciplinary offence and should therefore not have been forwarded to the 2<sup>nd</sup> respondent. He relied on the decision in **Hinga & Another vs. PCEA thro' Rev. Dr. Njogu & Another (1986) KLR 317** and contended that the 1<sup>st</sup> respondent should have exhausted all the available remedies before referring the matter to the 2<sup>nd</sup> respondent.

12. The applicant is also aggrieved by the length of the period during which the complaint lay with the 1<sup>st</sup> respondent. He alleges that he was entitled to a fair and speedy hearing before the Complaints Commission as guaranteed by the Constitution of Kenya 2010, and he relies on the decision in **Githunguri vs. Republic (1985) KLR 91** in which the court found that a prosecution 9 years after the commission of the alleged offence and 5 years after the decision of the Office of the Attorney General not to prosecute and to close the file was vexatious and an abuse of the court process.

13. The applicant contended further that one of the complainants had died, and consequently the matter had abated, and that in any event, there was an unresolved bill of costs pending in Misc Application No. 317 of 2007 arising out of HCCC Number 427 of 1997 the resolution of which may result in a finding that the complainants before the respondents were indebted to the applicant.

### **The 1<sup>st</sup> Respondents Case**

14. According to the 1<sup>st</sup> respondent, it derives its mandate from the provisions of the Advocates Act, Cap 16 Laws of Kenya. Its case was presented by Mr. Moimbo, Learned litigation Counsel, and is set out in the Replying Affidavit sworn by Mr. Joseph Nguthiru Kingarui, the Chairman of the Advocates Complaints Commission, on the 26<sup>th</sup> day of May, 2008.

15. The 1<sup>st</sup> respondent case is that upon receipt of the complaint against the applicant, it acted in accordance with its mandate under the provisions of the Advocates Act. Such mandate includes the hearing of complaints of professional misconduct against Advocates of the High Court of Kenya. The 1<sup>st</sup> respondents states that as provided under Section 60 of the Advocates Act, it proceeded to notify the applicant of the complaint before it and invited him to appear before it to be heard and to settle the complaint against him. However, the applicant did not appear before the Commission, he only responded to its first communication to him, and in his response, he only made counter allegations against the complainants. It states that all subsequent communication to the applicant elicited no response.

16. In his oral submissions before the court, Mr. Moimbo submitted that the court must interpret the provisions of the Advocates Act in such a manner as brings them into harmony with the Constitution. He argued that a counsel such as the applicant who has appeared before the 2<sup>nd</sup> respondent, a body established by statute, cannot thereafter challenge the process as this would be an abuse of the court process. He argued that the applicant had a right of appeal under the Advocates Act and it would be an abuse of process to overlook the process and approach this court with a view to curtailing the operations of the Disciplinary Committee. He therefore urged the court to dismiss the application with costs.

### **The 2nd Respondent's case**

17. The 2<sup>nd</sup> respondent is established under Section 57 of the Advocates Act. It has the statutory mandate to deal with, among others, cases of professional misconduct on the part of Advocates. Section

60 of the Advocates Act empowers it to receive complaints by any person against an Advocate for professional misconduct.

18. The 2<sup>nd</sup> respondent states that it received a complaint against the applicant from the 1<sup>st</sup> respondent which contained three charges against the applicant as follows:

**a) Failure to render the requisite professional services to the complainants despite having been paid legal fees amounting to Kshs. 164,905/=.**

**b) Failure to reply to correspondence from the Complaints Commission**

**c) Failure to provide a statement of account as required of him vide the Complaints Commission's letter of 8th September, 2000.**

19. The complaint originated from the Centre for Human Rights and had been lodged on behalf of several persons who had paid the applicant to render professional services but he had failed to do so. Mr. Olembo for the 2<sup>nd</sup> respondent submitted that the 2<sup>nd</sup> respondent had duly notified the applicant of the complaint against him. He referred the court to various letters sent to the applicant with regard to the complaint which are annexed to the replying affidavit filed on behalf of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent thereafter proceeded with the case against the applicant in his absence upon his failure to appear before the Disciplinary Committee. According to Mr. Olembo, the 2<sup>nd</sup> respondent reserved its judgment against the applicant to the 10<sup>th</sup> of December 2007, and sent a notice to this effect to him.

20. To the applicant's argument that there is a Bill of Costs which might turn out to be higher than the complainant's claim, the 2<sup>nd</sup> respondent submitted that it is empowered under section 60(6), (7) and (8) of the Advocates Act to estimate an Advocate's Bill of Costs where the Advocate has not submitted an account, and this was done in the case of the applicant.

21. On the allegation that the 2<sup>nd</sup> respondent acted in defiance of a court order, the 2<sup>nd</sup> respondent submitted that it was served with the order on the 7<sup>th</sup> of February 2008; that the order was limited in nature and clause 5 thereof required that it be served within 2 days of its issue, so it ought to have been served within two days from the 18<sup>th</sup> of December 2007. The order had therefore lapsed by the time it was served upon the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent did not therefore act in disregard of a court order in entering its judgment against the applicant.

## **Determination**

23. There is no dispute, I believe, on the facts that gave rise to the complaint against the applicant: he had received funds from parties involved in litigation in Eldoret to represent them but had not done so to the satisfaction of his clients, and after disagreements on the matter had arisen, they had withdrawn instructions from him. He does not deny receipt of the funds, arguing only that he had a pending Bill of Costs which may prove higher than the amount claimed from him. He is aggrieved rather by the decision of the 1<sup>st</sup> respondent to forward the complaint against him to the 2<sup>nd</sup> respondent, and by the decision of the 2<sup>nd</sup> respondent to pass judgment against him.

24. In making my determination in this matter, I believe I will need to address my mind to two main questions. The first is whether, as alleged by the applicant, the 1<sup>st</sup> respondent violated his rights to an expeditious trial in contravention of the provisions of Article 50 of the Constitution. The second question is whether, in dealing with the complaint against the applicant, the 2<sup>nd</sup> respondent violated his right to be heard or acted ultra vires its powers by disregarding an order of the court staying delivery of the judgment in the case against the applicant.

## **Whether the 1<sup>st</sup> Respondent Violated the Rights of the Applicant**

25. The applicant has alleged that his right to a speedy trial was violated by the 1<sup>st</sup> respondent as he did not hear from it for a period of 5 years. The question, however, is whether the provisions of Article 50 apply to this case which commenced some three years before the promulgation of the constitution. If it does, were the proceedings before the 1<sup>st</sup> respondent a 'trial' to which the Article would apply? In my view, the answer to both questions is in the negative. As has been stated in the case of Samuel Kamau Macharia & Another -v- Kenya Commercial Bank & 2 Others Supreme Court Application No. 2 of 2011, the Constitution does not have retrospective application, and so its provisions cannot be applied to matters that occurred before it came into force. However, the right to a trial within a reasonable time was guaranteed under the former constitution under section 77(1), and so if the proceedings before the 1<sup>st</sup> respondent were a trial, then the applicant would be entitled to invoke its provisions.

26. The 1<sup>st</sup> respondent is mandated to receive and investigate complaints against Advocates and forward those of a disciplinary nature to the 2<sup>nd</sup> respondent forthwith – see Section 53(4)(b) of the Advocates Act. It does not conduct trials of the parties against whom complaints are made, the hearing of those complaints of a disciplinary nature falling within the mandate of the 2<sup>nd</sup> respondent. There is therefore no basis for alleging that there was a violation of the right to a fair trial as no trial could properly take place before the 1<sup>st</sup> respondent.

27. However, even had the proceedings before the 1<sup>st</sup> respondent constituted a trial, is there any basis for alleging a violation? The evidence before me indicates that the 1<sup>st</sup> respondent received a complaint against the applicant in January 2000, and that it wrote to the applicant at least three times, on 8<sup>th</sup> September and 14<sup>th</sup> December 2000, and on 26<sup>th</sup> April 2005. It received no response from the applicant, and the failure to respond to correspondence forms one of the charges against the applicant before the 2<sup>nd</sup> respondent. I have not heard the applicant to argue that the address used by the 1<sup>st</sup> respondent to write to him was not the correct address, and he confirms at paragraph 9 of his affidavit sworn on 3<sup>rd</sup> December 2007 that he received a letter from the 1<sup>st</sup> respondent requiring him to respond to the complaint. I can therefore find no basis for faulting the course that the 1<sup>st</sup> respondent followed in forwarding the complaint against the applicant to the 2<sup>nd</sup> respondent. The entire complaint against the 1<sup>st</sup> respondent is therefore totally without merit.

### **Whether the 2<sup>nd</sup> Respondent Violated the Applicant's Right to be Heard**

28. The applicant makes two main allegations against the 2<sup>nd</sup> respondent. He argues that he was not accorded an opportunity to be heard; that the 2<sup>nd</sup> respondent breached the rules of natural justice by proceeding to have the complaint against him heard and determined in his absence. He also contends that the 2<sup>nd</sup> respondent acted outside its powers when it delivered its judgment against him at a time when there was a court order staying delivery of the judgment. The respondent counters that it gave the applicant an opportunity to be heard, but in the absence of a response from him, its rules permit it to proceed on the basis of evidence before it in the absence of the applicant.

29. Rule 27 of the Advocates (Disciplinary Committee) Rules states that

***"Service of any notice or document may be effected under these rules by any method authorized by law or by registered post, addressed to the last known postal address or abode in Kenya of the person to be served, and such service shall be deemed to have been effected seventy-two hours after posting."***

30. At Rule 17, the Advocates (Disciplinary Committee) Rules provide that

***"If any party fails to appear at the hearing, the Committee may, in its discretion, upon proof of service on such party of the notice of hearing, proceed to hear and determine the complaint or application in his absence."***

31. From the material placed before me, it is clear that the applicant was served, through his last

known postal address, with a Plea Notice, a Hearing Notice, and with a notice regarding the date of delivery of the Judgment. While he alleges that he learnt of the decision against him from an unknown person who called him to inform him about the decision, and that it is only then that he found out that there had been proceedings against him, it is difficult to credit this given that the 2<sup>nd</sup> respondent sent him notices through his last known postal address. In circumstances such as this where a party, having been duly notified and therefore being fully aware of a matter, elects not to present his side of a story to the adjudicating body, he cannot be heard thereafter to argue that he was not given an opportunity to be heard or that his right to a hearing was violated.

32. The applicant has argued that the 2<sup>nd</sup> respondent delivered its judgment in breach of a court order. I have considered the orders of the court in question. As correctly submitted by the 2<sup>nd</sup> respondent, the applicant was required to serve the orders within 2 days of issue. He only effected service close to two months after the date of issue, and has offered no explanation for the delay in serving the orders. In the circumstances, in my view, it cannot properly be argued that the 2<sup>nd</sup> respondent was in contempt of court in delivering its judgment against the applicant.

33. The applicant has also raised two other general arguments with regard to the proceedings before the Disciplinary Committee. The first is that one of the complainants had died some five years before, and so the complaint against him had abated. I believe there are two responses to this contention, both of which were in my view, properly so, raised by the 2<sup>nd</sup> respondent. First, the disciplinary proceedings against the applicant were commenced by the Advocates Complaint Commission on the basis of a complaint lodged on behalf of several aggrieved parties. The fact that one of the complainants was deceased did not therefore lead to an abatement of the matter.

34. More importantly, however, as correctly argued by the 2<sup>nd</sup> respondent, the mandate of the Disciplinary Committee goes over and above dealing with complaints by individuals. The Committee has the mandate to ensure ethical and professional conduct by members of the Bar and section 60 of the Advocates Act empowers it to deal with complaints regarding professional misconduct, defined to include conduct incompatible with the status of an Advocate. Even had the complaint been by a sole litigant who was deceased, I take the view that the Disciplinary Committee would have failed in its duty if it did not pursue disciplinary proceedings against the applicant if the evidence before it showed that such conduct was unprofessional and dishonourable.

35. The second argument raised by the applicant is that there was a Bill of Costs pending, the taxation of which may well result in an amount over and above what the complainants were owed. The complaint against the applicant relates to a 1997 matter, and the initial complaint was failure to render professional services. Had the applicant indeed had a pending Bill of Costs, it is difficult to understand why such a Bill was still pending some ten years after the instructions were given, and some seven years after the complaint against him was lodged with the 1<sup>st</sup> respondent. He alleges that the 1<sup>st</sup> respondent had taken five years to deal with his complaint—again more than adequate time for him to deal with the Bill of Costs. It is noteworthy, however, that he was entitled, under the Disciplinary Committee Rules to bring up the matter of his Bill of Costs before the 2<sup>nd</sup> respondent, but he did not. Section 60(7) of the Advocates Act states that:

***If a bill of costs has been filed in Court by the advocate against whom a complaint is being heard but has not been taxed, the Committee may adjourn the complaint for such period as it considers reasonable to allow such taxation: Provided that if at the expiry of such adjournment, the bill is still not taxed, the Committee may make its own estimate of the costs due to the advocate and make orders accordingly."***

36. The applicant did not raise the issue of his Bill of Costs with the 2<sup>nd</sup> respondent, which had the mandate to deal with it, as he elected not to appear before it. It nevertheless, as submitted by Mr. Olembo, took the matter into account in reaching its decision. In any event, the issue of the existence or otherwise of the bill of costs does not vitiate the actions and decision of the respondents. It is a matter of fact that could only properly have been addressed by the 2<sup>nd</sup> respondent. It does not disclose any procedural

impropriety that would lead to this court interfering with the decisions made or actions taken by the respondents.

37. In the circumstances, I find no basis for the applicant's complaints, and the application for orders of judicial review dated the 14<sup>th</sup> of December 2007 is hereby dismissed with costs to the respondents.

**Dated, Delivered and Signed at Nairobi this 14<sup>TH</sup> day of March, 2013**

**Mumbi Ngugi  
Judge**

**Ms. Mithamo instructed by the firm of Gichuki Kingara & Co. Advocates for the plaintiff**

**Mr. Moimbo Momanyi instructed by the State Law Office for the 1<sup>st</sup> respondent**

**Mr. Olembo instructed by the firm of Nyiha Mukoma & Co. Advocates for the 2<sup>nd</sup> respondent**