



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 231 OF 2011

REPUBLICAPPLICANT

VERSUS

THE DISCIPLINARY COMMITTEE.....RESPONDENT

MUSYOKI KIMANTHI

T/A KIMANTHI & ASSOCIATESINTERESTED PARTY

EX-PARTE

PROF PAUL MUSILI WAMBUA

JUDGMENT

The ex-parte Applicant, Professor Paul Musili Wambua, is an advocate of the High Court of Kenya practicing in the firm of Musyoka Wambua and Katiku Advocates. The Disciplinary Committee (the Committee) which is a creature of the Advocates Act Cap. 16 (the Act) is the Respondent. Its mandate is to deal with complaints relating to the professional conduct of advocates. The firm of Musyoki Kimanthi trading as Kimanthi and Associates, though in my view not properly before this court is an Interested Party in these proceedings.

I will straight away state why the firm of Kimanthi and Associates is not properly before this court. On 7th November, 2011 in the presence of Mr. Musyoki (the Interested Party) and Mr. Katiku for the Applicant Justice Warsame (as he then was) issued an order that **“leave is granted to Enfield Developers Ltd to be joined as an interested party. I direct that the firm be served with all the papers for them to make replies to the application.”** This is the order which Kimanthi and Associates believes gave them permission to be enjoined in these proceedings as an interested party.

As will emerge in these proceedings, Enfield Developers Ltd (Enfield) is a client of the firm of Kimanthi and Associates. It was made a party to these proceedings because it was the complainant before the Committee. The fact that Enfield was allowed to join these proceedings did not in any way allow its advocates to join this matter as a party. It must, however, be noted that the presence of Kimanthi and Associates in this matter has not prejudiced anybody. I will therefore ignore their replying affidavit and submissions and proceed on the presumption that the only parties to these proceedings are the Applicant and the Respondent. Enfield though granted leave to participate in these proceedings did not file any papers.

The subject of this decision is the Notice of Motion application dated 10th October, 2011 in which the Applicant prays that:-

1. **An Order of Prohibition prohibiting the Respondent from issuing to the ex-parte Applicant any notices or any other processes, hearing and/or entertaining proceedings in Disciplinary Cause No. 148 of 2011 or any other disciplinary cause or proceedings by the Respondent in relation to L.R. No. 5884/15.**
2. **An Order of Certiorari to quash the decision of the Respondent to commence disciplinary proceedings in Disciplinary Cause No. 148 of 2011.**
3. **Costs of this application and the entire proceedings be awarded to the ex-parte Applicant.**

The application is supported by the Chamber Summons application for leave, the statutory statement and the Applicant's verifying affidavit all dated 28th September, 2011. It is also supported by a supplementary affidavit sworn by the Applicant on 10th October, 2011, further affidavits sworn on 29th March, 2012 by George M Muchai and Albert Mulindi and the annexures to all the affidavits.

In my view the grounds upon which the reliefs are sought are found in paragraphs 27-36 of the statutory statement as reproduced hereunder:

“27. That sometime in August 2011, while the ex-parte applicant's advocates were in communication with the Law Society of Kenya's Programme Officer Ms Jemimah Keli, she met one Mr. Albert Simiyu Murambi an advocate in the firm of Musyoka wambua and Katiku Advocates in town along City Hall Way and intimated to him that she was under pressure from multiple quarters to forward the complaint to the Respondent Committee for purposes of politically and professionally embarrassing the applicant

28. The said Ms Jemimah Keli is a known friend and former classmate of Mr. Musyoki Kimanthi.

29. This information was instantly brought to the attention of the Law Society of Kenya on 24th August 2011 to which the secretariat confirmed that the complaint raised therein did not merit forwarding to the Disciplinary Committee

30. Surprising on 20th September 2011 the ex-parte applicant received a letter from the Law Society of Kenya intimating that the complaint had now been forwarded to the Respondent and is due for plea taking on 24th October, 2011.

31. The complaints commission acted maliciously and oppressively by failing to consider the explanation given by the ex-parte applicant on 2nd of August 2011 as to the actual events that surrounded the transaction.

32. The complaints commission acted maliciously and oppressively by failing to investigate the matter thereby breaching the ex-parte applicant's entitlement to fair administrative action.

33. The Law Society of Kenya raised the ex-parte applicant's legitimate expectations by initially informing him that matter did not merit disciplinary action, only to change their position without explanation.

34. The complaints commission acted maliciously and oppressively by failing, refusing and or neglecting to accept the ex-parte applicant's offer for inspection of the ex-parte applicant's file.

35. The intention to lodge this complaint having been manifestly labeled political, the Respondent, by admitting and entertaining the instant proceedings is being used to oppress

and intimidate the ex-parte applicant. The respondent is thus acting for ulterior purpose and in excess of its jurisdiction as it has no mandate to prosecute a case founded on politics.

36. The period of time that has lapsed since the transaction took place, (that is since 1999) is so long as to be unfair to expect the ex-parte applicant to concisely confront the claims made against him by the complainant and the same will amount to oppression if allowed to be prosecuted.”

I will come back to these grounds in due course.

The Committee opposed the application through the replying affidavit of its Secretary Mr. Apollo Mboya sworn on 10th July, 2012. Through the said affidavit the Committee narrates the background to the complaint and opposes the application on the following grounds:

1. THAT the Committee is mandated to receive, hear and determine complaints against advocates such as the Applicant herein;
2. THAT upon receiving and perusing the complaint the Committee determined there was a prima facie case which had been established and the matter should be placed for plea and the Applicant was notified accordingly;
3. That if the Applicant was aggrieved by the said decision then he ought to have filed an appeal as provided by the Act and not filed judicial review proceedings;
4. That the Applicant was given an opportunity to respond to the allegations before the matter was fixed for plea taking;
5. That the Committee is carrying out its lawful mandate and the orders being sought by the Applicant are aimed at preventing it from fulfilling its statutory mandate; and
6. That the Applicant has not established any grounds for grant of judicial review orders.

This application calls for some background information. Mr. B. R. Devani is a director of Enfield. Sometime in the year 1999 he entered into a land sale agreement with Justus Koske, George M Muchai and Albert Mulindi Mayani in which he was to purchase L.R. No. 5884/15 for Kshs.7 million. Enfield paid some money towards the purchase of the said plot. The agreement which was executed in the offices of Applicant's law firm was never completed.

The sellers state that the agreement was not completed because the Commissioner of Lands decided to amalgamate their plot with a neighbouring plot. Enfield believes that the whole sale transaction was a sham and the Applicant was aware of it or was negligent in performing his duties as an advocate.

In 2011 Enfield instructed the law firm of Kimanthi and Associates to demand the sum of Kshs.7 million from the Applicant's law firm. The demand was made through a letter dated 4th July, 2011. The letter was drawn to the attention of the Applicant. Subsequently Kimanthi and Associates, through a letter dated 13th July, 2011, made a complaint to the Committee on behalf of Enfield. Letters were exchanged and eventually a defamation suit H.C.C.C No. 411 of 2011 was filed by the Applicant against Kimanthi and Associates.

The decision that has brought the Applicant to this court is contained in the Respondent's letter dated 26th September, 2011 addressed to him as follows:-

“RE: DISCIPLINARY COMMITTEE CAUSE NUMBER 148 OF 2011

The cause under reference has been fixed for plea before the Disciplinary Committee sitting at 9.00 a.m. on Monday 21st November 2011 at the Professional Centre, in the Council chambers 2nd Floor, Parliament Road, Nairobi.

You have a right to instruct counsel but your personal presence is mandatory whether or not you instruct counsel.

Copy of the affidavit referring the complaint to the Disciplinary Committee is attached herewith.”

The letter is signed by one Mary Karen C. K. Sorobit (Mrs) who identifies herself as the Deputy Secretary (Compliance and Ethics). The Applicant seeks to quash the decision to charge him as conveyed by the said letter.

After reviewing the documents placed before this court, I am of the view that the main issue for the determination of this court is whether the Applicant has been subjected to a fair process by the Respondent. Any other issues are just but sub-issues under the main issue.

It is not disputed that the Committee is mandated to handle complaints raised against advocates. In doing so, the Committee must act fairly and legally. It should comply with the rules of natural justice. That is where judicial review comes in. If an advocate who appears before the Committee is not subjected to a fair process, he can seek an appropriate remedy by way of judicial review.

The purview of judicial review was clearly captured by Lord Diplock in the case of **COUNCIL FOR CIVIL SERVICE UNIONS v MINISTER FOR CIVIL SERVICE [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

When a decision is challenged by way of judicial review, the court will thus check if the decision is legal, rational and procedurally fair. The court does not look at the merits of the decision for that mandate lies with the decision-making body and any party aggrieved with the merits of the decision should file an appeal. This was confirmed by the Court of Appeal in **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2 KLR 189** when it observed that:-

“As the judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

The duty of a judicial review court is to apply the principles of judicial review to the facts of a case before it and decide if the remedies sought should be granted.

In line with the above argument, the Applicant contended that the Committee had not considered his defence before asking him to take plea. The answer to this argument is that it is the sole responsibility of the Committee to determine whether there is sufficient evidence before opening charges against an advocate. This court cannot decide for the Committee whether the defence offered by the Applicant should result in the termination of Enfield’s complaint. The decision as to whether a case has been established against the Applicant is within the jurisdiction of the Respondent. Section 60(3) of the Act is quite clear on this. The said sub-section provides that:-

“(3) Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:

Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.”

It is within the Committee’s power to decide whether a prima facie case has been established against an advocate.

The Applicant also asserts that the Committee subjected him to an unfair process. He alleges that one Ms Jemimah Keli the Law Society of Kenya’s Programme Officer in charge of Ethics and Compliance had intimated to an advocate in his law firm that she was under pressure to refer the matter to the Committee. According to the Applicant the fact that there was pressure to refer the matter to the Committee shows that the charge facing him is driven by malice. It is his case that the allegations made against him by Enfield are baseless and he had been assured by Mr. Kenneth Akide the Chairman of the Law Society of Kenya (LSK) through a letter dated 30th August, 2011 that **“the issues can be resolved at a different forum other than the disciplinary committee and I have advised as such.”** The Applicant asserts that the fact that he was asked to take plea even after such assurance means that his intended prosecution is based on ill-will. The Applicant also uses the above cited letter to argue that the Committee has breached his legitimate expectation. I will address the issue of legitimate expectation later in this judgement.

Counsel for the Applicant also submitted that the fact that one Ms Jemimah Keli had indicated that she was under pressure from multiple quarters to forward the complaint to the Committee in order to embarrass him politically and professionally is evidence that the proceedings were not commenced in good faith. At page 14 of the Applicant’s submissions dated 15th December, 2012 and filed on 17th December, 2012 it is submitted that **“(t)he said Jemimah Keli is also a friend and former classmate of Mr. Musyoki Kimanthi and as such is likely to be biased against the ex-parte Applicant.”** It is therefore the Applicant’s case that the Committee is likely to be biased since the charges against him were brought for political purposes and one of the employees of the Committee is likely to be biased since she is a classmate and a friend of Mr. Musyoki Kimanthi the advocate for Enfield.

I have carefully considered the Applicant’s arguments and I find them not convincing. If indeed Ms Jemimah Keli is a friend of Mr. Musyoki Kimanthi, then why would she reveal secrets to Mr. Albert Simiyu Murambi who is an advocate in the Applicant’s firm? In any case, Ms Jemimah Keli is just but an employee of LSK. There is no evidence that she is a member of the Committee. It is farfetched to imagine that she can influence an entire panel of the Committee. Even if Ms Jemimah Keli was a member of the Committee, the Applicant would not be allowed to overthrow the mandate of a statutory tribunal for that reason alone. The best option would be for the Applicant to submit himself to the disciplinary process and seek the disqualification of the said Ms Jemimah Keli. In my view, the Applicant will not suffer any bias if he submits himself to the Committee.

It was also contended on behalf of the Applicant that the Committee’s intended action is grounded on baseless evidence. On this, the further affidavits of George M Muchai and Albert Mulindi are cited. The Committee replied that this is the evidence the Applicant should submit during the hearing. I agree with the Committee. This court would be usurping the role of the Committee were it to decide who to believe between Enfield and the Applicant. It is the statutory duty of the Committee to hear the complainant (Enfield) and the respondent (the Applicant) and come up with a decision. The Applicant cannot escalate this matter to this court before the same is heard and determined by the Committee. I am aware that any person before a public body who believes that he/she is likely to be subjected to an unfair process, is entitled to approach this court at any time to seek reprieve. This is the purpose of an order of prohibition.

It seeks to protect a party before harm is visited on him. It must, however, be remembered that an applicant can only get reprieve if he/she establishes that a tribunal is about to act illegally and/or irrationally and/or outside the rules of natural justice.

It is not within the mandate of a judicial review court to analyze the evidence that is to be presented to a tribunal and then make its decision on that evidence. In the **MEIXNER** case (supra) the Court of Appeal held that:-

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed be subversion of the law regulating criminal trials if the judicial review court was to usurp the function of the trial court.”

Any attempt by this court to consider the evidence of George M Muchai and Albert Mulindi would mean that the court has taken over the statutory duties of the Committee. That would be contrary to the express intention of Parliament.

There is an argument that the Applicant will not be able to proffer a defence because the complaint is about an incident that took place over ten years ago. This argument does not hold any water since the Applicant has clearly articulated his defence both in the correspondence with LSK and in the papers filed in this cause. In any case, there is the need to ensure that Enfield has been heard and given a response in respect of the complaint made against the Applicant. Enfield has a legitimate expectation that its complaint against the Applicant who is an advocate will be heard and determined fairly by the Committee which was established by Parliament to hear such matters.

On the letter dated 30th August, 2011 the Applicant submitted that through the said letter the Chairman of LSK had assured him that the complaint would not be submitted to the Committee. It is the Applicant's case that the decision to have him charged before the Committee breached the legitimate expectation conveyed to him by the said letter.

What is legitimate expectation? In the case of **ABDUL WAHEED SHEIKH AND ANOTHER V COMMISSIONER OF LANDS AND 3 OTHERS [2012] eKLR** Lenaola, J quoted, with approval, the definition of the doctrine of legitimate expectation by the Supreme Court of India as follows:

“I should now turn to the doctrine of legitimate expectation. In J.P. Bansal vs. State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001, the Supreme Court of India stated as follows:-

“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and ors. Vs. Minister for the Civil Service (1985 AC 374 (408-409) (commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he had been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially

varied, then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they had a legitimate expectation that they would continue to enjoy the benefits of trade union membership, the interest in regard to which was protectable. *An expectation could be based on an express promise or representation or by established past action or settled conduct.* The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons.”

The ingredients of legitimate expectation have been clearly enunciated in the above judgement. I would add that for an applicant to cite legitimate expectation, the promise made must be within the jurisdiction of the party making it. An illegal promise cannot be relied upon to form a claim for legitimate expectation. The Committee has a legal obligation to investigate and prosecute misconduct by advocates. The Committee would be abdicating its responsibility were it to promise an advocate that he/she would not be investigated for alleged misconduct. The doctrine of legitimate expectation would not come to the aid of an advocate where such a promise is made. The Applicant cannot rely on the letter dated 30th August, 2011 as a shield from the legal process he has been subjected to. In any case, the Committee is an independent organ. It is expected to make its decisions independently. Although the chairman of LSK can sit as a member of the Committee, he only has one vote and he cannot influence the other members of the Committee. From the tone of Mr. Akide’s letter it is clear that he was writing as the chairman of LSK and not as a member of the Committee. He could not have conveyed any promise which the Applicant can rely on to form a basis for a claim of legitimate expectation.

Finally, the Applicant argued that he has not been subjected to a fair process since the Committee refused to visit his office to inspect the file in respect of the dispute. Whose duty was it to avail evidence to the Committee? The Applicant is the accused before the Committee and it is in his interest that he provides evidence to show his innocence. It is up to him to avail all documents that would support his case.

It would be stretching the rules of natural justice too far if this court will direct tribunals to go and collect evidence from the parties to the cases before those tribunals. It is for the parties to take evidence to the tribunal unless the evidence is immovable. The Applicant’s complaint along this line has no basis and the same is rejected.

Looking at the entire proceedings against the Applicant, I am of the firm view that he has been taken through a fair process. He has no legitimate complaint against the Committee and he must face the charges that have been laid against him before the Committee. His fate lies with the Committee. The application is therefore dismissed. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 7th day of August , 2013

W. K. KORIR,

JUDGE