REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 133 OF 2010

REPUBLIC .....APPLICANT

VERSUS

ADVOCATES DISCIPLINARY COMMITTEE.....RESPONDENT

GOURMET ENTERPRISES LIMITED .....INTERESTED PARTY

EX-PARTE KEITH HOWARD OSMOND

JUDGEMENT

In the notice of motion application dated 16th April, 2010 and filed in court on 23rd April, 2010 Keith Howard Osmond, the ex-parte Applicant (the Applicant) prays for orders as follows:

A. **Judicial review by an order of certiorari to remove into the High Court and quash the Judgment of the Advocates Disciplinary Committee in its Disciplinary Cause No. 114 of 2007 In the Matter of K. H. Osmond dated and purportedly made on the 18th January, 2010;**
B. **The costs of this application.**

The application is supported by a statutory statement and the Applicant's verifying affidavit filed together with the chamber summons application for leave. It is also supported by the grounds on its face.

The Disciplinary Committee (the Respondent) opposed the application through a replying affidavit sworn on 30th November, 2011 by Mr. Apollo Mboya who is the Secretary of the Law Society of Kenya as well as the Respondent. The Interested Party is Jacques Wainwiller/Gourmet Enterprises Limited. Jacques Wainwiller is a director of a limited liability company known as Gourmet Enterprises Ltd. I have not located the order allowing the Interested Party to be enjoined in these proceedings but since this has not been an issue and because the Interested Party was indeed a necessary party, I will proceed as if the Interested Party was duly enjoined to these proceedings.

The Applicant is an advocate of the High Court of Kenya. The Respondent is a tribunal established by the Advocates Act Cap 16 (the Act) and its basic duty is to hear and determine complaints made against advocates and their clerks.

Sometimes in 2005 the Interested Party instructed the Applicant to sell his house in Mombasa and remit the proceeds of the sale to him. The house was subsequently sold for 100,000 euros plus Kshs 1,032,530.200. The Applicant received the sale proceeds from the advocates for the purchasers but only

transmitted 20,000 euros to the Interested Party. In November, 2006 the Interested Party instructed the firm of Mwirigi M'Inoti & Company Advocates to recover the balance of the sale price from the Applicant. The Applicant refused to release the money and by a letter dated 15th May, 2007 the advocate for the Interested Party, Mr. Murungi D. MWiti wrote to the Secretary of the Advocates Complaints Commission seeking assistance in the recovery of the money. The Applicant did not budge and on 29th June, 2007 the said advocate swore an affidavit of complaint which was used to commence disciplinary proceedings against the Applicant vide the Respondent's Cause No. 114 of 2007 In the Matter of K.H. Osmond. The matter proceeded to hearing and on 18th January, 2010 judgment was entered in favour of the Interested Party. The Interested Party was the complainant in the cause before the Respondent. It is this judgement which the Applicant seeks to quash.

The Applicant, in his statutory statement dated 6th April, 2010, has extensively set out the grounds upon which the reliefs are sought. In summary, the Applicant seeks the orders on the grounds that the Respondent acted illegally, unreasonably and unfairly in reaching its decision. The Applicant argues that the judgment of the Respondent is a nullity because it was not signed by all members of the panel that made the decision. It is the Applicant's case that even though a different panel read the judgment on 18th January, 2010, the members of the panel which read the judgement did not countersign it. In support of his argument on the nullity of the judgment, the Applicant cited the affidavit of Pauline Mwai sworn on 6th April, 2010. In the said affidavit Pauline Mwai who is a personal assistant of the Applicant detailed how she attempted to get the decision of the Respondent from 18th January, 2010 but could not do so. She averred that she was informed that the judgment had not been signed.

The Applicant submitted that there was no valid complaint before the Respondent in that the affidavit that commenced the proceedings was not signed by the complainant himself as required by Section 60 (2) of the Act. The Applicant also submitted that even if the affidavit of Mr. Murungi Mwiti was valid, then the same was inadmissible because the name and address of the advocate preparing the affidavit had not been endorsed on the affidavit as per the requirements of Section 35 of the Act.

The Applicant contends that the complainant upon whose complaint the disciplinary proceedings were purportedly commenced was Mr. Jacques Wainwiller and not Gourmet Enterprises Ltd. It is the Applicant's case that it was only after his counsel raised this issue with the Respondent that the proceedings were improperly altered to show the company as the complainant. The Applicant argues that the Respondent's action was unfair and clearly showed that it was biased against him. It is therefore the Applicant's case that the Respondent acted illegally, unreasonably and unfairly.

The Respondent's reply is that the Applicant was taken through a legal, reasonable and fair process. The Respondent's case is better brought out by paragraphs 21-27 of Apollo Mboya's replying affidavit as follows:-

> **"21. <u>THAT</u> the Applicant's contention that the Respondent acted without jurisdiction is unmerited for the following reasons:**
>
> **a) The orders made by the Respondent are orders that fall within the jurisdiction of the Respondent as bestowed by the Advocates Act.**
>
> **b) Section 60 of the Advocate's Act provides: "A complaint against an advocate for professional misconduct...may be made to the Committee by any person." Consequently the contention that the Complainant, Mr. Jacques Wainwiller, was not the Applicant's client is inconsequential and does not arise at all.**
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> **c) In addition, the affidavit sworn by the Complainant's Advocate, Mr. Mwirigi, was rightfully before the Disciplinary Committee by virtue of the provisions of Section 60 (1) and the same could not be ousted by the reason that it had been sworn by the complainant's advocate.**

d) Further, the Applicant's allegation that there was no relationship of client-advocate between the shareholder complainant, Mr. Jacques Wainwiller, and the Applicant is unwarranted given that the Respondent's mandate with regard to professional conduct of advocates is wide and is not strictly conferred by the advocate/client relationship. The jurisdiction of the 1st Respondent spreads over the conduct of all advocates acting in their capacity as advocate and is not necessarily conferred by an advocate/client relationship.

e) The Respondent's jurisdiction was further not subject to a resolution of the Company.

22. THAT the Applicant's allegation that the judgment was based on errors of fact is refuted on the following grounds:

a) Although the complaint was instituted by way of an affidavit sworn by Murungi Mwiti Advocate, he did this in his capacity as the advocate for the complainant, Gourmet Enterprises Ltd. This is clearly stated in the said affidavit of Murungi Mwiti which is annexed hereto and marked "AM-2".

b) No error of fact alleged has been demonstrated by the Applicant.

23. THAT the allegation of the Respondent of having acted ultra vires is unmerited and the same ought to be disregarded.

24. THAT the allegation that the Respondent acted in breach of the rules of Natural Justice is also unwarranted and is only intended to mislead this Honourable Court for the following reasons:

a) The Respondent in its consideration of the merits of the Advocate's application for preliminary objection proceeded by way of submissions as suggested by the advocate's counsel. Accordingly, the Advocate duly filed his submissions on the Preliminary Objection on 25th June 2008 and Replying Submission to the Complainant's submissions on 16th July 2008. (These are annexed hereto and marked as annexture "AM-8" and "AM-9"). The Respondent considered all the submissions filed by the Applicant as shown in the body of Annexture "AM-10".

b) It is the Respondent's position that it accorded the Applicant a fair hearing and did not exceed its jurisdiction as alleged.

25. THAT in reply to the allegations of bad faith, the Respondent replies as follows:

a) The Applicant's allegation that the Complainant acted as complainant, investigator and judge in his own cause is without basis; the Complainant in the Disciplinary Cause was Gourmet Enterprises Limited and not Mr. Murungi Mwirigi, Advocate, as is clearly expressed in the Complaint annexed hereto and marked "AM-2". In addition, the decision that was arrived at was made by the Disciplinary Committee and not by Mr. Murungi Mwirigi, Advocate.

b) The objection referred to by the Applicant was duly considered and a merited ruling thereon delivered on 18th August 2008. The said ruling is annexed hereto as "AM 10".

c) There was no conflict of interest between the Complainant, the accused advocate and the Advocate prosecuting the Complaint, Mr. Murungi Mwirigi.

26. <u>THAT</u> on the Applicant's allegation of lack of a fair trial, the Respondent states:

a) The Advocate/Applicant was granted all pre-trial rights as required by the law and by principles of natural justice. This is clearly demonstrated by the bundle annexed hereto and marked "AM-3" which constitutes all the mention and hearing notices served to the Applicant.

b) The Applicant's right of representation was not denied in any way and he was indeed represented by his Counsel, Mr. Pheroze Nowrjee during the proceedings of the Disciplinary Committee.

c) The Applicant was availed a reasonable opportunity to be heard and the Respondent indeed heard his case on merit.

d) The Respondent duly considered all the evidence placed before it by both the Complainant and the accused advocate and accordingly delivered its judgment, which was based on merit on 18th January 2010. The judgment is annexed hereto as "AM-13".

27. <u>THAT</u> Applicant's allegations of bias, particulars of violation of Wednesbury Principles, Legitimate Expectation and breach of the principle of Proportionality are unfounded, lack merit and the same ought to be disregarded in their entirety."

The Respondent further argued that the Applicant being an advocate, was subject to its jurisdiction and if he was dissatisfied with the decision then he ought to have appealed to this court as provided by Section 62 of the Act.

The Interested Party supported the arguments of the Respondent.

What is the purpose of judicial review? It is meant to bring fairness to the dealings of public bodies or public officers in their interactions with the public. Judicial review is about the decision-making process and not the merits of the decision itself. Sometimes, when the decision is so unreasonable that a tribunal properly directing itself to the facts of the case ought not to have arrived at such a decision, the court may be forced to upset the decision of the tribunal for being manifestly unreasonable, unfair or irrational.

In the case before me it is not disputed that the Applicant fell under the jurisdiction of the Respondent. The Respondent has a statutory duty to hear any complaints relating to the way advocates deal with the consumers of their professional services. If any person is dissatisfied with the way he has been treated by an advocate, Parliament has provided avenues in the Act for ventilating such dissatisfaction. One can approach the Advocates Complaints Commission or the Disciplinary Committee-**see sections 53 and 60 of the Act.** This Court has no mandate to hear any complaint touching on the professional conduct of an advocate. Matters dealt with by those bodies can come to the High Court, where legislation allows, by way of appeal. Of course, judicial review is another avenue open to an aggrieved party, but only on the limited grounds under which judicial review reliefs can be granted.

As already noted, the Respondent had jurisdiction to entertain the complaint before it. It appears that the proceedings before the Respondent complied with the minimum standards required of such proceedings. The Applicant was duly notified of the allegations made against him and given an opportunity to present his defence and he did so. At the conclusion of the proceedings, the Respondent found him guilty as charged. I do not see how the Applicant can claim that the Respondent acted in excess of its jurisdiction.

The Applicant also attacked the judgement dated 18th January, 2010. The Applicant argued that the said judgement is not a judgement because it was never signed on the date of the delivery by the three members of the Respondent who heard the matter and neither was it signed by the panel which read it. The Respondent did not directly respond to this issue. The Respondent, however, attached a copy of the judgement to the replying affidavit. The copy of the judgement is dated 18th January, 2010 and signed by

V. T. Awori, N. W. Naomi and D. O. E. Anyul. This is the panel which heard the matter as can be seen at paragraph 2 of the affidavit of Pauline Mwai. It would have been better had the Respondent made a reply to the affidavit of Pauline Mwai. Even with the failure to offer an explanation, I still find that there is a copy of a judgement dated 18th January, 2010 signed by the members of the panel which heard the matter.

The proceedings could have shown if the panel which read the judgement had countersigned it or not. The Applicant did not exhibit the proceedings before this Court. He cannot be heard to say that the proceedings were with the Respondent. There is no evidence that he applied for the proceedings and they were not supplied to him. In the circumstances of this case, it is difficult for the Court to look beyond the judgment and make a finding that the same was not signed on 18th January, 2010 and yet there is no evidence upon which to arrive at such a finding. The affidavit of Pauline Mwai cannot be believed when there is a copy of a judgement clearly showing that it was signed by the panel which heard the matter. The judgement shows the date of delivery as 18th January, 2010. I therefore find that the proceedings and judgement before the Respondent were proper.

The Applicant also argued that the Respondent's proceedings were based on an affidavit which was not admissible since the same did not comply with the requirements of Section 35 of the Act to wit that an affidavit should contain the name and address of the advocate drawing it. The Respondent did not reply to this argument. It is true that the name and address of the advocate who drew the affidavit originating the complaint has no endorsement of the name and address of the advocate who prepared it. However, I do not agree with the Applicant that failure to endorse the name and address of the advocate on the affidavit would lead to inadmissibility of the affidavit. Article 159 (2) (d) of the Constitution would come to the aid of the Respondent in such a situation. It cannot be said that the fact that the Respondent acted on the affidavit demonstrates illegality and bias.

The Applicant asserted that the person who was named as the complainant before the Respondent was Mr. Jacques Waunwiller but when the Applicant indicated that the actual complainant ought to have been the company, the Respondent improperly altered its stance and started treating the company as the complainant. The Applicant therefore submitted that in doing so, the Respondent confirmed that it was biased against him. I have looked at the affidavit sworn on 29th June, 2007 by Murungi D. Mwiti. At paragraph 2 of the affidavit he averred:

> **"THAT Gourmet Enterprises Ltd appointed our Firm S. Mwirigi M'Inoti & Co. Advocates as the legal representative to act on their behalf in all matters pertaining to the above mentioned company on 7th November 2006."**

The complainant was indeed the company but its director Mr. Jacques Wainwiller actively pursued the complaint on behalf of the company. The Applicant admits that he raised all these matters with the Respondent but the Respondent rejected his arguments. The Respondent therefore made decisions on the issues placed before it by the Applicant. It may not have reached the correct decisions on the Applicant's grievances but the route open to the Applicant in that regard was to file an appeal and not come for judicial review.

The Applicant also argued that the Respondent breached the principles of legitimate expectation and proportionality. It is the Applicant's case that he had a legitimate expectation that the Respondent would act within the law and treat him fairly. He submitted that the Respondent dashed his expectation that he would receive a fair trial. He contended that the Respondent breached the principle of proportionality by failing to maintain a proper balance between the impact of its decision on him and the need to fulfill its statutory role.

I agree with the Applicant that every person who appears before a statutory tribunal has a legitimate expectation that the tribunal would act fairly and within the law. A tribunal is also not supposed to inflict a punishment not proportional to the transgression of the person who appears before it. I have gone through the material placed before this court and I find that the Respondent did not breach the principles

of legitimate expectation and proportionality in as far as the Applicant's case is concerned.

The question that calls for the interrogation of this Court is whether there was a legit complaint before the Respondent in the first place. The Applicant has argued that since the proceedings were not commenced through an affidavit sworn by the complainant, then there was no valid complaint before the Respondent. Section 60 of the Act provides that:-

> **"60. (1) A complaint against an advocate of professional**
>
> **misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.**
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> **(2) Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Tribunal, accompanied by such fee as may be prescribed by rules made under section 58 (6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.**
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> **(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:**
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> **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.**
>
> **(4)……"**

The Applicant submits that it is only a complainant who can lodge a complaint with the Respondent by swearing an affidavit. The Applicant argued that Section 60(2) of the Act can be compared to the repealed Rule 4(3) of the National Assembly Elections (Election Petitions) Rules which provided that:-

> **"The petition shall conclude with a prayer as for instance, that some specified person should be declared duly elected or nominated or that the election should be declared void, and shall be signed by all the petitioners."**

The Court considered the above cited rule in the case of **JAHAZI V CHEROGONY (2008) 1 KLR (EPD 273** and concluded that the provision that a petition shall be signed by the petitioner is mandatory and not a mere formality. This is what the Court (Wicks CJ, Sachdeva & Brar JJ) said:-

> **"Allegations of gross mismanagement of the election and of personal misconduct are made against the first respondent and allegations of election offences are made against the second respondent, yet the petitioner does not take responsibility of the allegations, he assumes no burden should the allegations prove to be unfounded.**
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> **The petition is signed by Adembesa & Co. purporting to be advocates for the petitioner. It is difficult to envisage how that could validly be so. As advocate, should a petitioner decide to engage one, is appointed in writing when the petitioner files his petition. The requirement that a petition be signed by a petitioner is not a formality. Equity demands that a petitioner assumes responsibility for his petition by signing it.**
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> **We are satisfied and find that the provision contained in rule 4(3) that a petition shall be**

signed by the petitioner is mandatory and that this petition not being signed by the petitioner it is not properly before the court. The petition is dismissed. The petitioner is to pay the costs of the first respondent and the second respondent."

The Applicant argues that the wording of Section 60(2) of the Act only envisages a situation where it is only the complainant who can, by swearing an affidavit, initiate a complaint before the Respondent.

In reply, the Respondent asserted that Section 60 (1) of the Act allows commencement of a complaint against an advocate by any person.

It is not disputed that Cause No. 114 of 2007 was commenced through an affidavit sworn by Murungi D. Mwiti on 29th June, 2007. In the said affidavit the deponent indicated that he was an advocate swearing the affidavit in support of a complaint by his client. In my opinion, Subsection (1) and subsection (2) of Section 60 of the Act should be read together in order to understand the true intention of Parliament. Subsection (1) provides for the making of a complaint by any person to the Disciplinary Committee. Subsection (2) then provides that for such a complaint to be valid the person complaining under Subsection (1) should swear the affidavit himself. In my view, whoever opts to make a complaint against an advocate must commit himself by swearing an affidavit. It cannot be that the person who is affected by the misconduct of an advocate must swear the affidavit in person. He can instruct an advocate like the complainant did in this case. If Section 60 of the Act is to be interpreted as suggested by the Applicant, then such interpretation would lead to absurd results. There are situations where a complainant, due to his physical and or mental status, may not be able to swear an affidavit and I do not see why his advocate once duly instructed should not be able to swear an affidavit and lodge a complaint with the Respondent on his behalf.

The Respondent correctly pointed out that a reading of Section 60A (1) and in particular 60A (1) (c) clearly shows that the law envisaged a situation where a complaint could be made to the Respondent on behalf of another person. Section 60 A (i) provides that:-

"60A. (1) The powers conferred on the committee by this section may be exercised on the hearing of–

(a) any application or complaint made to the Committee

under this Act by or on behalf of the Council;

(b) any application made to the Committee by the

Complaints Commission under this Act; or

(c) any application or complaint made to the Committee

under this Act, by or on behalf of any person."

An Act must be interpreted as a whole in order to get the real intention of Parliament. A reading of Section 60A (1) (c) shows that a complaint can be made to the Respondent "by or on behalf of any person". I therefore hold that the correct interpretation of Section 60 of the Act is that a complainant or an advocate as an agent of the complainant or any other person authorized by the complainant can approach the Respondent in relation to an advocate's professional misconduct. The complaint against the Applicant herein was properly and legally before the Respondent. Having said so, I must state that the institution of a complaint against an advocate by an affidavit sworn by the complainant should be the norm and not the exception. It is only the complainant who is privy to the facts of the complaint and he should be confident enough to bring forward the complaint by swearing an affidavit himself. Advocates should be wary of swearing affidavits which initiates complaints for the reason that they cannot vouch for the truthfulness of the allegations being made against an advocate.

I could be wrong in my understanding of the law. If Parliament's intention was that a complaint should be instituted by an affidavit sworn by the complainant but not any other person then the intention of Parliament should not be ignored by the courts. Ignoring the clear provisions of an Act of Parliament will surely lead to lawlessness and courts are meant to entrench the rule of law.

Sometimes however, the Court will look at the facts of the matter before it and conclude that failure to comply with a certain provision of the law should be treated as a mere technicality as envisaged by Article 159(2)(d) of the Constitution. The question to ask is whether compliance with the law would have made any difference in the decision of the tribunal. Where no difference would have been made, like in the case before me, the Court would save time and finances for all the parties by not quashing the decision. Quashing the decision would only mean that the parties will have start the process all over again.

Courts are midwives of justice. Their objective is not to obstruct justice. The Applicant and the Interested Party are all entitled to the protection of the law. The circumstances of each case must be considered so as to determine whether issuance of judicial review orders would serve the ends of justice. It is not disputed that the Applicant owes the Interested Party money, received in his professional capacity, from the sale of the Interested Party's house. This dispute commenced over six years ago and to date the Interested Party has not been paid. Looking at the evidence placed before the Respondent, I do not see it reaching a different decision. An evaluation of the proceedings before the Respondent does not reveal that the Applicant did not understand the charges that were facing him. It is not like an affidavit by the complainant would have revealed more information that would have allowed him to put forward a different defence.

In saying that it appears that the Respondent may not have reached a different opinion, I have been careful not to cross the red line into the minefield of decision-making by substituting my views for those of the Respondent. Judicial review is not a merits review or an appeal but a review of the process leading to the making of an impugned decision.

The Applicant delved into the evidence adduced against him. This Court is less concerned with the quantity and or quality of the evidence adduced against the Applicant. In my view that would form the subject of an appeal. Once it is clear that the Respondent had jurisdiction and complied with the rules of natural justice, the Court will down its judicial review tools. The Court will also check whether a decision is unreasonable in the Wednesbury sense (**Associated Provincial Picture Houses v Wednesbury Corporation (1948) 1 KB 273).** For a decision to be Wednesbury unreasonable it must be one that defies common logic. It must be a decision, which no tribunal would reach, applying its mind to the facts before it. The decision made by the Respondent cannot be said to be unreasonable in the Wednesbury sense.

The Applicant has not established that the Respondent's decision is one that would invite this Court to exercise its supervisory jurisdiction. The Applicant's application is therefore dismissed with costs to the Respondent and the Interested Party.

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

W. K. KORIR,

JUDGE