REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISC. CIVIL APPLICATION NO. 346 OF 2013

IN THE MATTER OF AN APPLICATION BY SALOME NYAMBURA NYAGAH FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF LAW REFORM ACT AND CIVIL PROCEDURE ACT

BETWEEN

SALOME NYAMBURA NYAGAH………....................................... ………..………..APPLICANT

AND

THE ATTORNEY GENERAL………………...……….1ST RESPONDENT

THE DEPARTMENT OF ADVOCATES COMPLAINTS COMMISSION…….2ND RESPONDENT

RULING

1. By a Chamber Summons dated 1st October 2013, the applicants herein seek the following orders:

1. **(spent).**
2. **THAT this Honourable Court be pleased to grant the ex parte Applicant leave to apply for;**

i. **An order of PROHIBITION directed to the Respondents barring the Respondents, their servants and/or agents from instituting, commencing, filing or in any manner howsoever proceedings with any disciplinary charges against the Applicant whatsoever in relation to the complaint by one Mary Nyakeru Walker as threatened vide the 2nd Respondent's letter dated 28th August 2013.**
ii. **An order of CERTIORARI to remove to this Honourable Court and quash the decision by the 2nd Respondent contained in the letter dated 28th August 2013, to prefer charges against the Applicant allegedly for acting and charging fees without instructions and/or charging the Applicant whatsoever in relation to the complaint by one Mary Nyakeru Walker.**
iii. **That costs of this application be borne by the Respondents.**

3. **THAT leave granted herein does operate as stay of the contemplated proceedings against the Applicant by the 2nd Respondent as threatened in the letter dated 28th August 2013 until the substantive motion of judicial review is heard and determined.**

2. When the application came before me on 21st October 2013, pursuant to the proviso to provisions of Order 53 rule 1(4) of the ***Civil Procedure Rules***, I directed that the application be heard *inter partes*.
3. The application is supported by an affidavit sworn by the applicant herein on1st October 2013.
4. According to the applicant, an advocate practising in the name and style of **Njoroge Nyagah & Co. Advocates**, the said firm was instructed by **Gatagama Housing Estate (1981) Limited**, land buying company to assist them in obtaining the requisite approvals and consents for subdivision, processing deed plans and thereafter processing and issuance of the title deeds for members in respect of LR No. 12933 and LR No. 13537/111. Pursuant to the foregoing it was agreed by the members of the company, of which the complaint herein **Mary Nyekeru Walker** was one, that payment for legal fees would be made directly to the firm's offices in Nairobi. Pursuant thereto the firm proceeded as instructed and in respect of the complainant she made initial payment of Kshs 6,050/= to the company and an additional payment of Kshs 22,400/- being disbursement and deposit of the firm's fees directly to the firm. It is contended that by making the said payment the complainant acknowledged the firm as acting on her behalf in the matter and on 23rd August 2010 when the titles were ready the complainant was informed to collect the same on settlement of the balance of the firm's fees and other disbursements amounting to Kshs 51,204/=. However no response was received and until 25th January 2012 when a letter dated the same day was received from the Law Society of Kenya indicating that a complaint had been made against the applicant as contained in a letter dated 24th January 2012 in which it was alleged that the fees of Kshs 51,204/= was not justified which letter the applicant responded to. According to the applicant there was no allegation that instructions were not given. The complainant was thereafter advised to inform the applicant if she was not satisfied with the charges to enable the firm file a bill of costs for taxation. Instead the firm received a letter on 22nd April 2013 dated 13th April 2013 from the Advocates Complaints Commission referring to a complaint lodged by her alleging that the firm had withheld her title documents and asking whether the applicant had filed the bill of costs. After an exchange of correspondences it was agreed that the applicant files the bill of costs as previously advised by the Law Society of Kenya and pursuant thereto the applicant filed a bill of costs on 9th July 2013. However by a letter dated 28th August 2013 the Commission purported to make a completely new, biased, inconsistent and unfounded allegations that the complainant had not instructed the applicant to act for her and that the Commission was proceeding to file charges against the applicant for acting and charging fees without instructions. Despite refuting the same, he Commission has not responded and the applicant is apprehensive that the Commission will proceed to prefer the said charges a fact which was confirmed by telephone conversation.
5. In his submissions, **Mr Thuo** learned counsel for the applicant contended that the applicant has not been afforded an opportunity of being heard before the said charges are preferred contrary to Articles 47 and 50 of the Constitution and as the matter touches on the legal practice of a lawyer the consequences of preferring the charges may be far reaching as she might not be able to get future work hence the stay ought to be granted in light of the failure to comply with the rules of natural justice and bias.
6. The application was opposed by way of a replying affidavit sworn by **Grace Thuku**, a Deputy Chief State Counsel in the Office of the Attorney General in the Department of Advocates Complaints Commission. According to the deponent, these proceedings are premature and an abuse of the Court process as no charges have been preferred against the applicant as they are still investigating the matter. In her view the Chamber Summons does not disclose a prima facie chance of success as they have the mandate to institute investigations and charge the applicant and that they have followed the due process of the law. It is therefore her view that it is only fair and just that this Honourable Court allows the Commission to complete its investigations and ascertain whether the Complainant instructed the applicant. According to her the applicant was given the opportunity to be heard and declined an invitation to appear before the Commission. Further, the application is grounded on merits of the decision and does not challenge the procedure of the

Complaints Commission.

7. In her submissions **Miss Cheruiyot** reiterated the foregoing and contended that the Respondent has offered a platform for Alternative Dispute Resolution Mechanism as mandated by the law but the applicant has been reluctant to participate therein and hence the Commission ought to be allowed to complete its process.
8. I have considered the application, the affidavits both in support of and in opposition to the application as well as the rivalling submissions.
9. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which prima facie appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321,** **Nyamu,J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. **See also Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**
10. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

    "The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

11. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
12. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

    "The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been

affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought."

13. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199**, the Court of Appeal was of the view that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.
14. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

"Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Like the Biblical mustard seed which a man took and sowed in his field and which 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 stemmed 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. One can safely state 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. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

15. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a prima facie arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the

application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The Court is under a duty to filter the application at that stage of leave to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. Public bodies ought to proceed with their statutory duties without being uncertain as to whether their actions will be overturned in the future and the public ought to be assured that the actions taken by the public bodies will not be overturned. Unless this assurance is given, public affairs are unlikely to be conducted in a manner that guarantees to the public confidence in the administration of its affairs. Therefore leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review.

16. In this case the applicant contends that the Respondent intends to charge the applicant without getting the applicant's side of the story in breach of the rules of natural justice and Articles 47 and 50 of the Constitution. The powers of the Advocates Complaints Commission are specified in section 53(4) of the ***Advocates Act*** as the power to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof. Where after considering such a complaint the Commission finds that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XII. If on the other hand it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification and it is only upon expiry of the said period that the Commission is empowered to proceed to investigate the matter for which purpose it has the power to summon witnesses, to require the production of such documents.
17. It is contended by the applicant that the complaint laid before the Law Society is not the one which is being relied upon by the respondent. In its letter dated 28th August 2013, the Commission intimated that it was proceeding to file charges against the applicant for acting and charging fees without instructions. However in the letter dated 21st June 2013, the Commission itself expressly indicated that the complaint was one of withholding the complainant's title documents and overcharging on fees. If the applicant was only to respond to the issue of overcharging and withholding title documents and was not and has never been requested and given opportunity to respond to the issue of acting for the complainant without instructions, then the decision by the Respondent to prefer charges against the applicant as intimated in the letter dated 28th August 2013 may well be in breach of the rules of natural justice and the procedure provided under section 54 of the ***Advocates Act***. Procedural impropriety is recognised as a ground for judicial review as well as breach of natural justice. As provided in Article 47 of the Constitution which provides:

    (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

18. Accordingly at this prima facie stage I am satisfied that the applicant's application discloses an arguable case that merits further investigation. In the premises the leave sought is merited and I grant the applicant leave to apply for judicial review orders as sought in prayers 2(i) and (ii) of the Chamber Summons dated 15th October 2013.
19. With respect to the decision whether or not the leave granted ought to operate as a stay of proceedings against the applicant under Order 53 Rule 1(4) of the ***Civil Procedure Rules*** as

threatened in the letter dated 28th August 2013, the law as I understand it is that the decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously.

20. Just like in cases of leave, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in an application for leave to apply for judicial review and stay of proceedings the Court has to be careful in what it

states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous. Therefore where the outcome of the judicial review might be in a manner contrary to the conclusion reached by the inferior tribunal, stay of proceedings should be granted as it might lead to an awkward situation.

21. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

22. In this case, if the Respondent proceed in the manner indicated in the letter dated 28th August 2013 and the applicant is charged, it is clear that these proceedings may well be rendered superfluous.
23. It is therefore only fair and just that the respondent be directed to hold its horses while the issues herein are being investigated.
24. I must however, make it clear that this does not mean that the respondents are barred from continuing with the investigations.
25. Accordingly I direct that the grant of leave herein will operate as a stay of the decision by the Respondent to prefer charges against the applicant as contemplated in the letter dated 28th August 2013 pending the hearing and determination of the substantive motion or until further orders. I further direct that the said Motion be filed and served within 10 days.
26. I however grant liberty to the parties to apply.
27. The costs of the application will be in the cause.

Dated at Nairobi this day 20th of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Thuo for the applicant.