REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW

JR CASE NO. 254 OF 2011

REPUBLIC .....APPLICANT

VERSUS

DISCIPLINARY COMMITTEE .....1ST RESPONDENT

THE LAW SOCIETY OF KENYA .....2ND RESPONDENT

THE HON ATTORNEY GENERAL .....3RD RESPONDENT

AND

RHODA WAKESHO SANGE.....INTERESTED PARTY

EX-PARTE

WILLIAM OCHANDA ONGURU P/A OCHANDA ONGURU & CO.

JUDGMENT

The ex-parte Applicant William Ochanda Onguru, hereinafter simply referred to as the Applicant, is an advocate of the High Court of Kenya. He practices in the name and style of Ochanda Onguru and Co. Advocates. He was the Respondent before the Disciplinary Committee (the Committee), the 1st Respondent herein, in **Disciplinary Cause No. 278 of 2007.** Rhoda Wakesho Sange who is the Interested Party in these proceedings was the complainant in the matter. The Law Society of Kenya (L.S.K.) is the 2nd Respondent whereas the Attorney General is the 3rd Respondent.

It is important to point out at this stage that the Attorney General sought and was granted permission on 23rd July, 2013 not to participate in these proceedings.

In a judgment delivered on 11th August, 2008 by the Committee, the Applicant was found guilty of committing certain offences. On 18th May, 2009 the matter was before the Committee for sentencing and in a letter dated 26th May, 2009 the Applicant was notified of the sentencing order as follows:-

> **"RE: DISCIPLINARY COMMITTEE CAUSE NUMBER 278 OF 2007**
>
> **The cause under reference came up for mitigation and sentence before the Disciplinary**

Committee on 18th May, 2009. The Committee made the following Orders:-

(f) You are to deposit Shs.357,836/- together with accrued interest at the rate of 12% p.a. from the date of the receipt with LSK within 21 days.

(g) Fined Shs.20,000/= on count 1 payable to LSK

(h) Fined Shs.5,000/= on count 2 payable to LSK

(i) Costs Shs.20,000/= to Complaints Commission

(j) All the latter sums to be paid within 30 days from the date of the Order failing which execution shall issue.

The matter will be mentioned on 27/1/2009 at 9.00 a.m. the Professional Centre, 2nd Floor to confirm compliance."

The Applicant was not happy with certain aspects of the sentence and he proceeded to file an application for review. In a ruling delivered on 13th September, 2010, part of the sentence was reviewed. The Applicant's prayer that two certificates of costs, in cases identified as **HCMA 664 of 2006** and **128 of 2007**, be taken into account when computing the amount payable to the Interested Party was rejected. In doing so, the Committee noted that the certificates of costs that the Applicant had availed were the same ones which the Committee had rejected in its judgement. The reason given for the rejection of the certificates of costs is that they did not have the court seal and neither were they certified as true copies of the original.

The Applicant did not give up and filed another application for review. He was seeking that three certificates of costs which had now been certified be taken into account in computing the amount payable in the Disciplinary Cause. In an undated ruling delivered in 2011 the Committee dismissed the application for review and noted that the Applicant's application did not meet the conditions for allowing a review. The Committee also observed that the application was contrary to Order 45 Rule 6 of the Civil Procedure Rules which barred an application to review an order arising from an application for review.

The Applicant has now moved to this Court and seeks judicial review orders of certiorari, prohibition and mandamus so that the ruling which is said to have been delivered on 15th August, 2011 is quashed and the Committee is prohibited from implementing the same. The Applicant also wants the Committee to be compelled to take into account the three certificates of costs.

In the statutory statement filed with the chamber summons application for leave on 27th October, 2011, the Applicant lists the grounds in support of the Application as:

"(a) THAT the 1st Respondent has refused to take into account two Certificate of Costs dated 2nd August 2007 and 25th January 2008.

(b) THAT these two certificates of costs have been duly certified as by law required.

(c) THAT these two certificates of costs have not been altered and/or set aside and are therefore final in terms of Section 51(2) and cannot be ignored.

(d) THAT the 1st Respondent has deliberately ignored these Certificates of Costs on technicalities.

(e) THAT the Constitution requires justice to be done without undue regard to technicalities.

(f) THAT the 1st Respondent has issued warrants of attachment against the Applicant and the Applicant is apprehensive that unless this Honourable Court intervenes, the Applicant will suffer irreparable loss and damage.

(g) THAT the action by the 1st Respondent is unconstitutional, unlawful, unreasonable and far in excess of its powers."

The Committee and LSK opposed the application through a replying affidavit sworn on 27th March, 2012 by L.S.K.'s Secretary Mr. Apollo Mboya. Through the said affidavit the respondents gave a detailed history of the matter and concluded that there is nothing unconstitutional, unlawful and unreasonable in the manner in which the Applicant was prosecuted, convicted and sentenced.

Looking at the Applicant's case which I have reproduced at length, it is clear that he believes that the Committee acted unreasonably, unlawfully and in excess of its powers when it refused to accept his certificates of costs. Is that so? That is the question to be answered in this judgment.

The scope and reach of judicial review is now settled. Judicial review targets the decision-making process and not the merits of the decision. Lord Diplock in the famous case of **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935** summarized the purpose of judicial review thus:

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, 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 it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). 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 it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I 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. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

A court of judicial review does not seek to substitute its opinion for that of the decision-maker. The judge may disagree with the decision but that alone is not a good basis for the grant of judicial review orders.

In the impugned decision the Committee discussed at length the Applicant's application for review and gave three reasons why the same was not allowed:

a. The Applicant was not diligent and had not moved to certify his certificates of costs in good time;
b. The application did not meet the grounds for review as set out by Order 45 Rule 1 of the Civil Procedure Rules; and
c. The application was untenable since it contravened the provisions of Order 45 Rule 6 of the Civil Procedure Rules which expressly barred the entertainment of an application seeking to review a decision arising from an application for review.

I do not see how the Committee can be said to have acted unlawful and unreasonably. There is nothing to show that the Committee exceeded its powers. The Applicant appears to be asking the court to substitute its opinion for that of the Committee. That is not the purpose of judicial review. It is immaterial that the Applicant had genuine certificates of costs. A party to a case is under an obligation to present evidence in compliance with the timeframes set by the law or in accordance with the directives of the court or tribunal. What the Applicant has presented to this court may be good material for an appeal but it is not good enough to move this court into issuing judicial review orders.

In short, the Applicant has not established grounds for the grant of the orders sought. The application fails and the same is dismissed with costs to the 1st and 2nd respondents and the Interested Party.

Dated, signed and delivered at Nairobi this 5th day of December, 2013

W. K. KORIR,

JUDGE OF THE HIGH COURT