



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW NO. 398 OF 2009

**IN THE MATTER OF AN APPLICATION BY STEPHEN O OWINO ADVOCATE FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE
DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA**

AND

**IN THE MATTER OF THE DISCIPLINARY COMMITTEE CAUSE NUMBER 273 OF 2007
BETWEEN POWER ENGINEERING INTERNATIONAL LIMITED AND STEPHEN O
OWINO, ADVOCATE**

AND

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16, LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26, LAWS OF KENYA

IN THE MATTER BETWEEN

REPUBLICAPPLICANT

VERSUS

THE DISCIPLINARY COMMITTEE OF

THE LAW SOCIETY OF KENYA.....RESPONDENT

EX-PARTE

STEPHEN OWINO, ADVOCATE

JUDGEMENT

On 15th June, 2009 the Disciplinary Committee of the Law Society of Kenya (the respondent) found

Stephen Owino (the ex-parte applicant) who is an advocate of the High Court of Kenya guilty of four counts in Misc. Cause No. D.C.C. No. 273 of 2007. The respondent thereafter directed the ex-parte applicant to prepare for mitigation and sentencing on 6th July, 2009. On 3rd July, 2009 the ex-parte applicant moved to this court and obtained leave to commence judicial proceedings. The ex-parte applicant was also granted temporary stay of further proceedings by the respondent.

Through a notice of motion dated 15th July, 2009 the ex-parte applicant therefore prays for orders as follows:-

- 1. THAT this Honourable Court be pleased to grant orders of Judicial Review by way of an order of Prohibition directed towards the Disciplinary Committee prohibiting it or its authorized agents from continuing with the proceedings in Disciplinary Cause No. 273 of 2007 or any variation thereof.**
- 2. THAT this Honourable Court be pleased to grant orders of Judicial Review by way of an order of certiorari to remove to the High Court and quash the decision of the Disciplinary Committee of 15th June , 2009 convicting the Applicant of professional misconduct.**
- 3. THAT costs of and incidental to this suit be borne by the Respondent.**

The application is supported by a supporting affidavit sworn by the applicant on 15th July, 2009, a statutory statement dated 30th June, 2009, a verifying affidavit sworn by the ex-parte applicant on 30th June, 2009, a further affidavit sworn by the ex-parte applicant on 3rd September, 2010 and the annexures to the affidavits. The applicant also supported his application with grounds found on the face of the application namely:-

- 1. The Disciplinary Committee proceeded to determine the matter solely on the basis of some affidavits when it was clear the same were in contention and the applicant had sought and obtained leave to summon a deponent whose affidavit was in support of the complaint to be cross-examined on his affidavit evidence.**
- 2. The Disciplinary Committee denied the applicant his rights to cross-examine the deponent and proceeded to base its decision on the affidavits whose contents were clearly contradicted by other affidavit evidence before the committee.**
- 3. The Disciplinary Committee's decision finding the Advocate guilty and thereby convicting him more so given the facts before committee and given the submission presented before committee fly in the face of the express provisions of the law.**
- 4. There exists sufficient and indisputable proof and evidence that the Advocate was instructed by PABCO and not the individual contractors and therefore a finding that the Advocate owed the individual contractors a fiduciary duty is clearly misplaced.**
- 5. The Disciplinary Committee went beyond its jurisdiction and erred in making a finding that directly flouts and contravenes an order of the High Court in a matter that is *sub judice*.**
- 6. The Disciplinary Committee took into account and considered very many things that were clearly irrelevant, *sub judice* and outside their jurisdiction and mandate and totally failed to consider and take into account many other matters that were cogent to and extremely relevant and germane to the Applicant's case.**
- 7. The Applicant stands the risk of being wrongly sentenced, which sentence may include disbarment with the attendant loss of reputation and suffering of clients represented by the Applicant.**

The ex-parte applicant's case was clearly brought out by paragraphs 11 to 16 of the supporting affidavit sworn on 15th July, 2009. Those paragraphs read as follows:-

“11. THAT when the matter first came up for hearing I applied for leave and was granted leave to cross examine the above mentioned *Mohammed Ali Charffi* on his affidavit of 3rd June, 2008 in support of the complaint.

12 THAT *Mr. Nyiha, Advocate* who was prosecuting the complaint on behalf of the Complainant undertook to avail the said *Mr. Charffi* for cross examination.

13. THAT I never at any point waived my right to cross-examine the said *Mr. Charffi* but in fact took every opportunity to inform the Committee that I reserved the said right and would if given the opportunity wish to cross examine the said *Mr. Charffi* before the judgement was delivered.

14. THAT on a date when my Advocate was indisposed and the opposite side were fully aware of the fact, the Committee ordered that the matter would proceed on the basis of affidavit evidence, but said nothing of my intended cross-examination of *Mr. Charffi* on his affidavit.

15. THAT as has been alluded to above, the Committee proceeded to base its judgment solely on the affidavit evidence and proceeded to deliver its judgement on 15th June, 2009 without giving me an opportunity to state my case after cross-examining the said *Mr. Charffi*, in spite of my Advocate's numerous efforts to do so prior to the delivery of the judgment.

16. THAT failure by the Committee to allow me to cross-examine the said *Mr. Charffi* on his affidavit, and which affidavit was subsequently relied upon in the reaching of the decision is clearly a procedural and fatal omission as it contravenes the express provisions of Section 58 of the Advocates Act and as is evident was extremely prejudicial to me.”

The application is opposed through a replying affidavit, and the annexures thereto, sworn on 7th June, 2010 by Apollo Mboya the Secretary of the respondent. The replying affidavit gives a detailed account of what took place before the respondent. In summary the respondent is saying that the procedure adopted in hearing the ex-parte applicant's case was in accordance with the Advocates Act Cap. 16 and the rules made thereunder. It is also the respondent's case that the issues raised by the ex-parte applicant touches on the merits of the decision and the route the ex-parte applicant should have taken was to appeal to this court instead of approaching it by way of judicial review.

It is important to briefly state what took place before the respondent so as to understand whether the rules of natural justice were followed in the ex-parte applicant's case. The case against the ex-parte applicant started when one Manoj J Shah (hereinafter referred to as Shah) on behalf of Power Engineering International Limited (PEIL) filed a complaint before the respondent by way of an affidavit. The complainant had entered into a sub-contract with Pan African Builders & Contractors Limited (PABCO) for the installation of fire alarms systems. The sub-contract was under the main contract between PABCO and Communication Commission of Kenya (CCK). A dispute arose between PABCO and CCK concerning the payment of the contractual sum. The matter was later settled in Nairobi HCCC No. 305 of 2006 with PABCO being paid kshs.36,256,999.50/= through the firm of the ex-parte applicant herein. The letter forwarding the money from CCK's advocates to the ex-parte applicant who was on record for PABCO had a schedule detailing payments to sub-contractors who included Shah's PEIL. The ex-parte applicant refused to release the money to the sub-contractors as per the schedule and that is when Shah went to the respondent for assistance via D.C.C. Misc. Cause No. 273 of 2007. Among the affidavits presented to the respondent by Shah was one sworn on 3rd June, 2008 by Mohammed Charffi a director of PABCO. The said affidavit was supporting Shah's complaint against the ex-parte applicant meaning the cosy advocate/client relationship that existed when the ex-parte applicant had represented PABCO against CCK in Nairobi HCCC No. 305 of 2006 was no more.

When the matter went before the respondent, it was adjourned three times and on 4th December, 2008 the

respondent gave a last adjournment. The matter came up for hearing on 2nd February, 2009 and on that day the proceedings were as follows:-

“Coram GITHU MUIGAI, M W NAOMI, D.S. KITAA

Mr. Njiha: Mr. Oriema Okoth had requested me to consent to an adjournment of this matter. I have no problem with his request.

Chairman: This matter has been pending since 17th December, 2007. There have been several adjournments. We direct that the matter proceed on the basis of the affidavits on record. Both parties to file and exchange submissions within 14 days of today’s date. Judgement/mitigation and sentence on 23rd March, 2009.”

On 23rd March, 2009 Mr. Njiha for the complainant was in court. The accused person was also present. Judgement was not delivered on that day. Although I do not find any evidence in the respondent’s proceedings, it was agreed by the parties herein that the ex-parte applicant had sought and obtained leave from the respondent to summon Mohammed Charffi for cross-examination. Judgment was delivered before Mohammed Charffi was cross-examined by the ex-parte applicant.

The ex-parte applicant now says that he was denied an opportunity by the respondent to cross-examine Mohammed Charffi on the contents of his affidavit. The ex-parte applicant argues that the respondent was wrong when it directed on 2nd February, 2009 that the matter should proceed by way of affidavits. The ex-parte applicant also says that it was the duty of the respondent to issue summons to Mohammed Charffi for purposes of cross-examination.

Who was supposed to call Mohammed Charffi for cross-examination by the ex-parte applicant? The ex-parte applicant told the court that the format of Form 5 which is found in the Advocates (Disciplinary Committee) Rules clearly shows that the respondent was supposed to issue the witness summons. Indeed the witness summons is issued in the name of the Disciplinary Committee and signed by the Secretary. This rule has however to be read with Section 58(4) of the Advocates Act which provides that:-

”For the purposes of any application or complaint made to it under this Part, the Committee may administer oaths or affirmations, and the complainant and the advocate to whom a complaint relates, and an applicant making any application to the Committee, may take out a summons to give evidence or to produce documents, but no person shall be compellable under such summons to produce any documents which he could not legally be compelled to produce at the trial of a suit.”

The person asking for the issuance of the summons ought to follow up with the Secretary of the respondent to ensure that the summons is issued. In the ex-parte applicant’s case the proceedings are so bare and one cannot tell by looking at them whether the ex-parte applicant followed up the issuance of the summons with the respondent. The respondent deals with the livelihoods of advocates and it should always ensure that the proceedings before it clearly shows what took place. I will return to this issue later in my judgement.

The ex-parte applicant has also complained that the respondent was wrong in proceeding in his absence and directing that the matter proceeds by way of affidavits. It is clear that the ex-parte applicant and his advocate failed to turn up on 2nd February, 2009 for the hearing despite the fact that his counsel Mr. Mwagonah was in court on 4th December, 2008 when the matter was fixed for hearing. The ex-parte applicant having been represented when the hearing date was taken, the respondent was allowed by the rules governing its operations to proceed in the absence of the ex-parte applicant. The respondent was also allowed to direct that the matter proceeds by way of affidavits and it cannot be faulted for giving such a direction on the hearing date. Rules 17 and 18 of the Advocates (Disciplinary Committee) Rules are very relevant and they state as follows:-

“17. 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

18. The Committee may in its discretion either as to the whole case or as to any particular fact or facts, proceed and act upon evidence given by affidavit.”

The respondent cannot therefore be faulted for proceeding the way it did on 2nd February, 2009. The respondent played within the rules by proceeding the way it did on that day.

I will now go back to the question as to whether the ex-parte applicant was denied an opportunity to cross-examine a witness on the contents of his affidavits. The rules of natural justice provides that no man can be a judge in his own cause and neither should a man be condemned unheard. In the case before me the question would be: was the ex-parte applicant condemned unheard? The principles of natural justice and fairness are found in the 4th Edition Vol. 1(1) at page 157 paragraph 84 of HALSBURY’S LAWS OF ENGLAND in the following words:

“Implicit in the concept of fair adjudication lie two cardinal principles, namely, that no man shall be a judge in his own cause (*nemo iudex in causa sua*), and that no man shall be condemned unheard (*audi alteram partem*). These two principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication.”

The treatise then continues in paragraph 85 at page 160 to outline the scope of the duty to act fairly in the following words:

“ In order to establish that a duty to act fairly applies to the performance of a particular function, it is no longer necessary to show that the function is analytically of a judicial character or that it involves the determination of a *lis inter partes*. The better view may now be that a general duty to be fair applies to almost all decision-making processes in the field of public law, but that its content varies from cases where all the traditional rules of natural justice apply to those where fairness requires little or nothing by way of procedural safeguards. However, it is still possible to point to factors which increase the likelihood of the normal principles being rigorously applied in a particular case. Thus a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where the decision is one entailing the determination of disputed questions of law and fact. Prima facie, moreover, a duty to act in accordance with natural justice will arise in the exercise of a power to deprive a person of his livelihood or of his legal status where that status is not merely terminable at pleasure, or to deprive a person of liberty or property rights or another legitimate interest or expectation, or to impose a penalty on him; though the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation so to act.”

I have gone through the proceedings that took place before the respondent and I do not see any mention in the proceedings about the ex-parte applicant’s request to cross-examine Mr. Charffi. It is not mentioned in the proceedings what decision the respondent made on the request. The respondent should have specifically given the reason why the ex-parte applicant did not cross-examine the witness on his affidavit. It is not lost upon this court that the said Mr. Charffi was once upon a time the ex-parte applicant’s client. The matter before the respondent was touching on the ex-parte applicant’s livelihood and it was only fair that the ex-parte applicant should have been given full opportunity to defend himself. It is possible that the ex-parte applicant may not have shown seriousness in having the witness availed for cross-examination. The only way the respondent could have demonstrated that it acted fairly was by indicating in the proceedings that the ex-parte applicant had been given a chance to cross-examine the witness but had failed to do so. For example, if the witness was present on 2nd February, 2009 when the ex-parte applicant and his lawyer failed to turn up, the respondent could not have been accused of denying the ex-parte applicant an opportunity to cross-examine the witness.

Looking at the evidence placed before this court, it is easy to agree with the ex-parte applicant that he was

never afforded a fair hearing by the respondent. Justice will be better served if this application is allowed since the respondent can still have another chance to hear the complaint against the ex-parte applicant. The ex-parte applicant's case therefore succeeds and he gets the prayers sought. It is noted that the ex-parte applicant and his counsel failed to turn up for the hearing before the respondent on 2nd February, 2009 without any good reason and that is most likely why the respondent directed that the matter proceeds by way of affidavits. Owing to the ex-parte applicant's conduct, I will make no order on costs.

Dated and signed at Nairobi this 8th day of March, 2012.

W. K KORIR

JUDGE