



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

IN THE CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 238 OF 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
AND
IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI AND
PROHIBITION
AND
IN THE MATTER OF: THE DISCIPLINARY COMMITTEE CAUSE NO.2 OF 2005
BETWEEN
REPUBLIC.....APPLICANT

AND
THE LAW SOCIETY OF KENYA1ST RESPONDENT
THE CHAIRMAN, DISCIPLINARY COMMITTEE.....2ND RESPONDENT
THE REGISTRAR, HIGH COURT OF KENYA.....3RD RESPONDENT

EX PARTE
HENRY ENOCK ALOO NYAGOL

JUDGMENT

The ex parte applicant's Notice of Motion is dated 7th July, 2010 and seeks the following orders:

- “1. Judicial review and order of certiorari against the 1st respondent to bring to this honorable court for the purposes of being quashed the decision, directive and/or order of the 1st respondent as contained in a letter dated 15th day of June, 2010 by which it rejected the application by the applicant herein for a practicing certificate.**
- 2. Judicial review and order of certiorari against the 2nd respondent to bring to this honorable court for the purposes of being quashed the proceedings, decisions, directives and/or orders of the disciplinary committee in Disciplinary Cause No. 2 of 2005 and more particularly the proceedings, decisions, directives and/or orders of 24th August, 2006, by which it purportedly ordered the striking off of the applicant herein from the Roll of advocates.**
- 3. Judicial review and order of prohibition against the 2nd respondent and/or the 2nd respondent’s committee stopping it from conducting any or any further proceedings and/or taking any or any further steps in Disciplinary Cause No. 2 of 2005.**
- 4. Judicial review and order of mandamus to compel the 3rd respondent herein, the Registrar of the High Court of Kenya, to discharge his/her statutory duty as provided under Section 21 of the Advocates Act Chapter 16 of the Laws of Kenya, by issuing the applicant with a practicing certificate.**
- 5. Costs herein be provided for.”**

The grounds upon which the application was brought may be summarized as hereunder:

- **On 19th December, 2008 the ex parte applicant forwarded to the 1st respondent his application for renewal of a practicing certificate for the year 2009 as well as a bank draft in the sum of Kshs.14,460/=.**
- **The ex parte applicant did not get any response and on 24th May, 2010 he wrote and enquired why a practicing certificate had not been issued to him.**
- **On 15th June, 2010 the 1st respondent informed the ex parte applicant that he had been struck off the Roll of advocates and could not therefore be issued with a practicing certificate.**
- **The ex parte applicant contended that he had not been informed of the said decision and that the decision was unlawful, malicious and intended to unfairly deny him the opportunity to practice law. The reasons for so contending are stated in the ex parte applicants’ verifying affidavit which I shall highlight shortly.**

In his verifying affidavit in support of the application for leave, the ex parte applicant stated that in the year 2005 one **George Kegoro**, then the Secretary of the 1st respondent, lodged a complaint against him with the 2nd respondent. The complaint was that the ex parte applicant had failed to account to his client, **Mr. Obel Otondo**, the sum of Kshs.5 Million being purchase price paid to him for the sale of Mr. Obel’s property. The 2nd respondent wrote to the ex parte applicant on 2nd February, 2005 directing him to appear before the disciplinary committee on 4th March, 2005 for purpose of taking a plea in **Disciplinary Cause No. 2 of 2005**. On that day the ex parte applicant appeared before 2nd respondent and pleaded not guilty to the said charge. The ex parte applicant alleged that since that date he did not receive any summons or communication from the 2nd respondent until he received the letter of 15th June, 2010 informing him that he had been struck off the Roll of advocates.

The ex parte applicant alleged that the 1st respondent, having lodged a complaint against him with the 2nd respondent, the 1st respondent went ahead to appoint a prosecutor and further acted as the accuser, the judge and executioner in its own cause by virtue of the fact that the 1st respondent is by law a member of the 2nd respondent. The ex parte applicant further contended that the 1st respondent acted without jurisdiction in rejecting his application for a practicing certificate. He further alleged that the proceedings before the 2nd respondent leading to his striking off the Roll of advocates were in blatant disregard and spite of the doctrines of *res subjudice* and *res judicata* as there was at the time of the purported decision a judgment of the High Court of Kenya in **Miscellaneous Application No. 342 of 2005**, issued on 30th March, 2006. In that decision, he had been ordered to deliver a cash account of the aforesaid sum within 14 days of the said decision in default of which his client was at liberty to execute a decree against him for recovery of the principal sum together with interest. Further, the ex parte applicant stated that the 3rd respondent failed to notify him of the decision of the 2nd respondent as required under **Section 61** of the **Advocates Act**.

The 1st respondent filed a replying affidavit sworn by **Mr. Apollo Mboya**, its Secretary, on 24th November, 2010. He stated that the 2nd respondent received a complaint from the Advocates Complaints Commission in respect of the ex parte applicant's failure to account for the sum of Kshs.5 Million as stated hereinabove. **Section 60** of the Advocates Act mandates the 2nd respondent to receive such complaints. The 2nd respondent, upon carrying out prima facie investigations into the complaint, commenced Disciplinary Cause No. 2 of 2005 and forwarded the complaint to the ex parte applicant and invited him for plea taking on 20th May, 2005. The ex parte applicant failed to turn up and consequently a plea of not guilty was entered on his behalf.

Thereafter the 2nd respondent forwarded a hearing notice to the ex parte applicant, notifying him of the hearing date scheduled for 20th June, 2005. Following that notice the firm of **Kiage & Company Advocates** filed a notice of appointment of advocates on behalf of the ex parte applicant. The same was filed on 6th June, 2005. The said firm also filed a preliminary objection stating, *inter alia*, that the proceedings were in contravention of the 1st respondent's stated mechanisms for dispute resolution and were in breach of the ex parte applicant's constitutional guarantee of a fair trial. Vide a letter dated 21st June, 2005 the 2nd respondent informed the parties that the matter would be heard on 4th July, 2005. On that date the ex parte applicant together with his advocate, Mr. Kiage, were in attendance. The preliminary objection was argued at length and a ruling delivered on 12th September, 2005 when the preliminary objection was dismissed. The ex parte applicant as well as his advocate were duly notified of the outcome vide a letter dated 13th September, 2005 which also informed them that the hearing would proceed on 21st November, 2005. On the scheduled date neither the ex parte applicant nor his advocate appeared before the Disciplinary Committee and the matter was stood over to 6th February, 2006 but before that date Mr. Kiage wrote to the 2nd respondent and requested that hearing be re-scheduled to the 6th of March, 2006. Come that date neither the ex parte applicant nor his advocate appeared. The hearing proceeded by way of affidavit evidence under **Rule 18** of the **Advocates (Disciplinary Committee) Rules**.

Vide a letter dated 14th March, 2006, the ex parte applicant and his advocate were informed of the proceedings and advised that judgment was scheduled to be delivered on 3rd April, 2006 but again they did not show up on the said date. In the judgment, the ex parte applicant was found guilty as charged and was ordered, *inter alia*, to repay the money that he had misappropriated together with interest at 12% per annum till full payment. Further, the 2nd respondent noted that due to the gravity of the complaint and by virtue of the provisions of **Section 60 (4) (c)** of the Advocates Act, a case for professional misconduct had been made on the part of the ex parte applicant, hence ordered that his name be struck off the Roll of advocates. Mr. Mboya stated that it is a blatant lie for the ex parte applicant to allege that he was unaware that he had been struck off the roll of advocates until June, 2010 because sometimes in August 2007, the

ex parte applicant had written to the chair of the 1st respondent seeking to be reinstated to the Roll of advocates.

In response to the allegation that the proceedings before the 2nd respondent were *sub judice* in view of the proceedings that had been instituted against the ex parte applicant in Civil Case No. 342 of 2005 at Milimani Commercial Courts, Mr. Mboya stated that under **Section 85 (2)** of the Advocates Act, an accused advocate who is guilty of an offence under the Advocates Act, whether or not he has been charged with, convicted or acquitted of such offence, is liable to proceedings under **Section 60** of the Act.

In further opposition to the ex parte applicant's application, Mr. Mboya stated that the ex parte applicant had not explained how he intended to refund the sum of Kshs.5 Million together with interest as ordered against him. The 2nd respondent therefore rightly rejected the ex parte applicant's application for reinstatement to the Roll of advocates, he stated.

I have carefully perused the written submissions filed by the ex parte applicant as well as the 1st and 2nd respondents'. The ex parte applicant complained that the decision of the Disciplinary Committee was bad in law because:

- (a) **There was breach of the principles of natural justice.**
- (b) **The matter before it was res judicata.**
- (c) **The 2nd respondent had no jurisdiction.**
- (d) **There was abuse of process.**
- (e) **There was inordinate delay in notifying him of the said decision.**

Although the ex parte applicant alleged that he was condemned unheard, it is evident that the 2nd respondent, having duly notified the ex parte applicant of the charge he was facing, invited him to take a plea on 20th May, 2005 but he failed to appear as required. The 2nd respondent entered a plea of not guilty and thereafter notified him of the hearing date. The ex parte applicant engaged a firm of advocates who entered appearance on his behalf. Both the ex parte applicant and his advocate did not attend the 2nd respondent on the subsequent hearing dates until the matter was heard and determined. The ex parte applicant cannot therefore allege that he was condemned unheard. As long as a reasonable opportunity to be heard was availed to him, the ex parte applicant cannot complain, see **BOARD OF EDUCATION vs. RICE [1911] A.C. 179**. It is him and/or his advocate who refused, failed and/or neglected to appear before the disciplinary committee as required.

The ex parte applicants' complaint that the 1st and 2nd respondents acted as the complainant and

prosecutor, judge and the executioner at the same time is without basis. It is true that the Secretary of the Law Society of Kenya is also the Secretary of the Disciplinary Committee. See **Section 58(3)** of the **Advocates Act**. Mr. George Kegoro, then Secretary of the Law Society of Kenya, in his affidavit referred to by the ex parte applicant had made reference to a complaint received from Mr. Obel Otondo in relation to the ex parte applicant. A letter addressed to the complaints commission was attached to the said complaint. The filing of the said affidavit was in compliance with the due process of dealing with such complaints as stipulated under **Rule 8** of the **Advocates (Disciplinary Committee) Rules**. The decision that was arrived at was made by the Disciplinary Committee and not the 1st respondent. It was to be acted upon by the 3rd respondent. The process of receiving complaints against an advocate and the manner of disposing of such complaints is well set out under **Sections 60** and **61** of the Advocates Act as read together with the relevant rules made thereunder.

The ex parte applicant complained that the 3rd respondent did not give him the report of the 2nd respondent in violation of the provisions of **Section 61 (2)** of the Advocates Act. The 3rd respondent did not file any affidavit in response to the ex parte applicant's averments therefore I am unable to verify the exact position. That notwithstanding, the ex parte applicant, having been aware of the proceedings that were before the 2nd respondent and having been notified of the outcome thereof vide the 1st respondent's letter dated 1st September, 2006 ought to have taken the initiative of collecting a copy of the report from the 3rd respondent and if he so desired, appeal against the said decision.

As regards the ex parte applicant's complaint that the proceedings before the 2nd respondent violated the principles of *res subjudice* and *res judicata*, the simple answer is found in **Section 85 (2)** of the Advocates Act which states as follows:

“Any advocate who is guilty of an offence under this Act shall be liable, whether or not he has been charged with, convicted or acquitted of such offence, to proceedings under section 60.”

Consequently, the ex parte applicant's contention that the 2nd respondent acted without jurisdiction is without any legal basis.

Judicial review remedies are also discretionary remedies. See **REPUBLIC vs. KENYA REVENUE AUTHORITY ex parte ABERDARE FREIGHT SERVICES LTD & 2 OTHERS [2004] 2 KLR 530**. The ex parte applicant has not denied that he misappropriated a sum of Kshs.5 Million that was entrusted to him as an advocate way back in 2004 or thereabout. He has not stated whether he has repaid the said sum together with interest as ordered by Kasango J. on 30th March, 2006. The ex parte applicant's conduct disentitles him from getting the orders which he seeking from this court.

I find no merit in this application and dismiss the same with costs to the 1st and 2nd respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Oyembo for Mr. Agina for the ex parte applicant

Mrs. Otaba holding brief for Miss Wambugu for the 1st and 2nd respondents