REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 324 OF 2010

REPUBLIC

VERSUS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

……. RESPONDENT

EX PARTE
HENRY ASAVA MUDAMBA T/A MUDAMBA & ASSOCIATES ……...

……..... APPLICANT

RULING

The applicant's Notice of Motion dated 2nd November, 2010 seeks the following orders:

"1. An order of certiorari to remove into the High Court of Kenya and quash the decision made by the Institute of Public Accountants of Kenya (the respondent herein) communicated to the applicant's advocates by a letter dated October 19, 2010 in the following terms:

"The Council therefore rejected your client's appeal and affirmed the Disciplinary Committee's earlier decision in accordance with Section 33(1)(h) and (e) of the Accountant's Act, Number 15 of 2008. Your client therefore stands suspended for a period of two years and will be required to undertake supervised Audit Training conducted by a reputable practicing member of the Institute for a period of 1 year after serving the period of suspension.

Kindly note that your client is required to return his practicing certificate and annual licence with immediate effect."

2. An order of mandamus directing the respondent's counsel to hear the applicant's appeal against the finding and recommendations of the Disciplinary Council on the following conditions:

(a) The said hearing to proceed before persons other than those who initially reviewed and upheld the decision of the Disciplinary Committee as well as those who summarily determined and rejected the applicant's aforesaid appeal.

(b) The Applicant be provided with the material upon which the Disciplinary Committee made its findings as well as recommendations, including:

(i) The documents availed to the respondent by the Capital Markets Authority referred to in the first sentence of the fifth paragraph of the Respondent's letter of 27th July 2009.

(ii) Report of the Statutory Managers of Francis Thuo & Partners Limited referred to in the letter from the Capital Markets Authority to the Respondent dated 19th August 2008.

(iii) All other correspondence between the Respondent and the Capital Markets Authority with respect to the latter's complaint against the applicant.

(c) In the absence of compliance with (a) and (b) above, the aforesaid findings of the disciplinary committee be reversed and its recommendations set aside.

3. The costs of and occasioned by these proceedings be provided for".

The application was supported by a statutory statement setting out the grounds upon which the said relief is sought and a verifying affidavit sworn by the applicant. In the affidavit, the applicant stated that he is a member of the Institute of Certified Public Accountants practicing under the firm name and style of **Mudamba & Associates** "(the firm)".By a letter dated 23rd October 2008 the respondent notified the applicant of a complaint which had been lodged against the said firm by the Capital Markets Authority "(CMA)" in respect of Francis Thuo & Partners Limited, a stock broking company. The letter stated, *inter alia*, that there were grounds for inquiring into the professional conduct of the firm in that it had negligently and in breach of professional standards audited the said stock broking company.

Upon receipt of the said letter the applicant responded to the charges made against him. He did so through a memorandum which he prepared sometimes in November 2008. On 13th January, 2009 the applicant appeared before the respondent's Disciplinary Committee and addressed it on the work that he had carried out in the said company. By a letter dated 27th July, 2009 the respondent informed the applicant that the committee had inquired into the allegations by the Capital Markets Authority where he had given an unqualified opinion on the financial statements of the company despite indications that the company's going concern status was in doubt. The committee was convinced that the applicant was guilty of professional misconduct and recommended that he be suspended for a period of three years during which he would undertake Audit Training conducted by a reputable practicing member of the Institute of Certified Public Accountants of Kenya (ICPAK) for one year.

Upon receipt of the said letter, the applicant consulted Mr. Walter Amoko, a partner in the firm of Messrs Inamdar & Inamdar, Advocates. The said advocates prepared a memorandum of appeal for and on behalf of the applicant. The advocates also wrote to the respondent and requested that as no rules and regulations had been promulgated regarding the conduct of such appeals to the Council, they be informed of the procedure the Council had adopted with respect to such appeals. They also requested copies of some documents which had been considered by the Disciplinary Committee in arriving at its decision.

By a letter dated 29th September 2009, the respondent acknowledged receipt of the applicant's advocate's letter and informed the advocates that **"the Council is in the process of formulating a procedure of appeals and constituting an appeals sub committee to handle any appeals under Section 33(3) of the Accountant's Act."** The respondent further stated that **Section 33(4)** gives the Council the option of rejecting the appeal or directing the Disciplinary Committee to re-open the enquiry. The letter further stated that the Memorandum of Appeal submitted would be considered by the Council on 5th October, 2009.

By a further letter dated 15th October, 2009 the respondent informed the applicant's advocates that the Council was seeking suitably qualified persons to be part of a Council Appeals Committee that will comprehensively look at the applicant's Memorandum of Appeal vis a vis the evidence and documentation presented in the disciplinary inquiry. That independent committee would then make a recommendation on the directions that the Council would give regarding the appeal.

On 30th November, 2009 the respondent wrote to the applicant's advocates and informed them that the Council would be meeting that day to appoint the subcommittee that will look into the appeal and

thereafter revert. The applicant's advocate responded to the said letter and stated that the applicant would like to be given an opportunity for a hearing on his appeal as the Memorandum of Appeal only gave the bear outline of his case against the decision of the Disciplinary Committee. They also pointed out that the applicant had not been provided with the documents that had been given to the respondent by the CMA as forming the basis of its complaint against him.

Thereafter the advocates sent several reminders to the respondent without any response thereto but on 14th May 2010 the respondent informed the applicant's advocates that the Council Committee on Appeals had started looking at the appeal and will be summoning the applicant in a few weeks time at which stage all his concerns will be considered. No further communication was received from the respondent until 19th October, 2010 despite two reminders that had been forwarded to it by the applicant's advocates.

In the letter of 19th October, 2010 the respondent informed the applicant's advocates that:

"The Council has concluded its review of your submissions and information submitted by your client during the disciplinary process. The Council subsequently made a decision on the appeal which I have been directed to convey.

The Council inquired into the allegations by the Capital Markets Authority that your client was negligent while engaged as the auditor of the Francis Thuo & Partner Limited for the financial year ended 31st December, 2005. According to the audited financial statements availed to the institute, your client gave an unqualified opinion on the financial statement of the company despite indications that the company's going concern status was in doubt. The company eventually collapsed in February 2007.

……
……....

The Council therefore rejected your client's appeal and affirmed the Disciplinary Committee's earlier decision in accordance with Section 33(1) (h) and (e) of the Accountant's Act, Number 15 of 2008. Your client therefore stands suspended for a period of two years and will be required to undertake supervised Audit Training conducted by a reputable practicing member of the institute for a period of one year after serving the period of suspension. Kindly note that your client is required to return his practicing certificate and his annual licence with immediate effect".

The applicant contends that the said decision by the Council not only amounts to a gross abuse of the rules of natural justice but was also contrary to and illegal under the terms of the Accountant's Act.

The respondent filed a replying affidavit that was sworn by **John Wambugu**, it's Legal Officer in charge of Discipline and Regulations. He stated that the applicant, being a duly registered Certified Public Accountant, is a member of ICPAK and is bound by all the laws, rules and regulations of the Institute. Mr. Wambugu gave the history of the appeal that gave rise to these proceedings. He stated, *inter alia*, that when the applicant appeared before the respondent's Disciplinary Committee on 13th January, 2009 he fully and actively participated in the entire process and put up a spirited defence. He gave both oral and written submissions. He was therefore given amble opportunity to tender his defence.

Regarding the appeal, Mr. Wambugu stated:

"The ex parte applicant has no automatic right to be heard at appeal stage; in fact the Council as an appellate organ has no powers to re-open the inquiry by re-hearing the ex parte applicant as per Section 33(4) of the Accountant's Act, Number 15 of 2008 which provides "the Council may upon receipt of an appeal under subsection (3) direct the Disciplinary Committee to re-open the inquiry and shall in such direction specify the aspects of the matter it requires the Disciplinary Committee to re-consider"."

Mr. Wambugu emphasized that under **Section 33(4)** aforesaid, the Council has power and discretion to reject or allow an appeal. In this case, the Council exercised its discretion when it rejected the applicant's appeal. He added that such a rejection is not an illegality, procedural or otherwise as stated by the applicant. He further stated that the Council, like an appellate court, has power to enhance punishment imposed upon an appellant by the Disciplinary Committee.

Regarding the respondent's letter of 14th May, 2010 where it had given an indication that the applicant will be summoned before the Council during the hearing of the appeal, Mr. Wambugu stated that the letter was written in an administrative capacity before the Council made its decision. It had been anticipated that the appeal would raise new issues that would have required the summoning of the applicant but after review of the appeal the Council found that no new issues had been raised as to warrant a re-consideration of the case. He denied that the Council introduced any new grounds at the appellate stage. The Council merely expounded the Disciplinary Committee's grounds when it referred to international standards of accounting, he stated.

With regard to the applicant's demand for the material upon which the Disciplinary Committee made its findings, Mr. Wambugu stated that:

"The Statutory Manager's and CMA's forensic investigations reports are the property of CMA. The corporation has no obligation to give ICPAK or the ex parte applicant a copy of its own report. They have a right to withhold it. The ex parte applicant has no legal grounds to compel the institute to produce a document it does not own and which it did not rely on in reaching its decision. The ex parte applicant can obtain the report directly from CMA or enjoin it as a party in the suit if he feels aggrieved by the report whose content we do not know."

He clarified that in reaching its verdict, the Disciplinary Committee relied entirely on the annual report and financial statement for the year ended 31st December, 2005 which were signed by the applicant as well as the annual report and financial statement for the year 2004. The committee also relied on ICPAK's report on the working status of the applicant's firm as auditors for Francis Thuo & Partners Limited.

The advocates for the parties filed their respective clients' submissions. I have carefully considered the submissions as well as the parties' affidavits on record.

The principle ground upon which the applicant attacked the decision of the Council is that his appeal was dismissed without having been heard. He argued that the Council was not statutorily authorized to dismiss his appeal without a hearing and that the Council was not empowered to enhance the sentence that had been imposed on him by the Disciplinary Committee. He submitted that the Council acted *ultra vires* its powers and by rejecting his appeal without hearing it the Council was guilty of procedural irregularity.

It was further submitted that the summary dismissal of the appeal is not authorized by law. The Council also had no mandate to expand the parameters of the appeal to include matters which were not before the Disciplinary Committee.

The aforesaid arguments revolve around interpretation of **Section 33(4)** of the **Accountant's Act Number 15 of 2008** which provides as follows:

"The Council may upon receipt of an appeal under subsection (3) direct the Disciplinary Committee to re-open the inquiry and shall in such direction specify the aspects of the matter it requires the Disciplinary Committee to re-consider."

Mr. Njue for the respondent submitted that under the said section the Council has the power and discretion to reject or allow an appeal and that the Council exercised that power when it rejected the

applicant's appeal.

On the other hand, Mr. Amoko for the applicant submitted that the Council had no right to dismiss the appeal and affirm the decision of the disciplinary committee without affording the applicant hearing, particularly so, having informed him that he would be called at the opportune time to present his appeal.

In **R vs COMMISSION FOR RACIAL EQUALITY ex parte HILLINGDON LBC [1982] AC 779,** Lord Diplock stated that administrative powers which affect rights must be exercised in accordance with natural justice. He stated:

"Where an Act of parliament confers upon an administrative body functions which involve its making decisions which affect to the detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."

Although the Council has the discretion upon considering an appeal to reject it or to direct the Disciplinary Committee to re-open the inquiry, in this particular case the applicant had stated that he wanted to be heard and the Council did not reject his request. He was promised that he would be summoned to appear before it to present his arguments. There was therefore legitimate expectation on the part of the applicant that the Council would fulfill its promise. The argument advanced by the respondent that the letter of 14th May, 2010 was written in an administrative capacity in anticipation that the appeal would raise new issues is not acceptable. If the Council had made it clear from the very beginning that it would determine the appeal by considering the record of the Disciplinary Committee and the memorandum of appeal, it would have been perfectly entitled to that position. But having promised the applicant that he would be summoned to argue his appeal only to be told much later that the appeal had been determined without affording him a hearing, the Council did not act fairly. As earlier stated, there was legitimate expectation on the part of the applicant that he would be summoned by the Council to argue his appeal. His advocate had stated that the memorandum of appeal was merely an outline of the issue which his client wanted to canvass during the appeal. The exercise of discretion requires a quasi-judicial body to take into account all relevant considerations before reaching its decision. The legitimate expectation of the applicant was dashed by the Council by failing to give him a hearing. See **RIDGE vs BALDWIN [1964] AC 40** where Lord Denning stated that where a complainant has some legitimate expectation that he would be heard it would not be fair to deprive him without hearing what he has to say.

However, no one can tell whether the appeal would have been successful had the applicant been given an opportunity to appear before the Council. The Council considered the appeal and formed an opinion that it had no merits and dismissed the same. In these proceedings the court is not concerned with the merits of the appeal but with the process in which that decision was arrived at. The court has established that the applicant was unfairly denied an opportunity to appear before the Council to argue his appeal.

But having said that, I must add that the orders which are sought by the applicant are discretionary in nature. In **REPUBIC vs THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT & OTHERS ex parte DAVID MWANGI & OTHERS HC MISC. APPLICATION NO. 805 OF 1990,** Bosire J, as he then was, held that:

"Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and legal principles."

Considering all the evidence that was laid before the Disciplinary Committee and the defence that was advanced by the applicant and the decision reached by the Disciplinary Committee and confirmed by the Council, I am of the view that it will be improper to grant the orders sought by the applicant. Save for the promise that had been made by the respondent that it would summon the applicant at the appropriate

time, **Section 33(4)** aforesaid does not provide a right to an oral presentation of arguments by an appellant before the Council determines an appeal. The Council is endowed with discretion to consider the record of appeal and determine the appeal one way or the other in accordance with the provisions of the Act.

As regards the Council's power to enhance sentence, I agree with the respondent's submissions that in the absence of any provisions to the contrary, the Council, being an appellate body, has power to enhance any lawful sentence passed by the Disciplinary Committee. The respondent relied on the provisions of **Section 35(1)** of the **Accountant's Act** to the effect that:

"The Chief Justice may make rules governing appeals under section 34 and providing for the fees to be paid, the scale of costs of any appeal and the procedure to be followed therein."

Section 35(2) of the **Act** provides that:

"Until rules are made under subsection (1) of this section and subject to any such rules the provisions of the Civil Procedure Code shall apply as if the determination appealed against was a decree of a subordinate court exercising original jurisdiction."

Order 42 rule 32 of the **Civil Procedure Rules** states that:

"The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made or to pass or make such further or other decree or order as the case may require …."

By parity of reasoning the Council was therefore empowered to enhance the sentence since it was acting in an appellate capacity.

For the reasons aforesaid, I dismiss the applicant's Notice of Motion. Each party shall bear its own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2011.

D. MUSINGA
JUDGE

In the presence of:

Nazi – Court Clerk
Mr. Muchiri for Mr. Amoko for the Applicant
Mr. Njue for the Respondent