REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 49 of 2010

REPUBLIC. ……APPLICANT

-AND-

THE DISCIPLINARY COMMITTEE

OF THE LAW SOCIETY OF KENYA……RESPONDENT

-EX PARTE-

ROBINSON ONYANGO MALOMBO…….EX PARTE APPLICANT

GEREZA KEYA……INTERESTED PARTY

JUDGMENT

The applicant, by virtue of Order **LIII** rules 1 and 2 of the Civil Procedure Rules, and ss 3A and 12 of the Civil Procedure Act (Cap. 21, Laws of Kenya), moved the Court by Notice of Motion of ***8th April, 2010*** to issue an order of Certiorari removing into Court for the purpose of being quashed, the orders of the Disciplinary Committee of the Law Society of Kenya made on ***22nd February, 2010***.

The applicant stated as grounds in support of the application that –

(i) ***the Disciplinary Committee acted without jurisdiction;***

(ii) ***the Disciplinary Committee acted contrary to principles of natural justice;***

(iii) ***an error appears on the face of the record of the Disciplinary Committee proceedings;***

(iv) ***the Disciplinary Committee has made illegal orders against the applicant.***

In the orders of the Disciplinary Committee complained about, the applicant was required to pay Kshs. 527, 385/= with interest at 12% to the applicant, and to pay a fine of Kshs. 30,000/= and costs in the sum of Kshs. 20,000/= within 45 days – and in default, be suspended from legal practice for a period of three months. The payments were required to be made through the Law Society of Kenya.

The applicant's pleadings are set out in the Statement made as required by Order **LIII** rule 1 (2) of the Civil Procedure Rules, dated ***7th April, 2010***.

The applicant practises as an Advocate of the High Court of Kenya, at Mombasa, by the firm name O.M. Robinson & Co. Advocates; and the respondent is a committee established under s.57 of the Advocates Act (Cap. 16, Laws of Kenya) to deal with matters relating to discipline among Advocates.

The interested party, ***Gereza Keya***, had instructed the applicant to take over the conduct of CMCC No. 1733 of

2003, ***Gereza Keya v. M. A. Bayusuf & Sons Ltd***. from the firm of M/s. Omondi Waweru & Co. Advocates; and, on the undertaking to pay M/s. Omondi Waweru & Co. Advocates Kshs. 269,750/=, the applicant herein took over the suit in question and conducted it up to the end. The ***ex parte*** applicant pleads that it was agreed that upon payment of the decretal sum, the applicant would take his fees, and would deduct Kshs. 269,750/= payable to M/s. Omondi Waweru & Co. Advocates. It is pleaded that a payment of Kshs. 310,000/= has already been made to the interested party, comprising Kshs. 80,100/= as an advance, and Kshs. 230,000/= paid to him on ***30th August, 2006***. The ***ex parte*** applicant had believed that the matter had been concluded; but on ***26th July, 2007*** the interested party filed an Originating Summons in the High Court, with the prayer that the ***ex parte*** applicant do deposit in Court Kshs. 527,385/=, to be accounted for; and after obtaining Court orders, the interested party secured orders for the arrest and commitment to civil jail of the ***ex parte*** applicant. On ***3rd June, 2007*** the ***ex parte*** applicant filed an application to have a stay of execution, and a setting-aside of the ***ex parte*** orders made under the said Originating Summons; and this led to orders of stay of execution. It is pleaded that the interested party thereupon abandoned the Originating Summons, and made a complaint to the Advocates Complaints Commission, and disciplinary proceedings began before that Commission (the respondent herein).

The ***ex parte*** applicant pleads that he had not been accorded a hearing before the respondent. He states that the matter was already before the High Court, in Mombasa HCCC No. 182 of 2007 (O.S.), ***Gereza Keya v. Robinson Onyango Malombo t/a O.M. Robinson & Co. Advocates***, and although the existence of that suit was brought before the respondent, the respondent ignored it; and so, it is pleaded, "the respondent acted in breach of the ***sub judice*** rule".

The ***ex parte*** applicant pleads that the respondent, in its proceedings, acted in breach of the principles of natural justice by: not affording the applicant a fair trial, as no hearing was held, and no evidence was given; failing to take into account the ***ex parte*** applicant's affidavit; failing to act in good faith; failing to hear and determine the ***ex parte*** applicant's application of ***14th November, 2008*** [Notice of Motion filed before the respondent Tribunal on ***17th November, 2008***]; passing Judgment and imposing sentence while the said Notice of Motion is still pending before the respondent; failing to take into account relevant matters, especially the fact that the ***ex parte*** applicant had made payment to the interested party.

The ***ex parte*** applicant contests the Disciplinary Committee's record for showing error on its face: "the record is not consistent [and] does not flow from previous proceedings"; the panel that delivered judgment is not the panel "that purported to hear the matter under Rule 18"; and "the panel that passed sentence is different".

The **ex parte** applicant pleads that "unless the orders sought are granted the applicant will suffer financial loss and may even be suspended from the Roll of Advocates".

The ***ex parte*** applicant enters upon his submissions by remarking the fact that, though the Notice of Motion herein was duly served, neither the respondent nor the interested party has taken steps to enter appearance. From that preliminary position based on the state of pleadings, the ***ex parte*** applicant urged that his application of ***8th April, 2010*** "is not opposed at all and should be allowed with costs".

The ***ex parte*** applicant invoked case law to buttress his position in the instant application: ***David Mugo t/a Manyatta Auctioneers v. Republic***, Civil Appeal No. 265 of 1997 – in which the Court of Appeal held that an order of certiorari lies where (i) there is want or excess of jurisdiction; (ii) denial of natural justice; and (iii) error on the face of the record.

The ***ex parte*** applicant submitted that the respondent is amenable to the supervisory jurisdiction of the High Court: it is a committee established under the provisions of the Advocates Act (Cap. 16, Laws of Kenya), s.57 and its function is to hear complaints made against advocates (s.60 (1)) and to make appropriate orders. The respondent, the ***ex parte*** applicant submitted, is required to act judicially – and this requirement makes the respondent amenable to the

supervisory jurisdiction of the High Court. It followed, the ***ex parte*** applicant urged, that the decisions of the respondent complained about were amenable to orders of certiorari.

The ***ex parte*** applicant asked that the respondent's decision of ***22nd February, 2010*** be removed into the High Court and quashed. Firstly, it was urged that the decision in question entailed excess of jurisdiction: for "the respondent being an inferior tribunal should not proceed with a matter pending in the High Court." The pertinent fact is that the complainant before the respondent [the interested party] had filed an Originating Summons suit in the High Court, against the ***ex parte*** applicant, and the said cause is still pending before the High Court; and indeed, under that suit the High Court had already issued orders of stay, in favour of the ***ex parte*** applicant.

The ***ex parte*** applicant stated, from the affidavit evidence, that the pendency of the Originating Summons suit had been brought to the respondent's attention – but the respondent "chose to ignore it".

The ***ex parte*** applicant submitted that he had not been accorded a fair hearing before the respondent-tribunal, and that the respondent had acted in contravention of the rules of natural justice: he contends that the proceedings before the respondent tribunal show that no hearing at all took place; no evidence was taken, and no submissions were made. It is contended that the ***ex parte*** applicant's affidavit which was indeed placed before the respondent, was not considered, "the respondent proceeded as if there was no affidavit by the applicant".

In this context, the ***ex parte*** applicant cited relevant case authority: ***Republic v. the Registrar of Trade Unions ex parte Kenya Union of Commercial, Food and Allied Workers***, Misc. Civil Application No. 298 of 1986 [Court of Appeal], and relied on the following passage:

> ***"The right to a fair hearing is a rule of universal application in the case of administrative acts [or] decisions affecting rights…….The duty to afford it is a duty lying upon everyone who decides anything and must always include a fair opportunity to those who are parties in the controversy to correct or [contradict] anything prejudicial to their view…….The right to a fair hearing is one of the rules of natural justice…….[that is,] fair play in action."***

From the principle thus stated in case law, the ***ex parte*** applicant submitted that "there was no fair hearing before the respondent, and principles of natural justice were violated".

It was submitted too, that the proceedings before the respondent showed error on the face of the record: "the record is not consistent and [does not] show what exactly took place"; it does not show when the complainant was heard, and what exhibits if any, were considered; and it appears that "the panel that gave the judgment is not the one that heard the matter if any hearing took place at all"; "the panel that passed the sentence is also not the same as the previous one".

Apollo Mboya, the Secretary of the Law Society of Kenya, swore a replying affidavit on ***5th May, 2010*** which was filed somewhat belatedly, on ***10th May, 2010***. He depones that the respondent had received a complaint from the Complaints Commission, regarding the conduct of the ***ex parte*** applicant as an advocate: (i) that the applicant failed and/or refused to account for the sum of Kshs. 670,000/= awarded and paid to him on behalf of the complainant, in respect of Mombasa CMCC No. 1733 of 2003; (ii) that the applicant failed to respond to the Complaints Commission's letter dated 20th February, 2008. The Commission raised a complaint about the professional conduct of the ***ex parte*** applicant, and lodged ***Disciplinary Cause No. 114 of 2008***, preferring charges against the ***ex parte*** applicant.

The deponent deposed that it falls within the objects of the Law Society of Kenya, acting through the respondent, "to receive, hear and determine complaints lodged against advocates"; that "the respondent herein is established under s. 57 of the Advocates Act…..for purposes, ***inter alia***, of dealing with professional misconduct on the part of advocates"; and that under s.60 of the Advocates Act, the respondent "is empowered to receive complaints by any person as against an advocate for professional misconduct".

The deponent avers that the Complaints Commission had written to and communicated the particulars of the

complaint to the applicant (by letters dated 20th February, 2008), but no response was received: and this is what led the Complaints Commission to lodge a complaint under the Advocates Act. It is deponed that the date ***18th September, 2008*** was fixed for plea-taking and the ***ex parte*** applicant was served with plea notice, but he failed to turn up; and as a result, the respondent entered a plea of ***not guilty***, and ordered that the applicant do file a replying affidavit and a statement of account within 21 days and the matter be set down for hearing on ***3rd November, 2008***. The ***ex parte*** applicant was "duly served with the hearing notice, the complaint and all other pleadings in the complaint before the respondent".

It is deponed that on hearing day, ***3rd November, 2008*** the ***ex parte*** applicant did not turn up; and so, on the application of the Complaints Commission, "the matter proceeded by way of affidavit evidence as provided for under Rule 18 of the Advocates (Disciplinary Committee) Rules", and judgment date was set as ***8th December, 2008***.

The deponent deposes that it was well after the set judgment date, that the ***ex parte*** applicant, on ***16th February, 2009*** applied for arrest of judgment and asked the respondent to consider his affidavit before delivery of judgment. Judgment was not delivered on the scheduled date (***8th December, 2008***), but on ***2nd April, 2009***: the ***ex parte*** applicant was found guilty of the charges preferred against him.

It is deponed that it was just on the date judgment was delivered (***2nd April, 2009***) that the ***ex parte*** applicant made certain communications to the respondent which he avers, should have influenced the decision-making process at the Disciplinary Committee [respondent]: he said he wished to lodge an appeal against the respondent's decision; he said he had effected payment of the sum of Kshs. 267,750; he sought more time to pay the balance.

The deponent deposes that at the time of passing judgment by the respondent, the ***ex parte*** applicant admitted that he "had not paid the interested party the entire decretal amount and that he needed time to sort out the same, and sought for time until ***August, 2009***"; the respondent, after entertaining the ***ex parte*** applicant's entreaty and, taking into account the ***ex parte*** applicant's admissions, "deferred sentencing until [the] end of ***August 2009***"; and the respondent fixed the matter for mention on ***9th September, 2009***.

It is deposed that when ***9th September, 2009*** came, the ***ex parte*** applicant "fought for more time to file an affidavit to prove how the monies should have been paid"; and "the respondent indulged the ***ex parte*** applicant with an order that he files a replying affidavit including the Court proceedings", and the matter was stood over for mention on ***9th November, 2009***.

When ***9th November, 2009*** (the date of mention) came, the ***ex parte*** applicant had ***not*** filed his affidavit, and the matter was stood over to ***22nd February, 2010***, for ***mitigation and sentence***. But the ***ex parte*** applicant, who had been served with the mention date, ***22nd February, 2010*** failed to turn up. The respondent, on that occasion, proceeded to pass sentence against the ***ex parte*** applicant, as follows:

> ***"(a) The Advocate is to refund the sum of Kshs. 527,385/=***
>
> ***together with interest at 12% with effect from 9th July, 2004 to the date of full payment to the complainant within 90 days and in default, he will stand suspended from practice for a period of three months [as] from the date of default;***
>
> ***(b) The Advocate is to pay a fine of Kshs. 30,000/= to the***
>
> ***Law Society of Kenya;***
>
> ***(c) The Advocate is to pay cost [in] Kshs. 10,000/=***
>
> ***[,respectively,] to the Law Society of Kenya and…..the Complaints Commission;***

(d) The matter be mentioned on** 12th April, 2010 **to confirm compliance."

The deponent averred that the ***ex parte*** applicant had, throughout the proceedings before the respondent, "admitted that he owed the interested party some balance of the decretal amount but to-date he has not effected payment of the said amount".

Leading on from the averments made as indicated hereinabove, the deponent further deposed as follows (para.23):

> ***"….the [ex parte applicant's] contention that he was not accorded an opportunity to be heard is false and intended to mislead this honourable Court, as the applicant was given due notice, duly served, and accorded an opportunity to respond to and attend the hearing in respect of D.C.C. No. 114 of 2008 and, as such, the allegation that the respondent breached the rules of natural justice is not true and does not arise at all".***

The deponent avers (para.24) that:

> ***"….the applicant is not entitled to the prayers sought in the application for judicial review as he has not shown how the respondent breached the rules of natural justice".***

And he further depones (para.25) that:

> ***"….the respondent duly followed the procedure as laid out in section 53 and section 60 of the Advocates Act (Cap. 16), and the allegation that the respondent's decision was without jurisdiction, against the principles of natural justice, [carries] an error on the face of the record, [or] is……illegal, is unfounded and not true".***

In the submissions, counsel for the respondent urged that ss. 55-60 of the Advocates Act (Cap. 16, Laws of Kenya) set out the powers of the Disciplinary Committee: this Committee is under duty to hear applications such as those relating to common law disciplinary offences of professional misconduct, or certain offences specified under the Act; and the ***ex parte*** applicant is an advocate of the High Court of Kenya and, therefore, falls within the ambit of the disciplinary machinery of the respondent Committee.

Counsel urged that the said disciplinary mechanism serves the positive role of upholding the good name of the legal profession, and protecting the public from the acts of unscrupulous advocates.

Counsel submitted that s.60(1) of the Advocates Act defines professional misconduct as including disgraceful and dishonourable conduct incompatible with the status of an advocate.

Counsel stated that the ***ex parte*** applicant was charged with failing and/or refusing to account for the sum of Kshs. 670,000/= awarded and paid to him on behalf of the interested party, in respect of Mombasa CMCC No. 1733 of 2003, and failing to respond to the Complainant Commission's letter of ***20th February, 2008***.

Learned counsel submitted that the ***ex parte*** applicant had admitted failing to do the required financial accounting when he attended the hearing before the respondent on ***2nd April, 2009*** and sought for time to pay up the moneys unaccounted for: and the fact that he sought such time-allowance until ***August 2009***, amounted to an admission of guilt for professional misconduct punishable by the respondent, in accordance with s.60 of the Advocates Act.

Counsel submitted that, on the charge of failing to respond to communication from the Complaints Commission, the ***ex parte*** applicant had raised no contest – and so he was rightly found guilty of professional misconduct.

It was submitted that the respondent has the jurisdiction to hear and determine the charges which were made against the ***ex parte*** applicant.

Counsel submitted that the judicial review matter lodged in Court lacked merit, as "it amounts to prohibiting the respondent from carrying out the very acts for which it was constituted by statute"; and that, ***Disciplinary Committee Case No. 114 of 2008*** carried charges falling under the mandate of the respondent.

Learned counsel submitted that after the ***ex parte*** applicant failed to attend at the respondent's hearing of ***3rd***

November, 2008, the complainant's advocate applied for a hearing under Rule 18 of the Advocates (Disciplinary Committee) Rules, and as a consequence, there was no need for ***viva voce*** evidence; and besides, the law allows for the respondent to proceed to hearing on the basis of affidavit evidence; and accordingly, a hearing by affidavits "cannot be taken to have taken away the ***ex parte*** [applicant's] right to be heard".

Counsel urged it to be relevant that when the matter came up for mention before the respondent on ***9th September, 2009***, the ***ex parte*** applicant sought for more time to file an affidavit, to show how he had made payments to the interested party; and the respondent indulged him and ordered him to file the affidavit by ***9th November, 2009*** – and since, indeed, the ***ex parte*** applicant himself had recognized the role of affidavit evidence in this matter, it was all "proper for the respondent to proceed to hear the matter on affidavit evidence, in accordance with Rule 18 of the Advocates (Disciplinary Committee) Rules."

It was submitted that, by s. 60(3) of the Advocates Act, the respondent was under duty to give the accused advocate an opportunity to appear before it, as well as an opportunity to inspect any relevant documents, not less than seven days before the hearing: and the applicant herein was given "more than ample time to inspect the documents and to file any necessary reply" – and therefore, "his allegation that he was not given an opportunity to be heard is unfounded and without any merit whatsoever".

It was urged that the law, notably s. 60(4) and (9) of the Advocates Act, empowers the respondent to admonish an advocate found guilty, to suspend such advocate from practice, to order the name of such advocate struck off the practitioners' Roll, and to order payment of compensation or reimbursement. The respondent therefore had the jurisdiction, it was submitted, to order the ***ex parte*** applicant to reimburse the complainant the sum of Kshs. 527, 385/=.

Counsel submitted that the ***ex parte*** applicant's prayer for orders of certiorari is misconceived, since the respondent exercised its power as granted by statute law. Counsel urged: "The applicant being an advocate, was properly before the respondent, and since the decision was arrived at in accordance with the clear provisions of law, …..the same should not be quashed as prayed in the applicant's Notice of Motion". Counsel submitted that the ***ex parte*** applicant was properly charged before the Disciplinary Committee….."

The burden of the ***ex parte*** applicant's case rests not so much on the detailed ***evidence*** of what transpired between himself and the respondent, as on the ***principle*** and ***theory*** of judicial review; and it is in this regard that he has sought to exemplify the judicial practice by invoking case law. That, by itself, cannot lead to a finding in the applicant's favour: he must show lack of jurisdiction, excess of jurisdiction, abuse of power, illegality or irregularity such as so taints the decision-making process by the respondent, that the decision issuing from the respondent must be said to have been in conflict with the lawful conduct of the mandate reposed in the respondent.

The ***ex parte*** applicant contends that the respondent acted without jurisdiction in subjecting him to discipline: but this claim is squarely contested by the respondent, which states that it has been established by virtue of ss. 55-60 of the Advocates Act, and entrusted with the task of ensuring discipline among advocates, and that it was dealing with a case of professional misconduct as defined in s. 60(1) of that Act.

The foregoing point is not denied by the ***ex parte*** applicant: and so his point about want of jurisdiction must have a different basis.

A close reading of the application herein, and the attendant documentation, indicates that the claim that the respondent lacked jurisdiction, is founded on ***another*** contention: that the matters covered by the remit of the Disciplinary Committee in this matter, already fell under a certain Originating Summons cause in the High Court, which the same complainant had initiated there.

On ***26th July, 2007*** the complainant filed Mombasa High Court Civil Suit No. 182 of 2007 (O.S.), ***Gereza Keya v. Robinson Onyango Malombo t/a O.M. Robinson & Co. Advocates***. The ***ex parte*** applicant contends that so long as the said suit remained pending, the questions covered by it were ***sub judice***, and therefore, it was not open to the

respondent to exercise its powers conferred by the Advocates Act – and so the respondent lacked jurisdiction.

The record shows, however, that the said Originating Summons suit had ended in an interlocutory judgment given on ***24th August, 2007***. Since this was not, of course, a final judgment, the ***ex parte*** applicant filed an application under it, by Chamber Summons of ***3rd September, 2007*** seeking that it be set aside. No further action was taken to execute that judgment, and even the said application of ***3rd September, 2007*** was not heard. But about the same time, the complainant lodged his complaint before the Complaints Commission, which, because the ***ex parte*** applicant would not respond to its queries, passed on the matter to the Disciplinary Committee (the respondent) for appropriate action.

Did, and does a condition exist which deprived the respondent of its statutory jurisdiction? On a strict technicality, yes; but this Court must be concerned only with the factual situation. On the ground, the said Originating Summons suit was ***not*** being prosecuted; and besides, the ***ex parte*** applicant was already in communication with the respondent, was making applications before the respondent, and was filing affidavits before the respondent.

The ***ex parte*** applicant instructed an advocate, ***Mr. Robert Hawi Wanga***, to represent him before the respondent; and this advocate swore an affidavit on 23rd March, 2010 carrying the following notable depositions:

(i) "THAT I am on record for MR. ONYANGO ROBINSON MALOMBO the respondent herein, and I have on several occasions appeared on his behalf before the Disciplinary Committee.

(ii) "THAT I recall sometime on 9th November, 2009 receiving an affidavit sworn by the Respondent dated 6th November, 2009 with instructions to present the same before the Disciplinary Committee.

(iii) "THAT I do recall appearing before the Committee and presenting the same when the matter was called out.

(iv) "THAT to the best of my knowledge the Disciplinary Committee did accept the Respondent's affidavit as part of the Respondent's defence."

The reality is that there was no High Court case ***under prosecution,*** which was ***sub judice*** and rendered the disciplinary function under the Advocates Act untenable; and, quite consistent with that point, it would be untenable that the ***ex parte*** applicant should both approbate and reprobate: he was already tendering evidence before the Disciplinary Committee, and he was craving certain time-dispensations from that Committee.

The contention that the Disciplinary Committee acted without jurisdiction is, therefore, disallowed.

Did the Disciplinary Committee act contrary to law and adjudicatory principles by denying the ***ex parte*** applicant natural justice? As already noted, the ***ex parte*** applicant had been represented by an advocate who was several times present, personally, at the Committee's sittings; and this advocate has deponed that the applicant's documents of evidence, in the form of affidavits, had been admitted during the committee's proceedings. That amounts to the ***ex parte*** applicant being accorded a hearing, as there is no requirement that for natural justice to be upheld, a party must be heard through ***viva voce*** evidence.

Although the ***ex parte*** applicant states as his objection the point that the Disciplinary Committee's proceedings are marked by error on the face of the record, this claim has not been detailed out; and in this form, it carries little conviction, and must be rejected.

The ***ex parte*** applicant also alleged that the respondent made "illegal orders" against him: once again, this is a mere general statement, which cannot be upheld.

In the result, the ***ex parte*** applicant has not shown why this Court should issue an order of certiorari to remove into the Court and quash the orders of the respondent, made on ***22nd February, 2010***. The orders sought, therefore, cannot be granted. The judicial review application is refused and dismissed. The ***ex parte*** applicant shall bear the respondent's costs.

Orders accordingly.

DATED and **DELIVERED** at

MOMBASA this 9th day of July, 2010.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the ***Ex parte*** Applicant:

For the Respondent: