



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Judicial Review 319 of 2009**

**IN THE MATTER OF: AN APPLICATION BY ALLOYS O. ABOGE FOR LEAVE TO APPLY  
FOR AN ORDER OF MANDAMUS, PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS, PROHIBITION AND  
CERTIORARI**

**AND**

**IN THE MATTER OF:**

**ALLOYS O. ABOGE.....APPLICANT**

**- VERSUS -**

**THE DISCIPLINARY COMMITTEE OF  
THE LAW SOCIETY OF KENYA .....RESPONDENT**

**AND**

**LOWE INVESTMENT LIMITED  
GEORGE W. OMONDI.....INTERESTED PARTIES**

**J U D G E M E N T**

By the Notice of Motion dated 12.6.2009, Alloys Aboge seeks the following judicial review orders against the Disciplinary Committee of the Law Society of Kenya:-

- (a) That the Honourable Court be pleased to grant an order of prohibition directed against the Disciplinary Committee of the Law Society of Kenya prohibiting it from hearing or continuing to hear Disciplinary Cause No. 333/07 LOWE INVESTMNETS LTD – VS – ALLOYS ABOGE t/a A.O. ABOGE & CO. ADV.
- (b) That the Honourable Court do further be pleased to grant an order of certiorari to remove the said proceedings and orders of the Disciplinary Committee 333/07 to the High Court with a view to quash the same and more particularly the order given on 12.3.2009.
- (c) That the grant of leave do operate as stay of the proceedings in Disciplinary Committee 333/07.
- (d) The costs of the application be provided for..

The said Notice of Motion is supported by the verifying affidavit of Alloys Aboge filed in court on 22.5.2008, a statutory statement

of the same date, a supplementary affidavit dated 27.10.2009 and skeleton arguments filed in court on 9.12.2009. Mr. Wamwayi was the counsel for the Applicant.

The motion was opposed and Apollo Mboya, the Acting Secretary of the Law Society of Kenya swore a replying affidavit dated 11.9.2009 and the Respondent filed its submissions on 8.6.2010. The Respondent was represented by Ms. Wambugu.

The Applicant's case is that he is an Advocate of the High Court of Kenya and he represented Lowe Investments Ltd in the purchase of Kisumu/Kogony/1378 when it purchased the land from one Risper Owago. He received Kshs.250,000/- from the purchaser to be paid to the seller. That the transaction did not materialize and a complaint was lodged with the Complaint's Commission on 21.11.07 in Disciplinary Committee 333/07 where Aboge faced three counts of misconduct, namely failure to refund Kshs.250,000/- paid by Lowe Investments Ltd. for sale of Kisumu/Kogony/1439 & 1378; failure to render adequate professional services and failure to reply to correspondence from the Commission. The criminal charges were exhibited as AOA 1. He denied the charges in a replying affidavit dated 18.2.2008 (AOA 11) and on 17.7.2008, the Committee acquitted him of the 2<sup>nd</sup> and 3<sup>rd</sup> charges but he was asked for proof that he refunded Kshs.250,000/- paid to him. On 18.9.2008 he tendered to the Commission a letter from Ms. Owiti Odhiambo Adv. dated 17.9.07 which indicated that the Applicant paid Kshs.250,000/- to Risper Owago. That on 2.2.2009 a person by name George Mallan Omondi who claimed to be the complainant in Disciplinary Proceedings was ordered to file an application if he wished to dispute the payment of the Kshs.250,000/- by the Applicant to Risper Owago which application was to be heard on 21.3.2009 but the application was never filed. That on 12.3.2009, Masara Adv. held brief for Mr. Wamwayi and Mr. Onamo appeared for the said George Mallan Omondi and acting *suo moto* the court recorded a consent order setting aside the judgement delivered on 17.7.2008 on the ground that the complainant did not receive a hearing notice and ordered the complainant to file a further affidavit showing the amount owed as Kshs.350,000/- and would be at liberty to reply. The hearing was set for 8.6.2009 (AOA VI). That despite Mr. Masara protesting that he had no instructions to enter into a consent, he was not listened to and neither Mr. Masara and Omino signed the said consent. Counsel urged that the Committee is *functus officio* on counts 2 and 3 of the charges the Applicant having been acquitted of them but the Committee without good reason, has refused to accept proof of payment of the Kshs.250,000/- paid to the vendor. It was contended that the said George M. Omondi has no *locus standi* in DCC 333/07 as he is not a director of Lowe Investments Ltd. And has no authority to swear the affidavit dated 1.4.2009 which was filed with the Respondents on 21.4.2009 (AOA VII).

It is therefore the Applicant's submission that he was denied an opportunity to be heard. The judgement was set aside by consent and that the consent order was made without jurisdiction as the Disciplinary Committee flouted rules of natural justice and fair hearing in failing to notify the Applicant before the consent judgment was set aside. Mr. Wamwayi relied on the following authorities:-

- 1. KAFURA – VS – KIMBOWA BUILDERS & CONTRACTORS 1974 EA 9, where the court held that a consent judgement that had been entered into by an advocate without authority was a nullity.**
- 2. FLORA WASIKE VS – DESTIMO WAMBOKO (1982 – 88) IKAR 625, the court held that a consent judgement can be set aside on the grounds as would justify the setting aside of a contract and that the burden of proving that there was no consent was a heavy one.**

In opposing the application, Mr. Apollo deponed that on the date the matter was to be heard, Mr. Masara appeared for the Applicant and consented to the judgement being set aside so that the Interested Party, George Omondi could be given a chance to be heard. That infact the Applicant had an opportunity to make the instant application before the Disciplinary Committee. That the court order to set

aside judgment was properly made by the Advocates who were present before the Disciplinary Committee on that date. That though the matter had been mentioned severally, to enable the Applicant prove that he had paid the Kshs.250,000/- to the vendor, he failed to do so and execution was issued against him. That the Committee acted within its powers to amend or allow further affidavits to be filed. It was also the Respondent's submission that if the Applicant is dissatisfied with the Respondent's decision, it has a right of appeal to the High court under Section 62 of the Advocates' Act.

The issue here seems to be whether the Tribunal had jurisdiction to record the consent setting aside the judgment entered into on 17.9.2008. I have seen the record of the proceedings of 12.3.2009 (AM 9) on the date on which the consent order was recorded. Mr. Masara held brief for Mr. Wamwayi, counsel for the Applicant herein, while Omino appeared for the then complainant, George Omondi, the Interested Party herein. It was Mr. Wamwayi's submission that Mr. Masara had no instructions to record the consent on behalf of the Applicant. Mr. Masara has sworn an affidavit dated 23.3.2009 to the effect that he did appear before the Disciplinary Committee to hold Mr. Wamwayi's brief and that his instructions were limited to showing that the ex parte Applicant had paid Kshs.250,000/- to the vendor and to confirm whether George Omondi had filed an application disputing the payment. That he protested to the entry of a consent but to no avail and he was invited to sign the consent. Whether or not Mr. Masara had instructions to enter into a consent is a matter to be sorted between Mr. Masara and Mr. Wamwayi who gave him the instructions given to Mr. Masara. Neither this court nor the Tribunal were privy to the instructions given to Mr. Masara as they were not written. An advocate, is an agent of the client and is deemed to be able to take decisions on behalf of the client and whatever decision is made binds the client. In my view, this court has no basis upon which it can find that Mr. Masara was not party to the consent or that he had no instructions to record it. That consent was entered into on 12.3.2009 in the presence of Mr. Masara. No objection was raised or recorded thereafter. Further, Mr. Wamwayi who had instructed Mr. Masara never moved the Tribunal to challenge the said order or have it set aside on the basis that it was made without instructions. The Tribunal recorded the consent order during proceedings before it. A Tribunal will normally not be bound by rules of civil procedure or criminal procedure and it is upto the Applicant to demonstrate that the Respondent acted contrary to certain statutory provisions. That has not been done in this case.

The judgement in the Disciplinary Proceedings was set aside on the basis that the Interested Party had not been heard on the merits. The Interested Party is the Director of Lowe Investments, the complainant in the Disciplinary Cause. The Applicant herein complains that the rules of natural justice were flouted in that he was not given a hearing. The Interested Party had the same complaint before the Disciplinary Committee; that he had not been given a hearing before the judgment that was set aside was entered into. Balancing the interests in both cases, it would only be just and fair that the Disciplinary Committee hear the case before it on the merits by the cause going to full hearing which is going to happen.

Mr. Wamwayi relied on **FLORA WASIKE – VS – DESTINO WAMBOKO (1982 – 88) 1 KAR 625. BROOKE BOND LIEBERG (T) LTD. – VS – MALLYA (1975) EA 266 AND KAFUMA – VS - KIMBOWA BUILDERS AND CONTRACTORS (1974) EA** where the courts considered when a consent order can be set aside. In **FLORA WASIKE'S** case, the court said that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation. Fraud, mistake or misrepresentation can not be proved in a judicial review application. That can only be done in a civil case where oral evidence can be adduced. In this case, Mr. Masara's affidavit evidence can not be put to test by way of cross-examination. If the Applicant wants to challenge that consent, it should be in the same proceedings or by way of a civil suit.

It is also the Applicant's contention that Mr. George Mallan Omondi has no locus standi in Misc. Appl. 333/2007 because he is not a director of Lowe Investments Ltd. and had no authority to swear the affidavit dated 1.4.2009 and filed at the Committee on 2.4.2009. I have seen the affidavit dated 1.4.2009 which is exhibited as (AOA VIII) and it annexes correspondences and copies of cheques written to the Applicant's company – Aboge & Co. Advocates and specifically G11 (a) dated 6.1.95 and 28.2.95 addressed to George Omondi of Lowe

Investments Ltd. by Aboge & Co. Advocates. That correspondence relates to the purchase of Kisumu/Kogony/1439 and 1378. In the letter of 28.2.1995, the Applicant was informing the Interested Party that they had paid Kshs.300,000/- leaving a balance of Kshs.200,000/- and requesting that the balance be remitted so that the transfer could be completed. It is not correct for the Applicant to allege that the said Interested Party had no interest or locus standi in the matter that was pending before the Disciplinary Committee.

The Applicant pleaded that this court allow him a chance to prove that he had paid Kshs.250,000/- but this court is not concerned with the merits of the case before the Disciplinary Committee. Judicial Review is concerned with the fairness of the process at the Disciplinary Committee. Whether or not the money was paid will be a matter for the Disciplinary Committee. I find that there are no good grounds shown by the Applicant to warrant the intervention by this court by way of an order of prohibition or certiorari.

In sum, I find that even if the orders were deserved, the orders sought would not have been granted because the Notice of Motion is incompetent. It is brought in the name of the Applicant who has no capacity to bring the same in his own name. In Judicial Review, the Applicant is the Republic who brings the Judicial Review application on behalf of the aggrieved party known as the ex-parte Applicant. The Applicant could not have brought the application in his own name. See the case of **FARMERS BUS SERVICE LTD. – VS – APPEALS LICENSING TRIBUNAL (1959) E.A. 779 AND WELAMONDI – VS – CHAIRMAN ECK 2002 KLR 486**, where the courts held that a judicial review application should be brought in the name of the Republic (CROWN) and should be properly intitled. This application is unmerited, incompetent and is hereby dismissed with costs to the Respondent and Interested Parties.

**Dated, and Delivered in Nairobi this 24<sup>th</sup> day of September, 2010.**

**R.P.V. WENDOH**

**JUDGE**

**Present:**

Mr. Wamwayi - for Applicant

Mr. Omino - for Interested Party

Muturi - Court Clerk