REPUBLIC OF KENYA

IN THE HIGH COURT AT (NAIROBI MILIMANILAW COURTS)

MISC APPLI 13B OF 2007

NE LSON KABURU FELIX ESQ

T/A NELSON KABURU ADVOCATES…….....…….....EX PARTE APPLICANT

versus

THE DISCIPLINARY COMMITTEE…….....……...……1ST RESPONDENT

THE COMPLAINTS COMMISSION…….....…….……2ND RESPONDENT

THE LAW SOCIETY OF KENYA.....…….3RD RESPONDENT

BONIFACE KINANDU MATHENGE…….....….1ST INTERESTED PARTY

UCHUMI INSURANCE BROKERS LTD…….....2ND INTERESTED PARTY

NYERI SUPERMARKET LTD…….....…...….…….3RD INTERESTED PARTY

JUDGMENT

This is a Judicial Review Application brought by way of a Notice of Motion dated 22nd February 2006. The ex parte Applicant Felix Kaburu, seeks the Following orders:

(a) An order of Prohibition prohibiting the Advocates' Disciplinary Committee from proceeding with Disciplinary Causes No. 57, 58 and 60 of 2005 against the ex parte Applicant;

(b) An order of certiorari to bring up and quash the Disciplinary causes No. 57, 58 and 60 of 2005;

(c) An order of mandamus compelling the Complaints Commission to give its decision in

Complaint No. CC/IC/129/6/915/98 by Uchumi Insurance Brokers Ltd. against the exparte Applicant;

(d) An order of mandamus compelling the Law Society of Kenya through its Compliance and Ethics Committee to consider the complaints and to make a decision thereon before preferring a disciplinary cause therefrom;

(e) An order for costs of all the proceedings.

The Application is premised on the Verifying Affidavit of the Applicant dated and filed in court on 11th January 2006 and a Statutory Statement of the same date. The Applicants also filed skeleton arguments on 17th July 2006.

The Respondents are the Disciplinary Committee, the Complaints Commission and the Law Society of Kenya (1st to 3rd Respondents respectively) whereas the Interested Parties are Boniface Kinandu Mathenge, Uchumi Insurance Brokers Ltd and Nyeri Supermarket Ltd. A Replying Affidavit was sworn by Betty Nyabuto, the Secretary of the 3rd Respondent and Secretary to 1st Respondent. The 2nd Respondent did not appear and Interested Parties were represented by 1st Interested Party, Boniface Mathenge who did not file any reply or arguments. The Respondents did not file any submissions. Both Respondents and Interested Parties opposed the Application.

Mr. Ibrahim opposed the Application on behalf of the 1st & 3rd Respondents, whereas Mr. Mathenge appeared in person and on behalf of the 2nd & 3rd Interested Parties.

Mr. Mathenge made brief submissions on behalf of the Interested Parties.

A brief background of the facts that give rise to this Application are as follows:

The Applicant is an Advocate of the High Court of Kenya and practices in the names and style of Nelson Kaburu Advocates. The Interested Parties were the Applicant's clients from the year 1995.

The Applicant and the Interested Parties disagreed on the fees payable to the Applicant. The Applicants then filed several bills of costs against the Interested Parties and some are already taxed while others still pend. The 1st Interested Party then complained to the Police, the Law Society and Complaints Commission. Some of the complaints are still pending. The Complainant and Police started to harass the Applicant as a result of which he filed Misc. Application 394/1999 seeking Judicial Review orders and the police were prohibited from arresting him. That the complaints made to the Complaints Commission have been heard and the verdict is yet to be rendered.

According to the Applicant, the issues raised in the new complaints to the Disciplinary Committee have been covered during the taxation and are therefore res judicata. That taxation of costs is a legal process and cannot amount to professional misconduct. That it is unprocedural to refer the matter to the Disciplinary Committee before it is considered by the Law Society of Kenya Compliance and Ethics Committee.

It is a further contention of the Applicant that the complaints are vague, generalized, are brought late in the day and the Respondents have violated Rules of Natural Justice in respect to the Applicant.

In her Replying Affidavit, Betty Nyabuto deponed that the 2nd Respondent received complaints from the 1st to 3rd Interested Parties of professional misconduct by the Applicant and Disciplinary cases 57, 58 & 60 of 2005 were preferred against him. She contends that Section 60 (7) and 81 of the Advocates' Act gives the 1st Respondent power to tax a bill of costs filed in court but which is not yet taxed. That the 1st Respondent has jurisdiction to tax bills of costs for BPRT 60/1993 which has been pending since 2003. She also deponed that the lengthy, evidence which the Applicant is relying upon in his affidavit will be

dealt with by the 1st Respondent but not this court because this is not a forum for considering all the evidence that Applicant has referred to and in any case, the court would be considering the merits of the cases which is outside the scope of this court. That this court should allow the disciplinary cases to proceed to hearing before the Respondents.

I have considered the rival arguments and wish to state at this stage that in Judicial Review, the court is not concerned with the merits of the decision but reviews the process by which the decision under challenge was reached. In this Application, the court will not concern itself with whether there is merit in the matters pending before the 1st Respondent or any other tribunal. The **SUPREME COURT PRACTICE 1997 VOL 53/1-14/6** sets out the scope of Judicial Review as follows:

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or the individual judges for that of the authority constituted by law to decide the matter in question…….The court will not, however, on a Judicial Review Appliction act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless it has been exercised in a way which is not within that body's jurisdiction……."

Before I consider the grounds upon which this Application is premised, it is proper that I look at and consider the functions of the Complainants Commission the 2nd Respondent herein. The 2nd Respondent, is set up under S. 53 of the Advocates Act and its functions are also set out thereunder.

Section 53 of the Advocates provides as follows:

"S. 53 (1) there is hereby established a Complaints Commission which shall consist of such Commissioner or commissioners as shall be appointed by the President for the purpose of enquiring into complaints against any advocate, firm of Advocates, or any member or employees thereof;

(2) ……..

(3) ……..

(4) It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof; and

(a) if it appears to the Commission that there is no substance in the Complaint, it shall reject the same forthwith; or

(b) if it appears to the Commission that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence shall forthwith refer the matter to the Disciplinary committee (DC) for appropriate action by it under Part XI; or

(c) If it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence, it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification; or

(d) Upon the expiration of the period specified under Paragraph (c), the Commission shall proceed to investigate the matter for which purpose it shall have power to summon witnesses, to require the prodution of such documents as it may deem necessary; to examine witnesses on oath and generally take all such steps …….make such an order or award in accordance with this

Section as it shall in the circumstances of the case consider just and proper; or

(e) If it appears to the Commission that there is substance in a complaint but that the circumstances of the case do not disclose a disciplinary offence with which the Disciplinary Committee can properly deal and that the Commission itself should not deal with the matter but that the proper remedy for the complaint is to refer the matter to the courts for appropriate redress, the Commission shall forth with so advise the complainant."

5. In all cases which do not appear to the Commission to be serious or aggravated nature, the Commission shall endeavour to promote reconciliation and encourage and facilitate an amiacable settlement between the parties to the complaint."

Sections 53 (6) to (7) provide for the Sanctions that the Complaints Commission can impose eg the Commission may order compensation for loss suffered, investigate the Advocates' accounts, or order distress under warrant of movable or immovable property of the Advocate.

In summary, the functions of the Complaints Commission upon enquiring into a complaint are as follows:

1) reject the complaint and dismiss it,

2) If it appears to constitute disciplinary offence, refer to Disciplinary Committee,

3) If no disciplinary offence is disclosed summon the parties and hear them, and make a determination;

4) If it discloses a matter that the Disciplinary Committee cannot deal, advise the complainant to pursue it in a court of law.

5) Attempt amicable settlement in less serious cases.

Though the Law Society of Kenya viewed the complaints as touching on serious matters of professional misconduct, as demonstrated by the letter dated 4th April 2005 from the Commission to the Applicant and Interested Party inviting them to an in house dispute settlement, (NKF 23) the Commission attempted an amicable settlement. It was made pursuant to S.53(4) and 53(5) of the Advocates Act.

The 1st Respondent, the Disciplinary Committee, is set up under S. 57 of the Advocates' Act and Part of its mandate includes hearing of complaints against Advocates and may dismiss the complaints if unsupported by evidence or take the necessary action against the Advocate if the Complaint is found to be of substance. Under Section 60 (1), the Committee is mandated to hear and determine a complaint of professional misconduct of an Advocate. As noted above, the Commissioner refers such complaints to the Committee after making an inquiry under S. 53 (4). The Discretionary Committee is the disciplinary machinery under the Act.

As observed above, the dispute herein arises out of taxation of a bills of costs. The 1st Respondents contend that they have jurisdiction to tax the bills of cost in HC No.2/1999 in disciplinary case 58/05. That under S. 60 (7) and 60 (8) of the Advocates Act, the 1st Respondent has power to tax a bill of costs filed in court which is not yet taxed. That the Applicant having admitted that the bill of costs in BPRTC 60/1993 and 2/1999 to be still pending, the Committee has jurisdiction to tax. Section 60 provides as follows:

"60 (1) A complaint against an advocate for professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Committee by any person.

(2) …….

(3) …….

(7) If a bill of costs has been filed in court by the Advocate against whom a complaint is being heard but has not been taxed, the Committee may adjourn the complaint for such period as it considers reasonable to allow such taxation;

(8) A determination of the Committee under subsection (7) and (8) will be deemed for all purposes to be a determination of the court."

It is the Applicants' contention that S.60(7) envisages a situation where during the pendency of a complaint before the Committee, an advocate files a bill of costs in court and so the Committee would have to adjourn to give way to the taxation of the bill by the court but if it is not taxed during the time of the Committee's adjournment, then when the Committee resumes its sittings, it estimates what costs will be due.

According to Mr. Kaburu, the legislature under S.60(7), intended to avoid the mischief whereby a complaint would be made against an advocate and the advocate would rush to court to file a bill of costs and would go to the Committee and claim that the matter was subjudice and the complaint could not therefore be heard by the Committee. The Applicant argued that it would be an absurdity for Parliament to give the jurisdiction of taxing bills to two legal bodies which may come up with conflicting decisions. He urged that since the bills at the centre of this contention were filed before the complaints were made to the Respondent's, then the bills should be taxed first and that the Committee has no jurisdiction to deal with those bills.

On the contrary, Mr. Ibrahim urged that S.60 (7) envisages bills filed both before and after the lodging of a complaint with the Disciplinary Committee. He said that the important words are "**if a bill of costs has been filed in court"** Counsel said the provision does not indicate when the bill to be taxed should have been filed, before or after the complaint.

Section 60(7) does not specify when the bill to be taxed should have been filed, whether before the lodging of a complaint with the Disciplinary Committee or after. Whatever the case, the Disciplinary Committee is not mandated to deal with the bill before it is taxed by the court but if it is not taxed during the time the Committee adjourns to allow for the bill's taxation, upon resumption of proceedings, the Committee may make an estimate of the costs due.

Clearly, under that Section 60 (7) the Committee has no mandate to tax a bill but the Committee can make an estimate of the costs due.

In my considered view, the jurisdiction under Section 60 (7) is similar to that under S.9 (3) of the Law Reform Act, as regards grant of leave in an Application for an order of certiorari. In such case, if the judgment, order or decree is subject of an appeal and a time is limited by law for the bringing of the appeal, the court 'may' adjourn the Application for leave until the appeal is determined or the time for appealing has expired.

From the wording of S.60 (7) I find and hold that it does not matter when the bill was filed, before or after the complaint, the Committee can only make an estimate of the costs if the court does not tax the bill when the Committee adjourns to allow for taxation. Once an estimate is made by the Committee it becomes an order of the court. Because the Committee first gives the court a chance to tax the bill failing which the Committee makes an estimate, there is no conflict in the jurisdiction of the two legal procedures. In any event, the court and the committee cannot give conflicting decisions because the parties in the matters are the same. It would also be expected that if an estimate is done by the committee, the same would be made known to the court before which the bill is pending for taxation. If the Committee makes an estimate of the costs before the court taxes the bill and the estimate made by the Committee becomes an order of the court, there cannot be a conflict between the jurisdiction of the court and the Committee because the estimate would be adopted and recorded as an order of the court.

It is S. 60 (8) that goes ahead to declare that the determination under S. 60 (7) and (8) becomes the decision of the court, so that if there is no taxation but an estimate by the Committee, it becomes an order of the court. I therefore come to the conclusion that S.60 (7) gives the Committee the mandate to make an estimate of what the costs are. To buttress the contention that the Committee has jurisdiction to estimate bills filed before the complaint is the fact that bills pending before the court may pend for a very long time as is the case here. One bill was filed in 1999 and has never been taxed. The Committee cannot control the working of the court and waiting for the court to tax would further delay or halt the Committee's deliberations indefinitely over the complaints filed and it would only be prudent that the Committee gives a limited time to allow for the taxation by the court failing which the Committee can then go ahead to deal. It is noteworthy that the members of the Committee are Advocates who are averse in taxation matters in their day to day practice.

It was the Applicants' contention that the matter now before the Disciplinary Committee is subjudice since there are bills pending before the High Court which is superior to the Disciplinary Committee, and that if there is any allegation of misconduct, the courts can deal.

Mr. Ibrahim was of different view. He submitted that the Interested Party complained to the Law Society about the Applicants' misconduct and inflation or falsification of the bills of costs and that is why the matter was referred to the Disciplinary Committee. I have seen the Affidavit of the Interested Party in Misc. 57/05.

The Respondents contend that the complaints made by the Interested Party amounted to professional misconduct on the part of the Applicant and the Committee therefore had jurisdiction to hear and determine the said matter. So is this matter subjudice?

I do not believe so. The jurisdiction donated to the Committee under the Advocates Act is an enquiry into the Advocates conduct as relates to the complaint on professional misconduct whereas the matter before court is a taxation of the bill of costs as between the Advocate and client. Though the two jurisdictions are interrelated with one another, the court doing a taxation cannot ably deal with allegations of professional misconduct of an Advocate. Sections 53 (4) and 60 (1) mandate the Committee to specifically deal with complaints of professional misconduct. The court can only deal with an Advocate's misconduct if the misconduct is committed during the course of proceedings before the Chief Justice or any judge as per provisions of S.56 of the Advocates Act.

A bill of costs only entails taxation. An enquiry into alleged professional misconduct would require adducing of evidence as per S.60 of the Advocates Act and that cannot be done during taxation of a bill of costs. The 1st Respondent has the mandate to deal with the question of alleged professional misconduct and there is procedure set out under the Advocates Act plus sanctions given under S.60 (4). The ordinary courts would be limited in their scope and the sanctions that are likely to follow. I therefore find and hold that the complaints before the 1st Respondent are not subjudice and are properly before the correct forum.

The Ethics Committee of the Law Society is a creation of the Law Society whose mandate is to try to resolve complaints of professional misconduct amicably. A complaint made to the Law Society of Kenya is referred to the secretary or a person acting on their behalf to an Ethics Committee. Under clause 10 of the Terms of Reference of the Ethics Committee exhibited by the Applicant, if they fail an amicable settlement of a complaint, the Secretary shall refer the complaint to the Complaint's Commission, or if appropriate to the Disciplinary Committee.

By a letter dated 27th April 1999, the Deputy Secretary of the Law Society referred the complaints in respect of the Applicant to the Complaints Commission advising that the Commissioner do consider filing a case before the Disciplinarily Committee. Thereafter, I note that the Complaints Commission attempted an amicable settlement again as per letters dated 2nd November 2004 and another dated 4th April 2005 (Annexture to MKF 23 verifying Affidavit). There is no evidence that the dispute was resolved as in any case the dispute is the one under consideration. In 2005, as per letter of 30th November 2005 from the Law Society of Kenya to the Applicant, the Applicant was invited to take plea in Disciplinary cases

No.57/05, 58/05 and 60/05.

It is apparent from what has transpired that the Ethics Committee failed in their attempt at an amicable settlement and the complaints before the committee having touched on alleged professional misconduct, the Disciplinary Committee has the mandate to deal and resolve. The Applicant did agree that the Complaints Commission and Disciplinary Committee have similar powers save that the Disciplinary Committee deals with matters touching on misconduct.

Were these same cases heard by the Complaints Commission and a ruling is pending? The Applicant submitted that these same cases had already been heard and were pending making of a ruling. As earlier noted, the Law Society of Kenya referred the complaints to the Commission asking them to forward them to the Disciplinary Committee. However, the record shows that the Secretary invited the parties to attempt an amicable settlement. (letter of 4/4/05). The Applicant avers that both parties were actually heard after filing their papers but no ruling has ever been given and that is why the Applicants seek an order of mandamus to compel the Commission to give its ruling. If the Commission ever heard the parties in terms of S.53 (4) (d), the issues dealt with cannot be complaints of professional misconduct. They must be any other complaints that fall under Section 53 (4) (d).

Indeed in the letter of 24th October 2005, the Applicant sought a ruling of the Commission on the following issues upon which it was supposed to deliberate:-

1) whether the Advocate had a lien over client's funds recovered through the Advocate's effort;

2) Whether the Advocate has a lien over the clients papers;

3) Whether the certificate of taxation will be set aside, reversed or confirmed on appeal;

4) Whether the certificates of taxation are conclusive;

5) Whether the instructions by the Managing Director Uchumi Insurance Brokers bind Uchumi to pay for its Directors and associated companies legal fees from its money.

6) Whether the taxed legal fees sets off the sum of Kshs.1,070,000/= claimed by Uchumi.

All the above issues would not fall under S.60 (1) of the Advocates Act. It is unfortunate that the Commission never filed any papers or appeared to shed light on whether or not they could have written a ruling on the matter. The letter inviting parties for settlement was said to be made under S.53 4 (d) & (5). Before the negotiations, they would have to file their papers. The amicable settlement was early in 2005. Later the Applicant received letters from the Law Society of Kenya inviting him to go and take plea on 16th January 2006. In my considered view, the Commission had merely attempted an amicable settlement and the same having failed, since the complaints touched on professional misconduct, the Commission left the matter to lie and await the Disciplinary Commission to determine. I do not think that the Commission would be obliged to write a ruling in an attempted settlement. I do find and hold that, that being the case the 1st Respondent is properly seized of the matters before it.

It is the Applicants contention that the complaints pending determination are Res Judicata because the Interested Parties lodged a complaint with the Complaints Commission, one was heard and dismissed (P 123 of the bundle).

I have seen the Ruling of the Commission in the said complaint. The ground upon which the Complaint was made was that there had been delay in finalizing HCC 4149 of 1992 and it was held that the Commission was unable to establish delay because the court file was not availed to them. Counsel says that the parties having been the same and issues the same, the present complaints are res judicata because they should have been determined at the same time. In DC 57/05, the complaint touches on the Advocate allegedly abandoning his client without conforming with Order 3 R 12 CPR and in DC 58/05 the Complaint also touches on Order 3 Rule 12 CPR and an allegation that bills were inflated and falsified.

In my considered view, the complaints that are still pending before the Respondents may be between the same parties but they arise from different cases and different circumstances and as per the letter from the Law Society of Kenya, they involve issues of alleged professional misconduct. The matter that was determined by the Complaints Commission did not involve professional misconduct because the Complaints Commission does not have jurisdiction to deal with such issues. I hold that the complaints now outstanding before the 1st Respondent are not res judicata.

Is the Applicant entitled to the orders sought?

The first prayer sought is that of prohibiting (a) the Disciplinary Committee from proceeding with causes No. 57, 58 and 60/05 against the Applicant.

From what I have considered above, the complaints were referred to the Committee because of its special jurisdiction under S.60 of the Advocates Act – that they touch on complaints of professional misconduct and it is the 1st Respondent who can deal. The complaints are before the proper forum, The Disciplinary Committee and that order cannot avail.

The 2nd prayer (b) is one of certiorari to quash the Disciplinary Causes 57, 58 and 60/05. Again, there is no basis upon which that order can be issued. The Disciplinary Committee has the jurisdiction to deal with the causes and should be left to deal with them to their conclusion.

In prayer (c) an order of mandamus is sought against the Complaints Commission to compel it to give its decision in Ref. No. CC/K/129/6/915/92 Uchumi Insurance Brokers against the Applicant. According to the Applicant, it is the same dispute in DC 60/06. I have noted the complaint that was made by the Interested Party NRF 19, 20 and 21 – all arise from HCC 2148/1987. it is apparent that the Commission attempted an amicable settlement as indicated in the letters of the Commission.

Earlier in this judgment I considered whether the causes before the 1st Respondent were subjudice and I found in the negative. The 1st respondent has jurisdiction to deal with allegations of professional misconduct which the Commission does not have. Clearly, the issues for consideration during the attempted amicable settlement as set out earlier in this judgment, are not related to allegations of professional misconduct. I doubt that the Commission would want to hear part of the complaint and refer the other relating to professional misconduct to the Disciplinary Commission. The Second Respondent need not have made any decision in an attempt at negotiation and the order sought to compel the Commission to render a decision must fail.

Prayer (d) seeks to compel the Compliance and Ethics Committee of the Law Society of Kenya to consider the complaints and make a decision thereon before filing a disciplinary cause.

An order of mandamus seeks to compel a Statutory body to perform its duty which the body has failed or neglected to perform. In this case, the Ethics Committee can only assist in an amicable settlement but if none is forthcoming, it refers the matter to the Complaints Commission. That is exactly what occurred and the Law Society in its letter of 27th April 1999 forwarded the matter to the Complaints Commission for onward transmission to the 1st Respondent.

In any case, where a discretion is vested in a body, the court cannot compel that body to act in a particular manner because that would be substituting the decision of the statutory body with that of the court thus usurping the powers of that body. (see **SUPREME COURT PRACTICE supra).**

The Case OF **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/1996,** sets out the scope of the order of mandamus. In the present case, the Law Society has already made its decision to refer the matter to the Disciplinary Committee to deal and this court cannot compel the Law Society to recall the matter from the Disciplinary Committee to refer it back its Ethics Committee to reconsider. The court would be saying, that their decision to refer the matter to the Complaints Commission is wrong and they should find otherwise. That prayer for mandamus cannot lie.

The upshot is that the Application for Judicial Review is refused in its entirety and the Applicant should proceed with the proceedings before the 1st Respondent to their Conclusion. Each party to bear its own costs.

Dated and delivered this 9th day of November 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Kemuki holding brief for Mr. Kaburu for the Applicant

Mr. Ibrahim for Respondent

Mr. Mathenge in person (Interested Party)

Daniel: Court Clerk