



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 189 of 2004

REPUBLIC APPLICANT

VERSUS

**1. THE CHAIRMAN ADVOCATES DISCIPLINARY COMMITTEE).....
RESPONDENTS**

2. THE SECRETARY LAW SOCIETY OF KENYA)

AND

JAFFERSON M. S. NYAGESOA EX PARTE

RULING

By a Notice of Motion the Ex-parte, JAFFERSON M. S. NYAGESOA sought the court to issue an Order of certiorari by removing to the High Court and quash the entire proceedings and decision/order of the Chairman Advocates Disciplinary Committee dated 10th September 2004 in disciplinary cause No.25 of 2005. He also seeks the respondent to be ordered to reinstate the applicant into the Roll of Advocates.

He prays for costs of the applicant.

The applicant is an Advocate of High Court of Kenya based in Migori Town. On 20th May 1996 the complainant's commission received a complaints from one GODFREY OMUTSANI who complained that the Ex. Parte Applicant failed to account to him for shs.92,800/= being a balance of shs.150,000/= paid to the ex parte applicant vide Migori PM CC.No.657 of 1995.

After correspondence between the complaints commission and the ex parte applicant, the commission through an affidavit sworn by its chairman one TIMOTHY KIPKOECH MIBEI filed a complaint to the Advocates Disciplinary Committee. This was on 8th March 2000. On 18th August 2000 the Ex parte Applicant appeared before the disciplinary committee and entered a plea of not guilty. He went on to say in his supporting affidavit that the committee met on 20th August 2004 in his absence and proceeded to hear the complaint ex-parte and on 10th September 2004 the following sentence passed:

- i. Accused struck off Roll of Advocates with effect from 10.9.08(sic)
- ii. Accused ordered to pay the complainant through the Law Society of Kenya

the sum of shs.Kshs.92,801/= together, with interest at 12% p.a with effect from the date of receipt of monies until payment in full.

iii. All payments to be made within 30 days of the date of this order.

This is the order the ex parte applicant has quarrel with. He deponed and it was submitted on his behalf that he was never served with any Notice to inform him that the committee will sit and hear the complaints on 28th August 2004. He was therefore condemned unheard and this was a violation of the rules of Natural justice.

He was deprived the opportunity to put up his defence.

Further it was said that there was no complaint before the committee.

The complainant had not sworn an affidavit as is required.

The Respondents were served with the application but they never entered appearance nor did they file a replying affidavit.

Later they were served with a hearing Notice but they did not appear on the hearing day.

As such the application proceeded ex parte. As submitted there was nothing filed to controvert the claims by the applicant. He swore an affidavit and clearly said that he was not served with any hearing notice for 28th August 2004. True the record shows that one Michieka for the Complainants Commission told the Committee that the applicant was served but 'absent'. However there is no affidavit of service to show this.

Applicant has categorically denied being served. If indeed he was served the process server who served him should have sworn and filed an affidavit of service.

The Respondent after being served should have filed a replying affidavit to state that indeed the ex parte applicant was served. What is before the court is only the applicant's contention that he was never served and in absence of any averment to the contrary the court has no reason not to believe him. What this means therefore is that the committee heard the complainants in his absence and with no notice to him. It then went ahead to sentence him. There are no doubts that this was clearly against the rules of Natural justice. He was condemned unheard and the committee went ahead to deprive him of his right to practice law. The committee is a public body established under the Advocates Act. It has a duty to observe rules of natural justice. Indeed rule 17 of The Advocates (Disciplinary Committee) Rules empowers the committee to proceed ex parte if a party fails to appear but this is only when such a party has been given Notice of the hearing date. Otherwise if a party is not served he cannot be accused of failing to appear for he cannot appear unless he is aware of the hearing. There is no evidence that the ex parte applicant was served and as such by proceeding in his absence the respondent denied him his right to be heard. The sentence passed on 10th September 2004 cannot stand.

There is another curious thing about that sentence. It states that the applicant was struck of the Roll of Advocates from 10.9.08. The letter to the applicant which is undated and unreferenced but signed by AMINA BASIR, Deputy Secretary of Law Society of Kenya informing the applicant of the sentence also states that he was struck from the roll of Advocates with effect from 10.9.08. It therefore seems that the applicant is still on the roll until 10.9.08. He has 3 more years to practice unless of course if there was a typing error but I don't understand why the same error would be repeated in the letter. If the Respondent participated in the hearing perhaps they would have shed light to this but as I stated they never filed any replying affidavit and they did not appear during the hearing. However that as it may be the hearing and subsequent sentence offends the rules of natural justice. I therefore allow the first prayer and issue the order of certiorari and quash the proceedings of 28th August 2004 and the sentence thereafter passed on 10th September 2004.

Having allowed the first prayer and quashed the sentence meted on the 10th September 2004 the second prayer seeking for an order that he be reinstated to the Roll of Advocates in Superfluous. The Order of 10th September 2004 was to have him struck from the Roll. Once that Order has been quashed there is no

reason to order for his reinstatement as it means the status quo reverts to what it was before the order was passed on 10th September 2004. The second prayer is therefore dismissed.

The applicant will also have costs of the application. **Dated 23rd May 2005**

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Ogutu for Mr. Marwa for Applicant.

KABURU BAUNI

JUDGE