



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Misc Civ Appli 83 of 2001**

**IN THE MATTER OF AN APPLICATION BY MORRIS MWABUI KUPALIA FOR LEAVE TO  
APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE ADVOCATE ACT CAP. 16**

**AND**

**IN THE MATTER OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF  
KENYA DISCIPLINARY**

**AND**

**IN THE MATTER OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF  
KENYA. DISCIPLINARY CAUSE NO. 2078 OF 1999**

**THE LAW SOCIETY OF KENYA VS. MORRIS MWABUI KUPALI**

**AND**

**IN ACCORDANCE WITH ORDER LIII, RULES 1,2,3, AND 4 CIVIL PROCEDURE RULES**

**REPUBLIC**

**1. THE LAW SOCIETY OF KENYA**

**2. THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA .....  
RESPONDENTS**

**EX -PARTE ..... MORRIS MWABUI  
KUPALIA**

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

The Applicant sought and obtained leave to institute judicial review application for certiorari to quash the decision of the Law Society Disciplinary Committee and to prohibit the execution the said discision made on 9.3.0-1 suspending the applicant from the Roll of advocates and the payment of shs. 45,000/- fines and 5000/- costs. The grounds upon which relief is sought is that the applicant being a practicing advocate was faced by a complainant which was forwarded to the disciplinary committee. On hearing of the complaint the applicant failed to attend for reasons of illness and request to extend time was turned down. The hearing went on in his absence.

It is stated that the tribunal proceeded on incorrect computations and furthermore one of the members of the tribunal (late Commissioner of Assize G. Omwitsa) enjoyed a High Court Judge status and should not have been sitting in the Tribunal. Therefore the tribunal was improperly constituted. The verifying affidavit sworn by the applicant exhibits the letter of the Secretary of the Commission setting up the orders made by the Tribunal. Annexed also is a letter dated 2.11.00 seeking adjournment of the hearing to next session due to illness.

At the hearing of Notice of Motion the Respondent had an outstanding application seeking to set aside the stay granted by the court (J. Hayanga) at the time the leave was granted. By consent that application and the motion were consolidated with the original motion and heard together. For the applicant it was argued that when the matter was heard there was no prove that notice had been served upon the applicant and that in a matter as serious as this, service should have been personal service. Although on the first occasion the applicant was represented by advocate one Mr. Matheka notice of hearing was never served upon him (advocate) Counsel cited the now famous statement in Civil Appeal no. 234/95 where Court of Appeal said Judicial Review is for examining decision making process to see that the litigant is treated fairly not to decide whether the decision reached by the Tribunal is right or not.

On the side of the respondent, Counsel Mungatana argued that the application was incompetent , there was another alternative procedure set out under the Advocates Act and that this matter touched on public interest. Also that notice to appear was sent by registered post and that the letter indicating the applicant was unwell was received after the decision had been made in his absence on 5.5.2000. It was at mitigation stage that the advocate wanted to appear in person and although given opportunity did not appear. It is correct therefore, that opportunity to be heard was given to the advocate. On perusing the Affidavit in reply by Miss. Umaraa it is clear that there were letters sent to advocate at his own postal address namely P.O. box 235 Malindi which is the address given in the letter heads. Several letters ere dispatched but only one elicited a reply dated 2.11.2000. There is also the affidavit by Mr. Matheka advocate acting for the applicant which shows that the applicant was aware of what was going on at the Tribunal and he was in touch with his advocate.

It is my finding that the applicant was given adequate opportunity to appear and present his case before the tribunal. He deliberately delayed his appearance until the Tribunal got tired of these delaying tactics and proceeded with the hearing and final determination of the matter. The illness pleaded was for 31.10.2000 for 4 days and it should not have prevented the advocate from traveling to Nairobi at the time he was required to attend. He never filed any documents in the Tribunal and if the decision was taken on wrong calculations he was the one to blame. He also says that the Commissioner of Assize was enjoying the status of High Court judge. In my view this did not elevate the Tribunal to the status of the High Court

and therefore I would not say the Tribunal was improperly constituted. I agree that the process of judicial review is not available to query the merits of the decision reached but to see that the applicant is treated fairly. I am convinced here that the applicant was given adequate opportunity to defend himself and not only one but several times when the matter came before the tribunal. For these reasons I find the Tribunal acted conscious of the need to accord the applicant an opportunity to be heard and indeed applicant was given adequate opportunity to be heard but he deliberately failed to utilize the opportunity. The application is hereby dismissed with costs.

Dated this 26<sup>th</sup> day of October, 2004.

**J. KHAMINWA**

**JUDGE**

Mr. Nyongesa – I apply for stay temporary for 14 days pending making of formal application.

Mrs. Odiang – No objection

Court – stay is granted for a period of 14 days to enable the making of formal application for stay.

**J.KHAMINWA**

**JUDGE**

**26.10.04**

Khaminwa – Judge

Cege – Court clerk

Ms. Odiag for respondent

Mr. Nyongesa holding brief.

**J. KHAMINWA**

**JUDGE**