



**Harrison v Mogaka & another (Civil Appeal E232 of 2022)  
[2024] KEHC 12562 (KLR) (Civ) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12562 (KLR)

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

**CIVIL**

**CIVIL APPEAL E232 OF 2022**

**WM MUSYOKA, J**

**OCTOBER 22, 2024**

**BETWEEN**

**KINYANJUI JOHN HARRISON ..... APPELLANT**

**AND**

**DANSTAN OMARI MOGAKA ..... 1<sup>ST</sup> RESPONDENT**

**LAW SOCIETY OF KENYA ADVOCATES DISCIPLINARY**

**TRIBUNAL ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from orders made in the ruling of the Advocates Disciplinary Tribunal (Mr. William Maema, Mr. George Ochich Oliech Otieno and Mr. Gathii Irungu), in ADTC/00/21, of 6th December 2021)*

**JUDGMENT**

1. The appellant raised a complaint with the 2<sup>nd</sup> respondent against the 1<sup>st</sup> respondent. The said complaint was dismissed, on the ground that no prima facie case had been established. The substance of the complaint was that the 1<sup>st</sup> respondent gave a professional undertaking, on 15<sup>th</sup> July 2021, from which he was never discharged, and which he had breached. There were other allegations of impropriety revolving around that undertaking. The acts of professional misconduct and conduct unbecoming of an Advocate, attributed to the 1<sup>st</sup> respondent, were particularized, and revolved around Rules 8, 9, 10, 11 and 12, of the *Law Society of Kenya Code of Ethics and Conduct of Advocates*, 2016, being violated or breached, based on material that was set out in the complaint.
2. The memorandum of appeal, dated 14<sup>th</sup> April 2022, raises 18 grounds of appeal, and it is sought that the decision by the 2<sup>nd</sup> respondent, made on 6<sup>th</sup> December 2021, and communicated to the parties on 18<sup>th</sup> March 2022, be vacated, and that the complaint, dated 4<sup>th</sup> October 2021, made against the



- 1<sup>st</sup> respondent herein, before the 2<sup>nd</sup> respondent, be reinstated, and remanded for consideration and determination, in accordance with the law, before members of the 2<sup>nd</sup> respondent, who do not include Mr. William Maema, Mr. George Ochich Oliech Otieno and Mr. Gathii Irungu.
3. Directions were given on 12<sup>th</sup> June 2023, for canvassing of the appeal, by way of written submissions. The parties have complied, by filing detailed written submissions, which I have read, and noted the arguments made.
  4. The appellant submits that the 2<sup>nd</sup> respondent exercised its discretion wrongly, in summarily rejecting all the limbs of his complaint. He argues that section 60(2) of the *Advocates Act*, Cap 16, Laws of Kenya, contemplates that allegations levied, with respect to the professional misconduct of an Advocate, in a complaint, must be assessed separately, on their own weight, to inform the decision of the 2<sup>nd</sup> respondent on whether a prima facie case is disclosed in any of them. He submits that the 2<sup>nd</sup> respondent breached the statutory intendment of section 60(2) of the *Advocates Act*, when it dismissed the entire complaint for having not disclosed a prima facie case, instead of making a verdict on each separate limb of the complaint. He terms the verdict unconstitutional, unjust and patently wrong, and as constituting a breach of Article 25(c) and 50(1) of the *Constitution* of Kenya, 2010.
  5. The 1<sup>st</sup> respondent identifies 3 issues for determination: being whether the appellant was accorded an opportunity to be heard as required under Articles 47 and 50 of the *Constitution* and section 4 of the *Fair Administrative Action Act*, Cap 7L, Laws of Kenya; whether the 2<sup>nd</sup> respondent acted within its powers in dismissing the complaint filed by the appellant; and whether the decision by the 2<sup>nd</sup> respondent ought to be set aside. He submits that the appellant had a right to present his case before the 2<sup>nd</sup> respondent, to which he, the 1<sup>st</sup> respondent, responded, and the 2<sup>nd</sup> respondent made a determination, based on the material on record. That determination was communicated to the parties, and, he submits, Articles 47 and 50 of the *Constitution* were not violated, as there was due process. He submits that the 2<sup>nd</sup> respondent is a subordinate court, capable of making binding decisions, based on the discretionary powers vested in them by the law. He argues that the 2<sup>nd</sup> respondent properly exercised its discretion, and acted within its power in dismissing the complaint, for lack of cogent evidence to support it. He cites section 60(3) of the *Advocates Act*, which allows the 2<sup>nd</sup> respondent to dismiss a complaint, at any stage, where no prima facie case is established. He submits that the 2<sup>nd</sup> respondent rightly dismissed the complaint, as it did not want to interfere with matters that were ongoing before the courts. He argues that, where contempt of court happens, when a court is seized of a matter, the trial court has inherent power to punish the contemnor, and, as such, the appellant ought to have raised the issues with the respective trial courts.
  6. The 2<sup>nd</sup> respondent submits that, having received the complaint, the same was considered, to determine if there was a prima facie case that had been made out, and, in its considered opinion, it made a determination, through its order dated 6<sup>th</sup> December 2021. It is submitted that it gave reasons for its determination, in compliance with the provisions of Article 47(2) of the *Constitution* and section 4(2) of the *Fair Administrative Act*. It is submitted that section 60(3) of the *Advocates Act*, allows it to dismiss a complaint at any stage of the proceedings. It is argued that, in its discretion, it found that there was no prima facie case before it, and it provided the reasons in its order dated 6<sup>th</sup> December 2021, to effect that the appellant had other sufficient avenues, from which he could canvass his complaint against the 1<sup>st</sup> respondent. It is submitted that its decision was correct, as it determined that the complaint raised arose out of actual proceedings before courts of competent jurisdiction, which could enforce professional ethics and etiquette. It is submitted that the decision was properly communicated to the appellant.



7. The issues for determination are: whether the right of the appellant to a fair trial and fair administrative action was violated; whether the 2<sup>nd</sup> respondent had jurisdiction to deal with the complaints; whether the appellant had a prima facie case; and costs of the appeal.
8. The right to fair trial and administrative action is provided for under Articles 50 and 47 of the Constitution. The appellant has alleged that the 2<sup>nd</sup> respondent violated that right of fair hearing and fair administrative action, by ruling that there was no prima facie evidence to prosecute the complaint. He also complains that the ruling was communicated to him after considerable delay. Article 47 grants every person the right to fair administrative action that is efficient, expeditious, lawful and procedurally fair. It stipulates that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
9. Article 47(2) of the Constitution provides that: “if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.” Section 4(2) of the Fair Administrative Action Act states: “Every person has the right to be given written reasons for any administrative action that is taken against him.”
10. The ruling delivered by the 2<sup>nd</sup> respondent did not analyse the issues individually, but just stated that the appellant did not have a prima facie case. The 2<sup>nd</sup> respondent has argued that section 60(3) of the Advocates Act allows it to dismiss a complaint if it finds that no prima facie case has been established.
11. Section 60(3) of the Advocates Act provides:

“Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:

Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.”
12. I find, based on the above provision, that the 2<sup>nd</sup> respondent was well within its discretion, to dismiss the complaint, on account of not establishing a prima facie case; and that, while the ruling by the 2<sup>nd</sup> respondent was brief and did not discuss how it arrived at the finding of a no prima facie case, that did not violate the right of the appellant to a fair administrative action.
13. I am persuaded that the finding and holding, by the 2<sup>nd</sup> respondent, that the complaint arose from active or life cases before the courts, and that the said courts had jurisdiction to deal with whatever issues that may arise, with respect to contempt of court, and professional ethics and etiquette, reasonable. There was no need to escalate those matters to the 2<sup>nd</sup> respondent, when the appellant had a ready avenue for redress. The courts would be most ideal to address the issues raised, as they directly affected the proceedings and the standing of the court, and there would be no need to seek the aid of the 2<sup>nd</sup> respondent to enforce discipline in court.
14. On the delay in communicating the decision to the appellant, I am persuaded that the 2<sup>nd</sup> respondent stands guilty as charged. There was a three-month delay, which was not adequately explained. The Civil Procedure Rules, in Order 50 Rule 4, dictates that time, for the purpose of the Christmas break,



is deemed to stop running between the 21<sup>st</sup> day of December in any year to the 13<sup>th</sup> day of January the following year. In the instant case, there is a time period, of about two months, which is not accounted for. That delay violated the right of the appellant to fair administrative action and fair trial. However, that of itself would not vitiate or invalidate the decision of the 2<sup>nd</sup> respondent, or provide basis for directing that the appellant be heard on his complaint.

15. The 2<sup>nd</sup> respondent, no doubt, has jurisdiction to deal with the complaint raised, but, as it has rightly argued, Advocates are officers of the court, hence subject to the jurisdiction of the court. I agree with the 2<sup>nd</sup> respondent, that the appellant ought to have raised his complaints, before the courts that were prosecuting the specific cases that he has cited. Rules 8, 9 and 10 of the *Law Society of Kenya Code of Ethics and Conduct of Advocates*, 2016 are specific on that, that Advocates are subject to the jurisdiction of the courts, and where a party feels that the conduct of some Advocate is unbecoming, it should raise that issue in the court, before whom it is appearing.
16. The same principle would apply, with regard to professional undertakings given in the context of ongoing court matters. Order 52 Rule 7 of the *Civil Procedure Rules* provides the process for enforcement of such undertakings. The 1<sup>st</sup> respondent allegedly gave a professional undertaking, on 15<sup>th</sup> July 2021, in Nairobi Children's Court Case No. E039 of 2021, which the appellant accuses him of dishonouring. The appellant ought to have raised the issue of violation of the professional undertaking before the Children's Court, where that undertaking was given, as that court had jurisdiction to enforce it.
17. On Rule 10 of the *Law Society of Kenya Code of Ethics and Conduct for Advocates* 2016, dealing with prosecution of matters on social media and the media in general, Advocates are discouraged from commenting on the affairs of their clients on social media. The appellant has alleged that the 1<sup>st</sup> respondent had encouraged his client to disobey court orders, and that they both posted their contempt on social media. That could be dealt with by the courts in the matter in which the parties were appearing. The appellant could have asked the court for orders to bar the 1<sup>st</sup> respondent and his client from discussing their dispute in the media.
18. Overall, from an overview of the material in front of me, I am of the persuasion that the 2<sup>nd</sup> respondent did not violate the rights of the appellant, and no justifiable case has been made out, on appeal, for interference with the exercise of jurisdiction by the 2<sup>nd</sup> respondent. Consequently, it is my finding and holding, that the appeal herein, is devoid of merit, and I hereby dismiss the same. Each party shall bear their own costs. Orders accordingly.
19. The judgment herein was due on 21<sup>st</sup> June 2024. A number of factors and events, inclusive of bereavement, intervened, causing delay. The same is sincerely regretted, and I hereby wholeheartedly apologise to the parties.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Kinyanjui John Harrison, the appellant, in person.



Mr. Danston Omari Mogaka, the 1<sup>st</sup> respondent, in person.

Mr. Olemba, Advocate for the 2<sup>nd</sup> respondent.

