Rabala v Compliance Department Law Society of Kenya & another (Application E111 of 2024) [2024] KEHC 14441 (KLR) (Judicial Review) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14441 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E111 OF 2024

J NGAAH, J

NOVEMBER 21, 2024

BETWEEN

DONALD RABALA .... APPLICANT

AND

COMPLIANCE DEPARTMENT LAW SOCIETY OF KENYA . 1ST RESPONDENT

ADVOCATES DISCIPLINARY TRIBUNAL .... 2ND RESPONDENT

JUDGMENT

1. The applicant's application is a motion dated 31 May 2024 expressed to be brought under section 8(2) of the *Law Reform Act*, cap. 26 and Order 53 rule 1 of the Civil Procedure Rules. The applicant seeks the following orders:

   " 1. An order of certiorari to remove into the High Court and quash the entire decision of the 1st Respondent deactivating the applicant's LSK portal as unlawful and directing is revocation(sic).

   2. An order of prohibition to prohibit the 2nd Respondent, its servants, agents or in any manner whatsoever from further rendering the advocates portal inactive and stopping him from applying for a practicing certificate for the year of 2024.

   3. An order of prohibition to prohibit the 1st and 2nd Respondents, their servants, agents or in any manner whatsoever from interfering with the Applicant's practice as an advocate of the High Court of Kenya.

   4. The costs of this suit be provided for"

2. The motion is based on a statutory statement dated 21 May 2024 and an undated affidavit verifying the facts relied upon sworn by Mr. Donald Odhiambo Rabala.

3. Mr. Rabala has sworn that he is an advocate of this Honourable Court practising in that capacity in the firm of M/s. Rabala & Company Advocates.

   A complaint against him came up for plea taking before the 2nd respondent on 22 May 2017. He entered a plea of not guilty and the hearing was set for 4 September 2017. On the material date, he was indisposed and, therefore, the hearing did not proceed. However, the 2nd respondent directed that the determination of the complaint would be based on affidavit evidence.

4. Judgment was scheduled for 22 January 2018 but, on that date, the 2nd respondent directed that the matter be mentioned on 16 April 2018 to confirm compliance with certain directions. By 22 April, the learned counsel had fully complied with the orders of the 2nd respondent and filed the bills, apparently, advocate-client bills of costs and a further affidavit. The 2nd respondent scheduled the ruling on the taxation for 2 July 2018. However, the ruling was not delivered as scheduled but was eventually delivered on 8 July 2019.

5. According to the applicant, on 14 October 2019, "concrete orders were given to show how the payments would be handled". Another hearing date of 9 March 2020 was given. The hearing did not proceed but the 2nd respondent issued a notice to show cause (hereinafter "the NTSC") why the applicant should not be suspended from practice for a period of twelve months. The hearing date, for the NTSC, was set for 4 May 2020. Again, the case did not proceed on this date.

6. The applicant's position is that the dispute before the 2nd respondent is about the legal fees payable to his firm, the amount of which he has proved by way of bill of costs and fee notes, apparently, submitted to the 2nd respondent. The complainant is said to have refused to acknowledge the bill of costs and to attend court, hence the delay in taxing the same.

7. The 2nd respondent is said to have directed the 1st respondent to deactivate the applicant's Law Society of Kenya (LSK) portal without proper notification of the reasons for their decision. According to the applicant, the 2nd rrespondent's decision is procedurally unfair, unlawful and unconstitutional, in so far as it was made without giving him an opportunity to be heard.

8. The applicant contends that the 1st respondent's decision is contrary to his legitimate expectation that he will not be deprived of his right to practise law without adherence to the due process of the law. He has also impeached the 1st respondent's decision for being arbitrary.

9. Ms. Florence Muturi swore a replying affidavit opposing the application. Ms. Muturi has introduced herself as the Secretary of the LSK and that by virtue of the provisions of the *Advocates Act*, cap.16, she is also the Secretary of the LSK's Disciplinary Committee.

10. According to Ms. Muturi, Disciplinary Cause No. 33 of 2017 in which the applicant is the accused is still pending for hearing and determination before the 2nd respondent and, therefore, the jurisdiction of this Honourable Court has been improperly invoked.

11. Ms. Muturi has sworn, further, that the genesis of the proceedings before the 2nd respondent is that a complaint for professional misconduct was lodged against the applicant by one Ms. Sheila Scio (hereinafter "the complainant") on 8 March 2017 in accordance with section 60(1) and (2) of the *Advocates Act*. The complaint was in relation to the applicant's failure to account for the sum of Kshs. 1,147,041/= awarded to the complainanton 14 November 2011 in civil case no. 4305 of 2013; Sheila Scio C/a Almasy Restaurant vs. Nairobi City County.

12. The applicant was served with the complaint and given an opportunity to file his response. The complaint was scheduled for plea taking on 22 May 2017 when the applicant entered a plea of not guilty. The hearing was then scheduled for 4 September 2017. On the material date, the applicant was not ready to proceed as his counsel informed the 2nd respondent that he was indisposed. Nonetheless, the 2nd respondent directed that the complaint would be disposed of by way of affidavit evidence under Rule 18 of the Advocates Disciplinary Tribunal Rules, and scheduled the judgment for 22 January 2018.

13. On 22 January 2018, the 2nd respondent did not deliver its judgment following the applicant's request to file a further affidavit to introduce his bill of costs against the complainant. The applicant's request was granted and a mention of the case to confirm compliance was scheduled for 16 April 2018. On this particular date, the applicant confirmed having complied with the 2nd respondent's directions.

14. The ruling on taxation was delivered on 8 July 2019 in the presence of Mr. Siage, the learned counsel for the applicant. Since the applicant had filed a response to the complaint, the hearing was scheduled for 14 October 2019. On 14 October 2019, the hearing of the complaint was deferred to 9 March 2020 on account of the absence of the applicant. The applicant was then ordered to release the sum due to the complainant less the taxed legal fees. The Tribunal made this order pursuant to its mandate under Section 60(9) of the *Advocates Act*.

15. On 9 March 2020, the applicant failed to attend the hearing for the second time. He also failed to comply with the order of the 2nd respondent to release the sum due to the complainant less the taxed legal fees, thereby prompting the 2nd respondent to issue a NTSC against him, why he should not be suspended for a period of twelve months. The NTSC cause was scheduled for hearing on 4 May 2020. On 4 May 2020, the NTSC was not heard as the 2nd respondent was not sitting. It came up again on 12 April 2021 when it was deferred to 2 August 2021 to allow the applicant file a response.

16. Even by 2 August 2021, the applicant had not yet filed his response to the NTSC. However, the applicant and the Complainant's advocate agreed to discuss the fee payable in relation to the applicant's fee note and record a consent. A mention of the cause for this purpose was scheduled for 13 September 2021. By this date, parties had not agreed and, therefore, the NTSC was deferred to 4 October 2021.

17. However, the applicant sought to settle the amount due to the complainant by payment of monthly instalments of Kshs. 100,000/= pending the outcome of the negotiations between the applicant and the complainant's counsel. Consequently, the 2nd respondent ordered the applicant to pay the complainant Kshs. 100,000/= every month until otherwise directed. He was also directed to file his bills of costs for assessment on 4 April 2022. By 4 April 2022, the applicant had still not complied with any of the orders of the 2nd respondent issued on 4 October 2021 and the NTSC was deferred to 20 June 2022. The 2nd respondent did not sit on 20 June 2022 and, therefore, the NTSC was deferred to 18 July 2022. It was, however, noted that the applicant had still not paid the complainant the monthly sum of Kshs 100,000/= as directed by the 2nd respondent.

18. On 13 February 2023, the 2nd respondent noted that the applicant had only paid Ksh 100,000/= out of the total sum of Kshs. 1,470,000/= owed to the applicant, thereby prompting the 2nd respondent to defer the NTSC to 6 March 2023.

19. In view of the reluctance or refusal by the applicant to comply with the 2nd respondent's order, the LSK exercised its mandate pursuant to Section 25(1)(f) and (h) of the *Advocates Act* and deactivated the applicant's LSK portal.

20. The LSK, vide its letters respectively dated 15 April 2024 and 3 June 2024, explained to the applicant why his portal cannot be reactivated and urged the applicant to comply with the 2nd respondent's order so as to reactivate his LSK portal. Todate, the applicant has not complied with the order of the 2nd respondent. The applicant was on 3 June 2024 also urged to engage the complainant's advocate and give a professional undertaking to be adopted by the 2nd respondent, but the applicant has refused or failed to reach out to the complainant's counsel.

21. According to Ms. Muturi,the applicant was afforded the opportunity to be heard except that he did not take up the opportunity. The decision to deactivate the applicant's LSK portal was made pursuant to Section 25(I)(f) and (h) of the *Advocates Act* and, therefore, within the mandate of the 2nd respondent.

22. Before considering submissions by the respective parties, I need state that there are facts, pivotal to the determination of this application, that are not in dispute. The applicant has alluded to some of these facts but they are clearer in the affidavit of Ms. Florence Muturi. For instance, while Mr. Rabala has in paragraph 4 of his affidavit only made reference to "the matter before the 2nd respondent came up for plea taking on 22 May 2017" Ms. Florence is categorical in her affidavit that the matter which the applicant has referred to is, in fact, a complaint against him for professional misconduct which was registered before the Advocates Disciplinary Tribunal as Disciplinary Cause No. 33 of 2017. In particular, the applicant is alleged to have failed to account for the sum of Kshs. 1,147,041/= awarded to the complainant in civil case no. 4305 of 2013.

23. Another crucial fact that is not in dispute but which the applicant did not disclose in his application, and only came to light in the replying affidavit of Ms. Muturi, is that the fees due to the applicant for the legal services he rendered to the complainant was established by the 2nd respondent and the applicant proposed to settle the decretal sum due to the complainant less his fees by way of monthly instalments pending the outcome of negotiations on settlement of a separate fee note. The applicant's own proposal was adopted as the order of the the 2nd respondent; however, and this is not in dispute too, the applicant did not follow through his own proposal and, to the extent that it had been adopted as the order of the 2nd respondent, he disobeyed the 2nd respondent's order.

24. Failure, by the applicant, to disclose that he had dishonoured his own commitment to pay the complainant by way of monthly instalments and had, in the process, disobeyed an order from the 2nd respondent as a result of which his account was deactivated renders the applicant's application bad for material non-disclosure. It is a material non-disclosure because the fact that the applicant's grievances arose from his own violation of an order from a tribunal of competent jurisdiction was material to the exercise of discretion by this Honourable Court to grant him leave to file the substantive motion for the judicial review reliefs. If the applicant had disclosed this fact at the outset, he certainly would not have been granted leave and, it is, perhaps, for this reason that the applicant chose to suppress this fact.

25. It is trite that material facts must be disclosed regardless of whether they are prejudicial to an applicant's case. It has been held that in application for leave for judicial review uberrimae fides is required and leave will not be granted, or may be later set aside, if there has been deliberate misrepresentation or concealment of material facts in the applicant's affidavit or affidavits.

26. In R versus Kensington Income Tax Commissioner, ex parte Princess Edmond De Polignac (1917) 1KB 495, Viscount LJ addressed this point and stated as follows:

> "Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead

the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

27. I am persuaded that the affidavit in support of the applicant's application was not candid and did not fairly state the facts or stated them in such a way as to mislead the court as to the true facts. Take for instance paragraphs 13 to 16 of the applicant's affidavit. He has deposed as follows:

> " 13. The main issue between the complainant and I is that of legal fees payable to my firm which can be proved by way of bill of costs and fee notes.
>
> 14. The complainant refused to acknowledge the bill of costs and to attend court, hence the delay in prosecuting the same.
>
> 15. The 2nd respondent thereafter directed the 1st respondent to deactivate my LSK portal without proper notification of the reasons for their decision. (attached and marked DOR 8 are screenshots of my inactive LSK and Ardhi sasa portals)
>
> 16. The 2nd Respondent's decision is procedurally unfair, unlawful and unconstitutional in so far as it was made without affording the Applicant a hearing as required by the rules of natural justice, *The Constitution* of Kenya, 2010 and other enabling laws of Kenya."

28. The impression one gets from these depositions is that the subject matter before the 2nd respondent is not necessarily the complainant's complaint against the applicant but the payment of the applicant's fees by the complainant. The applicant has presented himself as the one who is owed by the complainant and not the other way round. The complainant is presented as the aggressor, for allegedly having failed or refused to acknowledge the applicant's bill of cost and to attend court. It is also apparent from these depositions that direction to deactivate the applicant's portal accounts sprung from nowhere, so to speak, and without any form of notification to the applicant.

29. It is, however, apparent from the proceedings before the 2nd respondent, that following the applicant's request in his letter dated 13 December 2017, he was allowed, and indeed, he did file bills of costs that were assessed by the 2nd respondent. In that letter the applicant had stated:

> " It is our intention to introduce our bill of costs against the complainant, as this is the only issue payment of our fees...the said bill of costs is hereby attached".

30. In the proceedings of the 2nd respondent of 16 April 2018, Mr. Mwichingi, the learned counsel for the applicant, is recorded to have informed the 2nd respondent, thus:

> " The accused advocate has complied with the Tribunal order made on 22nd January, 2018 and has filed the bills and further affidavit as ordered."

31. On the material date, the 2nd respondent set a date for ruling on the taxation of the bills on 2 July 2018. The proceedings of 14 October 2019 show that a ruling on the taxation of the applicant's bills of costs was eventually given and the 2nd respondent ordered that:

> " The advocate to release the sum due to the complainant less the taxed legal fees."

32. I gather from a letter dated 22 July 2017 addressed to the applicant by the Compliance and Ethics Committee of the LSK that that the amount due to the applicant was established to be "Kshs. 127,075/ and Kshs. 64,000/- respectively".

33. The applicant did not comply with the order to release the money due to the complainant and so on 9 March 2020, the 2nd respondent made the order that:

> " 1. Notice to show cause against Mr. Rabala why he should not be suspended for a period of 12 months."

34. When the notice to show cause came up for hearing, the applicant contested it and even denied knowledge of the ruling on the taxation of his bills of costs. He, however, asked the 2nd respondent for time to consider the ruling and either comply with it or contest it. The 2nd respondent made the following order:

> " Although the accused advocate alleges that he was not aware of the ruling/judgment that gave rise to the notice to show cause the record on file shows that he was represented by various advocates in the matter on all the days that the matter came up for hearing. He also filed his bill of costs and a further affidavit as ordered by the Tribunal. The ruling on taxation was delivered in the presence of his advocate. He is however now seeking time to consider the ruling and make an appropriate decision. For the reasons given we defer the notice to show cause until 2/8/2021 which time the advocate will have filed his response to confirm the way forward based on the response which the accused advocate will have filed."

35. Thereafter, the applicant and the complaint's counsel entered into negotiations on settlement of a fee note which, as far as I understand the 2nd respondent's proceedings, had not been considered in the previous bills of costs that had been filed by the applicant. The negotiations were sanctioned by the 2nd respondent which made the following order on 2 August 2021:

> " By consent Mr. Rabala and Olembo to agree on the fee applicable for representation by FN1 and record their consent with the Tribunal within 2 weeks from the date(sic). Mention on 13th September 2021 for notice to show cause if Mr. Rabala will not have settled the amount due."

36. On 13 September 2021 Mr Rabala informed the Tribunal as follows:

> " We have held discussions only ones on this issues are outstanding(sic)."

I understand this to mean that only one issue was outstanding for parties to reach a settlement. The 2nd respondent set the matter for mention on 4/10/2021 "to confirm if parties have reached a settlement."

37. The record of proceedings of 4 October 2021 show that parties had not reached a settlement. However, Mr. Kenda, representing the applicant informed the 2nd respondent as follows:

> " Accused advocate seeks to pay Kshs. 100,000/= per month pending negotiations."

38. On its part, the 2nd respondent made the following orders:

> " 1) the accused advocate shall file his bill of costs in cmcc 4305 of 2013 before the tribunal for consideration. The bill of costs be filed and served upon the complainant within 14days from today.
>
> 2) In the meantime, the accused advocate shall pay to the complainant a sum of Kshs. 100,000/= per moth until otherwise directed.
>
> 3) the bill of costs aforesaid shall be listed for assessment by the tribunal on 4/4/2022
>
> 4) The said Kshs. 100,000/= shall be paid on or before the 10th day of every month to the complainant's advocate."

39. When the matter came up on 4 April 2022, the applicant had not complied, at least, with the order to pay the monthly sum of Kshs. 100,000/=. According to the proceedings of 13 February 2023, only one instalment of Kshs. 100,000/= had been paid by this date. The applicant did not make any further payments.

40. Against this background, the 1st respondent wrote to the applicant, vide a letter dated 15 April 2024 as follows:

> " Dear Sir,
>
> RE: APPLICATION FOR PRACTICING CERTIFICATE 2024 - DTC 33 OF 201
>
> "The above refers and our various correspondence on this matter.
>
> We are in receipt of your letter dated 9th April, 2024 requesting for approval for you to be able to apply for your practicing certificate for this year.
>
> Our record shows that you have 3 ongoing disciplinary matters. The one that is relevant to this issue, is DTC 33 of 2017. We refer to Section 25(l)(f) and25(l)(h) of the *Advocates Act* which gives the Society discretion not to issue a practicing certificate where there are existing orders against an Advocate for payment of monies owed. We note the following in this matter:
>
> 1. That a Notice to Show Cause why you should not be suspended, was issued against you and is pending.
>
> 2. That there are Orders against you to the effect that you reimburse the complainant the principal amount by paying Kshs. 100,000/- monthly, until payment in full.
>
> 3. That despite the orders, you have only made one payment of Kshs.100,000/- out of the total amount owed since the beginning of this matter in 2017.
>
> 4. That the complainant and her advocate, have objected to any consideration of leniency to be given to you. while the complainant continues to suffer.

5. That your Application to the Tribunal dated 20_th March, 2024, was not allowed and the decision made under Section 25 rests with the Society and the Council.

   In the circumstances, your request was considered but declined on the basis that there are orders against you for compensation of funds owed to the complainant in DTC33 of 2017.

   We therefore urge you to comply with the orders and we will have no objection to you making the application for your practicing certificate for the year 2024."

41. It is, therefore, apparent from the proceedings before the 2nd respondent that, contrary to the applicant's allegations, the deactivation of his portal account and, therefore his inability to apply for a practicing certificate for the year 2024, arose from his defiance of an order of the 2nd respondent, a fact that he suppressed in his application and only came to light after the respondents filed their replying affidavit. It is also worth remembering that the order which the applicant disobeyed arose out of his own proposal to settle the amount due to the complaint. On this ground alone, of suppression of material facts, the applicant's application is bound to fail.

42. That notwithstanding, judicial review remedies are discretionary. The court has a discretion whether to grant a remedy, in the nature of judicial review reliefs and, if so, the form of remedy it may grant. In exercising its discretion, the court will take into account such factors as the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. Unreasonable or unmeritorious conduct has been held to disentitle a party to judicial review relief (see R v Crown Court at Knightsbridge, ex p Marcrest Ltd [1983] 1 All ER 1148).

43. In my humble view, and with due respect to the applicant, it is unreasonable and unmeritorious conduct on his part to propose to settle the amount due to the complaint and disobey the order crystalising his own proposal. For this reason, even if the question of non-disclosure of material facts was out of equation, I would be hesitant to exercise my discretion in the applicant's favour, and grant the judicial review reliefs sought.

44. In the final analysis, I do not find any merit in the applicant's application. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND UPLOADED ON CTS ON 21 NOVEMBER 2024

NGAAH JAIRUS

JUDGE