



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 101 OF 2014

E.D.G. & ATELIER LIMITED.....1ST PETITIONER

EDWARD G. MUGO.....2ND PETITIONER

VERSUS

BOARD OF REGISTRATION OF ARCHITECTS

AND QUANTITY SURVEYORS.....RESPONDENT

AND

MTWAPA HEIGHTS LIMITED.....INTERESTED PARTY

JUDGEMENT

1. E.D.G. & Atelier Limited is the 1st Petitioner and its director Edward G. Mugo is the 2nd Petitioner. The Respondent is the Board of Registration of Architects and Quantity Surveyors ('the Board'), whereas Mtwapa Heights Limited is the Interested Party.
2. Through their petition dated 10th March, 2014 the petitioners allege that the Board violated their constitutional rights by failing to comply with rules 48 and 49 of the Architects and Quantity Surveyors By-Laws ('AQS By-Laws'). The petitioners claim that while in the process of resolving a matter between themselves and the Interested Party through mediation, the 2nd Petitioner received a letter dated 13th November, 2013 from the Respondent requiring him to appear before its Ethics and Practice Committee ('the Committee'). This request came as a result of a complaint by the Interested Party against the 1st Petitioner.
3. The petitioners assert that they were not informed that a complaint had been lodged against them as is required by Rule 48 of the AQS By-Laws. Additionally, they claim that they were not asked to file an explanation in answer to the complaint.
4. It is the petitioners' case that their advocates wrote to the Board raising a number of issues which required the action of the Board prior to a determination but they have not received a response from the Board to date.
5. The petitioners aver that a further letter dated 28th February, 2014 was sent to the 2nd Petitioner from the Respondent, summoning him to appear before the Board.
6. The petitioners claim that the actions of the Respondent breached a number of their constitutional rights, the first being the right to a fair hearing under Article 50. They aver that the Respondent failed, refused and neglected to abide by the provisions of rules 48 and 49 of the AQS By-Laws which has resulted in a violation of their rights under Article 50 (2) (b) and 50 (2) (j). It is their assertion that the Respondent is unable or unwilling to supply them with information.
7. Furthermore, the 2nd Petitioner was not given enough time and facilities to prepare a defence upon being notified of the hearing which was in clear violation of his rights under Article 50 (2) (c) of the Constitution.
8. According to the petitioners the Respondent had failed to take action on a complaint raised by the 1st Petitioner prior to that of the Interested Party hence violating their rights under Article 50 (1) (e) of the Constitution.
9. The second right alleged to be violated is the right to fair administrative action protected under Article 47 of the Constitution. The

petitioners claim that the failure of the Respondent to comply with the AQS By-Laws infringed their right to administrative action which is lawful and procedurally fair. The petitioners contend that the actions of the Respondent have caused delay and unreasonable expenses to them. Further, that the issues raised by the Interested Party before the Respondent are the same issues to be determined in the arbitration proceedings.

10. The third right said to have been violated is the right to equality and freedom from discrimination as guaranteed by Article 27 of the Constitution. This allegation is founded on the grounds that the Respondent has proceeded with the complaint by the Interested Party while no action was taken regarding the 1st Petitioner's own complaint which was lodged prior to that of the Interested Party. It is their averment that there is preferential treatment of the Interested Party by the Respondent.

11. It is also alleged that there is a violation of the national values and principles of good governance enshrined in Article 10 of the Constitution on the part of the Respondent. The petitioners aver that this is due to the failure of the Respondent to comply with rules 48 and 49 of the AQS By-Laws, the alleged preferential treatment of the Interested Party and failure to respond to the complaints by the 1st Petitioner.

12. The petitioners further allege that there has been a breach of certain provisions of the Constitution being Articles 2 (4); 3(1); 129 (2); 10 (1) (c) and 10 (2) (b); and Article 159 (2) (c). They aver that that Respondent and Interested Party have abused the disciplinary process by lodging a complaint despite the consent order for arbitration.

13. The petitioners therefore pray for orders as follows:-

(a) This Honourable Court do make a declaration that the failure on the part of the Respondent to comply with the mandatory provisions of by-law 48 and 49 of the Board of Registration of Architects and Quantity Surveyors By-Laws was illegal, unconstitutional and an infringement of the Petitioners' right to a fair hearing as enshrined in Article 50 of the Constitution and contravened the petitioners' right to administrative action that is lawful and procedurally fair as enshrined in Article 47 (1) of the Constitution of Kenya.

(b) This Honourable Court do make a declaration that the failure of the Respondent to take action, or any action, in relation to the complaint lodged with the Respondent by the 1st Petitioner amounted to a breach of the 1st Petitioner's fundamental right to equality before the law and to have the complaint heard and concluded within a reasonable time as set out under Article 50 (1) (e) of the Constitution.

(c) A temporary injunction/stay of proceedings do issue restraining the Respondent from proceeding with the hearing, disposal and determination of the complaint, if any, lodged by the interested party with the Respondent as against the 1st and/or 2nd Petitioner pending the hearing and determination of the on-going arbitration proceedings between the Interested Party and the 1st Petitioner [EDG & Atelier Limited v Mtwapa Heights Limited & Another].

(d) This Honourable Court do make an Order compelling the Respondent to comply with the provisions of By-Laws 48 and 49 of the Architects and Quantity Surveyors By-Laws with respect to the 1st Petitioner and specifically, to supply within a reasonable time, a copy of the complaint, if any, giving grounds of the complaint.

(e) This Honourable Court do grant compensation for the infringement of the Petitioner's rights.

(f) This Honourable Court do order that the Costs of this Petition be borne by the Respondent in any event.

14. The petition is supported by the affidavit of Edward G. Mugo sworn on 10th March, 2014.

15. The petitioners also filed a notice of motion application dated 10th March, 2014 under Articles 10, 22, 23, 35(1)(b), 47, 159 and 165 of the Constitution; rules 4, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; sections 1A, 1B, 3A, 59 and 63 (e) of the Civil Procedure Act; Section 7 of the Arbitration Act; and all enabling provisions of law. The application sought for the matter to be certified as urgent and that the court grant a conservatory order by way of a temporary injunction restraining the Respondent or any of its sub-committees from proceeding with the inquiry/hearing regarding the complaint by the Interested Party on matters touching on the professional conduct of the 2nd Petitioner pending the hearing and determination of the application *inter partes*.

16. The application further sought for grant conservatory orders by way of temporary injunction to restrain the Respondent or any of its sub-committees from proceeding with the inquiry/hearing regarding a complaint by the Interested Party on matters touching on the professional conduct of the 2nd Petitioner pending the hearing and determination of the petition.

17. On 30th April, 2014, M. Ngugi, J issued a conservatory order by way of temporary injunction restraining the Respondent or any of its sub-committees from proceeding with the inquiry/hearing regarding a complaint by the Interested Party on matters touching on the professional conduct of the 2nd Petitioner pending the hearing and determination of the petition.

18. In response to the petition, the Respondent filed a replying affidavit sworn on 27th June, 2014 by its Registrar, George C. Omondi.

19. The Respondent contends that a complaint was received from the Interested Party by way of a letter dated 6th November, 2012. On 7th November, 2012 it received a letter from the 2nd Petitioner responding to the complaint by the Interested Party. Thereafter, the matter was

forwarded to the Committee of the Respondent on 6th February, 2013 for discussions. The Committee conducted an investigation into the matter. It is the Respondent's averment that the 2nd Petitioner was all along aware of the investigation and even wrote to the Board asking about the progress of the inquiry.

20. According to the Respondent, the members reached an agreement on 7th November, 2013 that the 2nd Petitioner be summoned to appear before the Committee in order to make oral submissions on the matters regarding the dispute and this was done through a letter dated 13th November, 2013.

21. The Respondent contends that the matter before it concerns the 2nd Petitioner's alleged professional misconduct, whilst the matter before the arbitrator is a financial dispute. The Respondent avers that the matters should be allowed to proceed simultaneously.

22. The Respondent asserts that by summoning the 2nd Petitioner it does not mean that he was condemned unheard, and that if he avails himself he will be given the opportunity to defend himself.

23. The Respondent further contends that the provisions of rules 48 and 49 of the AQS By-Laws have been complied with. The Respondent therefore prays for the dismissal of the petition with costs.

24. The Interested Party responded to the petition through a replying affidavit sworn on 30th June, 2014 by its Managing Director, Wamagata Kairu.

25. It is Mr. Kairu's position that the petition is premature, incompetent, bad in law and fatally defective. He also avers that the court lacks jurisdiction to determine the petition as the alternative mechanisms and remedies available have not been exhausted by the petitioners.

26. Turning to the substantive issues raised in the petition, Mr. Kairu avers that the matter before the Respondent specifically deals with alleged professional misconduct and unethical behaviour of the petitioners while the matter before the arbitrator relates to monetary claims by the 1st Petitioner against the Interested Party. It is therefore his view that the two matters can proceed simultaneously without occasioning any prejudice to any of the parties.

27. Mr. Kairu contends that the mandate of the Respondent is to summon the petitioners and Interested Party to present their respective cases. He avers that the Interested Party has complied and the petitioners must also present their case before the professional body.

28. The Interested Party contends that whereas the petitioners are canvassing for the proceedings before the Respondent to be suspended, they in the same breath seek that its alleged complaint against it (the Interested Party) be prioritised. This, according to the Interested Party can only be done through an appeal to the Committee.

29. It is the Interested Party's position that by coming to this court, the petitioners seek to defeat the interests of justice and equal treatment of the parties and their petition ought to be rejected. Further, that they should articulate their pleas in the correct forum using the correct procedure.

30. It is further deposed on behalf of the Interested Party that although the petitioners claim that various constitutional rights have been infringed by the Respondent and the Interested Party, the petitioners have failed to set out with the necessary degree of precision the violations complained of, the specific constitutional provisions allegedly breached, and the manner in which the said rights have been infringed by the Respondent or the Interested Party.

31. It is the Interested Party's assertion that the petitioners cannot claim that there has been a breach of their right to fair administrative action and fair hearing as they have been offered the opportunity to appear before the Respondent which is the statutorily correct forum for handling the matter. According to the Interested Party, the petitioners have instead refused or neglected to appear before the Respondent.

32. It is the Interested Party's case that the Respondent has not acted in a discriminative manner by commencing proceedings in respect of the Interested Party's complaint on priority basis since the 1st Petitioner had not followed up its complaint with the Respondent.

33. It is the contention of the Interested Party that the petitioners have been included in the entire disciplinary process and the same is evidenced in the various correspondences and invitations. Further, that the petitioners have been granted their rights of equality before the law and non-discrimination. Additionally, that because the petitioners have defied the invitation to appear before the Respondent to answer the complaints against them, they are estopped from claiming that their rights have been infringed.

34. The petitioners filed submission dated 16th December, 2015 in which they reiterated the background of the petition. The petitioners cited various provisions of the law and case law in support of their case. Citing the decision in the case of **Judicial Review Miscellaneous Application No. 44 of 2012, Republic v The Attorney General & Another ex parte James Alfred Kosoro**, counsel for the petitioners contend that under Article 129 of the Constitution the executive authority given to public officers is derived from the people of Kenya and should therefore be exercised in a *"manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit..."*

35. The petitioners submit that in light of the said provision as well as Articles 10(1)(c), (2)(b) and 255 of the Constitution on the values and principles of governance any attempt to ignore these principles would amount to an attempt to usurp the powers of the people of Kenya.

36. The petitioners refer to Article 159(2)(c) of the Constitution as providing that in exercising judicial authority courts should promote

alternative forms of dispute resolution and urged the court to note that the parties have submitted themselves to arbitration which is an alternative dispute resolution mechanism.

37. Counsel for the petitioners then points to the principle of law which requires that where there is an alternative remedy and procedure available for resolution of a dispute, that remedy ought to be pursued and the procedure adhered to. The decision in the case of **Diana Kethi Kilonzo v IEBC and 2 others** (no citation provided) is identified as affirming the principle. Further, that “[t]he courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

38. Turning to the right to a fair hearing under Article 50 (1) & (2) (e) of the Constitution, the petitioners refer to the case of **Kenya Anti-Corruption Commission v Lands Limited and others, Nairobi Misc. App 583 of 2006** as cited in the case of **Geothermal Development Company Limited v Attorney General and 3 others Nairobi Petition No. 352 of 2012** as highlighting the importance of the right to a fair hearing in our system of justice. The petitioners submit that in line with the above, the proceedings conducted by the Committee ought to be declared null and void for being unconstitutional.

39. On the infringement of the petitioners’ right to fair administrative action as protected by Article 47 (1) & (2) of the Constitution, reliance was placed on the decisions in the cases of **Wangonde & others v Coffee Board of Kenya & The Minister for Agriculture [2012] eKLR** and **Geothermal Development Co. Ltd v AG & others Nairobi Petition No. 352 of 2012** where it was held that public officers should exercise their powers reasonably, rationally and within the confines of the law and that the issuance of a notice is a matter of procedural fairness and an important component of natural justice. The petitioners stress that they were not informed of the complaint brought before the Respondent.

40. The petitioners also rely on Article 23 (1) of the Constitution and the case of **Nancy Baraza v Judicial Service Commission & 9 others [2012] eKLR** to support their claim for redress in respect of the alleged violation of constitutional rights.

41. Applying the stated law to the facts of the case, the petitioners submit that the summons addressed to the 2nd Petitioner by the Respondent is void *ab initio* as the letter dated 6th November, 2012 makes no mention of a complaint against the 2nd Petitioner and the same is only levied against the 1st Petitioner which is the party that contracted with the Interested Party. The petitioners aver that the summons is intended to put pressure on the 2nd Petitioner in regard to the on-going arbitration proceedings. The petitioners therefore seek a declaration that the summons is null and *void ab initio*.

42. The petitioners further submit that in the on-going pending arbitration proceedings the Interested Party raised *inter alia* issues of professional misconduct on the part of the 1st Petitioner in relation to the project. They assert that because the same issues have been raised before the Respondent, it would be prejudicial to the 1st Petitioner’s claim which is pending before the arbitrator. They further aver that there is a chance of contradictory findings on the same issue in two different bodies which would cause unnecessary embarrassment and potential conflict.

43. On the issue of equality before the law, the petitioners maintain that the 1st Petitioner’s complain was first in time yet no action was taken. Further, that the Respondent had, in its reply to the petition, failed to explain its inaction. This inaction, the petitioners contend, is also a breach of the national values and principles outlined in Article 10 of the Constitution.

44. The Respondent through its submissions dated 17th May, 2016, reiterates the duties and powers of the Committee, as granted by the Architects and Quantity Surveyors Act, Cap. 525 (‘the Act’), which includes receiving cases of professional misconduct or initiating cases at its own discretion, carrying out investigations and making appropriate recommendations to the Respondent.

45. It further contends that the 2nd Petitioner was at all times aware of the investigations as evidenced by the letter dated 7th November, 2012 addressed to the Respondent. It further contends that by virtue of Section 13A of the Act the petitioners have the right to appeal a decision of the Board in the High Court.

46. The Respondent stresses that the 2nd Petitioner was only being investigated for alleged misconduct and not the financial dispute as the latter issue was before the arbitrator.

47. On the alleged constitutional violations, the Respondent avers that the petitioners have failed to demonstrate how being summoned to attend an ongoing investigation is unreasonable or procedurally unfair. Further, that the petitioners have only quoted the law but have failed to demonstrate in clear and unambiguous terms how their rights have been infringed. Reference is made to the decisions in the cases of **Anarita Karimi Njeru v AG [1979] eKLR** and **Stephen Nyarangi Onsuma & another v George Magoha & 7 others [2014] eKLR** as requiring a person who alleges violation of rights to set out with some level of particularity the constitutional provisions alleged to have been violated, the manner in which they have been violated and the remedy sought for the violations.

48. The Interested Party filed submission dated 23rd March 2017, in which it reiterates its pleadings by contending that the petition is premature, incompetent, bad in law and fatally defective as the Respondent is empowered to determine applications to do with unprofessional conducts under the Act. Further, that there is a procedure to be followed under the law and it is only after the procedure has been completed and a determination made by the Board that an appeal can be made to the High Court. For that reason it submits that the court has no jurisdiction to entertain and determine the petition.

49. Additionally, it is submitted that there exist alternative dispute resolution mechanisms under the Act which are effective and applicable to the grievances raised by the petitioners and therefore they are obliged to exhaust these mechanisms before coming to court. For this reason it is submitted that this court has no jurisdiction to entertain this petition.

50. The Interested Party relies on the cases of **Safmarine Container N.V. of Antwerp v Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010** and **Dickson Mukwe Lukeine (petitioning on his own behalf and on behalf of the residents of Olderkesi Adjudication Section) v Attorney General & 4 others [2012] eKLR** for the proposition that apart from the Constitution, other laws can confer or limit the jurisdiction of the court through express provision or implication and that the courts are bound to promote alternative dispute resolution mechanisms as commanded by Article 159(2)(c) of the Constitution.

51. On the issue of the alleged infringement of the rights to fair administrative action and fair hearing, the Interested Party relies on the decision in **Constitutional Petition No. 245 of 2016 Alnashir Popat and 8 others v Capital Markets Authority** where it was held that Article 50 is not applicable where a petitioner is being subjected to the administrative process and that the rights under the said provision are only applicable in criminal proceedings and not to civil proceedings.

52. The Interested Party contends that the petitioners' allegations are unfounded as the Respondent was acting within its mandate and gave the petitioners an opportunity to answer to the complaint lodged but the petitioners refused or neglected to respond. Additionally, that since the Respondent has not made a decision or conclusion on the matter before it, the petitioners have acted rashly in alleging a deprivation of the right to fair hearing.

53. On the alleged breach of the right to equality and freedom from discrimination, the Interested Party asserts that the petitioners have failed to establish any *mala fides* in the conduct of the Respondent nor have they provided any correspondence to prove that the Respondent and the Interested Party have been discriminative.

54. Lastly, on the alleged breach of the national values and principles of governance, the Interested Party submits that the petitioners have failed to provide particulars in support of the said violations. Further, that the petitioners have been accorded their rights but have defied the invitation to appear before the Respondent and answer to the complaints against them and for that reason they are estopped from claiming that their rights have been infringed.

55. I have carefully considered the substance of the petition, the responses, and the submissions of the parties and I identify the issues for determination as follows:-

- i. Whether this court has jurisdiction to entertain and determine this petition; and
- ii. Whether the actions of the Respondent have infringed on the constitutional rights of the petitioners; and if so, what are the appropriate reliefs to be granted?

56. The Interested Party contends that this court lacks jurisdiction to determine this petition as the alternative mechanisms and remedies available to the petitioners, as provided sections 5 (e) and 13A of the Act and as required by Article 159 (2) (c) of the Constitution, have not been exhausted.

57. Article 159 (2) (c) of the Constitution provides that **"in exercising judicial authority, the courts and tribunals shall be guided by the principles that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted"**.

58. On its part, Section 13A (2) of the Act provides that any person aggrieved by a decision of the Board to refuse to register his name, or to remove his name from the register, or to suspend the effect of registration of his name, or to refuse to restore his name to the register, may appeal to the High Court against the decision of the Board.

59. The cited provisions notwithstanding, Article 23 of the Constitution grants this court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Further, according to Article 165(3)(b) of the Constitution, this court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

60. The Interested Party's claim that this court lacks jurisdiction does not require citation of a plethora of authorities since it is now well-settled that where the petitioner alleges violation of rights this court has jurisdiction to entertain the claim-see **Hamisi Mangale Burehe v Director of Public Prosecutions [2019] eKLR** and **Felix Ochieng Omolo v Attorney General & another [2018] eKLR**.

61. A perusal of the petition clearly discloses that the petitioners are not seeking judicial review and neither are they appealing to this court. The petitioners are claiming a violation of their rights and fundamental freedoms as protected under the Bill of Rights. They have also clearly stated in what manner their rights have been violated. The remedies they seek are specific. In the circumstances the Interested Party's assertion that this court lacks jurisdiction and that the petition as presented does not meet the standards of a petition finds no favour with this court. The assertions are therefore rejected and dismissed.

62. I now turn to the substance of the petition. Looking at the pleadings and submissions by the parties, I find it appropriate to address the issues contemporaneously. The first violation complained of is to the right to a fair hearing as guaranteed by Article 50(2)(b), (c) and (j) of the Constitution. The petitioners aver that they were not afforded the right to be informed of the charge against them when the Respondent allegedly failed to abide by the provisions of the AQS By-Laws, specifically By-Laws 48 and 49. Furthermore, it is alleged that the Respondent violated the petitioners' right to be informed in advance of the evidence that the Respondent and Interested Party intended to rely on in order to prepare their defence. Lastly the 2nd Petitioner alleges that he was not provided with sufficient time to prepare his defence.

63. The Respondent's reply is that the petitioners have not properly demonstrated how their right to a fair hearing was violated by the actions of the Respondent.

64. The Interested Party herein, contends that Article 50 (1) is not applicable in this matter as the petitioners are being subjected to administrative action for which the Article does not apply. Additionally, they claim that Article 50 (2) cannot apply in these proceedings as it only applies to criminal proceedings.

65. The Interested Party also submits that the petitioners are estopped from claiming a breach of their rights as they were offered every opportunity to submit their defence but they failed to do so.

66. The petitioners' main complaint is that rules 48 and 49 of the AQS By-Laws were not complied with. By-law 48 provides that:-

“Upon receipt of a complaint against a registered person, the Board shall notify the person complained of, giving the grounds of the complaint, under cover of registered letter...”

67. By-law 49 states:-

“The Board may call upon the person whose conduct is complained of or is under investigation to file, within ten days thereafter, an explanation in answer to the complaint and may require such explanation to be verified by affidavit.”

68. Article 50(2) of the Constitution provides that the right to fair hearing includes the need to inform the accused person of the charge with sufficient detail to answer it; provision of adequate time and facilities to the accused person to prepare a defence; and that the accused person has knowledge in advance of the evidence to be used against him in the trial and has access that evidence.

69. The Interested Party submits that the right to a fair trial protected by Article 50 of the Constitution only extends to criminal trials and not civil proceedings. The law on the reach of Article 50 was expressed by the Court of Appeal in the case of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** as follows:-

“[22] That leads me to the consideration of articles 47 and 50 of the Constitution. The complexity of this appeal has partly been caused by the simultaneous invocation of the right to fair administrative action under article 47(1), the right to fair hearing under article 50(1) and natural justice – the right to fair hearing under the common law.

Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.

It was inappropriate therefore, for the 1st respondent’s counsel to invoke article 50(1) in this appeal particularly article 50(2) (k) which refers to right of an accused person to adduce and challenge evidence. The right to fair hearing under article 50 does not apply to the decision of the JSC under appeal. Rather, it would apply to proceedings in the tribunal appointed by the President.”

70. The cited case demonstrates that the right to a fair trial applies to proceedings whether before a court or tribunal where the law will be applied and interpreted for purposes of making a determination. Given the nature of the complaint before the Respondent, the determination would be made based on the law and the evidence to be adduced by the parties. The proceedings are intended to determine whether the petitioners breached the profession’s code of conduct. Such a hearing can only be equated to a hearing before a tribunal appointed to determine the eligibility of a judge to continue serving as a judge. The proceedings before the Respondent would therefore call for the application of Article 50 of the Constitution.

71. The petitioners also claim that their right to fair administrative action as provided under Article 47 of the Constitution was infringed by the actions of Respondent. They also contend that the proceedings before the Respondent raises the same issues of professional misconduct as in the arbitration proceedings. They claim that this goes against public policy and does not promote the efficient, reasonable and affordable use of resources and exposes the petitioners to extra undesirable costs.

72. Looking at the evidence provided by the petitioners and Respondent, it is clear that there was no notice provided to the petitioners as to the complaints against them. The petitioners were also not informed of the particulars, if any, of the complaint by the Interested Party against them. They were only told to appear for a hearing. The Respondent never notified the petitioners of any complaint in writing and neither were the petitioners asked to file an explanation as required by rules 48 and 49 of the AQS By-Laws. The net effect is that the laid down procedure was not complied with. The first letter dated 13th November, 2013 addressed to the 2nd Petitioner by the Respondent asked him to present himself before the Committee on 11th December, 2013 and make oral presentation on the matters touching on the development of SEC.III MN SUB-DIVISION NO. 3464 MTWAPA.

73. The second letter dated 28th February, 2014 addressed to the 2nd Petitioner by the Respondent stated as follows:-

“RE: THE MATTER OF EDG & ATELIER ARCHITECTS VS MTWAPA HEIGHTS LIMITED

Reference is made to the above matter.

The Board is in receipt of a complaint from M/S Mtwapa Heights Limited against you on matters related to your professional conduct.

In accordance with Cap. 525 By-Laws 46, 47, 48, 49 and 50, the Board hereby invites you for a meeting on Wednesday 12th March 2014 at 2.30p.m. The venue for the meeting shall be Boraqs Boardroom.

You are further requested to provide copies of all contract documents and agreements, Bills of Quantities and drawings, approval correspondences and any other relevant document in the matter.”

74. Although the second letter clearly confirmed that the 1st Petitioner was being taken through the disciplinary process envisaged by the AQS By-Laws, the letter, just like the first one did not inform him what the complaint was.

75. The Respondent argues that the AQS By-Laws were complied with by virtue of the petitioners’ knowledge of the investigation and the fact that they responded to the letters sent to them. The Interested Party adds that the petitioners were afforded an opportunity to provide their defence but refused to do so and were therefore estopped from claiming that there has been a breach of their rights.

76. I find that the law is very clear, that before any person is summoned before the Respondent to put forward their defense they must be provided with the written grounds of the complaint against them by the Respondent. It is clear from the evidence before me that this was not the case, and as such the Respondent failed to comply with AQS By-Law 48 which required it in mandatory terms to **“notify the person complained of, giving the grounds of the complaint”**. The Respondent concedes this was not done.

77. The petitioners assert that their right to fair administrative action as provided under Article 47 of the Constitution has been infringed by the actions of Respondent. This assertion is indeed correct, the failure by the Respondent to comply with the AQS By-Laws violated the petitioners’ right to fair administrative action. They were being asked to go for a hearing without being told the allegations against them. The Respondent, and not the Interested Party, is the body that was mandated by the law to frame the charges against the petitioners. It failed to discharge its statutory duty.

78. The petitioners also claim that the proceedings before the Board raise the same issues of professional misconduct as in the arbitration proceedings. They contend that this goes against public policy, and does not promote the efficient, reasonable and affordable use of resources and exposes them to extra undesirable costs.

79. The Respondent has submitted in its replying affidavit and submissions that the matter before the arbitrator concerns financial disputes while the matter before them is to do with professional misconduct and therefore the petitioners are not being tried twice on the same issues.

80. On its part, the Interested Party contends that the issue of plurality of proceedings has not been raised before the Respondent and that if the petitioners’ concerns are genuine they should have raised the issue before the Respondent’s Committee.

81. On the matter of plurality of proceedings, I have considered the evidence before me being the list of issues to be determined in the arbitration proceedings. Within this list, particularly issue number 13, it is stated that the claimant’s (the 1st Petitioner’s) actions will be considered in order to ascertain whether it acted unprofessionally. It is therefore evident that the professional misconduct complained of against the 1st Petitioner is an issue to be determined in the proceedings before both the arbitrator and the Committee of the Board.

82. The Respondent and the Interested Party submits that the matter before the Respondent would deal with the petitioners’ professional ethics whereas the one before the arbitrator would address financial issues. Although I do not find anything wrong with proceeding with the disciplinary proceedings and arbitration proceedings simultaneously, there is the risk that the two adjudicatory bodies may come up with conflicting decisions on the issue of professional ethics considering that both referees have been asked to deal with the issue of the professionalism of the petitioners. This court was informed at the hearing of the petition that the arbitration proceedings had been concluded. This issue has therefore become moot as there is no possibility of the Respondent issuing a decision on the disciplinary matter that is contrary to that of the arbitrator. I need say no more.

83. The petitioners further submit that their right to equality before the law and freedom from discrimination was infringed by the Respondent in taking action on the Interested Party’s complaint dated 6th November, 2012, before considering the 1st Petitioner’s complaint as evidenced by their letters dated 29th October, 2012 and 14th November, 2012. In its submission the Respondent does not directly respond to this allegation but simply states that the petitioners have not met the threshold of proof as set out in the case of **Anarita Karimi Njeru v A.G. [1979] eKLR**.

84. The Interested Party in its submissions claims that the Respondent as an administrative body has the discretion to decide the manner and order in which it determines complaints brought before it. It does not contest the fact that the petitioners’ complaint was the first in time, but contends that the Respondent was replying to an active request. It claims that the petitioners failed to follow up on their request and therefore slept on their rights.

85. I have perused the court file but I do not seem to find any evidence of the petitioners’ alleged complaint. There is however a letter dated

18th December, 2013 addressed to the Registrar of the Respondent by the firm of Njoroge Regeru and Company Advocates on behalf of the Interested Party in which it is stated, *inter alia*:-

“The issue herein arose out of a complaint made by EDG & Atelier Limited (“EDG”) to the Board of Registration of Architects and Quantity Surveyors (“BORAQS”) vide EDG’s letter dated 29th October, 2012. Our client responded to the said letter and raised a counter-complaint based on EDG’s professional misconduct.”

86. It is apparent from the said letter that the petitioners’ complaint was the first in time. The petitioners followed up on their complaint through letters dated 14th November, 2012 and 14th January, 2013. This proves that the petitioners did not sleep on their rights as alleged by the Interested Party. Furthermore, the Respondent has not responded to this particular complaint or given any explanation as to why it did not respond to the same. However, based on the evidence placed before the court, one cannot say that the actions or omissions of the Respondent amount to preferential treatment.

87. The impression one gets from this case is that the Respondent needs to streamline its operations so that it can give efficient services to its clients. It appears that at the time this matter was filed the Respondent was still in the learning process. I note that no harm has been suffered by the petitioners by the failure to address its complaint first. Had the petitioners been put on their defence, they would still have had an opportunity to submit their complaint against the Interested Party before the Respondent and would have been afforded a chance to be heard on their complaint. At the end of the day both complaints stem from the same contract, same facts and same sequence of events and therefore any decision made either upon a complaint by the Interested Party or the petitioners, would have taken both parties’ positions into consideration. I therefore find that the right to equality before the law and non-discrimination was not violated by the Respondent.

88. On the allegation of the violation of the national values and principles of governance, the petitioners claim that the Respondent as a public body is mandated to enforce and apply the national values and principles of good governance. It is their case that the Respondent failed to adhere to the constitutional standards by failing to take action on its complaint, failing to respond to their correspondences, and granting preferential treatment and priority to the Interested Party.

89. The Interested Party’s response is that the petitioners have been included in the entire disciplinary proceedings and have been accorded their rights to equality, rule of law, non-discrimination and human dignity.

90. By virtue of the decision on the right to equality before the law and freedom from discrimination, I cannot find that there has been a violation of the national values and principles of governance. As already stated, there is no evidence that the Respondent’s actions were driven by malice and aimed at injuring the petitioners.

91. In conclusion, I find that the Respondent’s actions violated Article 47 of the Constitution. It is my finding that the failure of the Respondent to abide by the AQS By-Laws resulted in the violation of the petitioners’ right to fair administrative action. Had the petitioners not quickly moved to this court to protect their rights, their right to a fair hearing was also likely to be violated.

92. Although one of the reliefs sought by the petitioners is compensation for the infringement of their rights, the petitioners did not make any submission on the issue. I take note of the fact that no harm was occasioned to the petitioners by the actions of the Respondent. The court stayed the proceedings before the Respondent at the interlocutory stage. As already stated, it is evident that no malice has been established on the part of the Respondent. In my view, this is a case in which declaratory orders will be sufficient remedy.

93. Looking at the reliefs sought by the petitioners, and considering my findings in this judgement, I allow the petition and enter judgement in favour of the petitioners as follows:-

- a) A declaration is hereby issued that the failure by the Respondent to comply with the Architects and Quantity Surveyors By-Law 48 was illegal, unconstitutional and an infringement of the petitioners’ right to a fair hearing as enshrined in Article 50 of the Constitution and contravened the petitioners’ right to administrative action that is lawful and procedurally fair as enshrined in Article 47 (1) of the Constitution of Kenya.
- b) An order of mandamus is issued directing the Respondent to comply with the Architects and Quantity Surveyors By-Laws if they intend to proceed with the disciplinary proceedings against the petitioners; and
- c) The petitioners are awarded the costs of the proceedings against the Respondent.

Dated, signed and delivered at Nairobi this 13th day of February, 2020

W. Korir,

Judge of the High Court