



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 132 OF 2018**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 2(1), 3(1), 10,19, 20, 22, 23, 25, 27, 28, 29, 43, 50(2), 157, 159, 165(3), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ADVOCATES ACT (CAP 16) LAWS OF KENYA**

**AND**

**IN THE AMTTER OF PROCEEDINGS AND RULING BEFORE THE DISCIPLINARY COMMITTEE CAUSE NUMBER 16 OF 2015**

**AND**

**IN THE MATTER OF SECTIONS 55, 57 AND 60 OF THE ADVOCATES ACT CAP 16, ACT NO. 7 OF 2007**

**PETER GICHUKI KING'ARA.....PETITIONER/ RESPONDENT**

**VERSUS**

**THE ADVOCATES DISCIPLINARY TRIBUNAL**

**OF THE LAW SOCIETY OF KENYA.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**MICHAEL MUCHUI CHEGE.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. The Applicant, The Advocates Disciplinary Committee through an Application pursuant to *Order 50 Rule 6 of the Civil Procedure Rules* seek the following orders:-

*a) That the Court does extend time for the Appellant to have its Notice of Appeal on Record.*

*b) That the attached Notice of Appeal be deemed to have been duly filed on time upon payment of the requisite filing fees.*

*c) That costs be provided for.*

2. The Petitioner/Respondent did not file any Replying Affidavit.

3. The Application is supported by annexed supporting affidavit by Mercy Mwinzi sworn on 4<sup>th</sup> July 2019 and supplementary affidavit sworn on 14<sup>th</sup> October 2019 and grounds in support on the face of the application being numbers 1 to 7.

4. The Respondent/Petitioner Peter Gichuki King'ara is opposed to the application and in doing so, he filed Notice of Preliminary Objections being as follows:-

**a) The Law Society of Kenya, the proposed Appellant was/is not a party in these proceedings and does not have locus standi to appeal against the said decision.**

**b) The "Society" has no litigable interest in the matter, and cannot act as prosecution and judge in any proceedings.**

**c) No proper reasons has been given for the delay in any event.**

#### **ANALYSIS AND DETERMINATION**

5. I have considered the application by the Applicant dated 3<sup>rd</sup> July 2019 and the Petitioner's/Respondent's preliminary objection dated 8<sup>th</sup> July 2019, parties rival submissions and the issues for consideration that arise in this matter are as follows:-

**a) Whether the preliminary objection is meritorious?**

**b) Whether the application has met the threshold to warrant it being granted?**

#### **A. WHETHER THE PRELIMINARY OBJECTION IS MERITORIOUS?**

6. The Court herein heard the Petition and delivered its Judgment on 31<sup>st</sup> May 2019 in absence of the Applicant/Respondent but in presence of the Petitioner/Respondent. The Applicant/Respondent contend that Judgment was delivered without notice being served to its counsel on record. In the Court's Judgment, it nullified and/or quashed the proceedings in Disciplinary case No.16 of 2015 and declared the 1<sup>st</sup> Respondent's /Applicant's conduct in the said Disciplinary Case null and void and in breach of the Rules of Natural Justice and fair hearing under **Article 47, 48 and 50 of the Constitution**. It is urged that the Law Society of Kenya through their advocates filed the current application as proposed appellants on behalf of the Respondents.

7. The Petitioner/Respondent in his preliminary objection contend that the Applicant/Respondent herein does not have the legal standing and capacity to file the application herein and/or seek leave to institute an appeal against the Court's Judgment. It is averred by the Petitioner/Respondent, that this was null and void as the proceedings, were instituted by a letter dated 4<sup>th</sup> February 2019 addressed to the Petitioner informing him of a complaint lodged against him and requiring him within fourteen (14) days to provide his written comments on the same for the purpose of forwarding the same to the 1<sup>st</sup> Applicant/Respondent for decision on whether the complaint disclosed a prima facie case.

8. The Petitioner contend that the Court heard the proceedings before the 1<sup>st</sup> Respondent, which was initiated by a letter from the secretary of the Law Society of Kenya in her capacity as such, and was abortive and a non-starter.

9. It is further submitted that the applicant here is the secretary of the Law Society of Kenya and acts in her capacity as such and not for the Advocates disciplinary committee. It is contended that the Applicant is not a party to this Petition and the mere fact that the Advocate's Disciplinary Committee works adjacent to the Law Society of Kenya does not mean that one can act in a place of it.

10. The Petitioner/Respondent in support of the above propositions referred to the case of **Republic v. Law Society of Kenya Ex-parte Nelson Havi & another [2018] eKLR**, the Court held:-

***"Therefore the directions emanating from the Tribunal's secretary in that capacity must be express that they are being given on behalf of the Tribunal and not the society. In this case it is not in doubt that the letter dated 7<sup>th</sup> September, 2016 addressed to the Ex Parte Applicant informing him of the complaint lodged against him and requiring him within fourteen (14) days to provide his written comments on the same for the purpose of forwarding the same to the 2<sup>nd</sup> Respondent for a decision on whether the complaint disclosed a prima facie case was written by the 3<sup>rd</sup> Respondent as the Secretary of the 1<sup>st</sup> Respondent, the Society and not as the secretary of the Tribunal. As held in Hardware & Ironmongery (k) Ltd vs. Attorney-General (Supra) what matters is the taking of the decision and not the signature. It therefore does not matter whether it is the same person that doubles as the secretary to the Tribunal that signed the letter but the capacity in which she did so... It is therefore clear that the Respondents commenced the disciplinary proceedings against the ex parte applicant on the wrong footing.... It is my view and I find that the letter which initiated the disciplinary process, in so far as it was authored by the 3<sup>rd</sup> Respondent in her capacity as the Secretary to the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent was clearly unprocedural. Therefore the whole disciplinary process was abortive and a non-starter (Our emphasis)."***

11. In **Wilberforce Nyaboga Mariaria vs. The Law Society of Kenya [2016] eKLR** and **Republic vs. Law Society of Kenya & another [2015] eKLR** considered in **Republic v Law Society of Kenya ex-parte – Nelson Havi & another [2018] eKLR** above, it was held that the **Law Society of Kenya, and the Disciplinary Committee/Tribunal are two distinct legal entities and one cannot be substituted one for the other.**

12. It is therefore contended that to the extent that the Societys intending to appeal on behalf of the 1<sup>st</sup> Applicant is thus improper and hence the application herein should not be entertained by this Honourable Court.

It is averred that it is trite law that the 1<sup>st</sup> Respondent, being an independent body established by the Advocates Act is separate from the Law

Society of Kenya established under the Law Society of Kenya Act.

13. It is further urged by the Petitioner/Respondent that the applicant lacks the locus standi to file the application herein and appeal against the decision of the Honourable Court. In support of this proposition the Petitioner/Respondent relies on the case of **Alfred Njau & 5 Others v. City Council of Nairobi (1983) eKLR** where it was stated:-

***“The term locus standi means a right to appear in court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceedings.”***

14. It is urged by the Petitioner/Respondent that the 1<sup>st</sup> Respondent is a quasi-judicial body operating in the adjudication of the differences between the 2<sup>nd</sup> Respondent and the Petitioner/Respondent. It is urged the 1<sup>st</sup> Respondent was acting as the Neutral Party whose enjoinder with the parties was limited to delivery of Judgment. The Petitioner aggrieved by Judgment delivered by the 1<sup>st</sup> Respondent instituted the present petition herein, in which the 1<sup>st</sup> Respondent is the Applicant herein and whose proceedings the court nullified. It is Petitioner’s contention that the 1<sup>st</sup> Respondent/Applicant does not have any legal standing qualifying it as an appealing party in the Petitioner herein; nor can it allege to represent the interest of the 2<sup>nd</sup> Respondent for the sole reason that it cannot be both the prosecutor and judge.

15. The Petitioner/Respondent assert that this Honourable Court declared the 1<sup>st</sup> Respondent/Applicant’s conduct null and void. It is Petitioner/Respondent’s view that it is utterly defective for 1<sup>st</sup> Respondent/Applicant to seek to appeal and/or file the application herein due to lack of standing to do so.

16. The Petitioner/Respondent contend that the respondent does not have any litigable interest in the matter herein and further cannot take up the role of complainant, the 2<sup>nd</sup> Respondent and act as the prosecutor and judge. The Petitioner/Respondent urge the 1<sup>st</sup> Respondent usurped the role of the complainant and proceed *suo moto* in the disciplinary hearing as in the case in this petition. It is further contended that the judgment of the Honourable Court does not affect in any way, affect the applicant to warrant or appear in any court of law. It is averred the 1<sup>st</sup> Respondent/Applicant filing the current application is usurping the role of the complainant. The 2<sup>nd</sup> Respondent have and intend to appeal to a decision emanating from an alleged complaint by the 2<sup>nd</sup> Respondent. The Petitioner/Respondent averments is that the 1<sup>st</sup> Respondent/Applicant has no litigable interest in the Petition herein or in the intended appeal as the initial dispute was between the petitioner and the 2<sup>nd</sup> Respondent.

17. It is contended that when the petitioner/Respondent instituted the petition herein, against the respondents, the 2<sup>nd</sup> Respondent did not participate despite proper service and has never been interested in the proceedings. However the 1<sup>st</sup> Respondent /Applicant who was the adjudicator in the disciplinary proceedings participated in the petition and have now expressed their interest to appeal dispute that they were not party and/or privy to the transaction between the petitioner and/the 2<sup>nd</sup> Respondent. It is therefore Petitioner’s assertion that it does not comprehend the interest the 1<sup>st</sup> Respondent, and by extension the Law Society of Kenya has in the Petitioner herein despite being an independent quasi-judicial body.

18. The 1<sup>st</sup> Respondent/Applicant, the Advocates Disciplinary committee, counters the Petitioner’s/Respondent’s preliminary objection by urging that the Preliminary objection is not a pure point of law. The point of preliminary objection as pleaded require the Applicant to present evidence by way of affidavit or otherwise as to its nexus with the Law Society of Kenya. The Applicant herein is the Advocates Disciplinary Committee and not the Law Society of Kenya. The Advocates Disciplinary Committee is an independent body established by the Advocates Act and is separate and distinct from the Law Society of Kenya established under the Law Society of Kenya Act.

19. The Application before this court is clear that it has not been filed and brought before this court in the name of the Law Society of Kenya. It is therefore not clear why the name of the Law Society of Kenya is invoked in the Petitioner’s/Respondents preliminary objection. However it should be noted that the Law Society of Kenya acts as a secretariat for the Advocates Disciplinary Tribunal. The question as to who gives an advocate instructions to pursue a matter is only an issue that is only relevant to matters of taxation and not a substantive motion in determination of a matter on merits.

20. On what constitutes a preliminary objection the 1<sup>st</sup> Respondent/Applicant relies on the case of **Independent Boundaries Commission v. Jane Cheparangu & 2 Others (2015) eKLR** in when the court endorsed the principle in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**, that;

***“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

***“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”***

21. I have considered the rival submissions and the principle set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors (Supra)** and agree as guided by the authority that a preliminary objection may only be raised on a “pure question” of law. I have considered the preliminary point of the law raised herein and I am satisfied that the facts are indisputable; indeed the 1<sup>st</sup> Respondent challenges the facts as incorrect. The facts are not agreed upon. I find the preliminary objection raised by the Petitioner/Respondent do not

raise pure points of law as been pleaded or which arises by clear implication out of the pleadings and which if argued can dispose of the suit. I find that preliminary objection to be without any merits.

**B. WHETHER THE APPLICATION HAS MET THE THRESHOLD TO WARRANT IT BEING GRANTED?**

22. The 1<sup>st</sup> Respondent relies on supporting affidavit sworn by Mercy Mwinzi on 3<sup>rd</sup> July 2019 and supplementary affidavit sworn by Mercy Mwinzi on 14<sup>th</sup> October, 2019; together with annexures “MM1-MM3”.

23. The 1<sup>st</sup> Respondent/Applicant aver that it was never served with a judgment Notice as to the date on which the judgment was scheduled for delivery, as earlier date which has been set for Judgment, the court was not sitting.

24. The Court record show that the Judgment had been set on 5<sup>th</sup> December 2018 for 13<sup>th</sup> May 2019 but on 13<sup>th</sup> May 2019 the Judgment was not delivered and no reasons are recorded for the failure to deliver Judgment on 13<sup>th</sup> May 2019. The judgment was however delivered on 31/5/2019 in presence of the Petitioner but in absence of the Respondent.

25. The 1<sup>st</sup> Respondent/Applicant got information that Judgment had been delivered through a letter from its instructing client on Friday the 28<sup>th</sup> June 2019 at 5p.m. (annexture MM1), to the affidavit of Mercy Mwinzi of 3<sup>rd</sup> July 2019. The Applicant filed the present application on 4<sup>th</sup> July 2019 for an extension of time for the Applicant to have its Notice of Appeal on record.

26. The averments in the Applicant’s application have not been controverted or challenged by the Petitioner/Respondent by way of an affidavit or otherwise. Upon considering the reasons for delay I find that the same are reasonable and further that the application was filed without unreasonable delay. The delay at any rare was caused by Court’s failure to notify the Applicant the date scheduled for delivery of judgement upon failing to delivery judgment on 13<sup>th</sup> May 2019.

27. The 1<sup>st</sup> Respondent /Applicant urges that it has arguable appeal, which raises issues for determination with overwhelming chances of success. The draft memorandum of Appeal with several grounds is duly annexed to the affidavit by Mercy Mwinzi as (MM 3). From the Memorandum of Appeal the 1<sup>st</sup> Respondent/Applicant has not only stated the appeal has overwhelming chance of success but has demonstrated why it believes so, and has pointed out, what it believes are glaring errors in law, in the proceedings and judgment, which it believes, will cause the Court to see the appeal as having overwhelming chances of success. In the case of **Geoffrey Karanja Wainaina vs. Republic (2004) eKLR**, the Court held that:-

***“It is not enough for one to merely state that an appeal has overwhelming chances of success, he must show to the appellate court why he believes that to be so. One can do so by pointing out any glaring irregularities or mistakes in law which may be standing out either tin the proceedings or in the judgment as would be likely to cause the court to see that the appeal is prima facie well founded and thus has high chances of success.”***

28. In view of my findings, herein above, I find that the Petitioner’s /Respondents preliminary objection dated 8<sup>th</sup> July 2019 is without merit. I find the 1<sup>st</sup> Respondent/Applicant’s application meritorious.

29. ***I accordingly make the following orders:-***

***a) The Notice of Preliminary Objection dated 8<sup>th</sup> July 2019 is without merits and is struck out.***

***b) The 1<sup>st</sup> Respondent’s /Applicant Notice of Motion is granted in the following terms:-***

***i) The time for the 1<sup>st</sup> Respondent/Applicant to have the Notice of Appeal on record is extended.***

***ii) The attached Notice of Appeal be and is hereby deemed to have been duly filed on time upon payment of requisite filing fees within the next 7 days from the date of this court’s Ruling.***

***c) Costs of the application be in the cause.***

**Dated, Signed and Delivered at Nairobi on this 16<sup>th</sup> day of July, 2020.**

.....

**J. A. MAKAU**

**JUDGE**