



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW & CONSTITUTIONAL DIVISION

JUDICIAL REVIEW NO. 149 OF 2019

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 2

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF AN APPLICATION BY ANNE MWIKALI KIUSYA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF AN ORDER OR CERTIORARI DIRECTED TO THE DISCIPLINARY TO THE DISCIPLINARY TRIBUNAL

ANN MWIKALI KIUSYA.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL.....RESPONDENT

DAVID MUTISYA MAKUMBI.....INTERESTED PARTY

JUDGMENT

[1] By a Notice of Motion dated 27th May 2019 upon leave granted by the court on 13th May 2019, the ex parte applicant sought the following specific judicial review orders:

“ORDERS:

- a) THAT the Honourable Court be pleased to grant an **ORDER OF CERTIORARI** to remove into the High Court and quash the entire decision made by the Respondent and issued on 1st of April 2019 in Disciplinary Complaint Cause Number 97 of 2016 **for the matter to proceed by way of Viva Voce evidence instead of written submissions as previously ordered.**
- b) THAT the order of leave granted by this Honourable Court on 13th May 2019 do operate as stay of the proceedings in **DTC No. 97 of 2016.**
- c) THAT the costs of this application be provided for.”

[2] In support of the application the ex parte applicant set out her case in the Statutory Statement filed under Order 53 (1) (2) of the Civil Procedure Rules as follows:

“B. THE FACTS RELIED ON

5. That on the 12th day of August, 2016 a complaint was lodged with the Respondent against the Applicant by the Interested Party for failure to account for a sum of Ksh.45,000,000/= and withholding client’s money.
6. That the matter was before the Respondent on the 24th day of October 2016 and was referred to Mediation and listed for mention for the 6th day of February 2017 and thereafter listed for mention for the 22nd of May 2017.
7. That on the 22nd day of May 2017 the matter was listed for mention before the Tribunal and a plea of not guilty was recorded in

respect of the charges against the Advocate and directions were given on the hearing date.

8. That on the **18th day of September 2017** Counsel for the accused Advocate NZILANI MUTETI sought and was granted leave to file further documents and also to cross examine the Complainant on the next hearing date that was scheduled that was the 5th day of February 2018.

9. That on the **11th of June 2018** when the matter was listed again for the hearing the order to cross examine the Complainant was endorsed and the Tribunal ordered the matter to proceed Viva Voce and this was again reiterated on the 1st of October 2018 but limited to **thirty (30) minutes**.

10. That on the 1st of April 2019 when the matter came up for hearing the Tribunal reviewed its previous orders and ordered the matter to proceed under Rule 18 and the Complainant was given 21 days to file submissions and the Applicant similar time after being served with submissions and judgment is scheduled to be delivered on 15th July 2019.

11. That the decision by the Respondent to deny the applicant an opportunity to cross examine the Complainant was grossly unconstitutional, unreasonable, irrational, unfair and unlawful taking into account that the Applicant's profession as an Advocate and Officer of the Court is at Stake in view of the Complainants accusations against her.

12. That the Respondent in setting aside the previous orders did so as in a casual and reckless manner hence depriving the Applicant a fair hearing.

13. That it is just and equitable that the application filed herein be heard immediately and orders sought granted for the ends of justice to be achieved.”

[3] In response, the Interested Party filed a Notice of Preliminary Objection dated 4th June 2019. The respondent did not file any response although duly served. The Interested Party's Preliminary Objection was as follows:

“NOTICE OF RAISING A PRELIMINARY OBJECTION

TAKE NOTICE that the Interested Party, **DAVID MUTISYA MAKUMBI** objects to the Notice of Motion dated 27th May 2019 and filed on 28th May 2019 by the Applicant **ANNE MWIKALI KKUSYA** on the ground that **the Notice of Motion as filed is defective and incompetent in law and shall seek to have the same struck out with costs.**

DATED at **NAIROBI** this 4th day of June 2019.

S.M. KEYONZO

ADVOCATE FOR THE INTERESTED PARTY”

[4] In the absence of the Respondent who had been duly notified of the date, the Court gave directions for the hearing of the Notice of Motion and the Preliminary Objection by way of Written Submissions by the parties as follows:

“Court

1. The Applicant's Notice of Motion dated 27th May 2019 and Interested Party's (I.P) Notice of Preliminary Objection dated 4th June 2019 shall be heard and determined together.

2. The Interested Party shall file and serve submissions on both the Preliminary Objection and Notice of Motion within 14 days of today's date.

3. The Applicant shall file and serve their replying submission on both the Preliminary Objection and Notice of Motion within 14 days of service of the I.P's submissions.

4. Mention on 4th September 2019 to reserve a Judgment date.”

[5] On 4th September 2019 judgment was reserved.

[6] The parties filed written submissions urging their respective contentions on the matter. For the Interested Party, it was urged that the application was incompetent as follows:

A. SUBMISSIONS ON THE NOTICE OF PREMINARY OBJECTION

1. Ann Mwikali Kiusya who is described as the applicant in the Notice of Motion dated 27th May 2019 had by Chamber Summons dated 13th May 2019 brought under the provisions of Order 53 of the Civil Procedure Rules and Section 26 of the Law Reform Act

applied for the leave to apply for the judicial review order of certiorari to remove to the High Court and quash the decision of the Advocates Disciplinary Tribunal made on 1st April 2019 that the complaint against her in Disciplinary Cause No. 97 of 2016 proceed by way of affidavit evidence and not by way of viva voce evidence.

2. Leave to apply for the said Order of Certiorari was granted on the same day the Chamber Summons was filed i.e. 13th May 2019 and she was given 7 days in which to file the main Notice of Motion for the said judicial review order of certiorari. The motion was on 20th May 2019 extended for 10 days.

3. The Notice of Motion for the judicial review order of certiorari was filed on 28th May 2019. In the heading of the Notice of Motion, Ann Mwikali Kiusya again appears as the “Applicant” and the Disciplinary Tribunal is described as the “Respondent” The Notice of Motion as drawn and intitled as erroneous and incompetent. As stated in the famous case of Farmers Bus and Others vs. The Transport Licensing Appeal Tribunal [1959] E.A. 779, prerogative orders are issued in the name of the Crown (read the Republic) at the instance of the applicant and are directed to the person or persons who are to comply therewith. After leave to apply for the prerogative order the Republic must be the applicant and the person or persons who directed to comply being the Respondents with the person who has obtained leave and in whose favor the orders are to be made being the ex-parte applicant. The Notice of Motion dated 27th May 2019 as drawn and intitled is erroneous and incompetent and should be struck-out.

B. SUBMISSIONS ON THE MAIN MOTION

4. Rule 18 of the Advocates (Disciplinary) Tribunal Rules reads as follows:

“The Tribunal may in its discretion either as to the whole case or to any particular fact or facts, proceed and act upon evidence given by affidavit”

This is a discretion given to the Tribunal to either proceed by way of oral evidence or affidavit.

5. The applicant complains that by the Tribunal direction that her case be heard on the affidavits filed, she is being denied a fair hearing. But in which way? There are two affidavits filed by the applicant and two affidavits filed by the Interested Party in proceedings before the Tribunal. It is assumed what the applicant wishes to state at the Tribunal is contained on her two affidavits. It cannot be said that she is being denied a fair hearing. As stated in the case of The Union Insurance Company of Kenya Ltd. vs. Ramzon Abdul Bhanji CACA No. 179 of 1996 (unreported) the law is that parties must be given a reasonable opportunity to be heard and not that they must be heard. The Tribunal has not denied the applicant the opportunity to be heard.

6. What is being questioned and is in issue is the discretion of the Tribunal to proceed by way of affidavit evidence. It has been given that discretion by the law. This Court is being asked to direct the tribunal to conduct proceedings in a particular manner. It cannot do so. Even in cases involving prerogative orders the evidence is normally on affidavits and not viva voce. There is nothing unfair or irregular in matter proceeding on affidavits. Unless it is shown that by directing the matter before it proceeds by way of affidavit evidence the Tribunal abused its discretionary power, this Court cannot intervene in that discretion by way of an order of certiorari. The applicant states that the decision was unreasonable, was biased and was based on bad faith and improper motives but has not placed facts before this Court on which unreasonableness, bias, bad faith or improper motive can be inferred.

7. If the applicant feels that by the Tribunal directing that the matter before it proceeds by way of affidavit evidence injustice would be occasioned to her. She can appeal the decision to the High Court because Section 62 of the Advocates Act allows an appeal from a decision of the Advocate Disciplinary Tribunal to the High Court. The application should be dismissed with costs.”

[7] For the Ex parte Applicant, it was urged that the application was properly before the court and the reliefs sought were available as follows:

“B. SUBMISSIONS ON THE NOTICE OF PRELIMINARY

OBJECTION

The Interested Party has filed this Notice of Preliminary Objection on the grounds that the Notice of Motion filed on 28th May 2019 as drawn is erroneous and incompetent and should be struck out.

The main ground upon which the Interested Party bases the Preliminary Objection is the form upon which the Application was filed. The raised issue of form to which the main Applicant should be the Republic whereas the Applicant should be the Ex-parte Applicant.

It is our submissions that this is a mere technicality and is not a fatal defect and the application should be determined on merit.

In the case of **PHILIP MUTUSE KIMUYU –VS- MINISTER OF LANDS AND SETTLEMENT & 4 OTHERS Justice Odunga** held as follows:

21 “As held in Farmers Bus Service & Ors –vs- The Transport Licensing Appeal Tribunal (1959) EA 779., the Court of Appeal for Eastern Africa held that prerogative Orders must be correctly instituted with the Republic as

the Applicant upon leave having been granted. But failure to properly institute the proceedings as such is not fatal, and as held in Farmers Bus Service Case, the proceedings having been shown to be brought in the name of the Applicant, rather than Republic, is with respect not a Preliminary Objection within the meaning of a pure point of Law capable of disposing the entire matter as held in Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, 700 – 1

22. In addition Order 51 Rule 10 (2) of the Civil Procedure Rules has clarified the place of form in pleadings by providing that substance shall not be trumped by the form as follows;

“Order 51, rule 10

10. (1) Every Order, rule or other Statutory Provision Order or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”

We submit that where a case lacks in form or default in compliance with a technicality, the Court must seek to have the defect in form remedied and any correction and or amendments made consistent with the substantial justice principle and ensure that justice prevails. None of the parties shall be prejudiced by such lack of proper form. The merit of the case must be considered. We rest this issue by citing the case of Republic –vs- Gerald Muthee &3 Others Exparte Kithaka Kiragacha, Misc App No. 134 of 2004 – Meru, Ouko J. stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment”

C. SUBMISSIONS ON THE NOTICE OF MOTION DATED 25TH

MAY 2019

From the onset it should be noted that the said Notice of Motion is not opposed by the Interested Party by way of any Pleadings/Replying Affidavit. The Interested Party has not opposed the averments set out in the Statement and the Supporting Affidavit. The Respondent has not also filed any opposition to the application.

*In opposing the Applicant’s application the Interested Party relies on Rule 18 of the Advocate (Disciplinary) Tribunal Rules which gives the Tribunal discretion to determine the manner of proceedings with the hearing of cases before it. It is our submission that the discretion so granted should be exercised in a fair and just manner. In this particular case the parties had agreed to proceed by way of **VIVA-VOCE** evidence and the Tribunal (Respondent) had granted the Applicant **THIRTY (30) minutes** to cross examine the Interested Party. The Order to Cross-examine was extended on three (3) occasions as clearly evidenced by the Tribunal Proceedings annexed as exhibit 4 page 107.*

In setting aside the previous order the sitting members of the Tribunal did not give any justifiable or reasonable cause. This in our humble submission amounted to abuse of the discretionary power conferred upon it by Rule 18 of the Advocates (Disciplinary) Tribunal Rules.

The issue before the Tribunal against the Applicant was failure to account for money receive by the Applicant on behalf of the Interested Party. True affidavits were filed but the Interested Party disputed receipt of the funds despite his having signed acknowledgment notes.

*The only way to test the veracity and demeanor of the Interested Party was by cross-examination. The Applicant’s livelihood is her Professional standing and repute and she stands to suffer irreparably if not given a fair hearing. **Section 62** of the Advocates Act will only apply after a fair hearing has been conducted.”*

ISSUE FOR DETERMINATION

[8] The issue before the Court is simply whether the Notice of Motion application is competent and, if so, whether the court may direct the disciplinary tribunal on its procedures.

DETERMINATION

Substantive justice

[9] At the outset, I would readily agree that the effect of Order 52 rule 10 (2) is to support the overriding objective of the civil process that

the court shall grant substantive justice without undue regard to the strictures of technicality, as follows:

“10. (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

[10] The principle of substantive justice is also a constitutional imperative since the 2010 Constitution which by Article 159 (2) provides as follows:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

[11] Is the failure to properly intitle the application before the court a mere technicality which may be cured by Article 159 and Order 52 rule 10 (2) of the Civil Procedure Rules. That is the question.

[12] The objection as to intitulement of proceedings is one of form only. It does not go to the root of the competence of suit. The Court has discretion to allow amendment to properly intitule the proceedings. See section 100 of the Civil Procedure Act, which provides as follows:

“The court may at any time, and on such terms as to costs or otherwise as it may think fir, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

[13] It cannot be the subject of a preliminary Objection in the technical sense, and I respectfully agree with Odunga J. in the case cited by the ex arte applicant above.

[14] The practice of improperly raising objection is deprecated in the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) EA 696, 700 per Sir Charles Newbold, P:

“A Preliminary Objection is in the nature of what used to be 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 had to be ascertained or if what is sought is the exercise of judicial discretion. **The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.**”

Constitutional right to fair hearing

[15] Article 50 (1) of the Constitution provides for the constitutional right to fair hearing as follows:

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

[16] The Disciplinary Tribunal is a *tribunal or body* for purposes of Article 50 (1) of the Constitution, which is required to give persons subjected to its procedures a fair hearing. What fair hearing entail? Does it necessary call for viva voce evidence? The position is clear as regards criminal trials that the accused must in accordance with Article 50 (2) (k) be granted a right “to adduce and challenge evidence” necessarily importing an oral hearing.

[17] As regards civil hearings, resort must be had to the principles of fair hearing as set out in the leading case of **De Souza v. Tanga Town Council** (1961) EA 377, 386-7:

“The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of *University of Ceylon v. Fernando* (4), [1960] 1 All E.R. 631. I think that the principles, so far as they affect the present case, may be summarized as under:

(1) If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed. As LORD SHAW OF DUNFERMLINE said in *Local Government Board v. Arlidge* (2), at p. 138 “If a statute prescribes the means it” (the Local Government Board) “must employ them”; and in *University of Cylon v. Fernando* (4), at p. 638 LORD JENKINS, delivering the judgment of the Board and speaking of a clause in the “General Act” of the University of Ceylon, said

“If the clause contained any special directions in regard to the steps to be taken by the vice-chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions”.

(2) If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue: *De Verteuil v. Knaggs* (5), [1918] A.C. 557, 560.

(3) In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means (per LORD SHAW in *Arlidge’s case* (2). It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best: per LORD LOREBURN, L.G., in *Board of Education v. Rice and others* (1), at p. 182; and *Arlidge’s case* (2). A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant: *University of Ceylon v. Fernando* (4), at p. 639. In this respect *Fernando’s case* (4) seems to go further than some previous eminent opinion (See e.g. the dictum of LORD PARKER, C.J., in *R. v. Agricultural Land Tribunal ex parte Bracey* (6), [1960] 1 W.L.R. 911 at p. 913:

“It (certiorari) goes where there has been a breach of some principles of natural justice...like receiving evidence from one party in the absence of another.”

And see per GREER, L.J., in *Errington v. Minister of Health* (7), [1935] 1 K.B. 249 at p. 268 “he must do it in accordance with the rules of natural justice that is to say he must hear both sides and not hear one side in the absence of the other”.

And see the remarks of COHEN, L.J. (as he then was) in *Johnson & Co. v. Minister of Health* (8), [1947] 2 All E.R. 395 at p. 405).

(4) The person accused must know the nature of the accusation made: approved in *University of Ceylon v. Fernando* (4).

(5) A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view: Board of Education v. Rice and Others (1); and to make any relevant statement they may desire to bring forward De Verteuil v. Knaggs (5); General Medical Council v. Spackman (10), [1943] A.C. 627, 641.

(6) The tribunal should see that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once party or from a third party, it should give the other party an opportunity of commenting on it: *Johnson & Co. v. Minister of Health* (8), at p. 404, p. 405.”

In this case, a fair opportunity to those who are parties **to contradict any statement prejudicial to their view** may require the cross-examination of the applicant’s accuser.

[18] The ex parte applicants right to fair hearing before the disciplinary tribunal must necessarily import oral hearing if the accused in the sense of the person facing proceedings so requests. It is not, with respect, the same as Order 53 proceedings as submitted by the Interested Party, that the proceedings here are heard on the basis of affidavits. Simply, the reason is that the judicial review court is not unlike the disciplinary tribunal a **fact finding** court. The judicial review court determines the legality of the process, the procedural fairness of the proceedings before the Disciplinary Tribunal, for instance, and the Tribunal determines the merits of the claim before it on the basis of facts proved before it. It is paramount that the procedure for the proof and determination of the facts of the case before the fact finding tribunal be fair to the parties, and especially to the accused advocate qualification and competence to practice law as such advocate, and, consequently, his livelihood, is threatened by those proceedings.

Prejudice to the parties?

[19] Hearing of the complainant by *viva voce* evidence has not been shown to prejudice the Interested Party, the complainant in the proceedings before the Disciplinary Tribunal.

[20] There is no replying affidavit by the Respondent or the Interested Party. There is therefore no substantive objection to the application. The Interested Party has only suffered a delay in the determination of the application and, therefore, his own complainant before the Disciplinary Tribunal.

[21] The determination of complaint before the Disciplinary Tribunal is a serious matter as it may lead to the offender being struck off the Roll of Advocates making him unqualified to practice law in the Republic. It must be taken with the same seriousness of procedures as to hearing. Even where the Tribunal makes directions for hearing on the basis of affidavit evidence, a party may still apply for the Tribunal’s leave to cross-examine a deponent by analogy to the provisions of Order 19 Rule (1) Proviso of the Civil Procedure Rules as follows:

“[Order 19, rule 1.] Power to order any point to be proved by affidavit.

1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by

affidavit.”

It is also clear from the provision on affidavits under the Civil Procedure Rules that the power to order evidence by affidavits is an exception to the general rule for oral evidence, which power is exercised for sufficient reason.

[22] Indeed, the Tribunal has under section 58 (4) of the Advocates Act the powers to summon witnesses as follows:

“58. Proceedings of Tribunal

(1)

(2) ...

(3) ...

(4) *For the purposes of any application or complaint made to it under this Part, the Tribunal may administer oaths or affirmations, and **the complainant and the advocate to whom a complaint relates, and an applicant making any application to the Tribunal, may take out a summons to give evidence or to produce documents**, but no person shall be compellable under any such summons to produce any document which he could not legally be compelled to produce at the trial of a suit.*

(5) ...

(6) *The Tribunal may make rules for regulating the making to the Tribunal, and the hearing and determination by the Tribunal, of applications or complaints under this Part or with respect to matters incidental to or consequential upon its Orders. [Act No. 2 of 2002, Sch., Act No. 12 of 2012, Sch.]”*

[23] No explanation has been presented to this court, for the curtailment of the applicant’s undoubted right to fair hearing in terms of Article 50 (1) of the Constitution, and the court is not able to consider whether the right’s limitation herein is consistent with provisions for Limitation of Rights and Fundamental Freedoms under Article 24 of the Constitution have been observed in the formulation of Rule 18 of the Rules of the Disciplinary Tribunal Rules.

[24] I respectfully agree with Odunga, J. in Misc. Civil Application No. 31 of 2016, **Republic v. The Advocates Disciplinary Tribunal & Anor. ex p. Asige Japheth Savwa** when he held that-

“24, In my view even where the hearing is supposed to be by way of affidavit evidence unless the parties indicate that they do not intend to address the Tribunal, the Tribunal ought to hear them either orally or by way of written submissions.”

In this case, the applicant (the accused advocate in the Tribunal proceedings) has requested to be heard by oral evidence.

CONCLUSION

[25] The ex parte applicant has a constitutional right to fair hearing under Article 50 (1) of the Constitution. The right to fair hearing includes a right to adduce oral evidence and to cross-examine witnesses called against her, as held in **De Souza v. Tanga town Council** (supra). The Interested Party’s objection as to the heading of pleadings is a mere form and cannot be permitted to defeat the substance of the application contrary to the constitutional direction of Article 159 (2) and Order 51 (10) (2) of the Civil Procedure Rules. Despite Rules 18 of Tribunal Rules, where a party desires to be heard orally in proceedings before the court or tribunal, the court or tribunal ought, consistently with Article 51 right to fair hearing, to grant the request despite procedure that allows the court or tribunal to take evidence on affidavits.

ORDERS

[26] Accordingly, for the reasons set out above, the court finds merit in the ex parte applicant’s application herein and the same is allowed as prayed.

[27] There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2019.

J.M. MATIVO

JUDGE

Appearances:

M/S Nzilani Muteti Advocates for the Applicant.

N/A for the Respondent.

Mr. Keyonzo for the Interested Party.