



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 160 OF 2019

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

BETWEEN

REPUBLIC.....APPLICANT

-VS-

THE DISCIPLINARY TRIBUNAL.....1ST RESPONDENT

LAW SOCIETY OF KENYA.....2ND RESPONDENT

EX PARTE: DAVID RONALD NGALA ODHOCH

AND

F.E JAMAL, ADVOCATE.....1ST INTERESTED PARTY

HELLEN AKINYI OKATCH.....2ND INTERESTED PARTY

ATTORNEY GENERAL.....3RD INTERESTED PARTY

JUDGMENT

[1] The ex parte applicant has by Notice of Motion dated 14th June 2019 sought judicial review orders as follows:

1. THAT the applicant herein DAVID RONALD NGALA ODHOCH be granted a judicial review order by way of certiorari to bring before this Court and quash the entire proceedings and judgments/or orders in DISCIPLINARY CAUSE NO. 12 OF 2009 and DISCIPLINARY CAUSE NO. 109 OF 2007.

2. THAT the Applicant herein DAVID RONALD NGALA ODHOCH be granted a judicial review order by way of Mandamus directed at the 1st and 2nd respondents to immediately re-admit the applicant to the Roll of Advocates and to membership of the 2nd respondent and to withdraw any notices and or publications informing the members of the public and or members of the 2nd respondent of their decisions in DISCIPLINARY CAUSE NO. 12 OF 2009 & DISCIPLINARY CAUSE NO. 109 OF 2007 except the notices that those decisions have been quashed and that the applicant has been re-admitted to the Roll of Advocates.

3. THAT the costs of this application be provided for.”

[2] In support of the Notice of Motion the ex parte applicant has set out the facts establishing his cause of action in the Statutory Statement under Order 53 Rule (1) (2) of the Civil Procedure Rules as follows:

“ILLEGALITY OF DECISION AND GROUNDS IN SUPPORTING

FOR THE RELIEF

- a) Article 22 of the Kenyan Constitution 2010 grants every person the right to institute Court proceedings claiming that a right has been denied, violated or infringed.
- b) This Honourable Court is mandated under Article 23 of the Kenyan Constitution 2010 to uphold and enforce the Bill of Rights, including an order of judicial review, Article 23 (3) (f).
- c) Article 43 of the Constitution of Kenya 2010 grants every person the right to be free from hunger and to have adequate food of acceptable quality, Article 43 (1) (c). Therefore by denying the applicant the opportunity to practice law and earn living respondents have violated, denied and infringed on the applicant’s Constitutional Rights.
- d) Article 47 of the Constitution gives the applicant the right to Fair Administrative Action. 47 (1). Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- e) Article 50 of the Constitution grants the applicant the right to fair hearing. Article 50 (6) (b) states that a person who is convicted of a criminal (and for this case quasi criminal) offence may petition the High Court for a new trial if; new and compelling evidence has become available. The applicant has adduced evidence in his Verifying Affidavit which were not before the Tribunal as at the time they arrived at their illegal decisions. Definitely they could have arrived at a different decision if all these evidence were available to them at the time of their decision that is assuming that the proceedings were legal, fair and proper.
- f) Under the Fair Administrative Actions Act, 2015, sec. 7 (1) & (2) any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a Court in accordance with sec. 8 and this honourable Court has the power to review the same.
- g) The Respondents are mandated under and established under the Advocates Act CAP 16 Laws of Kenya and Law Society Act, CAP 18 Laws of Kenya to deal only with Advocates and not persons who are not Advocates and not former Advocates. A person whose name had been removed from the Roll of Advocates is not an advocate in the definition in the Advocates Act.
- h) The Civil Procedure Act and Civil Procedure Rules Order 5 clearly states manner in which serves are effected on persons. These were clearly breached. **No proper Service was affected and or there was no service at all on the applicant** with these proceedings and with the judgments and orders made.
- i) Under the Advocates Act, CAP 16 Laws of Kenya and the Law Society Act, CAP 18 Laws of Kenya, the respondents have jurisdiction over all Advocates only. As at the time these proceedings were instituted and decisions reached, that is 2nd August, 2007 and 20th April, 2009 respectively, the applicant was not an advocate of the High Court of Kenya having been struck off the Role on 12th October, 2006. **They do not have jurisdictions over former Advocates and/or persons whom they had already disbarred and or struck off from the Roll of Advocates.**
- j) The Evidence Act was clearly violated when the respondents **admitted hearsay, irrelevant and unsupported evidence.**
- k) There was **no proper complaint before the respondents as none of the purported and or complainants** had sworn affidavits in support of the complaints. No advocate acting for them came out to swear my affidavit on their behalf. The letters of complaints were signed by third parties were not qualified advocates with instructions to act on their behalf. The complainants were normal persons with no physical or mental challenges.
- l) The respondents acted with heavy hands when suspending and ordering that the applicant be struck off the Roll the circumstances of the applicant’s cases. They were equally unfair to order that the applicant be suspended from the Roll of Advocates for unspecified period of time contrary to section 60 (4) (b) of the Advocates Act which states that the Tribunal may order that such advocate be suspended from practice for a period not exceeding five years.
- m) The respondents **acted contrary to the principles of Natural Justice.** Condemning the applicant unheard. It also appears that they acted in their own case, having admitted an affidavit sworn by the secretary to the Law Society who is part and parcel of the respondents.

n) *The applicant and his children stand to be **denied livelihood** contrary to Article 43 of the Constitution. It is well known in Kenya that Law degree graduates only get meaningful and gainful; employment upon passing through the Advocates Training Programme, after being admitted to the bar as an advocate of the High Court of Kenya, becoming a member of the 2nd Respondent, taking out a practicing certificate and practicing as an advocate.*”

[3] In reply, the Respondents have filed a detailed Replying Affidavit by the CEO of the 2nd Respondent as follows:

“REPLYING AFFIDAVIT

3. **THAT** there two (2) Disciplinary Tribunal Cases pending before the Disciplinary Tribunal (1st Respondent herein) against the Ex parte Applicant and these are; Disciplinary Cause Number 109 of 2007 and Disciplinary Cause Number 12 of 2009.

4. **THAT** on 12th February 2007, the 2nd Respondent received a letter date 8th February 2007 from Helena Okatch, (the 2nd Interested Party herein) requesting it take action against the Accused Advocate’s (Ex parte Applicant’s) law firm for the release of the decretal sum of Kshs.400,000/- received on behalf of the Complainant. (Annexed herein and marked “MKW-1” is a copy of the said letter).

5. **THAT** on 9th March 2007, we wrote to the Accused Advocate requesting for his written comments regarding the complaint made against him to enable us make a decision on how to proceed further in the matter. (Annexed herein and marked “MKW-2” is a copy of the said letter).

6. **THAT** the 2nd Respondent received no response from the Accused Advocate and proceeded to file an Affidavit of Complaint on behalf of the 2nd Interested Party for professional misconduct conduct of the Accused Advocate. Consequently, Disciplinary Cause Number 109 of 2007 was preferred against the Accused Advocate. (Annexed herein and marked “MKW-3” is a copy of the said Affidavit of Complaint).

7. **THAT** the objects of the Law Society of Kenya Act, Chapter 18 Laws of Kenya, (the 2nd Respondent herein) under Section 4 are to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. Therefore it’s the Law Society of Kenya’s mandate through the 1st Respondent to receive hear and determine complaints lodged against advocates such as the Ex parte Applicant herein.

8. **THAT** the 1st Respondent herein is established under Section 57 of the Advocates Act (Chapter 16 of the Laws of Kenya) for purposes, inter alia, of dealing with professional misconduct on the part of advocates.

9. **THAT** the 2nd Interested Party’s complaint was to the effect that the Ex parte Applicant issued bounced cheques, withholding funds belonging to her, contravening the provisions of the Advocates (Accounts) Rules and failing to reply to correspondence from the Respondent.

10. **THAT** following the placing of the Affidavit of Complaint before the 1st Respondent, it did find that there was a prime facie case and the matter was fixed for plea taking on Thursday 2nd August, 2007 and a notice dated 5th July 2007 was sent to the Ex parte Applicant. (Annexed herein and marked “MKW-4” is a copy of the said notice).

11. **THAT** by virtue of Section 60 (1) of the Advocates Act Cap. 16 Laws of Kenya, the 1st Respondent is statutorily mandated to hear any person (whether an advocate or not) a complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate. The complaint made against the Ex parte Applicant was deemed as such by the 1st Respondent hence the setting down of the matter for plea taking on 2nd August 2007.

12. **THAT** on 2nd August 2007, the Ex parte Applicant was present before the 1st Respondent when matter came up for plea-taking. Plea-taking was however deferred to 16th August 2007.

13. **THAT** on 16th August 2007, despite being serve d, the Ex parte Applicant was absent. A plea of not guilty was entered and the matter was scheduled for hearing on 15th October 2007. A hearing notice dated 24th September 2017 was sent to the Ex parte Applicant. (Annexed herein and marked “MKW-5” is a copy of the said notice).

14. **THAT** the matter was then fixed for judgment/mitigation and sentence on 5th November 2007 and a notice to that effect sent to the Ex part Applicant. (Annexed herein and marked “MKW-6” is a copy of the said notice).

15. **THAT** the 1st Respondent by a notice dated 6th November 2007 informed the Ex parte Applicant that he had been convicted of; issuing a bounced cheque, withholding funds belonging to the client and contravening the provisions of the Advocates Accounts rules.

16. **THAT** the 1st Respondent passed its sentence whereby the Ex parte Applicant was struck off the Roll of Advocates and was to pay the amount owing to the 2nd Interested Party within 60 days of the date of the order, in default execution to issue.

17. **THAT** due to an inadvertent error, the order issued indicated that the Ex parte Applicant had been suspended and not struck off

the Roll. This is amendable had the Ex parte Applicant indulged the 1st Respondent for clarity and/or rectification of the same as the judgment and the sentence aforementioned are very clear. (Annexed herein and marked “MKW-7 a & b” are copies of the said notice and Order).

18. **THAT** we ordered that execution due issue against the Ex parte Applicant to recover the sums of Kshs.400,000/- within the stipulated time. There was however no progress and on 21st November 2011, the matter was stood over generally. The Ex parte Applicant was duly notified by a notice dated 23rd November 2011. (Annexed herein and marked “MKW-8 a & b” are copies of the said notice and the typed proceedings).

19. **THAT** the second complaint against the Ex parte Applicant was a complaint dated 6th October 2006 by F.E JAMAL Advocate (the 1st Interested party herein). The Complaint was for professional misconduct and for the refund of the deposit of Kshs.1,591,054/- paid to the Ex parte Applicant via cheque on or about the 14th April 2005. The Ex parte Applicant was to hold the same as stakeholder pending completion of the transaction for the purchase of a property in Kitusuru known as L.R 17/276. (Annexed herein and marked “MKW-9” is a copy of the said Complaint).

20. **THAT** the 1st Respondent vide a letter dated 20th February 2008 duly informed the Ex parte Applicant of the complaint lodged against him. There was no response from his end. On 13th June 2008, the Respondent further requested the Ex parte Applicant to respond to the complaint and to the correspondence from the Advocate’s Complaints Commission as his failure to respond would amount to professional misconduct. (Annexed herein and marked “MKW-10 a & b are copies of the said letters).

21. **THAT** the Advocates’ Complaints Commission on behalf of the 2nd Interested Party formally lodged the complaint with the 1st Respondent which consequently became **Disciplinary Case No. 12 of 2009** against the Ex parte Applicant for; withholding Kshs.1,591,054/- from the complaint, failure to respond to the Commission’s letters dated 20/2/08 and 13/6/08, forging the letter dated 4/5/05 and undated letter purported to be by the complainant Advocate. (Annexed herein and marked “MKW-11 is a copy of the said formal Complaint).

22. **THAT** the 1st Respondent followed the established procedure as seen above and served the Ex parte Applicant with the following; a notice dated 16th March 2009 for plea-taking on 20th April, 2009, hearing notices dated 15th June 2009 and 4th August 2009 respectively and granted 21 days to file his replying affidavit on both occasions. The judgment notice dated 22nd September 2009 indicated that judgment/mitigation and sentence would be on 2nd November 2009. (Annexed herein and marked “MKW-12 a, b and c” are copies of the said notices).

23. **THAT** the 1st Respondent delivered its judgment on 2nd November 2009, and found the Ex parte Applicant guilty of; withholding Kshs.1,591,054/- from the complainant, failure to respond to the Commission’s letters dated 20/2/08 and 13/6/08, forging the letter dated 4/5/05 and undated letter purported to be by the complainant Advocate and convicted him accordingly. (Annexed herein and marked “MKW-13 is a copy of the said Judgment).

24. **THAT** on 3rd November 2009, the 1st Respondent informed the Ex parte Applicant of his sentence as follows;

a) He was struck off the Roll of Advocates;

b) Execution to issue to recover the sum of Kshs.1,591,054/- plus interest.

(Annexed herein and marked “MKW-14 a & b” is a copy of the said notice and Order).

25. **THAT** there was no progress with the execution order and the matter was stood over generally on 20th September, 2010. (Annexed herein and marked “MKW-15 is a copy of the typed proceedings).

26. **THAT** it is not dispute that the Honourable Court by its Judgment delivered on 21st March, 2018 Judicial Review Misc. Application No. 639 of 2006 issued an order of certiorari and quashed the disciplinary proceedings and judgment in Disciplinary Cause No. 4 of 2006 before the Disciplinary Committee of the Law Society of Kenya. The main reason for the Court’s finding was that the Respondent therein was admitting fresh and new evidence on the date when the matter was scheduled for judgment, mitigation and sentence. These facts are quite different from the facts of the two pending matters before the 1st Respondent.

27. **THAT** the 1st Respondent was guided by **Rule 17** of the Advocates (**Disciplinary Committee**) Rules which provides that if any party fails to appear at the hearing, the Committee may at its discretion proceed to hear the matter and determine the complaint his absence notwithstanding. The same Rules under **Rule 18** provide that the Disciplinary Tribunal is mandated to hear the matter relying on the evidence on record given in form of affidavits. This rules governs the Tribunal’s proceedings from unnecessary delays, especially in circumstances where the accused advocate deliberately fails and or neglects to appear, by allowing the Tribunal member to scrutinize the evidence before it and make a finding there from.

28. **THAT** the 1st Respondent is cognizant of Section 60 (3) of the Advocates Act which provides that were a complaint has been referred to it, the 1st Respondent shall give the Advocate an opportunity to appear before it and shall furnish him with a copy of the complaint. Further, it is my contention that the Respondent supplied the Ex parte Applicant with a copy of the complaint as required by law and all the necessary notices and outcome of the matters.

29. **THAT** the decisions reached by the 1st Respondent in **Disciplinary Cause NO. 109 OF 2007 and Disciplinary Cause No. 12 of 2009** were after granting the Ex parte Applicant sufficient time to hear his case. He was given time to file responses to the complaints filed therein but none was forthcoming. The 1st Respondent as mandated by law passed its judgments against the Ex parte Applicant and the sentences. At the moment, **both matters were stood over generally**. This implies that the matters are still pending and the Ex parte Applicant should have indulged the 1st Respondent for directions therein.

30. **THAT** the Ex parte Applicant has to this day failed, refused, an/or neglected to pay the full amount in both Disciplinary Tribunal Cases to the 2nd Respondent and the Advocates Complaints Commission for onward transmission to the Complaints.

31. **THAT** the complaints against the Ex parte Applicant were for acts done by the Ex parte Applicant as an advocate before he was struck off the Roll. Therefore, the proceedings were rightly before the 1st Respondent and within its mandate.

32. **THAT** it is my contention that the Ex parte Applicant herein should have indulged the 1st Respondent and adduced evidence before it than rushing to this Honourable Court for judicial review orders quashing the proceedings therein.

33. **THAT** in the event that the Ex parte Applicant is heard and is aggrieved by the decision of the 1st Respondent, Section 62 of the Advocates Act, Cap 16, Laws of Kenya under gives him a right of appeal to the High Court. It would be prudent for the Ex parte Applicant to indulge the 1st Respondent and take part in proceedings and thereafter await the outcome. ”

[4] The parties have filed written submissions. For the ex parte applicant by Submissions dated 15th July 2019, it was submitted, principally, that:

“APPLICANT’S WRITTEN SUBMISSION

First, for the past nearly 13 years, the applicant who has a young family with school going children has been denied his only source of livelihood. He cannot practice as an Advocate of the High Court of Kenya having been illegally, unfairly and unprocedurally struck off the Roll of Advocates. Although 12 years later, this Honourable Court did quash the proceedings and judgment which led to his being struck off, he again is faced with these two other cases brought against while he was not in the Roll. He was not aware at all of these two other cases. He was helping his father run a school in Rongo town within Migori County. The applicant has been made to illegally and unfairly suffer. This Court already made a finding quashing the decision to strike him off from the Roll in **HIGH COURT MISC. CIVIL APPLICATION NO. 639 OF 2006**. He should therefore not be made to continue to suffer anymore as the purported 2nd and 3rd striking off from the Roll are illegal ab-initio. The applicant right to gainful employment has been denied and is therefore rendered destitute and jobless contrary to the provisions of the constitution.

Secondly, Your Lordship the respondents acted without jurisdiction. As the time these proceedings were instituted, that is on 2nd August, 2007 and 20th April, 2009 respectively, the applicant was not an Advocate of the High Court of Kenya, having been struck off the Roll of Advocate on 12th October, 2006 in **DISCIPLINARY CAUSE NO. 4 OF 2006**. The said decision in DCC NO. 4 OF 2006 was however quashed by this honourable Court on 21st March, 2018 in **MISC. APPLICATION NO. 639 OF 2006**. Under the Advocates Act, the respondents have jurisdiction against Advocates only. The Act also defines an Advocate as a person whose name is in the Roll of Advocates. Your Lordship for argument purposes, if a complaint is brought against a Judge of this honourable Court, the JSC will interrogate the complaint and if they find merit in the complaint, the President of Kenya is called upon to constitute a tribunal which will enquire into the conduct of the Hon. Judge and if the tribunal makes a finding of guilty, the president removes the Judge from the office of a Judge. What happens when another complaint is brought up two or three years later against the former Judge? Does the JSC still have jurisdiction to over the former Judge? Can another tribunal to be constituted to inquire into the conduct of the former Judge? Your Lordship our answers to these questions are NO, NO, NO. Your Lordship in paragraph 11 of the replying affidavit, the respondent states that **“Respondent is statutorily mandated to hear any person (Whether an advocate or not)”** this is clearly a misguided position. Complaints can only be brought against Advocates. At paragraph 31 of the Replying Affidavit, the respondents have expressly and or impliedly admitted that their actions against the applicant were done when he was not an advocate. We quote **“the complaints against the Ex parte Applicant were fore acts done by the Ex parte Applicant as an advocate before he was struck off the Roll.”** Clearly the respondents lacked jurisdiction as at the time of they committed the actions which the ex parte applicant is complaining of Section 57 of the Advocates Act, CAP 16 Laws of Kenya gives the respondents power to deal with professional misconducts of Advocates, not former Advocates. Ones a person has been struck off the Roll of Advocates, is he/she still an Advocate? Is he/she still a member of the Law Society of Kenya? Is he/she still subject to the jurisdiction of the Respondents? Your Lordship our answer to these questions is NO.

The respondents acted against the well-known principles of Natural Justice by condemning the applicant unheard. The applicant was not aware of these proceedings and decisions as he was never served with any papers during and after these proceedings and decisions were made. The applicant learnt of these proceedings and decisions in November 2018 when he went to apply for his Practising Certificate. He was informed that he could not be granted his Practising Certificate as there were two other cases in which he was again struck off the Roll of Advocates. The purported service was a clear violation of the Civil Procedure Act and Civil Procedure Rules and the general rules set out for proper service. No affidavits of service have been filed to show how proper service was affected. The respondents have not attached any of the affidavits of service. **H.C. MISCL. APPL. NO. 189 OF 2004 JEFFERSON M.S. NYAGESOA VS DISCIPL. COMMITTEE & SECRETARY LAW SOCIETY OF KENYA. KABURU BAUNI J. held;**

“As such the application proceeded ex parte. As submitted there was nothing filed to controvert the claims by the applicant. He swore an affidavit and clearly said that he was not served with any hearing notice for 28th August 2004. True the record shows that one Michieka for the Complainants Commission told the Committee that the applicant was served but ‘absent’. However there is no affidavit of service to show this.”

“The Respondent after being served should have filed a Replying Affidavit to state that indeed the ex parte applicant was served. What is before the court is only the applicant’s contention that he was never served and in absence of any averment to the contrary the court has no reason to believe him. What this means therefore is that the committee heard the complainants in his absence and with no notice to him. It then went ahead to sentence him. There are no doubts that this was clearly against the rules of Natural justice. He was condemned unheard and the committee went ahead to deprive him of his right to practice law. The committee is a public body established under the Advocates Act. It has duty to observe rules of natural justice. Indeed rule 17 of The Advocates (Disciplinary Committee) Rules empowers the committee to proceed ex parte if a party fails to appear but this is only when such a party has been given Notice of the hearing date. Otherwise if a party is not served he cannot be accused of failing to appear for he cannot appear unless he is aware of the hearing. There is no evidence that the ex parte applicant was served and as such by proceeding in his absence the respondent denied him his right to be heard. The sentence passed on 10th September 2004 cannot stand.”

Your Lord the applicant has clearly explained that he never appeared at all before the disciplinary committee. Everywhere in the proceedings the Respondents stated that the applicant was served, but they have not shown any affidavits of service at all in their Replying Affidavit. On the face of the proceedings on DCC NO. 109 OF 2007, the respondent claim that the applicant was present in person on 02.08.2007 and the Plea was deferred. It is not stated whether the complainant was present or not. It is not stated why plea was deferred if at all it is true that the applicant was present. That plea was to be taken on 16th August, 2007. On 16.08.2007 it is stated that the applicant was SERVED BUT ABSENT. If at all the applicant was present on 02.08.2007, why was he being served to appear on 16.08.2007? where is the affidavit of service? The answer is very clear. The respondents knew that the applicant had been struck off the Role in another case and hence he was not expected to appear in this case. They were casually handling this very serious matter. In the case **KISUMU HCCC NO. 91 OF 1998 NATIONAL BANK OF KENYA VS PETER OLOO ARINGO, WARSAME, J. (as he then was) held;**

“In order for the Court to validate a mode of service other than personal, which is mandatory, the persons alleging proper service must have and prove in his return of service or otherwise the following:

- (i) The time when service was affected on the said person.
- (ii) The manner in which the summons were served.
- (iii) The name and address of the person identifying the person served.
- (iv) The exact place where the service was affected.
- (v) Whether or not the person served is known to the person the summons is meant for if the person is not known to the process server.
- (vi) If no personal service, the person should indicate the relationship between the person served and the person summons were directed at.
- (vii) The source of information in vi above must be stated.
- (viii) That he required his signature and response.

Non-compliance with any command of the above would make any such service fatally defective and if there is no proper service there can be no regular judgment.... The process server ought to explain the purpose of visit and the effect of the document served, so that the person served is able to comprehend his action and/or omission on third party.”

In the case **JR HC. MISC. APPL. NO. 384 OF 2018 ONDHIAMBO TOM ANYANGO VS ADVOCATES DISCIPLINARY TRIBUNAL, D. CHEPKWONY, J. Held;**

The consequences of being found guilty of professional misconduct are very dire. They include an advocate being struck off the Roll. In my opinion, and bearing in mind these consequences, the Respondent ought to have ensured that the ex-parte applicant is granted an opportunity to be heard so that he can defend himself against the allegations of the Interested Party. As stated above, there is no evidence to show that the Respondent did inform the ex-parte applicant of the date of the hearing of complaint to enable him elect to have the Disciplinary Tribunal rely on his affidavit evidence or be heard viva voce. The purported letter dated 30th January, 2017 is not on record. The court cannot conclusively state that the applicant was informed of the date of the hearing.

Be that as it may, the Respondent opted to rely on the provisions of Rule 18 of the Advocates Disciplinary Tribunal Rules which provide that the Tribunal has the discretion to determine a matter on affidavit evidence, while the Respondent had the right to exercise its discretion; it also ought to have considered the implications of its decision. A decision of the tribunal may have the effect of taking away an advocate’s livelihood. This being the case it would only be fair that the Respondent affords an advocate against whom a complaint is lodged and opportunity to be heard.

Thirdly the respondent acted irrationally, on hearsay and mere allegations without any evidence. The purported complainants did not any swear affidavits, nor give evidence under oath to enable them be subjected to close scrutiny through cross examinations. Not even copies of any of the cheques which are purported to have bounced are exhibited. They are mere hearsay and never existed. The purported letters of complaints by the 2nd Interested Party was signed by a stranger who is not a party to any of the proceedings.

The applicant has stated that the 2nd Interested Party informed him that she never lodged any complaint against him with anybody. This explains the absence of any documents, letters, affidavits or anything duly signed by her. Paragraph 4 of the Replying Affidavit is therefore untrue and misleading. The letter dated 8th February, 2007 did come from Hellen Akinyi Okatch who is a complete stranger in these proceedings. Indeed the applicant has shown that he fully paid her all the monies due to her and whatever was due to the advocate who previously handled the matter on her behalf was also fully paid to him. They both acknowledged receipt of the same. These are facts which have not been rebutted by anyone.

The applicant did not withhold any money from the complainant in DCC. NO. 12 OF 2009, the 1st Interested Party herein. The complainant wrote a letter to the applicant to release the funds to the purchaser. The applicant therefore released the funds to his client who duly acknowledged receipt of the same by signing the payment voucher. Even though the complainant later denied having written the two letters, he failed, neglected and/or refused to report the same to the police for investigations as had been discussed and agreed upon between him and the applicant.

The 1st Interested Party had the opportunity to get this matter investigated in time by the DCI to resolve his issues, but he chose to wait for nearly four years after the applicant stopped practicing as an advocate (2006 – 2009) then used illegal short cut, taking advantage of the fact that the applicant was no longer in practice, and the respondents helped him to penetrate the illegality against the applicant. Your Lordship an allegation of forgery of a letter is a very serious which even the respondent should have taken very seriously by forwarding the same to the police for investigations. This is not an allegation which one can prove by simply swearing an affidavit. It needs thorough investigations by the agencies entrusted with such matters. It should still however be noted that there is no affidavit attached sworn by the 1st Interested Party with such allegations against the applicant. One wonders what the respondents acted upon.

Fourthly the applicant was supplied with an order in DCC NO. 109 OF 2007 which order states that the applicant was suspended from the Roll of Advocates for unspecified period of time, while on checking on the proceedings and judgments, the applicant was purportedly struck off from the Roll of Advocates in the same case. The decisions were contradictory, hence illegal. The respondents have accepted in their Replying Affidavit at paragraph 17 that there was a mistake with those decisions. Section 60 (4) of the Advocates Act provides

“After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order:

(a) That such advocate be admonished; or

(b) That such advocate be suspended from practice for a specified period not exceeding five years; or

(c) That the name of such advocate be struck off the Roll; or

(d) That such advocate do pay a fine not exceeding one million shillings; or

(e) That such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.”

To therefore suspend a person for an indefinite period of time at definitely violates Section 60 (4) (b) of CAP 16, the Advocates Act. To give two sentences of Struck off 7 Suspend indefinitely equally violates Section 60 (4) of CAP 16. Your Lordship it is therefore our submission that this honourable court must intervene to ensure that the law is followed to the letter.

Your Lordship Article 50 of the Constitution grants the applicant the right to fair hearing. Article 50 (6) (b) states that a person who is convicted of a criminal (and for this case quasi criminal) offence may petition the High Court for a new trial if; new and compelling evidence has become available. The applicant has adduced evidence in his Verifying Affidavit which were not before the Tribunal as at the time they arrived at their illegal decisions. Definitely they could have arrived at a different decision if all these evidence were available to them at the time of their decision that is assuming that the proceeding were legal, fair and proper.

Your Lordship the decisions are ultra vires, contrary to the Advocates Act, Law Society Act, Fair Administrative Actions Act (No. 4 of 2015), the Civil Procedure Act, Evidence Act and Kenyan Constitution, 2010. Under the Fair Administrative Action or decision may apply for review of the administrative action or decision to a court in accordance with sec. 8 and this honourable court has the power to review the same.

Last but not least, the ex parte applicant was a young advocate of less than five years standing. There are provisions for admonishing, suspension and warning in the Advocates for any offence facing an advocate. A principal has been set up by judicial officers or by persons charged with the responsibility punishing offenders or the public for various offences. There is sometimes the need to **temper justice with mercy** especially for first and young offenders. Assuming that the ex parte applicant was duly convicted, and that all procedures were properly followed, and that the rule of Natural justice was properly applied (all which were not), could there have been any lesser offence admitted? It our submissions is that the answer is yes, especially given the fact that everyone deserves a second chance for first offences and the fact that there is far reaching economical, social and psychological implications coming with the striking off of an advocate from the roll.

During the last 13 years the ex parte applicant has not been in any gainful employment. He could not practice law due to case which was quashed by this honourable court. The Respondents should not be allowed to continue with their unlawful punishment. He has a

young family with 4 school going children. He has had difficulties in feeding and educating them. This is the right time for this Honourable court to intervene and exercise its discretion in favour of the applicant to redeem him. Indeed the law states that an advocate shall be struck off if convicted of a gross professional misconduct for a period of not less than five years, meaning there was an intention that after five years, one can be reinstated back to the roll.

Your Lordship the conclusion is that this case and more particularly the Notice of Motion dated 14th June, 2019 has merits and the prayers sort should therefore be granted with costs.”

[5] In the APPLICANT’S WRITTEN SUBMISSIONS, the ex parte applicant appears to extrapolate and enlarge the reliefs sought by seeking an order for prohibition beyond the reliefs sought in the Notice of Motion dated 14th June 2019, but which coincide with those for which leave was obtained herein as follows:

“Your Lordship the applicant filed the substantive NOTICE OF MOTION dated 14th June, 2019 seeking orders;

1. **THAT the applicant herein DAVID RONALD NGALA ODHOCH be granted a judicial review order by way of certiorari to bring before this Court and quash the entire proceedings and judgments/or orders in DISCIPLINARY CAUSE NO. 12 OF 2009.**
2. **THAT the applicant herein DAVID RONALD NGALA ODHOCH be granted a judicial review order by way of certiorari to bring before this Court and quash the entire proceedings and judgments/or orders in DISCIPLINARY CAUSE NO. 109 OF 2007**
3. **THAT the applicant herein DAVID RONALD NGALA ODHOCH be granted a judicial review order by way of Mandamus directed at the 1st and 2nd respondents to immediately re-admit the applicant to the Roll of Advocates and to membership of the 2nd respondent and to withdraw any notices and or publications informing the members of the public and or members of the 2nd respondent of their decisions in DISCIPLINARY CASUSE NO. 12 OF 2009 & DISCIPLINARY CAUSE NO. 109 OF 2007 except the notices that those decision the notices that those decisions have been quashed and that the applicant has been re-admitted to the Roll of Advocates.**
4. **THAT the applicant herein DAVID RONALD ODHOCH be granted a judicial review order by way of Prohibition prohibiting the respondents from further proceeding in any manner with DISCIPLINARY CAUSES NO. 12 OF 2009 & DISCIPLINARY CAUSE NO. 109 OF 2007.**
5. **THAT the cost of this application be provided for.**
6. **The Honourable Court do issue any other or further orders as the circumstance of the case may demand.”**

[6] The Notice of Motion of 14th June 2019 actually seeks orders as follows:

1. **THAT the applicant herein DAVID RONALD NGAL ODHOCH be granted a judicial review order by way of certiorari to bring before this Court and quash the entire proceedings and judgments/or orders in DISCIPLINARY CAUSE NO. 12 OF 2009 and DISCIPLINARY CAUSE NO. 109 OF 2007.**
2. **THAT the applicant herein DAVID RONALD NGALA ODHOCH be granted a judicial review order by way of mandamus directed at the 1st and 2nd respondents to immediately re admit the applicant to the Roll of Advocates and to membership of the 2nd respondents and to withdraw any notice and or publications informing the members of the public and or members of the 2nd respondent of their decisions in DISCIPLINARY CAUSE NO. 12 OF 2009 & DISCIPLINARY CAUSE NO. 109 OF 2007 except the notices that those decisions have quashed and that the applicant has been re admitted to the Roll of Advocates.**
3. **THAT the cost of this application be provided for.**

[7] However, by Order 53 rule 4 (1) of the Civil Procedure Rules provides that the prayers of the Notice of motion shall only contain reliefs as set out in the application for leave, as follows:

“[Order 53, rule 4] Statements and affidavits.

4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

[8] However, no prejudice is suffered by the Respondents who indeed responded to the claim for the relief as prayed in the Statutory Statement.

[9] For the respondents, the case for the defence was summarized in the Submissions dated 31st July 2019 as follows:

“1.3 It is the 1st Respondent’s position in these submissions that it is statutorily mandated to protect the image of the legal profession by prosecuting complaints against advocates as members of the 2nd Respondent brought to it by complainants (advocates or not). There is an

established procedure that the 1st Respondent follows in the conduct of proceedings before it and with regard to the principles of natural justice. The same was applicable to the Ex-parte Applicant's proceedings. This position is also captured in the Respondents' Replying Affidavit filed on 4th July 2019. The 1st Respondent commenced proceedings, observed and adhered to principles of natural justice. Thus, the Ex-parte Applicant's application lacks merit and that the only order that commends itself is one dismissing the Ex-parte Applicant's Application with costs to the Respondents."

[10] The respondents set out the background of the matter in their Submissions as follows:

2. BACKGROUND OF THE MATTER:

2.1 On 12th February, 2007 and 17th February 2009, the Disciplinary Cause Numbers 109 of 2007 & 12 of 2009 were preferred against the Ex-parte Applicant for professional misconduct for; withholding the 2nd Interested Party's money amounting to Kshs.400,000/- received on her behalf and for a refund of the deposit of Kshs.1,591,054/- received from the 1st Interested Party to hold as a stakeholder pending the completion of the transaction for the purchase of a property in Kitusuru known as L.R 17/276.

2.2 It is worth noting that upon receipt of the letters of complaint from the 1st and 2nd Interested Parties, the Ex parte Applicant was on 9th March, 2007 and 20th February 2008 duly informed of the complaints lodged against him and was requested to provide his written comments to enable the 2nd Respondent make a decision on how to proceed further with the matters. There was no response from the Ex-parte Applicant, the 2nd Respondent and the Advocates Complaints Commission proceeded to file their Affidavits of Complaint before the 1st Respondent. Consequently, Disciplinary Cause Numbers 109 of 2007 & 12 of 2009 respectively were preferred against the Ex-parte Applicant.

2.3 The 2nd Interested Party's complaint to the 1st Respondent was to the effect that the Ex parte Applicant issued cheques that were dishonored on presentation to the Bank, withheld funds belonging to her, contravened the provisions of the Advocates (Accounts) Rules and lastly, that he failed to reply to correspondence while the 1st Interested party's complaint to the 1st Respondent was for; withholding Kshs.1,591,054/- from the complainant, failure to respond to the Commission's letters dated 20/2/08 and 13/6/08, forging the letter dated 4/5/05 and undated letter purported to be by the complainant Advocate.

2.4 The 1st Respondent on 2nd August, 2008 and 20th April, 2009 found that prima facie cases had been established as against the Ex-parte Applicant and the matters scheduled for plea-taking and notices served upon him. The Ex-parte Applicant was present on 2nd August, 2007 when the matter came up for plea-taking in Disciplinary Cause Number 109 of 2007; however the same was deferred to 16th August 2007. The matters were then scheduled for hearing and on all occasions, the Ex-parte Applicant was duly informed and notices served upon him. The Respondents shall crave the leave of Court to avail the Affidavits of Service to that effect. Despite hearing notices having been served on the Ex-parte Applicant, he chose not to attend.

2.5 The 1st Respondent by notices dated 6th November 2007 and 22nd September 2009 informed the Ex parte Applicant that he had been convicted of; issuing a bouncing cheque, withholding funds belonging to the client and contravening the provisions of the Advocates Accounts rules in Disciplinary Cause Number 109 of 2007 while in Disciplinary Cause Number 12 of 2009, he was guilty of withholding Kshs.1,591,054/- from the complainant, failure to respond to the Commission's letters dated 20/2/08 and 13/6/08, forging the letter dated 4/5/05 and undated letter purported to be by the complainant Advocate and convicted him accordingly. The Ex parte Applicant was accordingly sentenced as follows

a) Struck off the roll of Advocates;

b) To pay the amount owing to the 2nd Interested Party within 60 days of the date of the order, in default execution to issue;

c) Execution to issue to recover the sum of Kshs.1,591,054/- plus interest.

2.6 The matters came up to record the progress of the execution for the recovery of the complainant's monies. It was noted that there was no compliance with the above orders and the matters were stood over generally. The Ex-parte Applicant on application for a practicing certificate was informed of the pending two (2) disciplinary cases against him. He then rushed to file this application dated 24th June 2019."

[11] The respondents concluded their submissions on the basis of the facts set out, legislation and case-law authorities that the relief were unavailable to the ex parte applicant as follows:

4. CONCLUSION:

4.1 In all, the Hon. Justice Mativo J, dismissed the Ex parte Applicant's application for judicial review orders with costs in the case of **Republic v. Advocates Disciplinary Tribunal Ex parte Apollo Mboya** [2019] eKLR where the ex parte applicant did not demonstrate any grounds of warrant the Court to grant the Judicial Review Orders sought therein. The Ex parte Applicant in his application has also failed to demonstrate any grounds to warrant the issuance of the orders sought herein.

4.2 My Lord, the totality of the Respondents' submissions is that the Ex parte Applicant's Application for Judicial Review Orders before this Honourable Court is devoid of merit. The Ex-parte Applicant ought to have invoked the appellate jurisdiction of this Court pursuant to Section 62 of the Advocates Act. Thus, the only order that lends itself from this Honourable Court is that the Ex-parte Applicant's Application be dismissed with costs to the Respondents."

Issue for Determination

[12] The principal issue for determination in this suit is whether judicial review orders of certiorari and prohibition will be granted in the circumstances of this case. In reaching this determination the court will consider specific questions as follows:

- a. Whether the applicant was given an opportunity to be heard;
- b. Whether the disciplinary process under the Advocates Act may be used when the respondent has since been struck off the Roll of advocates;
- c. Whether a complaint before the advocates disciplinary may only be mounted upon an affidavit by the complainant; and
- d. Whether the judicial review Court may determine questions of fact or merit of the complaints before the Advocates complaints mechanism.

Determination

[13] The complaint in DCC 109 of 2007 was initiated by the Law Society of Kenya through its Secretary upon receipt of a letter of complaint dated 8th February by the complainant Hellen Akinyi Okatch and the complaint in DCC 12 of 2009 by Joseph Nguthiru King'arui, a commissioner of the Advocates complaints commission upon a complaint by Firdosh Ebrahim Jamal, advocate received on or about 2nd November 2006 by letter dated 6th October 2006.

[14] Section 60 of the Advocates Act provides for the filing of complaints against advocates, as follows:

“60. Complaints against advocates

*(1) A complaint against **an advocate of professional misconduct**, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.*

(2) Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Tribunal, accompanied by such fee as may be prescribed by rules made under section 58(6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.”

[15] Notices of the complaint and proceedings were shown to have been sent to the applicant two postal addresses. Other than alleging to have surrendered the post office boxes the applicant does not deny the addresses having belonged to him. There was no evidence as alleged by the applicant in paragraph 21 of this supporting affidavit that he had upon being struck off the roll “the respondents were aware that I had long closed down my law firm, but they kept on using the address for the law firm, which addresses the applicant had long surrendered to the Post master General [and the] boxes were immediately allocated to other person not known to me.” There was no evidence of the said surrender of the boxes and allocation to other persons, and in any event the proceedings of the Disciplinary Committee indicate in the case of DCC 109 of 2007 that the applicant was present on the first day of the proceedings on 02.08.2007 when plea was deferred. I have noted the decision of Kaburu Bauni, J. in Misc. Appl. No. 189 Of 2004, on lack of affidavit of service justifying a finding that a party is condemned unheard, but in this case the tribunal record indicates that the applicant had been **present in person** on the first day of plea. On a balance of probability test, the applicant was required to provide cogent evidence to prove this allegation that he had not been served with the notice of the complaint as incumbent on him under section 107 and 108 of the Evidence Act.

[16] The applicant was clearly given an opportunity to be heard but chose not to avail himself of that opportunity. Section 60 (3) of the Advocates Act provides for the advocates opportunity to be heard as follows:

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

Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.

(4) After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order— (a) that such advocate be admonished; or (b) that such advocate be suspended from practice for a specified period not exceeding five years; or (c) that the name of such advocate be struck off the Roll; or (d) that such advocate do pay a fine not exceeding one million shillings; or (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.”

[17] On the facts of the case, I would find that the applicant was afforded opportunity to be heard but he did not wish to be heard. Unlike the holding in Misc application 31 of 2016 R v. *The Advocates Disciplinary Tribunal & Anor. ex p. Asige Japheth Savwa*, there is evidence here

that the applicant was given an opportunity of being heard by notices sent to his last known postal addresses. Even if the applicant could show that he was not served with notices of the complaint the forum for redress is in the setting aside of the judgment of the tribunal, *ex debito justitiae* (see JR Misc 435 of 2012 **R v. BPRT & Anor. ex p. John Mwangi Karuri**) and *National Bank of Kenya v. Peter Oloo Arinog Kisumu HCCC NO. 91 of 1998*. It is not an occasion for seeking judicial review orders which are remedies of last resort and ought not to be applied for where there exists appropriate remedies to redress the grievance. See **Muigai International (K) Ltd v. Resident Magistrate Milimani Commercial Court & Anor.** (2015) eKLR; **Priscilla Land Gates Ltd & Anor. Morris Gikonyo & Anor.** (2015) eKLR and **National Oil Corporation Ltd. v. Real energy Limited & Anor.** (2015) eKLR.

[18] As observed by Odunga, J. in **Republic v Advocates Disciplinary Committee & another Ex-Parte Patricia Njeri Wanjama [2016] eKLR**, the judicial review court does not usurp the adjudication role of the tribunal:

*“The Advocate dwelt at length on the merits of its objection and urged this Court to find that the Tribunal had no jurisdiction notwithstanding her position that the Tribunal did not deal with her preliminary objection. For avoidance of doubt, it is my view and I hereby find that the Tribunal, in its finding that the issues raised before it did not constitute proper issues for determination as a preliminary objection, was properly within its powers to do so. **However, even if I was to find that the Tribunal did not determine the objection, the only remedy would have been to quash its decision and pursuant to the provisions of section 11(1)(e) and (h) of the Fair Administrative Action Act, 2015, and direct the Tribunal to determine the objection rather than to substitute my decision for that of the Tribunal.**”*

[19] The applicant averred in his supporting affidavit (paragraph 22-31) “that the allegation that I did not pay Ksh.180,000/- to one of the complainant in DC 109 of 2007 is false, not true at all” and that he had paid certain sums to his said client over time, is a matter of the merit of the case before the tribunal and not suitable for adjudication in the judicial review court. The same with the averment in Paragraph 32—35 that he had not withheld any money for the complainant in DC 12 of 2009 and had in fact released the money to his client on instructions by the complainant who denied having ever written the letters and that they had agreed to pursue police investigations only for the complaint to turn around and file the complaint against him.

[20] These matters of fact call for a determination of the merits of the case, rather than the process of the decision making of the tribunal and are therefore beyond the regular scope of the judicial review proceedings. See also **Commissioner Of Lands v Kunste Hotel Limited [1997] eKLR**. I respectfully agree with Odunga J. **Republic v Advocates Disciplinary Committee & another Ex-Parte Patricia Njeri Wanjama**, supra, of the availability of the procedure of appeal under section of the Advocates Act as follows:

*“39. In my view the Tribunal was properly entitled to arrive at that decision. As to whether its decision in light of the facts disclosed before it was correct is a matter which went to the merit of the decision and if the Applicant/Advocate is aggrieved therewith, she can only challenge the same by way of an appeal pursuant to section 62 of the Advocates Act. The Advocate however contended that the right of appeal can only be invoked after the disciplinary cause is determined and cannot be exercised in respect of a preliminary determination as was the case in this matter. That may be so. However, it is trite that an issue going to jurisdiction can be raised at any stage of the proceedings and even at the appellate stage. See **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998.**”*

[21] The applicant contended that the respondent had no jurisdiction over him in the period the proceedings subject of this application were instituted on 2nd August 2007 and 20th April 2009 in that he had been struck off the roll on 12th October 2006 by virtue of the proceedings in Disciplinary Cause NO. 4 of 2006, as he was then not an advocate when the proceedings. With respect, that is absurd. That cannot be the correct interpretation of the provisions of the Advocates Act.

[22] In my respectful view, the conduct under investigation being that of the applicant as an advocate for professional misconduct happening when he was a practicing advocate and not in respect anything done after he had been struck off the roll upon judgment of the Disciplinary Committee in DC No. 4 of 2006, disciplinary proceedings were properly before the respondent. The disciplinary proceedings are instituted for conduct as an advocate of the Court and, consequently, whether struck out of the roll by reason of a judgment in a previous cause, he is liable for prosecution for his acts undertaken when he was a practicing advocate. To hold otherwise would be to grant immunity for advocates for all culpable misconduct prosecuted or for which he is liable to be prosecuted on discover or receipt of a complaint after a previous conviction and removal from the Roll of Advocates.

Conclusion

[23] The tribunal exercised its mandate in the discipline of advocates under the Advocates Act and on a balance of probabilities, by the evidence before the court, it is clear that the applicant was granted an opportunity to be heard as required by section 60 (3) of the Advocates Act.

[24] The ex parte applicant has alternative remedy in seeking to have the judgment of the Tribunal set aside and the matter may proceed to hearing on the merits before that tribunal. The judicial review court will not determine the merits of the complaint before the disciplinary tribunal and any objections as to service of process may be taken before the tribunal.

Orders

[25] Accordingly, I do not find merit in the Notice of Motion herein dated 14th June 2019, and the same is dismissed.

[26] There shall be no order as costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2019.

J.M. MATIVO

JUDGE

Appearances:

M/S C. M. Ongoto & Co. Advocates for Ex-parte Applicant.

M/S Nyiha, Mukoma & Co. Advocates for the Respondent.

Hon. Attorney General for the Respondent.