REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 637 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

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

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 22, 27(1), 47, 50, 159(2) AND 165 OF THE CONSTITUTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL.....1ST RESPONDENT

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

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

JITAD PREMCHARD SHAH.....INTERESTERD PARTY

EX PARTE : JULIUS NDUGI KIRUBI

JUDGMENT

The Application

1. The *ex parte* Applicant herein is Julius Ndugi Kirubi, an Advocate of the High Court of Kenya (herein referred to as "the Applicant"). He claims that the Interested Party herein, Jitad Premchard Shah, filed a complaint against him with the 1st Respondent, which is a Disciplinary Tribunal established under section 57 of the Advocates Act (Chapter 16 of the Laws of Kenya). The 2nd Respondent is the Law Society of Kenya, which acts as the secretariat for the 1st Respondent.

2. The Interested Party's complaint arose from a sale transaction of land parcel number LR No. 4992/2201, wherein the Applicant's firm of Advocates acted for Skylife Estates Limited, who were selling the said land parcel to the Interested Party. It was alleged that the Applicant

had breached a professional undertaking and withheld Kshs 2,000,000/= from the Interested Party.

3. The 1st Respondent delivered its judgment on 4th September 2017 and found that the Applicant guilty of withholding Kshs 2,000,000/= belonging to the Interested Party, and which money had been paid to the firm of Advocates as a deposit. The Applicant was ordered to refund the Interested Party the said Kshs 2,000,000/= within 60 days together with interest at 12% per annum from the date he received the same until payment in full.

4. The Applicant consequently filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 8th November 2017, in which he seeks the following orders :

a) An order of certiorari do issue to remove to this court and quash the 1st Respondent's decision made on the 4th day of September 2017 in Disciplinary Cause No. 106 of 2016

b) An order of prohibition do issue to prohibit the 1st Respondent and the 2nd Respondent from proceeding any further with Disciplinary Cause Number 106 of 2016 and /or from acting on and/or implementing in any way whatsoever the 1st Respondents impugned decision of the 4th day of September 2017.

c) Costs of the application be provided for.

5. The application is supported by the grounds on the face thereof; the Chamber Summons for leave to commence judicial review proceedings and accompanying statement both dated 31st October 2017, and the verifying affidavit sworn by the Applicant on 30th October 2017. The Applicant's Advocates, Macharia Kahonge & Company Advocates in addition filed written submissions dated 19th February 2018 which they relied upon during the hearing.

6. The first ground for the application is that the 1st Respondents decision is unfair biased, rash, discriminatory, highhanded and also unconstitutional, as it condemned the Applicant to singularly pay the said sum instead of including his partner as well, as they had both been charged. It was the Applicant's case that he had been charged alongside Mwangi Joseph Ben at the Disciplinary Tribunal in Cause No 106 of 2016 with three counts namely: withholding the sum of Kshs 2,000,000/= contrary to the professional undertaken given and clause 16 of the sale agreement dated 8th day of November 2013; breach of the professional undertaking dated 8th day of November 2013; and conspiracy to defraud the complainant of Kshs 2,000,000/=.

7. The Applicant urged that they were dully represented before the 1st Respondent by Charles Mbugua Wanjiru Advocate, and gave their response to the counts against them, but that despite their joint defence, the 1st Respondent found the Applicant guilty of withholding funds belonging to the complainant to the exclusion of his partner, and that he was due to be sentenced on the 5th day of February 2018.

8. The second ground raised by the Applicant was that the 1st Respondent made a wrong finding and in complete disregard of a competent decision made in **Muranga Chief Magistrates Court Civil Case No. 405 of 2015**, which found that the Applicant was entitled to the subject funds. He contended that during the hearing, he furnished the 1st Respondent tribunal with the judgement and decree from the **Muranga Chief Magistrates Court Civil Case No 409 of 2015 - Julius Ndugi Kirubi & Joseph Mwangi Ben T/A Kirubi, Mwangi Ben and Company Advocates –vs Skylife Estates Limited,** where the lower Court found that the monies held by the Applicant on behalf of the defendant formed part of their legal fees and could not be released to the complainant. He added that the judgment or decree has not been set side.

9. The Applicant averred that the 1st Respondent erred in law and acted in excess of jurisdiction in convicting him for the reasons that it ignored the said Magistrates Courts judgment and decree, and the fact that unless the said judgment was set aside it could not proceed with the matter; and that it acted in excess of its power when it ordered that a refund of the funds ignoring the fact that a competent court had ruled otherwise. Further, that this action was irrational and unreasonable in the circumstances.

10. That owing to the foregoing his right to fair administration action was severely curtailed; that by convicting him alone the tribunal was biased and discriminatory contrary to Article 27; that he had a legitimate expectation that the disciplinary tribunal would act fairly, judiciously and observe all the cardinal tenets of natural justice; neither did it advance any reason why it condemned him alone from an undertaking by two partners who had been charged before it.

11. The Applicant in his submissions relied on the case of **Onyango vs Attorney General (1986-1989) EA 456** for the proposition that the principles of natural justice apply where ordinary people would reasonably expect those making decisions which affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard. The Applicant further submitted that Article 47 (1) and (2) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, and that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

12. Reliance was also placed on the decision in **Republic vs Advocate Disciplinary Tribunal and Another Exparte Japheth Savwa, Miscellaneous Civil Application No 31 of 2016** for the proposition that fair administrative action imports the rule of natural justice. The Applicant further relied on the case of **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining And Chemical Engineering Co Ltd/Pride Enterprises vs Public Procurement Administrative Review Board And 2 Others (2015) eKLR** on what amounts to error of law.

13. In closing the Applicant submitted that where the law exhaustively provides for the jurisdiction or authority of a tribunal, it must operate within those bounds and ought not to expand its jurisdiction through administrative craft or innovation. Further, that the tribunal must act in

good faith and extraneous considerations must not influence its actions, and it must observe the principles of natural justice.

The Responses

The 1st and 2nd Respondents' Response

14. The application was opposed by the 1st and 2nd Respondents by way of a replying affidavit sworn on 10th January 2018 by Mercy Wambua, the 2nd Respondent's Chief Executive Officer. The Respondents' Advocate, Anthony M. Mulekyo Advocates, also filed submissions dated 15th March 2018.

15. The deponent contended that a complaint was lodged against the Applicant by the Interested Party through the Advocate's Complaints Commission, to the effect of withholding clients' money which were proceeds of a sale of property. She gave an account of the facts of the complaint and responses by the Applicant, and averred that the Applicant explained that he had entered into an agreement with the vendor that his legal fees for the transaction would be Kshs 2,000,000/=, to be recouped from the proceeds of sale of the property.

16. Further, that the Applicant filed a preliminary objection to the complaint which was heard together with the main case, and judgment was delivered by the 1st Respondent on the 4th September 2016. It was the Respondents' case that both parties were accorded a hearing by the 1st Respondent, and subsequently a finding was arrived at whereby the Applicant was found guilty of withholding Kshs 2,000,000/= belonging to the complainant, and was convicted. The deponent added that the Applicant was also ordered to refund the money with an interest of 12 % from the date he received the same until payment in full.

17. The Respondents further urged that the 1st Respondent found the Applicant guilty of failure to disclose the information it had offered to the Court in **Muranga Chief Magistrates Court Civil Case No. 405 of 2015** to warrant an order for lien to be issued. They contended that the Applicant has not proved his case, and the same is frivolous, vexatious, and abuse of the court process.

18. The 1st and 2nd Respondents in their submissions enunciated the applicable law on grant of orders of certiorari and prohibition, and relied on the case of **Republic vs Chancellor Jomo Kenyatta University and Technology exparte Dr Cecilia Mwathi and Another, (2008) eKLR,** where the Court enumerated the grounds for interfering with a decision in judicial review. It was their submission that the Applicant by virtue of being an advocate is subject to the jurisdiction of the 1st Respondent as provided for under sections 55, 57 and 60 of the Advocates Act.

19. They further submitted that it is the 1st Respondent's duty to exercise discretion in determining whether a *prima facie* case existed, and that this discretion was exercised judiciously. The Respondents contended that in order to succeed in an application for judicial review, the Applicant has to show that the decision complained of is tainted with illegality, irrationality and procedural impropriety, which terms were defined in their submissions. The case **of Associated Provincial Pictures vs Wednesbury Corporation (1948) 1 KB 223** was also cited to illustrate the standards of unreasonableness that would make a decision amenable to quashing in judicial review.

20. According to the Respondents, the Applicant has not demonstrated any instances of illegality, and that the Respondents acted within the scope of their mandate and within the provisions of the law. Further, that he has failed to show that the Respondents acted in abuse of discretion and breached his legitimate expectations. Reliance was placed on the cases of **Republic vs Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 Others, (2004) 2 KLR 530** and **Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited, (2008) eKLR** to demonstrate when decisions are in breach of legitimate expectations and *ultra vires* respectively.

21. The Respondents further relied on the cases of **Republic v President & 7 others Exparte Wilfrida Itolondo and 4 Others, (2014) eKLR** and **Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge and Others, Civil Appeal No 266 of 1996** for the parameters of judicial review, and for the position that prohibition looks to the future and was not available in the present case. This Court however found the Respondents' submissions in this regard puzzling, particularly the argument that the 1st Respondent is only concerned with the receiving of complaints filed against advocates and determining whether a *prima facie* case exists, and that the Applicant will have an opportunity of presenting his defence should he be found to have a case to answer.

22. The Respondents' submissions seemed to suggest that the proceedings before the 1st Respondent were as plea taking stage, and it was contended in this respect that the Interested Party would still have to prove his case to the required standard, and that the Respondent would not be offending the rules of natural justice or acting in excess of its jurisdiction by continuing with the proceedings. The true and correct position however, as shown in the pleadings filed by the parties, is that the 1st Respondent did conclude the hearing of the complaint against the Applicant and delivered judgment, which judgment is the subject of the present application.

23. In closing, the Respondents submitted that the Applicant's role in the transaction was only as a stake holder to hold the clients funds until the agreement for sale was completed and transfer effected. Further, that the Applicant's claim to a lien would have matured upon completion of the sale and subsequent transfer of the subject matter. Therefore, that before the completion of the sale and in the absence of written or formal consent from the Purchasers advocate, the Applicant was to hold the deposit advanced as stakeholder.

The Interested Party's Response

24. The Interested Party's response was in submissions dated 5th March 2018 filed by his Advocates, J. Louis Onguto Advocates, wherein a chronology of events leading to the complaint before the 1st Respondent was given. The Interested Party submitted that in order to succeed, the Applicant would have to show that the impugned decision arrived at by the 1st Respondent was done in an unlawful and unreasonable manner, in breach of natural justice and legitimate expectation of the Applicant.

25. Further, that an order of prohibition cannot quash a decision which has already been made, and can only prevent the making of a contemplated decision, while certiorari will only issue if the decision is without jurisdiction or in excess of it. The Interested Party relied on the case of **Republic vs Kenya Nations Examinations Council exparte Gathenji and 9 Others, (supra)** on the parameters of the orders of certiorari and prohibition.

26. As to whether the impugned decision was made illegally, the Interested Party relied on the decision in **Council of Civil Service Unions and Others vs Minister for the Civil Service, [1983] UKHL 6** where it was stated that illegality as a ground of judicial review meant that the decision maker must understand correctly the law regulating his decision making power and must give effect to it. Further, that irrationality applies to a decision which is so outrageous in its defiance of logic or accepted moral standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it.

27. The Interested Party submitted that the 1st Respondent was properly cloaked with the authority to pass judgement on the Applicant under sections 57 and 60 of the Advocates Act, which empower it to deal with misconduct and receive complaints about advocates. Further, that when the complaint was lodged, the Applicant was informed as required on the 27th July 2015, that the Applicant and his advocate were also present during mediation sessions held before the hearing by the 1st Respondent, and that the procedure followed by the Respondents was at all times lawful.

28. According to the Interested Party, the omission of the Applicant's partner from the judgement was an oversight and a mere technicality which has no bearing on the liability of both partners. Reliance was placed on the decision in **Republic vs Advocates Disciplinary Tribunal and 2 Others ex parte Nahashon Mwiti, 2015 eKLR** where the court observed that advocates by relating together through a professional undertaking are officers of the court, and it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship.

29. It was in this respect contended that on 18th November 2013 the Applicant and his co accused partner did give the Interested Party's advocate an undertaking to hold the deposit as stakeholder until the sale agreement dated 8th November 2013 was completed and transfer effected. However, that the Applicant and his co accused wilfully defied the terms of their undertaking, and that the agreement stipulated that each client was responsible for paying their advocates fees. Therefore, that any reasonable person acting reasonably would conclude that a breach of the undertaking would lead to a disciplinary process.

30. On the Applicant's argument that he was not given a fair hearing pursuant to Article 47 of the Constitution, and that the 1st Respondent in finding against him disregarded the rules of natural justice and his right to legitimate expectation, the Interested Party submitted that the Applicant appeared before the 1st Respondent four times and was well represented. Further, it was only after learning that the dispute would be elevated to the 1st Respondent that the Applicant sought refuge before the Chief Magistrate's Court at Muranga.

31. Lastly, on whether the 1st Respondent had abused its power and breached the Applicant's legitimate expectation by disregarding the lower court's decision, the Interested Party submitted that the 1st Respondent in its judgement noted that the Applicant filed the proceedings in court in an attempt to frustrate the complainant's endeavour to what lawfully belonged to him and out of bad faith. Further, that the Applicant failed to disclose what was presented to the lower court in getting the order of lien over the money of a third party, who was not his client or a party to their agreement.

32. The Interested Party further submitted on this point that the order being relied on by the Applicant is bad in law; contravenes the dictates of Order 1 rule 3 of the Civil Procedure Rules 2010 which provides that all persons may be joined as defendants against whom any right or relief arising out of the same acts or transactions is alleged to exist; and even though the Interested Party's name featured prominently in the lower Court's proceedings, he was not made a party to the said proceedings. Therefore, the Applicant's legitimate expectations were not violated.

33. The Interested Party relied on the decision in **Republic v Disciplinary Committee & another Exparte Daniel Kamunda Njue, (2016) eKLR,** where the court observed that if the applicant's conduct amounted to a professional misconduct, the mere fact that a civil suit was yet to be determined did not bar the 1st Respondent from entertaining the complaint.

The Determination

34. The Court of Appeal discussed the nature of the remedies sought of certiorari and prohibition at length in its decision in in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

> **" . What does an ORDER OF PROHIBITION do and when will it issue. It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition…. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like**

reasons..."

35. The order of certiorari is therefore concerned with the decision making process, and is issued when the Court is convinced that the decision of an inferior Court, tribunal or public authority sought to be quashed was reached without or in excess of jurisdiction, in breach of the rules of natural justice or contrary to law. An order of prohibition on the other hand is forward looking and lies to restrain an inferior tribunal from assuming jurisdiction ,or from doing that which it is not authorised by law to do. Prohibition does not therefore review the past errors or irregularities and is unavailable if a decision has already been made, and is only meant to contain an anticipated event or action.

36. In the present application, the decision that is being challenged is the judgment by the 1st Respondent dated 4th August 2017, and which was delivered on 4th September 2017 as shown by proceedings attached by the Respondents. The Applicant was found guilty of withholding Kshs 2,000,000/= belonging to the Interested Party, and was ordered to refund the said sum together with interest to the Interested Party. The only aspects of that judgment that can be subject to an order of prohibition is the said payment and the order that mitigation and sentencing of the Applicant was to take place on 5th February 2018, which are the only aspects of the decision that are outstanding, having been stayed after the Applicant filed the application for leave to bring the current judicial review proceedings on 31st October 2017. However, any finding in this regard will be dependant on whether or not the impugned decision is quashed.

37. The main issues therefore that require to be determined are firstly, whether the Applicant's rights to a fair hearing and fair administrative action were breached by the 1st Respondent, and secondly, whether the 1st Respondent's decision was illegal, irrational and in error.

38. On the first issue, the Applicant claims that his rights to a fair hearing and fair administrative action under Article 47(1) and (2) of the Constitution were infringed and he was discriminated against by the 1st Respondent's decision to singularly convict him instead of including his partner at the law firm who was his co-accused. The rights to a fair hearing and fair administrative action are well established under the Article 47 of the Constitution and rules of natural justice.

39. Section 4 of the Fair Administrative Actions Act (Act No 4 of 2015) expounds on the content of the right to fair administrative action as follows:

> (**1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**
>
> **(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard;**
>
> **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
>
> **(d) a statement of reasons pursuant to section 6;**
>
> **(e) notice of the right to legal representation, where applicable;**
>
> **(f) notice of the right to cross-examine or where applicable; or**
>
> **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
>
> **(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> **(a) attend proceedings, in person or in the company of an expert of his choice;**
>
> **(b) be heard;**
>
> **(c) cross-examine persons who give adverse evidence against him; and**
>
> **(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**
>
> **(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.**
>
> **(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure."**

40. The rules of natural justice on the other hand impose the right to be heard, which imposes a duty on decision makers to fairly hear both

parties and consider both sides of the case before making it decision, and includes giving the parties adequate opportunity to be heard. Natural justice also requires impartiality in decision making and for decision makers to be free from bias while discharging their duties.

41. The Applicant does not dispute the Respondents' and Interested Party's averments that he was given notice of the complaint made against him and represented at the hearings held by the 1st Respondent by his Advocate. The Applicant's arguments in this respect therefore do not turn on the decision making process *per se*, but on the decision that resulted from the said decision making process. It is my understanding that his contention is on the merits and correctness of the 1st Respondent's decision in finding him solely culpable instead of the Applicant's firm of Advocates.

42. This Court in my view is not the appropriate forum to make a decision on the merits of that particular reason by the 1st Respondent, for the reason that it is not seized of sufficient facts to do so. The evidence provided by the Applicant on the complaint made against him was the notification of the complaint in a letter dated 27th July 2015 to Ms Kirubi Mwangi Ben & Co. Advocates from the Secretary, Advocates Complaints Commission, and another letter dated 7th September 2016 from the said Secretary, forwarding copies of the complaint to the Law Society of Kenya. He also provided his replying affidavit sworn on 19th December 2016 by his advocate.

43. No evidence of the legal nature and/or type of registration of the law firm of Ms Kirubi Mwangi Ben & Co. Advocates was availed, or of any legal arguments made by the Applicant in this regard, for this Court to be able to make a determination that the decision of the 1st Respondent's in this respect was wrong or not supported by the facts and evidence. In particular, no evidence was availed that there were other partners in the law firm other than the Applicant who ought to have been found culpable by the 1st Respondent.

44. In any event, if indeed there was such evidence or legal argument made by the Applicant, then the proper and appropriate remedy would have been to appeal the decision on the ground that it was erroneously made, as this Court in this respect is only limited to reviewing the processes of decision making in determining if there was fairness or not.

45. On the second issue, the 1st Respondent's decision is alleged to have been illegal, irrational, in breach of the Applicant's legitimate expectations and in error, for failing to consider the decision made in **Muranga Chief Magistrates Court Civil Case No 409 of 2015 - Julius Ndugi Kirubi & Joseph Mwangi Ben T/A Kirubi, Mwangi Ben and Company Advocates –vs Skylife Estates Limited.** These grounds of judicial review were discussed in the holding in **Pastoli vs. Kabale District Local Government Council and Others, [2008] 2 EA 300,** as follows:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires,* or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

46. A regards the application of the principle of legitimate expectation, it was held in **Keroche Industries Limited vs Kenya Revenue Authority and Others , Misc Application No. 1285 of 2007** that the principle applies where public authorities must be held to their practices and promises unless a departure is justified by an overriding interest. In addition, errors of law on the record must be self evident patent and manifest, and should not require a long drawn process of reason or argument to establish.

47. In the present application, the Applicant did not dispute that the 1st Respondent has power and jurisdiction to hear and determine the complaint made by the Interested Party pursuant to section 60 of the Advocates Act, which provides as follows:

> **"(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 Committee 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 Committee, 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.**
>
> **(3) Where a complaint is referred to the Committee under Part X or subsection (1) the Committee 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 Committee the complaint does not disclose any prima facie case of professional misconduct, the Committee 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 Committee 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 Committee 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;

***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 Committee thinks fit.**

(5) The Committee may make any such order as to payment by any party of any costs or witness expenses and of the expenses of the Committee or the members thereof in connection with the hearing of any complaint as it may think fit, and any such order may be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect.

The Committee in the section means the Disciplinary Committee established under section 57 of the Act, which is the 1st Respondent herein. Section 55 of the Act also subjects all advocates to the jurisdiction of the Committee…."

48. The 1st Respondent therefore acted within its powers in arriving at the impugned decision. The Applicant is mainly aggrieved by the substantive decision made by the 1st Respondent in exercise of these powers, and in particular that the 1st Respondent did not consider nor follow the lower court's decision in **Muranga Chief Magistrates Court Civil Case No 409 of 2015 - Julius Ndugi Kirubi & Joseph Mwangi Ben T/A Kirubi, Mwangi Ben and Company Advocates –vs Skylife Estates Limited** when arriving at the impugned decision.

49. The Applicant provided the pleadings and judgment made by the lower Court in **Muranga Chief Magistrates Court Civil Case No 409 of 2015 - Julius Ndugi Kirubi & Joseph Mwangi Ben T/A Kirubi, Mwangi Ben and Company Advocates vs Skylife Estates Limited.** This Court has two main observations from the said evidence. Firstly, the said suit was filed in the lower Court on 9th November 2015, which was after the Applicant had been notified of the Interested Party's complaint, which notification was made in a letter to the Applicant dated 27th July 2015 which he attached. Secondly, the Interested Party was not a party to the proceedings in the lower Court, and therefore did not participate in the said proceedings.

50. There is thus not only an element of abuse of process of Court on the part of the Applicant, but there could also be a possible breach of the rules of natural justice and fair administrative action as regards the Interested Party, that militates against the exercise of this Court's discretion in the Applicant's favour with respect to the consideration of the orders given in **Muranga Chief Magistrates Court Civil Case No 409 of 2015 - Julius Ndugi Kirubi & Joseph Mwangi Ben T/A Kirubi, Mwangi Ben and Company Advocates –vs Skylife Estates Limited.**

51. In addition, the 1st Respondent in its judgment did clearly consider the said orders of the lower Court and made a finding as follows:

"The Accused further filed suit CMCC No 409 of 2015 at Muranga Court as a way to frustrate the Complainant's attempt to get back what lawfully belonged to him and therefore out of bad faith. He has not shown what disclosure he made to the civil Court to warrant getting an order of lien over the money of a third prty who not his client or a party to their agreement. He can only use that order to demand for his fees from his client. Court order or no court order, Accused ahas behaved in a dishonourable manner"

52. It cannot thus be said that there was breach of the Applicant's legitimate expectation, error on the face of the record or irrationality by the 1st Respondent for the foregoing reasons, and the Applicant is thus not entitled to the reliefs he seeks. In the premises I find no merit in the Applicant's Notice of Motion dated 8th November 2017. The same is hereby dismissed with costs to the Respondents and Interested Party.

53. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF JUNE 2018

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS THIS 7TH DAY OF JUNE 2018

J. MATIVO

JUDGE