



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 495 OF 2017**

**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 SECTIONS 8&9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAW SOCIETY OF KENYA**

**DISCIPLINARY TRIBUNAL.....RESPONDENT**

**AND**

**JACINTA MUTHEU ANTONY.....INTERESTED PARTY**

**EX PARTE APPLICANT:**

**MUEMA KITULU**

**JUDGMENT**

**The Application**

1. The ex parte Applicant herein, Muema Kitulu (hereinafter “the Applicant”) is an advocate of the High Court of Kenya, practicing under the name and style of Muema Kituku and Company Advocate. He had an advocate-client relationship with Jacinta Mutheu Anthony, the Interested Party herein, which culminated in the Interested Party filing a complaint with the Law Society of Kenya Disciplinary Tribunal, which is the Respondent herein.

2. The Applicant thereafter filed an application by way of a Notice of Motion dated 11<sup>th</sup> August 2017 in which he is seeking the following orders ;

a) **An order of Certiorari to bring into this court and quash the decision of the Respondent conveyed vide a letter dated 13.07.2017 requiring the Applicant to take plea before the Respondent on 14/08/2017 in Cause Number 71 of 2017**

b) **An order of Prohibition to prohibit the Respondent from carrying on with Disciplinary Cause Number 71 of 2017 or further disciplinary proceedings against the applicant on the basis of the same complaint**

c) **The costs of this application be provided for.**

3. The application is supported by the Applicant's statutory statement and verifying affidavit sworn on the 10<sup>th</sup> August 2017. It is the Applicant's case that the Interested Party was introduced to him in the course of his professional business on or about the 17<sup>th</sup> November 2006. He thereupon received instructions to pursue her claim for damages arising out of a motor vehicle accident where the Interested Party had sustained serious injuries. Further, that he then lodged a suit **CMCC No. 2567 of 2007 - Jacinta Mutheu Anthony vs Peter Njenga Kuria**. That despite the Interested Party's numerous complaints, he conducted the hearing and judgment was delivered in the Interested Party's favour on 7<sup>th</sup> September 2012 in the sum of Kshs 1,060,377.45, and what was to follow was the process of execution.

4. According to the Applicant, the process of tracing the judgment debtor proved difficult for purposes of execution, and that on or about June 2013, the judgment debtor's insurer lodged an appeal against the award, contending that the amounts awarded were excessively high. Thereafter in February 2014, the Applicant made a decision to cease acting for the Interested Party, and filed his Advocate -Client Bill of Costs, which he served upon the Interested Party.

5. According to the Applicant, he held a meeting with the Interested Party on the 28<sup>th</sup> March 2014, where a compromise was reached that the Advocate -Client Bill of Costs be withdrawn, and the Applicant pays the Interested Party the amount so far received from the insurer less the costs. Further, that pursuant to this consensus, he released to the Interested Party Kshs 675,918.40, which was the amount that the Interested Party through her Advocate had claimed in a letter dated 8<sup>th</sup> April 2014. The Applicant also stated that prior to the payment, his firm had received several letters from the Interested Party's advocates seeking to pursue a disciplinary cause against him with the Respondent.

6. The Applicant's contention is that the demand by the Interested Party relates to the amount of legal fees he is entitled to, and that there are clear procedures in the Advocates Act and the Civil Procedure Rules for pursuing this question in a civil cause, without dragging him through an embarrassing and professional image damaging cause at the Respondent. In addition, that the Interested Party has misconstrued the party and party costs set out in the decree to be the amount due to him for services rendered to her.

7. The Applicant also contended that by the time his relationship with the Interested Party was severed, costs and interest were yet to be recovered as they were disputed by the insurance company, and it was for the Interested Party's advocates on record to pursue the said sum.

8. It was the Applicant's position that a determination on the fairness of the administrative decision to arraign him before the Respondent, and the propriety of the said proceedings needs to be made before any further action is taken. He deponed that the impugned decision and proceedings are in bad faith, unreasonable, unfair and violates the legitimate expectation of the Applicant, and are being taken in abuse of power.

### **The Response**

9. The application was opposed by both the Respondent and Interested Party. Mercy K. Wambua, the Secretary of the Respondent, filed a replying affidavit sworn on 19<sup>th</sup> March 2018. It was her case that on the 25<sup>th</sup> April 2017, the Respondent received an affidavit of complaint sworn by the Interested Party against the Applicant, that he had withheld the sum of Kshs 385,504.60 together with interest at 14% and costs from May 2013. That the Respondent subsequently wrote to the Applicant on 25<sup>th</sup> April 2017 informing him of the complaint, and requiring him to respond within 14 days, which the Applicant did through a letter dated 8<sup>th</sup> May 2017.

10. Further, that the affidavit of complaint and the response were placed before the Respondent on the 22<sup>nd</sup> May 2017, who upon perusal found a *prima facie* case had been established against the Applicant, and ordered that the matter be placed for plea taking. That the matter was duly fixed for plea taking on 14<sup>th</sup> August 2017 as Disciplinary Tribunal Cause Number 71 of 2017, and a notice issued to the Applicant.

11. The deponent contended that the Respondent is statutorily mandated to entertain a complaint against an advocate of professional misconduct by virtue of section 60(1) of the Advocates Act. She likened the process of establishing whether a complaint discloses a *prima facie* case with the process of applying for leave for judicial review orders; and stated that a decision that a complaint discloses a *prima facie* case just like the grant of leave, does not necessarily mean that the matter has been disposed in favour of the applicant. Further, that the members of the Respondent have no reason to treat the Applicant unfairly or breach his rights, and that like this Court they have to deal and determine the matters filed before them.

12. The Respondent therefore contended that it is premature on the part of the Applicant to impute that the decision of the Respondent as contained in its notice dated 13<sup>th</sup> July 2017 was unfair.

13. The Interested Party, through a replying affidavit sworn on 17<sup>th</sup> October 2017, stated that the Respondent has a mandate to hear and determine complaints, and contended that the instant complaint was filed after there arose misconduct on the Applicant's part who refused to remit the decretal sum that was awarded by the trial court, even after she had paid all the relevant legal fees.

14. It was her case that she retained the services of the Applicant to offer her legal services and to represent her in **CMCC No 2567 of 2007-Jacinta Mutheu Anthony vs Peter Njenga Kuria**, regarding a claim for damages for an accident she was involved in. The Interested Party

averred that the matter proceeded, and judgement was entered in her favour on 7<sup>th</sup> September 2012 for Kshs 1,296 329 plus costs of kshs 134,994/=.

15. According to the Interested Party, from 7<sup>th</sup> September 2012 when judgment was delivered until 8<sup>th</sup> April 2014, the Applicant did not inform her of the status of the case, and she became apprehensive and instructed the firm of Koceyo And Company Advocates to peruse the court file and write to the insurance company. Further, that is when the said advocates discovered that judgment had been entered and the decretal sum payed, and they then wrote to the Applicant seeking release of the decretal sum.

16. That on 8<sup>th</sup> May 2014, the Applicant released to the Interested Party Kshs 675,918/=-, and purported to file a Bill of Costs on 6<sup>th</sup> February 2015 claiming Kshs 473,958/60. Further, that the Bill of Costs was filed malafides to enable the Applicant withhold funds due and payable to her. It was her position that since once the fees are assessed according to the Advocates Remuneration Order, and taking into account the fees she had already paid, the sum total due to the Applicant is 88,454/= and not the Kshs 473,958.60 his firm is unlawfully withholding.

17. The Interested Party alleged that Bill of Costs filed by the Applicant has never been prosecuted, and the court file has been missing since the year 2014, and that the Applicant did not formally serve her with the notice of its withdrawal. That it was therefore clear that the Applicant is in breach of his obligations towards the Interested Party, and the Respondent is the best forum for the issue to be heard and determined.

### **The Determination**

18. The parties were directed to canvass the instant application by way of written submissions. The main issues that arise for determination are firstly, whether complaint by the Interested Party against the Applicant is within the jurisdiction of the Respondent; and secondly, whether the Applicant is entitled to the reliefs sought.

19. On the first issue, the counsel for the Applicant, Ongoya & Wambola Advocates, urged that the Advocates Act at Part IX as read together with Order 52 Rule 2 of the Civil Procedure Rules 2010, set outs clear procedures on the manner in which any dispute relating to advocates remuneration is supposed to be presented, which is by a civil suit that is heard by a judge. It was also their submission that the Act establishes the complaints commission at part X which is mandated to handle all complaints against advocates, and only refers those matters it considers to be of a disciplinary nature to the disciplinary committee.

20. Therefore, that the question which must be answered in determining whether indeed the Respondent has jurisdiction to handle the dispute before it, is whether the complaint against him by the Interested Party constitutes a disciplinary offence which can only be determined by the Respondent in the first instance.

21. The Applicant urged the court to make a finding in the negative, for the reasons that theirs was a dispute that was already foreseen by the Advocates Act as read together with the Civil Procedure Rules, and there are clear procedures set out by the said acts to aid in resolving the arising issues. Reliance was placed on the decisions in **Owners and Masters of the Motor Vessel "Joey" vs. Owners And Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367:** and **Republic vs Institute of Certified Public Accountants of Kenya Exparte Vipichandara T/A J V Bhatt & Company Nairobi HCMA No 285 of 2006** for the proposition that jurisdiction is a threshold issue and a statutory body can only do that which it is authorised by statute to do.

22. The Respondent's counsel, Nyiha Mukoma & Company, also submitted on this issue. They contended that sections 57- 60A of the Advocates Act clearly stipulates the powers of the Respondent, which is mandated to hear common law disciplinary offences of professional misconduct and certain offences prescribed under section 60(1) of the Act. It was their submission therefore, that the basis of the Respondent is to receive and determine complaints brought by persons against advocates and determine them.

23. It was contended by the Respondent that the complaint brought before it was rightfully done as per section 60(2) of the Act, and that the Applicant being an advocate of the High Court of Kenya falls within the ambit of the Respondent's disciplinary machinery. It was their submission that the Applicant received the decretal sum of Kshs 1,296,329/= plus costs of 134,994/= from CIC General Insurance Company, and did not inform the Interested Party. Further, that it was not until 8<sup>th</sup> April 2013 and after instructing the firm of Koceyo and Company Advocates that the Interested Party became aware.

24. The Respondent relied on the case of **T. O. Kopere vs. The Disciplinary Committee Law Society of Kenya & Another, HCCCA No 461 of 2011,** where the court observed that to try and stop the Respondent from carrying out its mandate will be an illegal exercise. It was their submission that section 62 provides for the right of appeal within fourteen days against the orders of the Respondent, and therefore the Applicant can appeal if aggrieved. That further, under section 60(7) and (8) of the Advocates Act, the Respondent has the power to tax a bill of costs filed in court if after a reasonable period of time the same has not been taxed.

25. Koceyo and Company Advocates, the counsel for the Interested Party, on their part submitted that the Respondent has the mandate to hear and determine the instant complaint filed by the Interested Party, which arose after misconduct on the Applicant's part who refused to remit the decretal sum that was awarded by the trial court even after the Interested Party had paid all the relevant legal fees. The Interested Party reiterated that under section 60(1) of the advocates Act, the mandate of the 2<sup>nd</sup> Respondent is to hear and determine a complaint against an advocate of professional misconduct, and for offences prescribed in the Act.

26. On the issue whether the Applicant is entitled to the remedies sought, the Applicant's Counsel submitted that judicial review is concerned with the decision making process as opposed to the merit. They relied on the cases of **Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd, Civil Appeal No 185 of 2001,** **Council of Civil Service Unions vs Minister for the Civil Service, [1985] AC2,** and **Republic vs Kenya Revenue Authority ex Parte Yaya Towers Limited (2008) eKLR.**

27. They submitted that the remedies of judicial review are discretionary and that the Applicant is not disputing the existence of a dispute between him and the Interested Party, but states that there are clearly laid down mechanisms for an amicable resolution of the said dispute which does not involve taking plea and all the antecedent proceedings before the Respondent.

28. The Respondent on its part relied on the case of **R v Secretary of State for Education and Science ex parte Avon County Council (1991) 1 ALL ER 282**, and **Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd, Civil Appeal No 185 of 2001**, for the position that judicial review is concerned with the decision making process and not with the merits of the decision. They further relied on the decision in **Republic vs Judicial Service Commission ex parte Pareno (2004) 1 KLR** for the proposition that judicial review remedies are discretionary.

29. The Interested Party also submitted that judicial review only deals with the decision making process, and relied on the case of **Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd (supra)** and **Pastoli vs Kabale District Local Government Council And Others (2008) 2 EA 300** for this proposition. Further, that the issues raised by the Applicant are with regard to merits of the case before the Respondent, that has not been concluded, and that the Applicant is granted a window to appeal the outcome of the Respondents decisions as provided in section 62 of the Advocates Act.

30. Lastly, the Interested Party submitted that the Applicant has failed to convince the court as to how its complaint is illegal, irrational, or filled with procedural impropriety, and relied on the case of **Republic Vs Kenya National Examination Council ex parte Geoffrey Gathenji Njoroge and 9 Others, (1997) eKLR** for the scope of the orders of mandamus and prohibition.

31. I have considered the arguments made by the parties herein, and am alive to the broad grounds on which the Court exercises its judicial review jurisdiction as stated in the case of **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.”**

32. On the first issue that was canvassed of the jurisdiction of the Respondent to entertain the Interested Party’s complaint, section 60(1) of the Advocates Act provides as follows in this regard:

**“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.”**

33. The Applicant’s main argument is that the Respondent had no jurisdiction on account of the issue before it being that of the legal fees due to the Applicant, which is the province of other procedures set out in the Advocates Act and Civil Procedure Rules. I have perused the Affidavit of Complaint that was sworn by the Interested Party on 21<sup>st</sup> April 2017 and filed with the Respondent on 25<sup>th</sup> April 2017, which was annexed as “Annexure MKW1” to the Respondent’s Replying Affidavit. It is evident that paragraphs 4-8 therein constitute a complaint about failure of the Applicant to inform the Interested Party of the judgment entered in her favour.

34. This is a complaint which was over and above that of the Applicant withholding funds due to the Interested Party which the Applicant claims are his legal fees, and is also a complaint about professional conduct and therefore well within the Respondent’s jurisdiction.

35. In addition, the Applicant did concede to having filed an Advocate/Client Bill of Costs and having served the same on the Interested Party. He did not provide any evidence of its withdrawal, which withdrawal is contested by the Interested Party. Disputes about Bills of Costs are also still within the jurisdiction of the Respondent under section 67 (7) and (8) of the Advocates Act which provides as follows:

**“(7) If a bill of costs has been filed in Court by the advocate against whom a complaint is being heard but has not been taxed, the Committee may adjourn the complaint for such period as it considers reasonable to allow such taxation:**

**Provided that if at the expiry of such adjournment, the bill is still not taxed, the Committee may make its own estimate of the costs due to the advocate and make orders accordingly.**

**(8) A determination of the Committee under subsections (7) and (8) shall be deemed, for all purposes, to be a determination of the Court.”**

36. I am also in this regard in agreement with the holding by Odunga J. in **Republic v Advocates Disciplinary Tribunal & 2 others Exparte Thomas Letangule & 3 others, [2015] eKLR**, wherein the learned judge stated as follows:

“46. I am equally not convinced that the mere fact that a party has filed his bill of costs for taxation deprives the respondent from jurisdiction to entertain a complaint. Whereas that is a matter which the Respondent may in its discretion take into account, that cannot be the sole basis upon which this Court would prohibit the Respondent from enquiring into a complaint made before it. The 1<sup>st</sup> respondent is mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act. It is also true that under section 60 of *Advocates Act* (“the Act”), the said Committee has the power to receive complaints of professional misconduct against an Advocate from any person. Since the Applicants herein are Advocates, the 1<sup>st</sup> respondent has jurisdiction to entertain any complaints made against them in their professional capacity pursuant to section 55 of the Act. This power, as was appreciated by Mumbi Ngugi, J in Ex Parte Kimaiyo Arap Sege, Misc. Appl. No. 1266 of 2007:

“goes over and above dealing with complaints by individuals. The Committee has the mandate to ensure ethical and professional conduct by members of the Bar and section 60 of the Advocates Act empowers it to deal with complaints regarding professional misconduct, defined to include conduct incompatible with the status of an Advocate...I take the view that the Disciplinary Committee would have failed in its duty if it did not pursue the disciplinary proceedings against the applicant if the evidence before it showed that such conduct was unprofessional and dishonourable.”

37. On the outstanding issue as to whether the Applicant is entitled to the reliefs he seeks, I am guided by the parameters of the judicial review orders, as set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, Civil Appeal No. 266 of 1996 thus:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition 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...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

38. This Court has found that the Respondent was acting within its jurisdiction, and the order of certiorari and prohibition sought by the Applicant cannot therefore lie, as they can only be granted it has been demonstrated that the impugned decisions or action was made in excess of jurisdiction.

39. In the premises, I find that the Applicant’s Notice of Motion dated 11<sup>th</sup> August 2017 is not merited, and it accordingly fails. The same is hereby dismissed with costs to the Respondent and Interested Party.

40. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2018

P. NYAMWEYA

JUDGE