REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR NO. 59 OF 2016

IN THE MATTER OF APPLICATION BY AMOTA NYASAE NYANG'ERA FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS, AGAINST ICPAK

IN THE MATTER OF: DECISION/ORDER MADE BY ICPAK DATED 12TH JULY 2016 DECLARING APPLICANT NOT TO BE OF GOOD STANDING TO PRACTICE ACCOUNTANCY

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA…….....……..RESPONDENT

AMOTA NYASAE NYANG'ERA…….EX-PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Motion on Notice dated 22nd February, 2016, the *ex parte* applicant herein, **Amota Nyasae Nyang'era**, seeks the following orders:

> **1. An order of certiorari to remove into the High Court and quash the order/decision made by the Institute of Certified Public Accountants of Kenya on the 12th day of January, 2016, retracting the letter of good standing issued by the Respondent to the ex parte applicant on the 7th day of January, 2016.**
>
> **2. An order of prohibition directed at the Respondent restraining them from retracting the letter of good standing issued by the respondent on 7th day of January, 2016 until complaint reference D/121/2/14: KTDA – VS –NYASAE & ASSOCIATES is heard and determined.**

3. An order of mandamus directed at the Respondent to restore and declare the ex parte applicant as a person of good standing and issue him with a practising certificate and annual practicing licence until complaint reference D/121/2/14: KTDA – VS –NYASAE & ASSOCIATES is heard and determined.

4. The costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the applicant, he is a registered accountant practising in the name and style of Nyasae & Associates since 9th July, 1986 and on 25th April, 2007, he was appointed as the external auditor by Kiamokama Tea Factory Company Limited (hereinafter referred to as "the Company") during the said company's annual general meeting and since the financial year 2007/2008 had been reappointed as such save for the 2015/2016 financial year when he was unable to offer his candidature for reappointment due to lack of certificate of good standing, practicing certificate and annual practicing licence for the year 2016.

3. According to the applicant though he was issued by a certificate of good standing on 7th January, 2016, the same was retracted by the Respondent on 12th January, 2016 without justification and the Respondents declined to issue him with both practicing and annual practicing licence for the year 2016 based on a complaint lodged by the Kenya Tea Development Agency (hereinafter referred to as "the Agency")being reference D/121/2/14: KTDA – vs –Nyasae & Associates (hereinafter referred to as "the complaint") filed with the Respondent.

4. The said complaint it was averred was due to an opinion the applicant gave in the company audit report for the year 2010/2011 in which the applicant stated that there was an overstatement of a sum of Kshs 16,636,844/- and recommended that the Agency indemnifies the Company in the said sum. In the applicant's view, it was this opinion that provoked the sad complaint which was still pending hearing. Subsequent to the said complaint the applicant was notified by the Respondent to respond thereto and the applicant responded accordingly. However since 17th April, 2014 when the applicant furnished the Respondent with the requested documents, no further communication was received by the applicant despite request for the same.

5. The applicant averred that sometime in October, 2015, he received an unreferenced email notifying him of the disciplinary committee sitting for 21st October, 2015 which meeting was attended by the Agency and its oral submissions made. However, the applicant contended that he was never invited thereat and the proceedings of the day were conducted in his absence. On the same day further hearing was scheduled for 18th November, 2015 which date was inconvenient for the applicant and the applicant notified the Respondent accordingly. It was averred that the applicant was assured that his interests would be taken into account an on 7th January, 2016, he obtained a letter of good standing from the Respondent.

6. However on 13th January, 2016 he received a letter dated 12th January, 2016 from the Respondent retracting the said letter of good standing on the grounds of the said complaint which letter seemed to have been received by the Agency in advance despite the fact that the same was not even copied to them.

7. According to the applicant the said decision was biased, unfair, procedurally flawed, irrational, in bad faith, irrelevant, an infringement of his fundamental rights, *ultra vires* and an abuse of the Respondent's powers. According to him, the decision was based on the opinion he gave with respected to the said sum and the same was arrived at in violation of the rules of natural justice.

8. In his submissions, the applicant contended that the Respondent Institute's decision of 12th January 2016 was made in excess of jurisdiction as the respondent Institute did not accord the ex parte applicant an opportunity to be heard before retraction of his letter of good standing dated 7th January, 2016. Further, the Respondent Institute did not serve the ex parte with notice to show cause before retracting the same.

9. It was accordingly submitted that the Respondent Institute's decision to declare the ex parte applicant a member in not good standing is defective and not in accordance with the requirements of the law, specifically section 32 and the Fifth Schedule to the ***Accountants Act***, No. 15 of 2008. The applicant therefore contended that he was condemned unheard and his right to practice as a professional Accountant infringed, contravened, violated, curtailed, trumped upon and truncated. It was submitted that the Respondent Institute's decision/order dated 12th January 2016 is inconsistent with the provisions of Articles 2, 22, 27, 47 and 50 of the Constitution of Kenya, 2010 hence were illegal, unlawful, illegitimate and against ***Fair Administrative Action Act*** No. 4 of the 20015.

10. To the applicant, the Respondent Institute was biased and unfair *ab initio* as it did not give the ex-parte applicant a notice before retracting his letter of good standing; did not give reasons for retracting the ex parte applicant's letter of good standing; without prejudice to the foregoing, the reasons given for the retraction were not valid and do not stand the test of the law and the day because of the following reasons:

(i) the ex-parte applicant has not been formally charged before the Respondent Institute's Disciplinary Committee;

(ii) the ex-parte applicant has not taken a plea in regard to the complaint lodged by KTDA;

(iii) the Respondent Institute have not entered and or delivered any verdict against the ex parte applicant as required by and under section 33 of the Accountants Act, No. 15 of 2008;

(iv) the Respondent Institute's Disciplinary committee in regard to this complaint has not been formed as required by and under section 32 of the ***Accountants Act***, No. 15 of 2008; and

(v) The complaint has not been referred to the Disciplinary committee as required by and under section 32 of the Accountants Act No. 15 of 2008.

11. It was further submitted that the procedure culminating in the ex-parte applicant's retraction of letter of good standing was flawed since section 32 as read together with the Fifth Schedule to the ***Accountants Act***, No 15 of 2008 was not followed and or complied with. According to paragraph 1(1) of the Fifth Schedule to the ***Accountants Act***, No. 15 of 2008, the Council shall cause a statement to be prepared setting out the allegations of professional misconduct to be investigated by the Disciplinary Committee and, by paragraph 1(2) the secretary to the council shall transmit to each member of the Disciplinary Committee and to the person whose conduct is the subject matter of investigation a copy of the statement prepared pursuant to sub-paragraph 1. Here, it was contended that no statement has, to date, been transmitted to the ex-parte applicant as required.

12. It was further contended that the respondent Institute's decision was and is irrational in that the Respondent Institute failed to take into account the substantive and procedural law as articulated by and in section 32 and the Fifth Schedule to the ***Accountants Act***, No. 15 of 2008 prior to retracting the ex-parte applicant's letter of good standing dated 7th January 2016.

13. In addition the said decision was faulted on the ground that the respondent Institute acted in bad faith by clandestinely and secretly transmitting a copy of the letter of retraction of good standing of the ex-parte to the Agency which the Agency used to discredit the ex parte applicant and, accordingly convince the shareholders of Kiamokama and Tombe Tea Factory Companies not to re-appoint the ex parte applicant as auditor of Kiamokama and Tombe Tea Factory Companies at their respective Annual General Meetings.

14. According to the applicant, the status of any member of the Respondent Institute is confidential and the same cannot be revealed to a third party unless the third party has an interest to receive that information. Therefore the ex-parte applicant's status at the Institute can only be revealed to a third party upon specific request and only if their party has a common interest to receive such information. There is no evidence that the KTDA specifically requested the information under reference and the interest they had in requesting the information.

15. It was submitted that contrary to the rules and or the principles of natural justice, the ex-parte applicant was not afforded an opportunity to present his side of the story prior to retraction of his letter of good standing dated 7th January 2016 yet section 4(2) of the ***Fair Administration Action Act***, 2015, every person has a right to be given written reasons for any administrative action that is taken against him. It was submitted that by section 4(3) of the ***Fair Administrative Action Act***, where an administrative action is likely adversely affect the right 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 representation 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, where applicable; or

(g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

16. With regard to (d) above, note that section 6 of the ***Fair Administrative Action Act*** No. 4 of 2015 provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5 of the same Act. In this case, it was submitted that none of the foregoing requirements were notified and or communicated to the ex parte applicant to enable him adequately prepare to undertake his defence. In addition, section 4(4) of the ***Fair Administrative Action Act*** No. 4 of 2015 provides that 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.

17. However, none of the foregoing requirements were notified and or communicated to the ex parte applicant to enable him adequately prepare to undertake his defence. The said Act, it was asserted provides that it is in addition to and not in derogation from the general principles of common law and the principles of natural justice.

18. The Court was therefore urged to fund that the respondents acted, biased, unfair, procedurally flawed, in bad faith, irrelevant and an infringement of the Ex-Parte Applicant's fundamental right, ultra vires and abuse of the Respondent's powers and to proceed to grant the orders sought with costs.

Respondent's Case

19. In response to the application, the Respondent averred that a decision to retract the letter of good standing having been made, an order of prohibition cannot issue. With respect to the prayer for *mandamus*, it was averred that there is no mention of any public duty that the Respondent is alleged not to have performed; that the issuance of letter of good standing is not a pre-requisite to a practicing or annual

licence hence there is no duty that the Respondent has failed to perform and that in fact the Respondent has issued the applicant with practising certificate and annual licence hence there is no further duty remaining to be performed by the Respondent that can be compelled by an order of mandamus. It was further averred that the issuance of letter of good standing is discretionary hence cannot be compelled by an order of *mandamus*.

20. It was averred that the impugned letter of 12th January, 2016 while retracting the letter of good standing issued on 7th January, 2016 only mentioned the existence of the disciplinary matter hence cannot be termed as biased, unfair, procedurally flawed, in bad faith, irrelevant or an abuse of power.

21. After setting out the legal foundations for the issuance of the letter of good standing, the Respondent averred that it has designed or developed various forms in an attempt to enforce the obligations and standards espoused by the ICPAK Code of Ethics for Professional Accountants including form C & S named "Good Standing Application Form" in which it is clearly indicated that it is not mandatory and a member may choose to submit the form in order to obtain letter of good standing, tax agency, application for practicing certificate or annual licence.

22. It was averred that in case a member requires to be given a letter of good standing, he needs to confirm whether the Institute has not instituted any disciplinary proceedings against him, since pendency of such a claim has an effect however little, on a member's standing.

23. It was however contended that there is no requirement under the Act that a member wishing to apply for a practice certificate or annual licence must have a letter of good standing. It was averred that in fact the applicant had already been issued with practicing certificate for the year 2016.

24. According to the Respondent, the confusion that led to the issuance of the first letter arose because, in the ex parte applicant's application dated 7th January, 2016 for the letter of good standing, the applicant ticked "yes" to the question whether the Respondent had not instituted any disciplinary proceedings against him and it was later discovered that there were indeed such proceedings pending

Determinations

25. I have considered the Motion on Notice, the affidavits filed by the various parties, the submissions and authorities cited therein.

26. In these proceedings the Court is not concerned with the determination whether the decision to retract the letter of god standing was correct or wrong. What the Court is concerned with is the process through which that decision was made.

27. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."**

28. In this case, it was contended that the letter of good standing is irrelevant in so far as the issuance of

the practicing certificate or practicing licence is concerned. In other words, the Respondent would like this Court to believe that the said document an inconsequential piece of paper. The Applicant however contends which contention was not seriously disputed that the fact of retraction of the said letter was transmitted to the Agency which was the complainant in the case that gave rise to the act of retraction of the said letter.

29. The Respondent however conceded that the said letter of good standing is provided for in ICPAK Code of Ethics for Professional Accountants. In this case, the said letter had been issued to the Applicant before it was retracted. The applicant contends that the said retraction was undertaken without him being afforded an opportunity of being heard and without being given notice to show cause why the same ought not to be retracted.

30. In **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

> **"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. *It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.* They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."** [Emphasis mine].

31. ***Halsbury's Laws of England*** (supra) puts it thus:

> **"However, the nature of the inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; ad it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."**

32. It is therefore clear that the need to act fairly depends on the nature of the report and the recommendations to be made. The circumstances in which the rule will apply cannot be exhaustively

defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. Where the report and recommendations may have far reaching implications such as the ruining of careers and reputation as well as being the basis of judicial proceedings, the authority concerned has a duty to act fairly. In this case, the effect of the withdrawal of the letter of good standing would necessarily have had adverse implications on the applicant's ability to be retained as an accountant by Kiamokama Tea Factory Company Limited. Whereas it may well be true that the issuance of the said letter was as a result of "confusion" as the Respondent contended, that "confusion" could only be resolved by hearing the applicant's version on the issue and not unilaterally by the Respondent.

33. In my view, having been issued with the letter of good standing, a legitimate expectation was created in favour of the applicant that the same would not be retracted without good cause and in such event the applicant would be accorded a hearing before the same was retracted. In **Republic vs. Attorney General & Another Ex Parte Waswa& 2 Others [2005] 1 KLR 280** it was held that:

> **"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."**

34. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where **Lord Diplock** states, at page 949:-

> **"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."**

35. In this case, the applicant had been conferred upon the benefits that accrue with the issuance of the letter of good standing. The decision retracting the same had the effect of depriving him of that benefit or the advantages that appertain to that letter. In fact he had previously enjoyed the benefits and advantages of possessing the same. Whether he had used it to his advantage is another issue altogether. Nevertheless the Respondent could not arbitrarily retract the same without communicating to him some rational ground for withdrawing it on which he ought to have been given an opportunity to comment.

36. By acting in the manner it did, the Respondent violated the rules of natural justice as espoused in Article 47 of the Constitution as read with the provisions of section 4 of the ***Fair Administrative Actions Act***, 2015.

37. The powers and the procedure before disciplinary bodies were dealt with in **Republic vs. Institute of**

Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006, where the Court expressed itself as follows:

> **"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."**

38. Public Authorities must be guided by the principle espoused by **Prof Sir William Wade** in ***Administrative Law*** that:

> **"The powers of public authorities are…essentially different from those of private persons. A man making his will may, subject to any right of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"**

39. In the foregoing premises I find merit in the Motion dated 22nd February, 2016.

Order

40. In the result, I issue an order of certiorari removing into this Court and quash the order/decision made by the Institute of Certified Public Accountants of Kenya on the 12th day of January, 2016, retracting the letter of good standing issued by the Respondent to the ex parte applicant on the 7th day of January, 2016. Further prohibit the Respondent from withdrawing the said letter unless and until the due process of the law is adhered to.

41. The applicant will have the costs of these proceedings to be borne by the Respondent.

42. It is so ordered.

43. The delay in the delivery of this judgement was occasioned by the failure by the parties to comply with the directions of the Court and furnish the Court with all the soft copies of the pleadings and submissions.

Dated at Nairobi this 1st day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Waiganjo for Mr Odhiambo for the Respondent

CA Mwangi