REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 6 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI BY PETER KINYANJUI

AND

IN THE MATTER OR DISCIPLINARY COMMITTEE AND IN THE MATTER OF DISCIPLINARY CAUSE NO. 104 OF 2014

PETER KINYANJUI……..……..APPLICANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL……..1ST REPONDENT

ANNE WAMBUI NGUGI…….....2ND RESPONDENT

RULING

1. On 29th June, 2016, I delivered a judgement in this cause in which I dismissed the applicant's case with costs. In arriving at the said decision I expressed myself *inter alia* as hereunder:

> **"In this case the applicant contends that the manner in which the 1st respondent conducted its proceedings was unprocedural. This contention was based on the fact that the 1st respondent granted leave to the advocate to file her replying affidavit on the day when the matter was fixed for judgement. The applicant has however not contended that the 1st respondent had no jurisdiction to grant such orders. Whereas the grant of the same may, to an appellate Court be found to have been a wrong exercise of discretion, this Court not being an appellate tribunal over the decision of the 1st respondent cannot inquire into the, merits of its decision. Such a decision can only be challenged by way of an appeal to the High Court and such option is available in respect of decisions of the 1st Respondent. In my view the route that the applicant has taken in challenging the decision of the 1st respondent cannot lead him to the destination he intended to arrive at. If he felt that the decision of the 1st Respondent was incorrect he ought to have filed an appeal against the 1st respondent's decision. In other words even if I was to be of the view that the 1st respondent in exercising its undoubted discretion, did so wrongly, I am not entitled to substitute my discretion for that of the 1st respondent in proceedings of this nature."**

2. By a Notice of Motion dated 25th August, 2016, the applicant herein now seeks the following orders:

1. That the portion of the judgment and order delivered by the honourable (Mr.) Justice Odunga on 29/6/2016 directing that the ex parte application meets the costs of the respondent by review, varies or set aside.

2. That this honourable court by notice of motion dated 27/1/2016 guided and gave directions on how to vacate the orders of the tribunal and commit the accused advocate to pay the money she had unlawfully obtained from me by honourable Justice Wakiaga, and the same was said by the honourable Justice Odunga during hearing could not have changed the outcome noting that the tribunal never filed submissions, how do I become a looser on a ground where I have no competitor the outcome were interfered with as had been in the years.

3. That the court be pleased to issue any other orders that it deems fit.

3. According to the applicant, pursuant to my application dated 26th January, 2016, he was granted leave to commence proceedings herein as a Pauper and even received a waiver on court filing fees. However in this Court's judgement of 29th June, 2016, he was penalised to pay costs without reference being made to his status as a pauper.

4. The applicant believed that had his status been considered this Court would not have penalised him in costs as it did hence it was unjust to punish him with costs.

5. The foregoing, according was the state of the pleadings when the matter was fixed for hearing. That issue in my view can be resolved by simply referring to the proceedings herein. It is true that on 27th January, 2016 the applicant was granted leave to prosecute this suit as a pauper. Accordingly I agree with the applicant that the order penalising him in costs was as a result on inadvertence on the part of the Court.

6. The Respondents however contended that this Court having made its decision cannot revisit the same and that the only recourse available to the applicant is an appeal against this Court's decision. In **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** the Court of Appeal held that the superior court (read the High Court) in the matter before it has the residual power to correct its own mistake.

7. The decision whether or not to review a Court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. However, it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion since misconstruing a statute or other provisions of the law cannot be a ground for review.

8. In this case however, the decision on costs in my view amounts to an apparent error or omission on the part of the court hence can be corrected by the Court on an application by a party or even by the Court on own motion. In the premises prayer 1 in the Motion is merited.

9. That would have been sufficient to dispose of the instant application. However the applicant contended that this Court dismissed his application on the basis that he had a right of appeal when in fact the law does not permit him to appeal. Due to this interesting point of law, I have decided to deal with this rather novel point though it was not the basis of the application before me.

10. In support of his case, the applicant relied on section 62 of the ***Advocates Act*** which provides as follows:

Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.

11. It is clear therefore that under this provision, the only person who can take advantage of the said section is an advocate and not an ordinary complainant before the Disciplinary Tribunal. It follows that judicial review proceedings cannot be disallowed merely on the basis of the availability of alternative appellate remedy since that alternative remedy is not available to the ordinary complainant under that provision.

12. This Court however did not determine the application simply because there is availability of the alternative appellate remedy. Had it done so it would have struck out the application instead of dismissing the same. This Court in its decision found that the issues which the applicant raised did not properly fall within the purview of judicial review as they required determination on the merits of the decision of the Tribunal. Therefore whereas I appreciate that the applicant had no recourse to an appellate process under section 62 of the ***Advocates Act***, the material placed before me by the applicant did not merit the grant of judicial review orders sought. In this respect I wish to refer to the decision in **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999** that a wrong that is liable to be set aside for an error of fact or substantive law are remediable is to appeal to a higher court and where there are no higher courts to appeal to, then none can say that there was an error since the fundamental right is not a legal system that is infallible but one that is fair.

13. Therefore whereas the High Court hearing a petition may well have been in a position to consider the merits of the decision of the Tribunal, this Court in the exercise of its judicial review jurisdiction does not deal with the merits of the decision under challenge. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

14. The applicant alluded to the fact that **Wakiaga, J** had found his application merited. With due respect to the applicant **Wakiaga, J** was dealing with an application for leave and as he was entitled to find granted the same the applicant having established a *prima facie* case. That finding did not mean that the applicant's substantive Motion had to succeed. A *prima facie* finding is not the same as a definite finding as to the merits of the main case. I have not found anything in **Wakiaga, J's** order indicating that the applicant's application had to succeed.

15. Accordingly, I find that the applicant's Notice of Motion dated 25th August, 2016 is merited to the extent that the Applicant ought not to have been penalised in costs. Accordingly the order penalising him in costs is hereby reviewed and is set aside.

16. There will be no order as to costs.

17. It is so ordered.

Dated at Nairobi this 7th day of March, 2017

G V ODUNGA

JUDGE

<u>Delivered in the presence of:</u>

Mr Njoroge for Miss Wangare for the 1st Respondent

Mr Kinyanjui the ex parte applicant

CA Mwangi