REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 555 OF 2015

IN THE MATTER OF ARTICLE 22 (1) & 3 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 2 (1), 3, 19 & 165 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER CONSTITUTION OF KENYA SECTION

AND

IN THE MATTER OF THE MEDIA ACT CAP 411 B OF THE LAWS OF KENYA

BETWEEN

ARTHUR WAMITI NJOROGE.....PETITIONER

VERSUS

THE DISCIPLINARY TRIBUNAL.....RESPONDENT

GEOFFREY GATHARA MAHINDA.....INTERESTED PARTY

JUDGEMENT

The petitioners case

The crux of the petitioners case as I understand it is that he is an advocate of the High court of Kenya; that a complaint was lodged against him with the Law Society of Kenya by the interested party; that he was not notified of the said complaint; that the complaint was heard and determined by the Respondent his absence notwithstanding, and that he was never served or summoned to attend the hearing. He avers that the notification and hearing notices were posted to the wrong address, hence the reason why he did not appear and that he was never afforded an opportunity, a breach to the rules of natural justice, hence his constitutional right not to be condemned unheard were violated and seeks orders to quash the said determination and an injunction stopping implementation of the decision and a declaration that his rights were violated.

The Respondents response is that a complaint against the petitioner was received by the Law Society of Kenya from the interested party, that the petitioner was notified about the said complaint through his last known address, and that the Disciplinary Committee perused the complaint and established that a *prim facie* case had been established. The petitioner was invited to enter a plea and was also informed of the hearing date, and that after considering the evidence the committee rendered its judgement.

The interested party admits that he was the complainant in cause number **143** of 2013 at the Advocates Disciplinary Tribunal against the petitioner, that the complaint concerned unbecoming behaviour of the petitioner who had failed to refund a sum of Ksh. **18** Million which he held as stakeholder and the petitioner cordoned or perpetuated a fraudulent transaction over a conveyance of a property in a transaction he acted for the vendors.

The interested party stated that the judgement was rendered after the tribunal considered the evidence and found the petitioner guilty. Also, the interested party further stated that the petitioner has no defence to the complaint and that the petitioner filed another case on the same facts being judicial review number **379** of **2014** which was dismissed on 10th December 2015 by Odunga J. He also stated that these proceedings were instituted to obstruct execution of the decision complained of.

Counsels for all the parties filed written submissions, which I have considered. As stated above, counsel for the Respondent submitted that the petitioner filed Judicial Review number **379** of **2014** which was dismissed by Odunga J. The said case was premised on the same set of facts and circumstances and challenged the same decision.

This averment was not contested at all. It has become a practice for litigants to file multiple suits in different courts premised on the same issues and circumstances. Such practice is in my view improper and utter abuse of court processes. More disturbing is the fact that there is no mention in the petition of any previous litigation on the same subject. It is only proper and just for a party to disclose to the court at the earliest opportunity possible of any previous litigation related to the issues in the subsequent case.

Duty of a litigant to disclose material facts

I would be failing in my solemn duty if I do not mention that it is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner.****[1]***

A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[2]The petitioner was under a solemn duty to bring to the attention of the court the above information and leave it to the court to determine the merits or otherwise of his complaint.

The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the petitioner, but also to any additional facts which he would have known if he had made inquiries. The question that inevitably follows is whether the non-disclosure in this case was innocent, in the sense that the fact was not known to the petitioner or that its relevance was not perceived. In my view, the non disclosure in this case was not innocent at all but deliberate and such conduct cannot be entertained by a court of law. I find that the above conduct amounted to non-disclosure of material information and abuse of court process, especially so, when the conduct in question is attributed to an advocate who is an officer of the court. Because conduct amounts to abusing court processes, I find it fit to spare some time and ink to address the issue.

Abuse of court process

Given the striking similarity of the reliefs sought in this petition and the Judicial Review dismissed by Odunga J., crucial questions do arise such as whether it is open for the petitioner to file this petition which

is identical to the suit that was dismissed seeking substantially identical reliefs and whether such conduct amounts to abuse of court process.

I have in numerous decisions of this court[3] observed that "It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[4]

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[5]

The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right.*
>
> ***(d)*** *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> ***(e)*** *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[6]***
>
> ***(f)*** *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> ***(g)*** *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
>
> ***(h)*** *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* ***[7]***

Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexations and oppressive.[8] Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[9] Justice Niki Tobi JSC of Nigeria observed that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[10]

It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their

different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amounts to abuse of court/legal process."[11]

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[12] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[13] Turning to this case, I find no difficulty in concluding that the two cases, arising from the same set of facts and circumstances and seeking substantially the same reliefs amount to gross abuse of court process and on this ground alone I am inclined as I hereby do, to strike out this petition for being an abuse of court process.

Whether the petitioner is entitled to a order of certiorari

Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. ***[14]***

Broadly, in order to succeed, the applicant will need to show either:-

> *(a) the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*
>
> *(b) a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

Strictly, speaking, there is nothing to demonstrate that the Respondent acted illegally or outside its legal mandate. The law permits judicial proceedings to proceed *ex parte* where a party is served and does not attend. If and when proceedings proceed *ex parte,* that is not an illegality because the law allows it. Service was effected through the last known address of the petitioner. It has not been demonstrated that the address used was not the last known address of the petitioner in the records of the Law Society of Kenya.

The law is also clear on the remedy where a suit proceeds *ex parte*. An aggrieved party can apply to set aside the decision on grounds that service was improper. Thus, by proceeding *ex parte,* the Respondent acted within the confines of the law. The petitioner is a lawyer. He certainly knows consequences on non appearance and default of attendance and the procedure for setting aside *ex parte* proceedings. This petition is not the proper procedure to challenge an *ex parte* proceeding by framing some alleged constitutional issues. On this ground alone this petition fails.

Further, there is nothing to show that the decision was unfair or irrational***[15]*** or unreasonable to warrant the exercise of this courts judicial review powers. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd* vs *Wednesbury Corporation*[16]:-

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

The onus is on the applicant to establish irrationality, perversity or unreasonable. This onus has not been discharged.[17] I have carefully evaluated the material before the court and I am not persuaded that the applicant has demonstrated sound grounds for the court to grant an order of *certiorari.*

Whether the petitioner is entitled to an injunction

An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles. The petitioner asks this court to issue an injunction stopping a lawful decision of a lawful body. Such a decision can only be challenged by either setting aside or following the appellate procedure provided and not by inviting the court issue an injunction. The prayer for injunction is in my view misplaced and cannot be issued.

Whether the petition raises any constitutional issues

It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[18] When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful…the question is whether the argument forces us to consider constitutional rights or values.[19]

The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others**[20]* in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak**[21]* notes that:-

*"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."**[22]***

Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [23] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organise an analysis of the nature of constitutional matters arising from the cases before the Court. I find no constitutional issues raised in the present petition nor has any violation of rights been proved as alleged.

In view of my analysis of the facts of this case and the law and authorities as shown above, I find that the petitioner has failed to prove his case against the Respondent and the interested party to the required standard.

The up short is that this petition is dismissed with costs to the Respondent and the interested party.

Orders accordingly.

John M. Mativo

Judge

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[1] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[2] Brinks-Mat Ltd vs Elcombe {1988} 3 ALL ER 188

[3]See e.g. Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others Succ Cause no 920 of 2009 AND Graham Rioba Sagwe & Others vs Fina Bank Limited & Others, Pet No. 82 of 2016

[4]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[5] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[6] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[7] (2007) 16 NWLR (319) 335.

[8] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[9] Ibid

[10] Supra Note 1

[11] Supra note 1

[12]Ibid

[13] Ibid

[14] Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji {2014} eKLR

[15] See John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano JR No 17 B of 2015

[16] {1948} 1 K. B. 223, H.L.

[17]See Pastoli vs Kabale District Local Government Council and Others {2008} 2EA 300

[18]http://www.yourdictionary.com/constitutional-question

[19]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[20] {2002} 23 ILJ 81 (CC)

[21] {2001} (1) SA 912 (CC)

[22] 2001 (1) SA 912 (CC)

[23] Supra note 5 at paragraph 23