



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 377 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT (CAP 26) LAW OF
KENYA**

IN THE MATTER OF ORDER 53 OF CIVIL PROCEDURE RULES

IN THE MATTER OF THE ADVOCATES ACT (CAP 16)

IN THE MATTER OF ARTICLE 22, 27(1), 159(2) & 165 OF THE CONSTITUTION OF KENYA

REPUBLIC (EX PARTE)

CHRISTOPHER AUKA ABELE.....APPLICANT

VERSUS

THE DISCIPLINARY COMMITTEE.....1ST RESPONDENT

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

HONORABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUSTUS BOAZ OKUMU.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st December, 2015, filed on 10th October, 2014, the *ex parte* applicants herein seek that this Court be pleased to issue an order of certiorari directed at the 1st Respondent removing to this Court its decision made on 14th April 2014 in Disciplinary Cause No. 194 of 2011 for purposes of having it quashed.

Ex Parte Applicants' Case

2. According to the applicant, an advocate of the High Court of Kenya, sometime in the year 2011 the Interested Party through her agent, **Ms Esther Anyango Aduma**, Commissioner for Advocates Complaints Commission commenced proceedings against him pursuant to which the

- Tribunal made a judgment on 11th February 2013 and convicted the applicant for failing to account to the client in the sum of Kshs 69,500/=.
3. According to the applicant, thereafter the 1st Respondent proceeded through a series of mentions, in the proceedings in which the applicant was represented by the firm of **R.H. Wanga and Company Advocates**. The applicant averred that at some point the tribunal made an order for attachment of one-third of his salary but the applicant opted to voluntarily effect a Standing Order for Kshs 25,000/= and made for (4) monthly payments and communicated this fact to the 2nd Respondent. However, the 2nd /Respondent denied receiving the same and never issued receipt despite the fact that the 2nd Respondent's representative verbal acknowledgement of receipt thereof after the applicant stopped the standing order to investigate the same and engaged the complainants directly in payment.
 4. It was contended by the applicant that despite furnishing his letter of employment with details of his salary, the 1st Respondent failed to act on the same and proceeded on presumption that he had failed to furnish proof of his income. It was the applicant's belief that the 2nd Respondent would advise the 1st Respondent of all monies received through its accounts. It was further averred by the applicant that he had informed the 1st Respondent that his misfortunes were brought about by the collapse of the various Insurance Companies namely M/s United Insurance, M/s Stallion Insurance, M/s Blue Shield Insurance and others whose collapse meant the loss of colossal sums of money owed to him and for which he was still pursuing. The applicant disclosed that the 1st Respondent was all along aware that at one time there were at least 4 complaints pending against him and in a spirit of reconciliation had advised him to seek alternative employment to enable him offset the debts and rehabilitate himself which the applicant did and informed the 1st Respondent.
 5. According to the applicant he had separately settling other complaints directly with complainants and that the complaints against him were purely issues of account and the amounts ranged between Kshs 50,000/= and 300,000/= and he was confident he would clear them in good time.
 6. However, on or about 29th September 2014 the applicant received a letter from his employer suspending him with immediate effect pending further orders. Prior to the said suspension, the applicant averred that he had been promoted as a result of his impressive performance. To the applicant he had met the Interested Party in this case and made all restitution and fully reconciled with him.
 7. It was therefore the applicant's case that the 1st Respondent had been harsh, unfair and biased against him and he therefore believed that a fair and unbiased administrative tribunal would have handled this matter in a totally different manner resulting in a just outcome. To the applicant he stood to suffer immensely in terms of loss of profession as well as employment, which are his only means of earning an income, if his prayers are not granted yet he has several young children and family to take care of.

1st and 2nd Respondents' Case

8. On behalf of the 1st and 2nd Respondents it was contended vide a replying affidavit sworn by **Apollo Mboya**, its secretary that a complaint was instituted against the *ex parte* Applicant before the 1st Respondent by the Advocates Complaints Commission (hereinafter "the Commission") via an affidavit of complaint sworn by **Esther J.A. Aduma**, one of the commissioners of the Commission on 10th October 2011 in which the *ex parte* Applicant was being charged with the following charges;
 - a. Withholding a sum of Kshs 69,500/= together with interest at the rate of 12% per annum being the amount due and owing to the complainant.
 - b. Failing to account for the said sum
 - c. Failing to respond to and/or heed to the commission's letters dated 30th September 201 and 11th November 2010.

9. Pursuant to the said complaint the matter was fixed for plea taking on 23rd January 2012 and the *ex parte* Applicant served with the notice for plea taking on which day though the complainant was present, the *ex parte* Applicant was absent as a consequence of which a plea of not guilty was entered for the *ex parte* applicant. The *ex parte* Applicant was then given 21 days within which to file a replying affidavit and a statement of accounts and the matter was then fixed for hearing on 16th April 2012 and the hearing notice served upon the *ex parte* Applicant.
10. It was averred that when the matter came for hearing on 16th April, 2012, the *ex parte* Applicant had neither filed a replying affidavit and statements of accounts as directed nor did he appear despite being served with the hearing notice. As a result, the prosecutor from the Commission requested that the matter does proceed under Rule 18 of the ***Advocates (Disciplinary Committee) Rules*** and the matter was then scheduled for judgment on 2nd July 2012 and the *ex parte* Applicant served with the judgment notice. After a number of rescheduling of the same, the judgement was eventually on 11th February, 2013 ready and the same was read wherein the *Ex parte* Applicant was convicted of all the charges and the matter fixed to mitigation and sentencing on 22nd April 2013.
11. It was averred that the matter was then to come up on 15th July 2013 on which day the *ex parte* Applicant was represented by his advocate. On that day it was ordered that a notice to show cause does issue to the *ex parte* Applicant for appearance on 7th October 2013 on which day the *ex parte* Applicant was once again represented by his advocate who informed the Tribunal that there was an order that a third (1/3) of the *ex parte* Applicant's salary be attached in other matters before the 1st Respondent which attachment had been effected and requested that the notice to show cause be deferred for three weeks to check whether the *ex parte* Applicant could get a loan and pay. The 1st Respondent then directed that the matter be mentioned on 4th November, 2013 on which day the *ex parte* applicant's advocate informed the Tribunal that he was not able to communicate with the *ex parte* Applicant though he had knowledge that the *ex parte* Applicant had paid Kshs. 75,000/=, though he did not have evidence to prove that. It is then that the 1st Respondent directed that the matter to come up on 11th November 2013 for the *ex parte* Applicant to appear in person and show why he should not be struck off the Roll of Advocates on which day the *ex parte* failed to attend. After a number of adjournments at the behest of the *ex parte* the Tribunal on 14th April 2014 made an order striking out the *ex parte* from the Roll of Advocates. According to the respondents, in so acting the Tribunal took into consideration of the following issues:
- a. The *Ex parte* Applicant had failed to produce his current payslip to show that the sum of Kshs 25,000/= was actually 1/3 of his salary
 - b. The *Ex parte* Applicant had failed to prove that he was eligible for a loan based on his current salary from his employer;
 - c. The *Ex parte* Applicant had failed to comply with the directions given in this matter as to payment and that he had also failed to comply in other matters being DCC/15.2009, DCC/17/2009, DCC/165/2010 and DCC/354/2007 and
 - d. The *Ex parte* Applicant's advocate had indicated that the *Ex parte* Applicant did not require a practicing certificate and hence the order of the 1st Respondent would not have any effect to the *Ex parte* Applicant.
12. It was the 1st and 2nd Respondents position that the *ex parte* Applicant was accorded a fair hearing in that all the relevant rules of natural justice and rules of procedure were adhered to during the proceedings leading to the *ex parte* Applicant being struck off the Roll of Advocates. In arriving at the said decision against the *ex parte* Applicant, only the relevant issues and matters were taken into consideration and in so doing the 1st Respondent exercised its discretion rightly as statutory empowered under section 60(4) of the ***Advocates Act*** (Cap. 16 Laws of Kenya) and prayed that the application be dismissed with costs.

Determinations

13. I have considered the application and the evidence adduced in the form of affidavits filed on behalf of the parties herein.
14. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

“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.”

15. The applicant herein has not addressed the Court on any of the grounds that would warrant the grant of judicial review relief. The applicant in my view seem to be appealing to this Court's emotions with respect to the financial circumstances that made him find himself in the position in which he is. However, the decision to grant judicial review reliefs being an exercise discretion, like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.
16. In this case the applicant has invited the Court to consider the fact that the respondents ought to have opted for alternative dispute resolution mechanisms. Whereas that maybe a prudent way of solving disputes, unless that mechanism is mandatory, the respondents cannot be faulted for not resorting to the same. Where the decision to refer the matter to mediation or any other alternative dispute resolution mechanism is purely discretionary, judicial review jurisdiction cannot be invoked with a view to compelling the authority concerned to opt for such alternative.
17. I am equally not convinced that the mere fact that a party may have resolved a matter with the complainant deprives the respondents of the 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 1st and 2nd respondents are 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 Applicant herein is an Advocate, the said respondents have the jurisdiction to entertain any complaints made against him in his professional capacity pursuant to section 55 of the Act. This power, as was appreciated by **Mumbi Ngugi, J** in **Ex Parte Kimaiyo Arap Sego, 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.”

18. In the premises I find no merit in these proceedings.

Order

19. According to the Notice of Motion dated 10th October, 2014 fails and is dismissed with costs to the 1st and 2nd respondents.

Dated at Nairobi this 11th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyarindo for the 1st and 2nd Respondents

Cc Mwangi