REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 113 OF 2016

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

IN THE MATTER OF AN APPLICATION BY THE APPLICANT, WANGUI KATHRYN KIMANI,

FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION DIRECTED

TO THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA (LSK)

IN THE MATTER OF DISCIPLINARY TRIBUNAL CAUSE NO. 137 OF 2014

AND IN THE MATTER OF THE JUDGMENT OF THE DISCIPLINARY

TRIBUNAL DATED 15TH FEBRUARY, 2016

BETWEEN

WANGUI KATHRYN KIMANI.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA....RESPONDENT

AND

ROSEMARY JAJA MBOGO.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th March, 2016, the *ex parte* applicant herein, **Wangui Kathryn Kimani,** wrongly described in these proceedings as the applicant which ought to have been the Republic, seeks the following orders:

> a. **AN ORDER OF CERTIORARI to remove from this Honourable Court to quash the decision of the Law Society of Kenya Disciplinary Tribunal issued on 15th February, 2016 in cause no. 137 of 2014 which**
>
> > i. **Found the Applicant herein guilty of professional misconduct**
> >
> > ii. **Ordered the Applicant to pay within 30 days of the Judgment Kshs. 1,568,970/= together with interest thereon at the rate of 25% per annum from 1st September, 2011 to the interested party herein.**
> >
> > iii. **Ordered the Applicant herein to deposit with the Law Society of Kenya Kshs. 1,312,500/= together with interest thereon at the rate of 25% per annum with effect from 1st September, 2016.**
> >
> > iv. **That the Applicant herein files a Bill of Costs upon complying with numbers ii and iii above.**
>
> b. **AN ORDER OF PROHIBITION prohibiting the Law Society of Kenya Disciplinary Tribunal from sentencing, deliberating, hearing or proceeding further with sentencing scheduled for 18th April,2016 in Disciplinary Cause No. 137 of 2014 pending the Hearing and Determination of the proceedings herein.**
>
> c. **Costs.**

Ex Parte Applicant's Case

2. According to the applicant, on 6th March, 2009, **Rosemary Jaja Mbogo**, the complainant before the Respondent and the interested party herein (hereinafter referred to as "the Complainant") approached the Applicant and briefed her to handle the winding up of Pasadena Systems Limited and handed over to the applicant all the documents relating to Pasadena Systems Limited and requested her to raise a Fee Note later, a request the applicant acceded to.

3. It was averred that later on the Complainant briefed the applicant to handle other legal work for her and still requested her to raise her Fee Note later. According to the Applicant, in June, 2010, the complainant informed her that she wished to sell Maisonette No. 9, Vijay Villas Nairobi and buy Apartment No. 1 Block B, Thompsons Glade, LR No. 330/537, Nairobi and instructed the Applicant to conduct due diligence on the above mentioned Apartment which the applicant did. However, the Complainant decided not to purchase the above mentioned Apartment and again confirmed to the Applicant that she would pay the Applicant's Legal Fees later.

4. The Applicant averred that in August, 2010, the Complainant found a party who was interested in buying the Maisonette and instructed her to start the process and liaise with **Ms. Wanjao & Wanjau Advocates** who were representing the interested party. Pursuant thereto, the Applicant commenced the

Sale process with the promise that her Legal Fees would be settled later. At this stage, the Complainant informed her that she had lost the Lease to the Maisonette and instructed the Applicant to start the process of obtaining a Provisional Title which the Applicant did. However, the interested purchaser pulled out of the sale when he realized that the Lease document was not forthcoming.

5. It was averred that on 30th September, 2010, a purchaser for the Maisonette was found and the arrangement was that the Purchase price of Kshs. 21,000,000/=was to be paid in cash while Kshs. 7,000,000/= and Kshs. 14,000,000/= would be paid in kind in that the Purchaser would transfer to the Complainant an Apartment valued at Kshs. 14,000,000/=. According to the Applicant, she informed the complainant that because these were two different transactions, she would charge Legal Fees for both transactions separately and also reminded her about the earlier Legal Fees which were still outstanding. It was disclosed that the Purchasers paid a deposit of Kshs 500,000/= on 30th November, 2010, but the Complainant insisted that the full deposit be transferred to her account as she needed the money. Upon being reminded of the long outstanding Legal Fees, the Complainant instructed the Applicant to deduct Kshs. 110,000/= as part payment of the Legal Fees and transfer the balance to her account at Cooperative Bank of Kenya Limited, which the Applicant did.

6. It was averred that after a long search involving visiting the archives department of **Ms. Daly& Figgis Advocates** and Lands Office and Kilimani Police Station, the Complainant finally managed to trace the Lease document in her belongings. The Applicant disclosed that on 11th July, 2011 Kshs. 6,000,000/= was sent to her Account on her professional undertaking not to part with the same until the Transfers were complete. However, on 30th July,2011, the Complainant asked the Applicant to transfer the said sum of Kshs. 6,000,000/= to her account whereupon the Applicant informed her that she had received the funds against an undertaking not to part with the same until all the transfers were complete. However, the Complainant informed her that she needed the money as she had started building a house in Nyeri and the Contractor needed to be paid and asked the Applicant to transfer to her account Kshs. 2,000,000/= and use the balance as a loan from her to the Applicant as she was not in a position to pay any Legal Fees at that time though she promised that the Legal Fees would be paid from the Sale proceeds once the Sale was concluded. Further, the Complainant informed the Applicant that she had other legal work which she wanted the Applicant to handle. On 8th February, 2012, the Complainant asked the Applicant to transfer Kshs. 600,000/= to her contractor and Kshs. 400,000/= to her which the Applicant did.

7. The Applicant contended that by the end of August, 2012, the owners of the Apartment could not complete and asked for more time which was accepted on condition that he Applicant would be released from her undertaking and the Applicant was released from her undertaking on 7th September, 2012. In December, 2012, the Complainant requested the Applicant to write a letter confirming that the Applicant owed her the balance of money and that the money would continue attracting interest at the rate of 25% p.a. until repaid in full which the Applicant did on the premise that this was for the Complainant's records. The Complainant however told the Applicant to raise her Fee Note Separately and not to include the Legal Fees in the letter while appreciating the fact that the Applicant had not insisted on being paid her Legal Fees in the preceding years and also had allowed her access to the funds before the conclusion of the transactions.

8. It was averred that in early January, 2013 the Complainant went to the Applicant's offices and informed the Applicant that she wanted them to calculate the interest due to the Complainant and after calculation, the interest came to Ksh.704, 117.50 which the Complainant asked the Applicant to pay on a monthly basis pending the payment of the money due to her.

9. It was averred that in disregard of the agreement the Complainant took the Applicant's letter to her lawyers to file a complaint with the Law Society of Kenya Disciplinary Tribunal, the Respondent herein (hereinafter referred to as "the Tribunal"). In January 2013, the Applicant requested the Complainant to pay her Legal Fees of Ksh.1, 315,400/= which had been outstanding since the year 2009 but did not get a response. Instead, she received a letter from the Law Society of Kenya dated 20th August, 2014 informing her of a complaint, and enclosing the Affidavit of the Complainant. Subsequently, on 25th September, 2014 the Applicant received a letter from the Law Society of Kenya Disciplinary Committee inviting her

to attend the Disciplinary Committee meeting of 27th October, 2014 for plea taking. Thereafter, the Applicant received a Notice of Hearing dated 15th February, 2015 which stated the complaint to be *Witholding Funds/Failure To Account***.**

10. The Applicant however averred that she never took plea and the matter proceeded without the plea being taken. After the Hearing which proceeded through Affidavits and submissions, Judgment was entered against her finding her guilty of Professional Misconduct, a complaint she had not been charged with.

11. According to the Applicant, the Judgment was signed on 15th February, 2016 by **Anna Ngibuini Mwaure** who had not renewed and did not have a valid practicing certificate as at the date. The Applicant was ordered to pay the Complainant Kshs.1, 568,970/= with interest at 25% within 30 days of the Judgment and Deposit what would have been her legal fees of Kshs. 1,312,500/= with interest at 25% with the Law Society of Kenya and ordered to produce a Bill of Costs after paying the above sums.

12. According to the Applicant, the Law Society Disciplinary Tribunal proceedings were fraught with Procedural Ultra Vires as evidenced in:-

a. Valid Notice was not issued to the Applicant as it was issued approximately 4 months after the trial had started.

b. On 27th October, 2014, when the Tribunal sat for plea taking, Notice had not been issued to her and it is evident from the proceedings that the Tribunal had not received or read her Replying Affidavit showing that due procedure had not been followed.

c. The Judgment was signed by an unqualified person since **Anna Ngibuini Mwaure** had not renewed her Practicing Certificate by 25th February, 2016, the date the Judgment was signed and was in breach of Section 30 of the ***Advocates Act*** Cap. 16 Laws of Kenya.

d. The Charges specified in the Notice are not the Charges she was convicted of and therefore did not have the chance to prepare her defence appropriately.

e. The order for production of Bill of costs should have been given before the final orders.

f. The Judgment did not consider whether the remedy for the matter could reasonably be expected to be available to the interested party in civil proceedings.

13. It was further contended that the Law Society of Kenya Disciplinary Tribunal acted against the Laws of Natural Justice in that:-

a. The Applicant's right to be heard was flouted when she was denied the opportunity to defend myself by highlighting her submissions.

b. The Notice issued by the Law Society Disciplinary Tribunal was issued approximately 4 months after she had already attended the sittings of the Tribunal, denying her the chance of fair hearing.

c. The Notice given by the Law Society Disciplinary Tribunal was vague.

d. She was found guilty of a Charge that was not specified in the Notice and no reasons were given by the Tribunal why this decision was taken leading her to think that she was the victim of arbitrary decision.

e. Her rights under Article 47(1) and (2) Constitution of Kenya 2010 were compromised.

f. The Order that she deposit what should have been her legal fees with the Law Society of Kenya

together with interest shows bias against her.

14. To the Applicant, the Law Society of Kenya Disciplinary Tribunal exhibited bad faith in questioning the raising of her fee notes for legal fees due to her though in her view, she submitted herself to the Law Society of Kenya Disciplinary Tribunal with the legitimate expectation that:-

i. it to be an impartial Tribunal,

ii. her Bill of Costs would be given consideration first before the issuance of any orders,

iii. she would not face double jeopardy by being ordered to deposit what should have been my legal fees with the Law Society of Kenya.

15. It was the Applicant's case that the Law Society of Kenya Disciplinary Tribunal acted unreasonably when it imported into the proceedings extraneous considerations which she did not aver in my Affidavits by stating in its Judgment stated that the Applicant contended that she did not pay the balance of the purchase price because of her professional undertaking which extraneous considerations were given weight in the Judgment.

Respondent's Case

16. In response to the Application, the Respondent averred that in the affidavit of complaint the Tribunal was being called upon to determine whether the applicant herein was guilty of professional misconduct for withholding the Complainant's funds amounting to Kshs 3,331,470.00 since 2011. It was contended that upon receipt of the said affidavit of complaint, the matter was given a reference disciplinary committee cause No. 137 of 2014 and listed down for plea taking on the 27th October, 2014 and the applicant was informed of the said date for plea taking on which date the applicant was absent and a plea of not guilty was entered. The applicant was granted leave to file her replying affidavit within 21 days and the matter was fixed for hearing on 9th March, 2015. On the said date, the applicant herein was present in person and the interested party herein was represented by **Mr. Mbaka** and the applicant served **Mr. Mbaka** with her replying affidavit who requested for 14 days to respond to the issues raised in the replying affidavit to which the applicant did not object but also sought leave to respond and to file submissions. **Mr. Mbaka**, it was averred, was granted 14 days to file and serve a further affidavit and the applicant was also granted 14 days to file and serve any response thereto after service and the matter was fixed on 13th July, 2015 to confirm compliance and take a date for judgment.

17. It was averred that on the said date, on the application of the applicant, the applicant was granted lave to file her submissions within 14 days and the matter fixed for further mention was on 24th August, 2015 to confirm compliance and give a date for judgment. Since both parties were present, the tribunal informed them that there was no need for the Law Society of Kenya to serve the mention notice. According to the Respondent, on 24th August, 2015 **Mr. Mbaka** informed the tribunal that the applicant had filed and served them with her submissions and he sought a date for judgment. Thereafter the delivery of the judgement was fixed for 9th November, 2015 after the applicant's request to highlight the submissions was disallowed as the Respondent opted to proceed under Rule 18 of the Committee Practice Rules. However as judgement was not ready on the scheduled date and was eventually delivered on 15th February, 2016 in the presence of both parties and the matter set for mitigation and sentencing on 18th April, 2016.

18. According to the Respondent, in the said judgment, the applicant was found guilty of professional misconduct for unjustly withholding money belonging to the Complainant since 2011 and that to the date of delivery of the said judgment and the orders made therein, the applicant had not complied as directed by the disciplinary tribunal despite having been given 30 days to do so.

19. The Respondent therefore contended that it was unfair and unjust to grant the orders sought herein as this application is only designed and intended to delay the proceedings of the respondent against the

applicant and to defeat the interested party's pursuit of justice. In the Respondent's view, the applicant was duly accorded a fair and just hearing and that the said judgment was signed by a qualified person since **Ann Ngibuni Mwaure** at the delivery of the said judgment had already paid for her practicing certificate.

20. The Respondent therefore prayed that this application be dismissed with costs to allow the respondent proceed with mitigation and sentencing in DC No. 137 of 2014.

Interested Party's Case

21. The Application was similarly opposed by the Complainant, the interested party herein who contended that the applicant was accorded a fair and just hearing and there was no irregularity in the proceedings before the disciplinary tribunal. In her view, the application for judicial review orders of certiorari and prohibition are an abuse of this courts process for the following reasons:-

a. The applicant was expected to deposit the monies that she had received on her behalf in her client's account which she did not do.

b. On 31st December, 2012, the applicant admitted owing her Kshs 2,881,470.00 which she agreed to pay with interest at the rate of 24% p.a. from September 2012.

c. The applicant knew that she was selling her property because she was constructing a house in Nyeri and she was required to release the aforesaid balance to enable her complete the said construction.

d. She was forced to borrow a sum of Kshs 1,500,000.00 from Standard Chartered Bank when the applicant refused to release the balance for which she paid Kshs 384,274.64 as interest.

e. To avoid paying her the admitted amount of Kshs 2,881,470.00 the applicant made fictitious fee notes against her in 2013 for legal services she had not rendered.

f. The complainant has notwithstanding the orders of disciplinary tribunal has failed and or deposit the disputed sum of Kshs. 1, 312,560.00 with the Law Society of Kenya.

22. It was the Complainant's view that the facts enumerated above disclose acts of professional misconduct on the part of the applicant as an advocate for unjustifiably withholding her money since 2011 and that these are the matters within the mandate of the disciplinary tribunal to deal with. In her view, as the facts further disclosed the criminal offence of theft by agent contrary to Section 272 as read with 283(c) of the ***Penal Code***, the applicant is not deserving of this court's discretion in the grant of judicial review orders.

Determinations

23. I have considered the application, the evidence adduced in the form of affidavits and the submissions filed on behalf of the parties herein.

24. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **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** 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."

25. In this case, the first ground raised by the applicant is that of procedural impropriety in that the notice for hearing specifying the charges levelled against her was posted by ordinary mail 4 months after the trial started.

26. The general position on the right to a hearing was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and 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. As has already been indicated, 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 legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

27. In **Geothermal Development Company Limited vs. Attorney General & 3 Others (2013) eKLR,** it was held that:

"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board***[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action,* ***Thomson Reuters 2nd edition, at page 272,*** **notes that, '*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision*'…Article47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including '*(c) responsive, prompt, effective, impartial and equitable provision of services*' and '*(f) transparency and provision to the public of timely, accurate information*'…Fair and reasonable administrative**

action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* **[1994] 2 IR 439)…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See* *Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission* (2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"**

28. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

29. Section 4(3) of the ***Fair Administrative Action Act, 2015,*** a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

(3) Where an administrative action is likely to adversely affect the rights 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 representations 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 or where applicable; or

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

3. It is however my view that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the ***Fair Administrative Action Act*** provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings.

31. In this case, though it is contended that the notice was sent after the hearing commenced, it is not contended that the applicant was unaware of the proceedings that were intended to take place. To the contrary the applicant was present and participated therein. There is no allegation that the applicant applied for adjournment to enable her adequately prepare for the hearing. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR,** the court held the view that;

"The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would

perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners' claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing."

32. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."

33. The rationale for service of process was restated in **Bett vs. Electoral Commission of Kenya & 2 Others (No. 2) [2008] 2 KLR (EP) 461** where it was held that:

"The general rule is that service of any process serves the purpose of bringing to the notice or knowledge of the party being served that such a process is in existence and that the party to be served is concerned with it and is required to respond to it. Knowledge of a court process is the core of the whole issue of personal service."

24. Similar position was adopted in **Nanjibhai Prabhudas & Co. Ltd vs. Standard Bank Ltd. [1968] EA 670** where **Harris, J** held that:

"The defect of which the defendant complains in regard to the service of the summons constitutes, at most, an irregularity capable of being waived, and, secondly, that irregularity has been waived…It does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. The practical difference between an irregularity and a nullity is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgement on a writ which has never been served and one in which there has been a defect in the service but the writ had come to the knowledge of the defendant…Here there is no doubt that the summons, which on the face states that a copy of the plaint was annexed to it came to the knowledge of the defendant and that the latter's subsequent course of conduct was adopted and followed in the light of the information so conveyed to it. Therefore, there can be no doubt that any defect there may have been in the service constituted an irregularity only, capable of being waived."

35. As per **Newbold, P**:

"Although it was incorrect to put on the summons the seal of the Resident Magistrate's Court, the summons itself purports to issue from the High Court and is signed by the Deputy Registrar of the High Court. The defendant entered appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was incorrect. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The court cannot regard the incorrect placing of the seal of one court on a document, instead of the seal of another court, as an act so fundamental that it transforms what would otherwise

be an effective document into a complete nullity…Although the service of the summons on the defendant instead of a notice was incorrect, the courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature and matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as of so fundamental a nature that it results into a complete nullity and vitiates everything following would appear to be completely unreal unless there is a good reason for this distinction between the service of the summons and the service of the notice. It would seem therefore that there is nothing in this mistaken service of the summons instead of the notice of summons as could or should be regarded as so fundamental a nature as to result in a nullity…Where the defendant enters an unconditional appearance to an action it has always been regarded as an act which waives any irregularity."

36. It is therefore my view that the applicant having fully participated in the proceedings, this Court cannot in the exercise of its discretionary judicial review jurisdiction quash the said proceedings as it has not been shown that any prejudice was occasioned to the applicant thereby. This case must be distinguished from a case where no opportunity is afforded at all to the parties to be heard in which case the proceedings are thereby rendered a nullity. See **Onyango Oloo vs. Attorney General [1986-1989] EA 456.**

37. It was contended that the charges which were specified in the notice are not the ones which the applicant was confronted with. It is true that the law requires that the charges which are levelled against a person be precise. In other words the exact nature of the charge and the grounds therefor must be clearly brought home to the applicant so as to enable him or her appreciate the exact nature of that with which he or she is charged. To my mind the rules require both substantive and procedural justice to be adhered to.

38. In this case the applicant alleges that the charge levelled against her was that of withholding funds/failure to account but was eventually found guilty of professional misconduct. This issue raises the question of what constitutes professional misconduct. As was appreciated by **Mumbi Ngugi, J**, in **Ex Parte Kimaiyo Arap Sego, Misc. Appl. No. 1266 of 2007,** the power of the respondent:

"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."

39. I did not hear the applicant to contend that failure to account or withholding client's funds is not unethical. Accordingly, I do not agree that where an advocate is found guilty of withholding client's funds or failing to account the Respondent cannot conclude that such conduct amounts to professional misconduct.

40. The Applicant has further contended that the judgement did not consider whether the remedy for the matter could reasonably be expected to be available to the client in civil proceedings. This Court has had occasion to deal with the issue of the disciplinary proceedings before the Respondent Tribunal and civil proceedings and held that the mere fact that a party who has suffered a loss as a result therefor may invoke the Court's jurisdiction under Order 52 rule 7 of the ***Civil Procedure Rules*** does not bar a complaint being lodged with the Tribunal on the same issue. This was the position adopted in **R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013** where the Court expressed itself as follows:

"In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject

of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent. Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

41. Therefore if the applicant's conduct amounted to a professional misconduct, the mere fact that civil proceedings could be instituted or may have in fact been instituted and were yet to be determined does not bar the Respondent from entertaining the 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 Respondent is mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act. It is also clear that under the ***Advocates Act*** ("the Act"), the said Respondent has the power to receive complaints of professional misconduct against an Advocate and since the Applicant herein is an Advocate, the respondent has the jurisdiction to entertain any complaints made against her in her professional capacity pursuant to section 55 of the Act

42. The other ground which was relied upon by the Applicant was that the judgment was signed by an unqualified person since **Anna Ngibuini Mwaure** had not renewed her Practicing Certificate by 25th February, 2016, the date the judgment was signed and was in breach of section 30 of the ***Advocates Act*** Cap. 16 Laws of Kenya. In support of this ground the Applicant exhibited search results in respect of **Mwaure Anna Ngibuine** dated 22nd February, 2016 which indicated the status of the said Advocate as "inactive". However, there was a disclaimer to the effect that the accuracy, completeness or currency of the information contained therein was neither warranted nor guaranteed and the Society repudiated any liability in respect of loss, damage or harm suffered in consequence of reliance thereon. In other words the information contained in such a search is *prima facie* evidence of the status of an advocate but such information is rebuttable.

43. In rebutting this information the Respondent exhibited a copy of the receipt dated 29th January, 2016 in respect of payment for practicing certificate by the said Advocate.

44. In light of these two conflicting factual positions, this Court in these proceedings cannot resolve the same by making a definite finding as to which position is the correct one.

55. After considering the grounds upon which the application was based, it is my view that whereas the same may well be grounds for appeal under section 62 of the ***Advocates Act***, they do not meet the threshold for the grant of judicial review reliefs. In this respect I reiterate what was held by this Court in **JR. Misc. Application No. 477 of 2014: <u>Republic vs. Public Procurement Administrative Review Board & 2 Others</u>** where this Court expressed itself as follows:

"…the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substituting their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question…In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its

directions issued in the respondent's earlier decision is a matter which would go to the merit rather that the process".

45. In the premises I find no merit in the Notice of Motion dated 18th March, 2016.

Order

46. In the result the said Motion fails and is dismissed with costs to the Respondent and the interested party.

47. It is so ordered.

Dated at Nairobi this 15th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Kimani the Applicant

Mr Njeru for Mr Mbaka for the Interested Party

Cc Mwangi