



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC. CIVIL APPLICATION NO. 52 OF 2015

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

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

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

AND

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

EX PARTE:RAIKUNDALIA ASHNA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th February, 2016, the *ex parte* applicant herein, **Raikundalia Ashna**, seeks the following orders:

1. **The Honourable court be pleased to grant an order of:**

a. **Certiorari to remove into this court for the purposes of being quashed the decision of**

the respondent made 13/10/2014 (hereinafter the decision) in disciplinary committee cause number 201 of 2013 (the disciplinary cause) finding the applicant guilty of professional misconduct and all consequential orders therefrom.

b. Prohibition prohibiting the respondent from proceeding with the any disciplinary action against the applicant and/or sentencing of the applicant with regard to the disciplinary cause.

2. The costs of the application be provided for.

Ex Parte Applicant's Case

2. According to the applicant, a complainant against him was instituted by **Ruthcode Krishnaiyer Seshadri** and **Prrema Sheshardi** (hereinafter the complainants) by an affidavit sworn on the 5th September, 2013 as disciplinary Cause 201 of 2013 (the disciplinary cause). It was averred that the complainants were represented by counsel from the Law Society of Kenya while at the time of the institution of the complainant the applicant was an advocate practising as such in the name and style of A. Raikundalia & Co. Advocates.

3. According to the applicant, the complainant against the her were:

i. Conspiring with a **Mr. Thomas Maosa** Advocate, **Ms Mary Kemunto** and the purported vendors of Nairobi/Block/94/66 (hereinafter the suit property) to defraud the complainant the sum of Kshs 21,840,000;

ii. Aiding and abetting the purported vendors in forging the passports to reflect the names in the original certificate of lease of Nairobi/Block/94/66;

iii. Breach of duty to act in good faith as an advocate; and

iv. Knowingly and fraudulently acting without instructions from the real registered owners of Nairobi/Block/94/66.

4. It was contended that when the disciplinary cause came up for plea taking on the 2nd December, 2013 the applicant was absent and a plea of not guilty was entered for her and the Tribunal proceeded to direct, her, despite the fact that she was absent, to file a replying affidavit within 21 days and the matter was fixed to be heard on the 14th April, 2014. It was averred by the applicant that it is this hearing notice and directions by the respondent that were served upon herself which prompted her to instruct an advocate to represent her when the matter came up for hearing. The applicant deposed that she instructed and informed her advocate that she had not received the complaint documents and did not know why she was being asked to appear before the respondent. Consequently when the mater came up for hearing her advocate informed the respondent that the applicant had not been served with the complaint documents and therefore could not adequately address the issues and requested the respondent to direct service upon the advocate as the applicant's representative and to enable the filing of a proper response. It was the applicant's view that it would not have been difficult for the respondent to order the service of the complainant's documents upon her said advocate and ensure a fair hearing of the disciplinary cause.

5. The applicant averred that the respondent however undemocratically showed open against her and in favour of the complainant's advocates and instead of ordering the service of the complaint documents upon her or her advocate proceeded to hold that she had been served with the papers vide letters dated 10th September, 2013 and 14th November, 2013 which were apparently inviting her for plea taking. She however asserted that she never received the said letters and this explains her absence on the date the disciplinary cause came up for plea taking.

6. It was the applicant's case that upon averring and/or stating that she had not received the complaint

documents as alleged by the advocates for the complainants, it would have been logical for the respondent to order service of the complaint documents so as to give her a chance to file a reply and afford her a fair hearing. She therefore contended that she was thus denied a right to a fair hearing.

7. According to the applicant, when the matter came up for hearing on the said 14th April, 2014 the respondent directed that the disciplinary cause against her be consolidated with another disciplinary cause being disciplinary cause 202 of 2013 and directed that the disciplinary cause was to proceed by way of affidavit and that she was to file a reply within fourteen (14) days thereof. However, she could not file a reply to a complaint as she did not know about and it was unreasonable and irrational for the respondent to expect her to file a reply when she did not know the complaint against herself.

8. The applicant averred that she was not aware of the hearings and purported by the respondent as the hearing notices allegedly posted to her last known address, which allegation she refuted, never reached her as purported by the respondent. Whereas she expected that the respondent would from 14th April, 2014 henceforth communicate with her advocates on record as regarding any hearings to be conducted and/or any other notices, as evidenced by the respondent's deposition in the replying affidavit the respondent unreasonably and illogically continued sending notices to her last known address.

9. Accordingly, the respondent in its judgment delivered on 13th October, 2014 held that the case against her was uncontroverted for failure to file a reply and further held that:

a. There was not enough evidence to prove and/or establish that she aided and abetted the purported vendors in forging passports to reflect the names in the original certificate of lease of Nairobi/Block/94/66.

b. There was not enough evidence to establish whether she knowingly and fraudulently acted without instructions from the real registered owners of Nairobi/Block/94/66.

c. There was not enough evidence to make conclusive finding on the charges of conspiracy between her and the advocate in disciplinary cause 202 of 2013 to defraud the complainant of the sum of Kshs 21,840,000.

10. It was the applicant's case that having determined that there was not enough evidence to find her guilty of conspiracy and/or fraud with respect to the complaint lodged against herself it logically followed that she was not guilty and malice could not be inferred in the impugned transaction if at all. To her to prove that she breached the duty to act in good faith the respondent had to determine based on the evidence adduced, that she acted maliciously in the transaction. Despite the foregoing, the respondent illogically and unreasonably proceeded to make a determination that she had breached an advocate's duty of good faith by knowingly luring the complainant to the impugned transaction. In the applicant's view, the holding by the respondent unreasonably and without any shred of evidence implied that she was acting *mala fides* in the impugned transaction and that she knowingly and with intention conspired with the 2nd advocate in defrauding and/or attempting to defraud the complainants. To her, the respondent illogically and without evidence imputed *mens rea* on her actions despite holding that there was not enough evidence to make a conclusive finding on the charges of conspiracy between herself and the 2nd advocate.

11. The applicant therefore asserted that the decision by the respondent is full of contradictions and unreasonable conclusions which a reasonable man afforded the facts of the case would not have reached. Further, the respondent took into account irrelevant matters in concluding that she was guilty of professional misconduct by knowingly and with *mens rea* luring the complainants to a fraudulent transaction despite the respondent holding that there was no evidence of conspiracy. In addition, the respondent failed, refused and neglected to consider relevant matters that ought to have been considered by any reasonable person such as the fact that she assisted the complainant in performing due diligence by helping the complainant do an official search of the suit property at the lands registry. In her view, the only mistake and/or error committed by herself was to describe the 2nd advocate in the manner she had

previously dealt with him and which in any event did not bar the complainants from seeking separate legal advice and/or choosing another counsel from representing them.

12. It was the applicant's case that the decision by the respondent is grounded on an error of fact as the respondent found her guilty of professional misconduct for allegedly abetting fraud while at the same time holding that there was not enough evidence to find her guilty of fraud and/or conspiracy. Accordingly, the said decision was grounded on a thorough misapprehension of law as the respondent upon finding that there was not enough evidence to find her guilty of fraud and/or conspiracy ought not to have found me guilty professional misconduct as the threshold of proving bad faith had not been met.

13. According to the applicant, the said decision was thoroughly tainted with procedural impropriety, illegality and irrationality and ought to be quashed by this Court.

Respondent's Case

14. In response to the Application, the Respondent averred that the Applicant was charged under OB Number 32/23/11/2012 at the Muthaiga Police Station by the Complainants **Puthucode Krishnaiyer Seshadri** and **Prema Seshadri** for obtaining money in the sum of Kshs. 21,840,000/- by false pretences contrary to section 310 of the **Penal Code** while pretending to be in a position to sell a parcel of land registered as **NAIROBI/BLOCK 94/66** measuring 0.24 Ha situated in Nyari area, Nairobi. It was the Respondent's position that under section 4 of the **Law Society of Kenya Act** (Chapter 18 Laws of Kenya) the objects for which the Law Society of Kenya is established are, *inter alia*, to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. It therefore falls within the objects of the Law Society of Kenya through the Disciplinary Tribunal to receive, hear and determine complaints lodged against advocates such as the Advocate herein. The said Disciplinary Tribunal herein is established under section 57 of the **Advocates Act** (Cap 16, Laws of Kenya) for purposes, *inter alia*, of dealing with professional misconduct on the part of advocates and under section 60 of the **Advocates Act**, the Respondent herein is empowered to receive complaints from any person as against an advocate for professional misconduct.

15. The Respondent averred that under the foregoing provision, a complaint was received by the Respondent vide an affidavit sworn by **Puthucode Krishnaiyer Seshadri** on 5th September 2013 on behalf of **Prema Seshadri** (hereinafter referred to as "the Complainants") against the professional conduct of the Applicant herein, **Ashana Raikundalia** (hereinafter referred to as "the Advocate") the gist of which was that the Applicant, together with **Mr. Thomas Maosa** Advocate and three others defrauded the Complainants of the sum of Kshs. 21,840,000/- (being the purchase price of Kshs. 21,000,000/- and stamp duty in the sum of Kshs. 840,000/-) by purporting to sell all that parcel of land known as **NAIROBI/BLOCK 94/66** (hereinafter referred to as "the Property") situate in the City of Nairobi which property they knew they had no capacity to sell. Consequently Disciplinary Cause Number 201 of 2013 was preferred against the Applicant and she was duly informed of the complaint filed against her and was subsequently served with the Notice of plea taking date in accordance with the principles of Natural Justice. However when the disciplinary cause came up for plea taking on 2nd December 2013, the Advocate was absent and a plea of not guilty was entered in her favour and the Tribunal proceeded to direct the Advocate to file a Replying Affidavit within 21 days and fixed the matter for hearing on 14th April 2014. When the matter came up for hearing on 14th April 2014 the Tribunal consolidated this matter with Disciplinary Cause Number 202 of 2013 - Thomas Maosa Advocate - and slated both matters for hearing on 16th June 2014 on which date the Tribunal granted leave of 21 days to the Applicant to file and serve her Replying Affidavit while the Respondent's Prosecuting Counsel **Mr. James Nyiha** was afforded 14 days to file and serve submissions to highlight the salient features in DCC 201 and 202 of 2013 involving the Applicant and **Mr. Thomas Maosa**, Advocate.

16. According to the Respondent, the Applicant was found guilty of professional misconduct vide the Respondent's Judgment dated 13th October 2014 and Mitigation and Sentencing in this matter is slated before the Respondent for 11th May 2015, and it was this decision that provoked these proceedings.

17. It was the Respondent's position that the proceedings at the Disciplinary Tribunal were legally carried out and were within the Respondent's mandate as spelt out under section 60(4) of the **Advocates Act**. It was disclosed that in a meeting with **Mrs. Prema Seshadri**, one of the Complainants, the Applicant produced a purported Original Certificate of Lease for land known as **NAIROBI/ BLOCK 94/66** bearing the names of **Aggrey Christopher Ackello Ogutu** and **Anna Berta Brigitte Hillen** as the registered owners of the said land and that the purported vendors both informed the Complainants at a meeting held at the Serena Hotel on 10th November 2011 that the Applicant and **Mr. Maosa**, Advocate would be the Vendors' advocates pertaining to the transaction.

18. According to the Respondent, the Applicant failed to respond to the Complainants' correspondences on several occasions or refund the money paid to **Mr. Maosa**, Advocate as the purchase price for the said land. However, as per the provisions of Rule 15 of the Law Society of Kenya Digest of Professional Conduct and Etiquette made pursuant to section 81(1)(a) of the **Advocates Act**, failure to reply to correspondence amounts to professional misconduct.

19. It was the Respondent's case that it showed no bias whatsoever in dealing with this matter or any other matter brought before it hence the Applicant's claim of procedural impropriety, illegality and irrationality is an attempt at stalling due process. In its view, the act of luring the Complainants to a fraudulent transaction is relevant and it has been proven that the purported vendors are not the registered proprietors of the said parcel of land.

20. The Respondent asserted that any application for a Practising Certificate includes a declaration of an advocate's current postal and physical address for service of documents either by hand delivery or by post and that the Respondent relied on the information furnished to it by the Applicant with regard to her current postal and physical address and the said letters were deemed to have been delivered and received by the Advocate once posted. It was averred that the Advocate was duly served with all subsequent notices of Hearing, Judgment and Mitigation and Sentencing to the postal address she had surrendered to the Law Society of Kenya upon making her application for a Practising Certificate and that the Applicant failed and/or neglected to take any necessary steps to inform the Respondent of any purported change in her current postal and/or physical address. Therefore her failure to rectify the information furnished is the Applicant's own fault and this omission directly impacted her alleged failure to receive correspondence from the Respondent as she had not put in writing any purported change of location or postal address.

21. According to the Respondent, the Applicant's right to a fair hearing was exercised by the Respondent as proper service was effected on the Advocate thus her advocate's presence on 14th April 2014 at the Respondent's sitting

22. It was the Respondent's position that the Complainants jointly produced evidence before the Respondent which proved that the Applicant acted *mala fides* in the transaction and knowingly and with intention conspired with **Mr. Thomas Maosa** Advocate to defraud the Complainants and that as per the provisions of Rule 46 of the Law Society of Kenya Digest of Professional Conduct and Etiquette, made pursuant to section 81 of the Advocates Act, any breach of an undertaking accepted by an advocate shall constitute professional misconduct. In any event, the Respondent's mandate with regard to professional conduct of advocates is wide and is not strictly conferred by the advocate/client relationship. The jurisdiction of the Respondent spreads over the conduct of all advocates acting in their capacity as advocate and not necessarily by virtue of an advocate/ client relationship. After considering the submissions of the Complainants and the Advocate, the Respondent found the Advocate guilty of professional misconduct for breach of good faith by luring the Complainants into the well planned scheme with regard to the Property and not without her knowledge.

23. It was averred that the **Advocates Act** provides at section 62 that "*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 him 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 him of such notice of appeal.*" Accordingly, the Applicant has failed to exercise her right to appeal the decision of the Tribunal. In addition to the above, Section 62(3) provides

that “An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.”

Determinations

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

25. In my view the determination of this matter revolves around the issue whether or not the Applicant was served with the hearing notices subsequent to the proceedings of 14th April, 2014. According to the applicant, on that day her advocate appeared before the Respondent and informed the Tribunal that the applicant had not been served with the complaint and that any further processes should channelled through her said advocate. Thereafter neither her advocates nor herself were served with the said processes.

26. That contention would only have been verified if the parties and in particular the applicant had exhibited copies of the proceedings before the Tribunal. In the absence of the said proceedings it is not possible for this Court to verify the applicant’s contention more so as the advocate who allegedly represented her before the Tribunal has not sworn any affidavit to explain what transpired on 14th April, 2014 since the applicant herself was not present thereat.

27. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

28. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

29. It must therefore be remembered that in an application judicial review, the onus is always on the applicant to satisfy the Court that the orders sought ought to be granted. It behoves the supplicant for judicial review relief to place before the Court the pertinent material which form the basis of his case, if favourable orders are to be granted. In this case without copies of the proceedings, this Court cannot determine what transpired after the applicant was represented at the proceedings. Whereas it may well be that there was no service prior to the said appearance, for the purposes of these proceedings, it is what transpired after the 14th April, 2014 that is material to the determination of this application. In the absence of the said proceedings I am unable to find that the applicant was not afforded an opportunity of being heard.

30. Whereas under Article 47 of the Constitution 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. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every

step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

31. As regards the other issues which relate to the findings of the Respondent and the eventual determination, it is important to understand the scope of judicial review jurisdiction an issue which was dealt with by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** as follows:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

32. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***

33. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, it was held:

“It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal’s decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court’s to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one

is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.”

34. In Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo J.A. stated as follows:

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

35. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him.

36. It is therefore my view and I so hold that the material placed before me does not meet the threshold for the grant of judicial review relief. Whereas the grounds may find favour with an appellate Tribunal, sitting as a judicial review Court I form a dim view of the case.

Order

37. In the result this Motion fails and is dismissed with costs to the Respondent.

38. It is so ordered.

Dated at Nairobi this 7th day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Busaidy for Mr Kiongera for the Respondent

CA Mwangi