REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 430 OF 2015

IN THE MATTER OF AN APPLICATION BY PATRICIA NJERI WANJAMA, ADVOCATE, FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION IN RESPECT OF THE DECISION OF THE DISCIPLINARY COMMITTEE MADE ON 23RD NOVEMBER 2015

AND

IN THE MATTER OF SECTIONS 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

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 THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

THE ADVOCATES DISCIPLINARY COMMITTEE.....RESPONDENT

BRITISH-AMERICAN ASSET MANAGERS.....INTERESTED PARTY

EX-PARTE

PATRICIA NJERI WANJAMA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th December, 2015, the ex parte applicant herein, **Patricia Njeri Wanjama**, seeks the following orders:

> **1. THAT an Order of Certiorari do issue to remove into this Honourable Court and quash the decision of the Disciplinary Committee made on 23rd November 2015 in Disciplinary**

Cause No. 5 of 2015 dismissing the Applicant's Preliminary Objection filed on 11th March 2015.

2. THAT an Order of Prohibition do issue to prohibit the Disciplinary Committee from entertaining and/or hearing the purported complaint against the Applicant in Disciplinary Cause No. 5 of 2015.

3. THAT a declaration be issued that the Disciplinary Committee of the Law Society of Kenya has no jurisdiction to entertain disputes arising from an employment contract or relationship whether the employee is an advocate or not.

4. THAT the costs of and occasioned by this Application be provided for.

Ex Parte Applicant's Case

2. According to the ex parte applicant herein, **Patricia Njeri Wanjama**, an advocate of the High Court of Kenya (hereinafter referred to as "the Advocate"), the Interested Party herein, **British-American Asset Managers** (hereinafter referred to as "the Complainant") filed proceedings against the Advocate in Disciplinary Cause No. 5 of 2015 (hereinafter referred to as "the Cause") before the Respondent herein, the **Advocates Disciplinary Committee** (hereinafter referred to as "the Tribunal"), on 26th November 2014 which complaint was based wholly on the Applicant's actions undertaken in her capacity as an employee of the Complainant as the Assistant Company Secretary of the said Complainant (British-American Asset Managers Ltd.) up to and until she tendered her resignation which took effect from 15th August 2015.

3. According to the Advocate, the Complaint filed with the Tribunal contained allegations that the Advocate breached duties owed to the Complainant therein as follows:

a) Duty to act in utmost good faith in the discharge of her obligations to the Complainant

b) Duty to act in the best interests of the Complainant at all times

c) Duty to apply due care and skill in the execution of her duties.

d) Duty to disclose any conflict of interest

e) Duty not to profit from her engagement with the Complainant outside of the just remuneration paid to her in the course of employment

f) Duty of confidentiality

4. It was averred that Complaint also raises the issue of the Applicant entering into what was termed as unsanctioned irregular contractual arrangements on behalf of the Complainant with various entities, which allegation was at the time being canvassed, along with all other allegations, in HCCC No. 352 of 2014, 353 of 2014, 354 of 2014, 361 of 2014 and 362 of 2014, which have since been withdrawn by the Complainant, as well as in JR No. 435 of 2014 which was pending determination before this Court. However, the propriety of the said Complaint was challenged by the filing of a Preliminary Objection on 11th March 2015 by the Advocate, which called into question the said proceedings on the following grounds:

1) The matters complained of were within the exclusive jurisdiction of the Employment and Labour Relations Court.

2) None of the allegations made against the Advocate disclosed any case for professional misconduct.

3) The Complaint was an abuse of the process of the Honourable Tribunal.

5. To this objection the Tribunal rendered its decision on 23rd November 2015, wherein the said Objection was overruled on the ground that it contained contentious issues that could only be determined in the context of a full hearing of the matter, and not on a preliminary basis and the Tribunal declined to rule on any of the preliminary objections including the issue of jurisdiction.

6. It was the Advocate's case that the Tribunal failed to appreciate and apply the cardinal principal that once the issue of jurisdiction is raised, a Tribunal must rule upon it and not defer it. In the Advocate's view, by virtue of Article 162(2)(a) of the Constitution as well as section 12(c) of the ***Industrial Court Act***, since the Employment and Labour Relations Court has exclusive jurisdiction to deal with disputes and complaints relating to labour relations, the Tribunal does not and cannot have any jurisdiction over disputes and complaints relating thereto.

7. It was further contended that the Tribunal failed to tender its reasons for rejecting or otherwise rendering its decision on all the grounds proffered in the Preliminary Objection and that in the absence of clear reasons for the decision, the issues of jurisdiction, cause of action and abuse of process remain unsettled, and the Tribunal's powers to proceed with the hearing and determination of the matter cannot be ascertained rendering any action taken by it void *ab initio.*

8. In the verifying affidavit, the applicant reiterated the foregoing and added that after her resignation and after it had lodged several civil suits against her and her colleagues as well as criminal complaints, the Complainant lodged a complaint against her before the Tribunal. She averred that the chronology of events that led to my resignation are set out more specifically in the numerous suits filed by and against her and her colleagues, including JR No. 435 of 2014.

9. Upon an application the Tribunal granted a stay of proceedings and directed that a formal application by be filed 30th November, 2015 but the Advocate could not comply with those directions nor could she take any other step as the manuscript of the impugned ruling of the Disciplinary Tribunal was not ready for collection until the afternoon of 2nd December, 2015.

10. In the Advocate's view, though the ***Law Society of Kenya Act*** provides for Appeals against decision of the Tribunal, this right of appeal is limited expressly to final decisions under section 60 as opposed to rulings hence the Advocate could not take advantage of it and lodge an appeal.

11. It was submitted on behalf of the Advocate that while he is indeed an Advocate of the High Court of Kenya, the relationship between the Complainant and her was that of employer-employee governed by a contract of employment and was not of advocate-client governed by a retainer and that the supposed misconduct laid at her feet relates to the period when she was employed by the Complainant which is alleged to have constituted breaches of her contract of employment. It was contended that though the Complainant alleged that the misconduct also constituted violation of her professional obligation as an Advocate, this does not change the basic fact that the relationship between them was that of employer and employee. It was however submitted that the only specified damage the Complainant alleged to have sustained is reputational risks and diminution of its value in the stock market for which it was seeking compensation from the Tribunal.

12. According to the Advocate, *ex facie,* matters raised by the Complainant are classic disputes arising out of an employment dispute disguised as complaints for professional misconduct merely because the Applicant happens to an advocate for this Court hence the raising of a Notice of Preliminary Objection with the only one relevant to these proceedings being that the matters raised fell within the exclusive jurisdiction of the Employment and Labour Relations Court.

13. However, by a ruling delivered on 23rd November, 2015, the Respondent dismissed them without addressing each objection individually (indeed it explicitly disclaimed any intension to do so) so as to determine whether (a) it constituted a proper preliminary objection and (b) it was well-founded, the Respondent, simply tracked the Interested Party's submissions and expressed a composite general and

simplistic, determination.

14. According to the Advocate, judicial review proceedings are special *sui generis* proceedings by which this Honourable Court discharges its important historical function of examining the lawfulness of the impugned actions or decisions on the part of those exercising or purporting to exercise statutory powers. Leave having been granted, it was contended that it was incumbent upon the Respondent/Tribunal to file a response showing in sufficient detail the basis of its impugned action and/or decision to enable the Court determine whether or not it is adequate. In this present case, the Respondent has failed to do so, it is open to this Court to grant prerogative relief in favour of the Applicant as a matter of law and reliance was placed on **R vs. Lancashire County Council ex parte Huddleston [1986] 2 All ER 941** CA at pages 942, 945-6, 946-947 where it was held that:

> **"alternatively, the Court might simply decide that the Applicant has made out a prima facie case and that, the authority having produced no adequate sufficient evidence, relief should be granted".**

15. It was submitted that the Respondent misapprehended the Applicant's objection on to its jurisdiction to entertain and adjudicate upon the Complaint, which was fairly straightforward as these were employment matters within the exclusive jurisdiction of the Employment Court. The mere and inevitable happenstance that it was this legal issue was contentious does not render it inappropriate as preliminary objection. Indeed, it is precisely because it is contentious that it is the unyielding duty of an adjudicating authority to determine that legal issue on the assumption that the facts alleged by the party against whom the preliminary objection are true. This is where the Respondent fell into error by failing to distinguish contested factual matters- which cannot be the subject matter of a preliminary objection and contested legal matters (which includes disputed legal inferences to be drawn from those assumed facts)- which is the very stuff preliminary objections. In support of this submission the Advocate relied on **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696**.

16. Based on ***Samuel Kamau Macharia & Another vs. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR***, **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** and **Anismic Limited vs. Foreign Compensation Commission [1968] All ER** it was submitted that when a question of jurisdiction is raised any adjudicative body must immediately address it and make a determination and that a Tribunal, like the Respondent cannot seek to get away from this by refusing to determine whether or it has jurisdiction.

17. It was further submitted that nothing in the ***Employment Act*** authorizes the inclusion of additional duties and/or obligations owed by an employee beyond those stipulated in the contract of employment prepared in accordance with Part III of the ***Employment Act*** and to which the employee has assented. Any changes to this contract can only be done in accordance with section 13. There is no exemption for professional persons who are members of bodies with internal disciplinary mechanisms whether or not statutory.

18. To the Advocate, Part XI of the ***Advocates Act***- Discipline - which establishes the Respondent does not authorise the Respondent to deal with the employment disputes such as those contained in the Complaint. According to the Advocate, the correct *reductio* relevant to the inquiry before your Lordship is the following. Is it really the law that for all professionals in employment, if the employer is unhappy with their performance, the employer's remedy is before the Employment and Labour Relations Court or the relevant professional body? The answer is simple. As it is a relationship governed by a contract of employment, those are matters within the exclusive jurisdiction of the Employment and Labour Relations Court. An alternative answer would only lead to absurdity. Indeed, not only absurdity, but if the Interested party's position is upheld, it would grant an open licence to the employer to make an end-run around the salutary protections enjoyed by employees under our system of labour laws as they turn run-of-the mill employment disputes into professional complaints and inundate professional disciplinary bodies with matters that should only be before the Employment and Labour Relations Court.

Respondent's Case

19. On behalf of the Respondent the following grounds were filed:

> **1. The ex parte applicant has not demonstrated the basis upon the orders of certiorari and/or prohibition ought to issue.**
>
> **2. Neither an order of certiorari nor one of prohibition can issue for the reason that the ex parte applicant has failed to demonstrate what statutory power(s), if any, the respondent has acted in contravention of.**
>
> **3. There is no jurisdiction to grant an order of certiorari as the decision complained of by the ex parte applicant was founded squarely on the legal position in Kenya as relates to preliminary objections.**
>
> **4. There is no jurisdiction for the court to grant an order of prohibition where it has not been shown why the respondent should not continue to hear Disciplinary Cause No. 5 of 2015.**
>
> **5. Judicial review is concerned with the process by which a decision is made, not the merits or otherwise, of the decision. The application and entire judicial review proceedings are thus an abuse of the process of the court.**
>
> **6. In the circumstances, no declaration can issue as sought in prayer number 3 of the application.**

20. Apart from the said grounds, the Respondent averred that it is a creature of section 57 of the ***Advocates Act*** Chapter 16 Laws of Kenya and all advocates are subject to its' the jurisdiction.

21. It was deposed that on the 28th November, 2014, the Tribunal received a complaint against the ex parte applicant by the Interested Party herein vide an affidavit whose subject was generally on the conduct of the Advocate and therefore a copy thereof was sent to the Advocate with a requirement that she responds to the allegations therein. On the 11th March, 2015 the Tribunal received a notice of preliminary and on the 16th March, 2015 when the matter was coming up for plea, the advocate representing the Advocate indicated that the preliminary objection should be heard first. Accordingly, the parties filed their written submissions on the preliminary objection after which the Tribunal wrote its decision thereon in which it dismissed the preliminary objection and found that the preliminary objection raised was not grounded on pure points of law as is required and gave reasons and the legal backing for its decision.

22. According to the Tribunal, the Advocate is yet to take plea and therefore if she does agree with the allegations levelled against her she will have the option of taking a plea of not guilty and presenting the Tribunal with the defence after which the Tribunal will make a determination on whether or not she is guilty. The Advocate's case was therefore that this application is meant to arm-twist this Court into usurping the mandate of the Tribunal which at all time during proceedings in disciplinary tribunal Cause No. 5 of 2015 followed the laid down procedure in discharging its mandate.

23. It was therefore the Tribunal's case that the applicant had failed to establish a case for this Court to grant the judicial review orders sought and that the application is frivolous, vexatious and an abuse of the court process and should be dismissed with costs.

Interested Party's Case

24. According to the Interested Party herein, by way of an affidavit filed before the Tribunal on 25th November, 2015, the Interested Party filed a complaint regarding the professional misconduct of the Advocate, its former Head of Legal. In response to the complainant, the Advocate filed a notice of

preliminary objections dated 11th March, 2015 and the Tribunal directed that the preliminary objection be disposed of by way of written submissions which direction the parties complied with. That Preliminary Objection was dismissed by a ruling delivered on 23rd November, 2015.

25. It was therefore contended that this application has no merit as the applicant has failed to demonstrate or lay a basis for the grant of any of the prerogative orders sought in the application.

Determinations

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

27. The basis of this application, according to the Advocate is the failure by the Tribunal to make a decision on the Advocate's preliminary objection in particular directed at the Tribunal's jurisdiction to entertain the matter before it. According to the Advocate the matters the subject of the complaint before the Tribunal were properly speaking matters that ought to have been investigated and determined by the Employment and Labour Relations Court as they relate to employment relationship between the Advocate and the Interested Party.

28. That an issue going to jurisdiction ought to be determined *in limine* is not in doubt. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

29. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where**

the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

30. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

31. It is therefore clear that where an issue of jurisdiction is raised before a Court, the Court must deal with the issue and reach a decision one way or the other and the mere fact that the issue is irregularly raised or that there is insufficient evidence, does not relieve the Court of the obligation to determine whether or not it has jurisdiction. This is so because the mere fact that an issue of jurisdiction is not raised does not necessarily confer jurisdiction on the Court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.

32. Upon hearing submissions on a preliminary objection, the Court or Tribunal may allow the same and therefore find that it has no jurisdiction in which event the matter under dispute be it an application, a suit or proceedings are struck out. Conversely, the Court or Tribunal may find that the objection is unmerited and that indeed the Court or Tribunal is properly seised of jurisdiction to entertain the matter before it in which event it will dismiss the preliminary objection. Apart from these two courses, the Court or Tribunal may find that the issues purportedly raised by way of preliminary objection are properly speaking not matters that ought to have been raised as a preliminary objection. In that event the Court or Tribunal will dismiss the objection though in that event the issues are still alive and can be raised at the hearing of the action on its merits.

33. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** this Court expressed itself, *inter alia*, as follows:

"Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion…In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively.

Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication."

34. In arriving at that decision, the Court relied on the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**. In that case **Law, JA** was of the following view:

"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

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

"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".

36. Also cited was the decision in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

37. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a

matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

38. In this case, the Respondent upon considering the submissions on the preliminary objection expressed itself, *inter alia*, as hereunder:

"We have carefully considered the grounds of objection, the Complainant's grounds of opposition and submissions by Counsels for the parties, we are of the view that the objection by the Respondent does not find basis in pure points of law. Substantially it raises factual aspects which cannot be ascertained without calling for and considering evidence.

We are hesitant to make any specific findings on the specific grounds of objection, for by so doing we risk the danger of appearing to be substantially determining the complaint itself.

The material placed before us would be good stuff for an application for summary dismissal of the complaint herein.

In conclusion we wish to state that the preliminary objection raised herein by the Respondent was improper. The issues that the Respondent's Advocate canvassed before us were all contentious and could not be determined in a summary manner before taking evidence. This matter should be left to proceed to trial. We hope as was observed by Sir Charles Newbold, P. in the case we have that we have cited above that this improper practice of raising as preliminary objections issues which should go to trial would stop."

39. In my view the Tribunal was properly entitled to arrive at that decision. As to whether its decision in light of the facts disclosed before it was correct is a matter which went to the merit of the decision and if the Applicant/Advocate is aggrieved therewith, she can only challenge the same by way of an appeal pursuant to section 62 of the ***Advocates Act***. The Advocate however contended that the right of appeal can only be invoked after the disciplinary cause is determined and cannot be exercised in respect of a preliminary determination as was the case in this matter. That may be so. However, it is trite that an issue going to jurisdiction can be raised at any stage of the proceedings and even at the appellate stage. See **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998.**

Accordingly, the Advocate is not barred from raising the issue even after the determination of the subject disciplinary proceedings. It is however improper to raise the issue by way of judicial review proceedings.

The Advocate dwelt at length on the merits of its objection and urged this Court to find that the Tribunal had no jurisdiction notwithstanding her position that the Tribunal did not deal with her preliminary objection. For avoidance of doubt, it is my view and I hereby find that the Tribunal, in its finding that the issues raised before it did not constitute proper issues for determination as a preliminary objection, was properly within its powers to do so. However, even if I was to find that the Tribunal did not determine the objection, the only remedy would have been to quash its decision and pursuant to the provisions of section 11(1)(e) and (h) of the ***Fair Administrative Action Act***, 2015, and direct the Tribunal to determine

the objection rather than to substitute my decision for that of the Tribunal.

In my view there is no merit in this application.

Order

43. Consequently, the Notice of Motion dated 11th December, 2015 fails and is dismissed with costs to the Respondent and the Interested Party.

Dated at Nairobi this 15th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amoko for the Applicant

Miss Omondi for Miss Mwongo for the Interested Party

CA Mwangi