



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CIVIL CAUSE NO. 437 OF 2014

IN THE MATTER OF AN APPLICATION ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT AND THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA DISCIPLINARY TRIBUNAL CAUSE 083 OF 2013

REPUBLICAPPLICANT

VERSUS

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

AND

AHMEDNASIR ABDULLAHI.....INTERESTED PARTY

EX-PARTE:LEONARD GETHOI KAMWETI

JUDGMENT

Introduction

1. By a Notice of Motion dated 16th December, 2014, the applicant herein, **Leonard Gethoi Kamweti**, seeks the following orders:
 - a. That an Order of Certiorari do issue to bring to this honourable court for purposes of being quashed the proceedings, decisions and order and all consequential orders made therein by the Respondent in its Disciplinary Cause No. 083 of 2013 on 27th October 2014 at 2nd Floor Professional Centre Parliament Road Nairobi under Section 60 of the Advocates Act Cap 16 wherein it unlawfully declined jurisdiction and consequently terminated the proceedings against Ahmednasir Maalim Abdullahi (the Advocate).

b. An order of Mandamus to compel the Tribunal exercise its judicial authority to expeditiously hear and determine the complaint on its substantive merits applying correct legal principles and according to law.

c. That the costs of the application be to the *Ex parte* Applicant in any event.

Applicant's Case

2. The facts relied upon by the Applicant are that on 27th October, 2014 the Honourable Law Society Disciplinary Tribunal, the Respondent herein (hereinafter referred to as “the Tribunal”) ruled that it had no jurisdiction to hear an ongoing disciplinary complaint lodged by the Applicant on 8th February, 2012 against the Interested Party herein. In doing so the Tribunal placed reliance on the fact that **Ahmednasir Maalim Abdullahi**, the Interested Party, had become a Senior Counsel on 3rd June, 2013, which to the *ex parte* applicant was 395 days (or 1 year 1 month) after the complaint against him had been lodged with the Tribunal.
3. It was the *ex parte* Applicant's case that this decision was in total disregard of the non-discretionary irrefutable fact that the complaint had been lodged on 8th February, 2012 and a clear error of fact giving rise to an issue of law on the face of the record.
4. It was deposed that by an affidavit of complaint sworn on 16th September, 2010, the Applicant lawfully commenced disciplinary proceedings against the interested party on account of his having unlawfully acquired confidential advocate-client correspondence held by the Applicant as Company Secretary for National Bank of Kenya. The said affidavit of complaint was in accordance with Section 60 of the **Advocates Act** Cap 16 of the Laws of Kenya (hereinafter referred to as “the Act”) in that it set out the details of professional misconduct complained of. The said affidavit of complaint was forwarded to Law Society of Kenya Disciplinary committee (now the tribunal) (hereinafter referred to as “the Committee”) vide the Applicants letter dated 8th February, 2012 which letter and affidavit were received and acknowledged by the Committee by a letter of 3rd May, 2012 in accordance with Section 60(3) of the Act.
5. According to the *ex parte* applicant, the Interested Party answered by dishonestly claiming that (i) the complainant had already been dismissed (ii) the Applicant had personally given the advocate the stolen documents without furnishing supporting proof. In the *ex parte* Applicant's view, all replies were dishonest and diversionary raising collateral issues to side-step the complaint.
6. It was averred that the Committee as part of ongoing proceedings set out in Section 60(3) in turn asked the Applicant to attend to the Advocate's claims rebutting the complaint. In response thereto, the *ex parte* Applicant informed the Complainants Commission that the allegations were untrue and gave reasons therefor.
7. After 8 months of prompting by the Applicant, the Tribunal forwarded to the Applicant a letter from the Interested Party responding to the Applicants letter of 18th May, 2012 by which the Interested Party while stating that he had no intention of responding to the complaint, raised various diversionary collateral issues to sidestep the complaint including alleging that the complainant was a lapdog and a witch hunter and seeking help of his friend **Mr. Mohammed Abdirahman Hassan** who had been newly appointed Chairman of National Bank where the Applicant was then working and had worked for the past 17 years. On 12th June, 2013 after considerable reminders from the Applicant and inexplicable delays by the Committee, the Disciplinary Committee asked the Applicant to forward an affidavit with a specific paragraph on the “prayers sought” by the Applicant against the offending advocate to which the *ex parte* applicant promptly replied on 13th June 2013.
8. Unknown to the Applicant by Notice No. 7921 of the Kenya Gazette dated Friday 14th June 2013 the Interested Party was conferred with the rank and dignity of Senior Counsel (Gazette of Conferment). That notwithstanding on 26th June, 2013 the Disciplinary Committee found that the Interested Party had a case to answer and the Interested Party returned a plea of “not guilty” on 22nd July, 2013 and filed his Defence Affidavit on 13th November, 2013 claiming that he had been previously acquitted by parliament and by the Law Society and that the Applicant was engaged in a tribal witch hunt to which response a further affidavit was filed by the *ex parte* applicant.

9. It was the *ex parte* applicant's case that the interested party instead of responding to the facts constituting professional misconduct objected to proceedings on the basis that he had since been elevated to the rank of senior counsel and therefore not subject to the ongoing Law Society Disciplinary Proceedings. However, the Applicant was of the view based on the documents filed by the Applicant vide the affidavit dated 16th September, 2010 that the grounds constituting unprofessional conduct as well as the affidavit of complaint were filed nearly two years before the Interested Party became a senior counsel and that therefore he was still subject to the Law Society Disciplinary Committee. However, the Tribunal by an order of 27th October, 2014 ignored the documents on record and held that the complaint was filed after the advocate became a senior counsel in 2013 and that therefore it had no jurisdiction to hear the matter which now stood terminated.
10. It was the *ex parte* applicant's case that the Tribunal in declining jurisdiction misdirected itself in law failing to consider the material fact on the face of the record that in accordance with Section 62(2) of the Act the Applicant filed a complaint by way of an affidavit of complaint setting out the allegations complained against to the Disciplinary Committee on Wednesday 8th February, 2012 before the Interested Party was listed as senior counsel and the said conferment Gazette. Secondly that the applicant served the Tribunal and the advocate with the affidavit of complaint and supporting documents on 15th May, 2012, as part of the ongoing proceedings which was 395 days before the Interested Party was listed as senior counsel and the said conferment gazette.
11. To the applicant, the Tribunal proceeded to unlawfully terminate proceedings when no tribunal properly addressing itself and its mind to the relevant facts on record and the law could have made such a conclusion. Further, the said order of termination is bad in law and defective on the face of the records before the Tribunal so that no reasonable tribunal could arrive at such a decision.

Interested Party's Case

12. In opposition to the application the Interested Party filed a replying affidavit sworn by him on 20th November, 2014.
13. According to him, the Applicant herein is a vexatious litigant and frivolous complainant seeking any available opportunity to pursue a personal witch hunt against him which with hunt begun when he appeared before parliament's justice and legal affairs committee on 28th January, 2010, complaining that the Interested Party was unsuitable to serve as a commissioner in the Judicial Service Commission based an allegation that the Interested Party had divulged confidential correspondence between advocate and client. In those proceedings the applicant alleged that the Interested Party was therefore not suitable to hold any constitutional office as his conduct as an advocate was contrary to the ***Advocates Act*** and Chapter 6 of the constitution on leadership and integrity.
14. The Interested Party deposed that he appeared before the Justice and Legal Affairs Committee of the National Assembly on the same day the Applicant filed his complaint and reiterated the source of the confidential letter after which the Committee was satisfied with his explanation, dismissed the complaint for lack of merit and approved his candidature to serve as a commissioner in the Judicial Service Commission.
15. To the Interested Party, the Applicant having failed in his attempt to frustrate his election as the representative of the Law Society of Kenya in the Judicial Service Commission, filed a complaint against him with the Advocates Complaints Commission in or around September 2010. To the said complaint, the Interested Party responded on the 21st and 27th of October, 2010 by filing his response thereto with the Complaints Commission.
16. The Interested Party averred that interestingly in a letter dated 16th October, 2011, the Advocates Complaints Commission advised the Complainant that the National Bank of Kenya, on whose behalf he purported to have filed the complaint, had no *locus standi* to do so, as the only legitimate complaint could have been from the law firm of Ochieng, Onyango Kibet & Ohaga Advocates and in a letter dated 26th September, 2011, the Advocates Complaints Commission dismissed the complainant stating inter-alia that the Complaint had not met the threshold of proof beyond reasonable doubt and was at liberty to file a private prosecution with the Disciplinary Committee.
17. Undeterred, the Complainant filed yet another complaint dated 8th February 2012 with the Law

- Society's Disciplinary Committee, purportedly on behalf of the National Bank of Kenya to which the Interested Party on 29th May, 2012 responded. The Interested party disclosed that the Complaint was dismissed in mid-2012 under the provisions of Section 60(3) of the **Advocates Act** for failing to pass the *prima facie* preliminary threshold.
18. The Interested Party was however surprised when on 18th June, 2013, he received yet another letter from the Advocates Complaints Commission dated 5th June 2013, intimating that the complaint previously dismissed by the same commission under their reference CC/A/76/2/204/10 was still "outstanding". The Interested Party responded on 18th June, 2013 by stating that the Complainant had no authority whatsoever to file the alleged complaint on behalf of National Bank of Kenya. While still corresponding with the Advocates Complaints Commission, the Complainant again proceeded to file another complaint by affidavit to the Law Society Disciplinary Committee on 13th June, 2013 which complaint it was alleged to have been instituted by or on the behalf of the National Bank of Kenya Limited. However, the alleged complainant, the National Bank of Kenya Limited, clearly and unequivocally stated that it did not lodge, nor cause the instant complaint to be instituted at any time whatsoever. Moreover on the 2nd July, 2013 vide a letter of the same date, the alleged Complainant, the National Bank of Kenya Limited, withdrew the complaint having noted that the same had not been authorized nor sanctioned by the Bank. Thereafter on 27th October, 2014, the Law Society Disciplinary Committee terminated the complaint as it had no jurisdiction to hear and determine the complaint and directed that within thirty (30) days from the date of the ruling, the secretary of the Society to write to the honourable chief Justice to empanel a committee complaint pursuant to the provisions of Section 19 of the **Advocate Act**.
19. According to the Interested Party in view of the determination by the Law Society Disciplinary Committee and the clear provisions of Section 9 of the Act the Applicant herein has no case and cannot purport to insist that the disciplinary committee should proceed to hear the frivolous complaint when it has no jurisdiction hence the application for leave is an abuse of the court process and should be struck out with costs. To him, the prayer for *status quo* of the disciplinary proceedings before the Law Society Disciplinary Committee is untenable in law as the committee has no jurisdiction to hear the matter and the Applicant has no *locus standi* to pursue this matter in view of the fact that he did not have instructions to lodge any complaint on behalf of National Bank of Kenya, and he is no longer its company secretary. The court was therefore urged to decline to assist the Applicant in senseless with hunt.

Determination

20. I have considered the application, the affidavits both in support of and in opposition to the application.
21. Although several matters were introduced into this matter to justify the decision made by the Respondent on 24th October, 2014, from the Respondent's own decision the only basis for terminating the ex parte applicant's complaint was that the Respondent had no jurisdiction over the Interested Party in light of the provisions of section 19 of the **Advocates Act**.
22. Section 19 of the Act establishes a different Tribunal to determine complaints against Senior Counsel from that which ordinarily hears complaints against advocates generally. Section 19(1) provides that in the application of Part XI to Senior Counsel, all references therein to the Disciplinary Committee shall be construed as references to a Committee of three, to be appointed in each case by the Chief Justice, consisting of the Attorney-General or the Solicitor-General and two Senior Counsel and the Attorney-General or Solicitor General shall be chairman of the Committee. This is the kind of provision usually known in legal parlance as a "deeming" provision. The word "deem" has been judicially interpreted and in **Gatete and Another vs. Kyobe SCCA No. 7 of 2005 [2008] 2 EA 135** where it was held by the Supreme Court of Uganda that:

"The word "deemed" is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for

the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to place beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

23. Section 55 of the Act which is to be found in the said Part XI provides:

Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Committee.

24. It is therefore the status of the advocate rather than the nature of the complaint or the time of the complaint that determines the Tribunal which is clothed with the jurisdiction to entertain a complaint. There must have been good reasons why the legislature deemed it fit that disciplinary proceedings in respect of an advocate of the status of a senior counsel be undertaken by a differently constituted Tribunal from that which ordinarily presides over complaints made against advocates generally.

25. The question that arises for consideration is therefore whether an advocate who has acquired the status of senior counsel can still be dealt with as if he or she was an “ordinary” advocate. In other words can such an advocate be temporarily “stripped” of his or her senior counsel status in order that he or she be subjected to the jurisdiction of the Disciplinary Tribunal? In my view to permit such a course would amount to defeating the very purpose for which the constitution of the Tribunal under section 19 was enacted. By parity of reason would a magistrate who has since been elevated to the position of a Judge of a Superior Court subjected to a disciplinary proceedings other than the one contemplated for disciplining Judges simply because the complaint was lodged before the person was elevated to the status of a Judge? I don’t believe so. My view is reinforced by the provisions of section 17(1) of the Act which provides:

The President may grant a letter of conferment to any

person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya conferring upon him the rank and dignity of Senior Counsel.

26. Since the conferment upon the person of the rank of senior counsel also confers upon him or her the dignity of the office it would follow that the person henceforth enjoys the rights and privileges appurtenant to that rank including the provisions relating to disciplinary proceedings preferred against him or her. Since the only Tribunal properly constituted to entertain complaints against Senior Counsel is the one contemplated and established in accordance with section 19 of the Act, it is my considered view that any proceedings undertaken by the Disciplinary Committee constituted other than in accordance with section 19 of the Act would not have the capacity to make binding determinations against such Counsel. In other words its proceedings would be in vain.

27. In my view for the Respondent Tribunal to undertake disciplinary proceedings against a Senior Counsel under the pretext that the complaints were made before the elevation of the advocate would be to confer jurisdiction on the Respondent by craft. Jurisdiction must be conferred expressly and cannot be seized by implication. An issue of jurisdiction may arise in one of two instances or both. The first scenario is where the Tribunal has no jurisdiction to embark upon the investigation of the matter before it *ab initio*. The second scenario is where though the Tribunal was seized of jurisdiction at inception but subsequent events or circumstances remove the dispute from the jurisdiction of the Tribunal. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no

jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make...The phrase “to make such order thereon as it deemed fit” giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication.”

28. Similarly, in **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that 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. In this case, it is not in doubt that at the time the ex parte applicant lodged his complaint against the Interested Party, the Tribunal had jurisdiction over the Interested Party. However during the pendency of the said complaint, intervening events took place, i.e. the conferment on the Interested Party of the status of Senior Counsel, which event removed the rag from under the feet of the Respondent Tribunal as it were, thus depriving the Respondent of the jurisdiction over the Interested Party.
29. I accordingly find that the Respondent’s decision that it had no jurisdiction to entertain the proceedings before it in light of the fact that the interested party had by virtue of having acquired the status of senior counsel had thus left the Respondent’s “airspace” was correct.
30. That a Tribunal can only engage in a matter with which it has jurisdiction was made clear in **Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Limited [1989] KLR 1**, where the Court of Appeal held that jurisdiction is everything, and if a court finds that it has no jurisdiction, it should not take any further step in the matter before it. Further, in the case of **Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, the Supreme Court of Kenya observed with regard to jurisdiction that:

“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...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.”

31. In this case having found, rightly in my view, that it had no jurisdiction, the Respondent proceeded to direct the Secretary of the Law Society of Kenya to within thirty (30) days write to the Chief Justice advising him of the existence of the complaint against the Interested Party and requesting him to constitute a Committee pursuant to section 19 of the Act. Under section 53(4) of the Act, the Complaints Commission has the power to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof and if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XI. In the case of the Interested Party the Committee or Tribunal ought to be the one contemplated under section 19 of the Act.
32. It is therefore clear that the power to refer a complaint to the Tribunal solely rests with the Complaints Commission and the Respondent Tribunal has no power to direct the Commission as it purported to have done in the instant case. By so doing it, with respect acted without or in excess of its jurisdiction. Its direction along the lines indicated hereinabove to the Secretary Law Society of Kenya was a gratuitous, unsolicited and unwarranted. Having found that it had no jurisdiction, the law required the Respondent to down its tools and take no further step in the matter and let the Complaints Commission take the necessary steps as provided under the law.
33. Accordingly I quash and set aside the latter direction.
34. In the circumstances of this case there will be no order as to costs.

Dated at Nairobi this 8th day of July, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamweti the Applicant

Miss Chepkurui for the Interested Party

Cc Patricia